COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 03-10-2007
C(2007)4441 final

COMMISSION DECISION

of 03-10-2007

relating to a proceeding under Article 81 of the EC Treaty

Case COMP/38710 – Bitumen Spain

(ONLY THE ENGLISH AND SPANISH TEXTS ARE AUTHENTIC)

TABLE OF CONTENTS

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[1] and, in particular, Articles 7(1) and 23(2) thereof,

Having regard to the Commission Decision of 22 August 2006 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 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty,[2]

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,[3]

Having regard to the final report of the Hearing Officer in this case,[4]

Whereas:

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1 OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

2 OJ L123, 27.4.2004, p. 18.

3 OJ […], […], p.[…].

4 OJ […], […], p.[…].

A. INTRODUCTION

1 ADDRESSEES

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

- Repsol YPF Lubricantes y Especialidades S.A. (Rylesa)
- Repsol Petróleo S.A.
- Repsol YPF S.A.
- Productos Asfálticos S.A. (Proas)
- Compañía Española de Petróleos S.A. (Cepsa)
- BP Oil España S.A.
- BP España S.A.
- BP plc
- Nynäs Petróleo S.A.
- AB Nynäs Petroleum
- Galp Energia España S.A.
- Petróleos de Portugal S.A.
- Galp Energia, SGPS, S.A.

2 SUMMARY OF THE INFRINGEMENT

(2) The addressees of this Decision participated in an infringement of Article 81 of the EC Treaty, which prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

(3) In particular, the addressees of this Decision participated in a single and continuous infringement of Article 81 of the EC Treaty by which, to different extents, they:

- established market quotas;
- on the basis of the market quotas, allocated volumes and customers to each participant;
- monitored the implementation of the market sharing arrangements and, to that effect, exchanged sensitive market information;
- established a compensation mechanism to correct deviations from the market sharing arrangements;
- agreed on the variation of bitumen prices and the moment at which the new prices would apply.

3 PRODUCT AND TERRITORY CONCERNED BY THE INFRINGEMENT

(4) The product concerned by the infringement is penetration bitumen used for road construction.

(5) The infringement covered the territory of Spain (excluding the Canary Islands).[5]

4 DURATION OF THE INFRINGEMENT

(6) Participation in the infringement started for all undertakings except one at least as early as 1991 and lasted for all undertakings except one at least until October 2002.

(7) In particular, the undertakings are considered liable for the infringement for the periods indicated:

– Repsol : from 1 March 1991 to 1 October 2002;

– Proas : from 1 March 1991 to 1 October 2002;

– BP : from 1 August 1991 to 20 June 2002;

– Nynäs : from 1 March 1991 to 1 October 2002;[6]

– Petrogal : from 31 January 1995 to 1 October 2002.[7]

5 MARKET VALUE

(8) The value of the Spanish market for penetration bitumen is estimated at EUR 286,4 million in 2001, the last full year of the infringement.[8]

B. THE INDUSTRY SUBJECT TO THE PROCEEDING

1 THE PRODUCT

(9) Bitumen is a by-product produced during the distillation of specific heavy crude oils. Different crude oils and refinery configurations produce different bitumen types.

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5 *[…]*

6 In the case of AB Nynäs Petroleum, from the date its wholly-owned subsidiary, Nynäs International BV, acquired 100 % ownership of Asfaltos Europeos S.A. (currently Nynäs Petróleo S.A.), i.e. 22 May 1991 (see recital (47)), to 1 October 2002.

7 In the case of Galp Energia, SGPS, S.A. from the date it was incorporated, 22 April 1999 (see recital (56)), to 1 October 2002.

8 The estimate of the value of the market for penetration bitumen in Spain in 2001 is an average between the figures provided by *[…]*, response to request for information of 8 November 2005, p. 12061, and *[…]*, response to request for information of 18 November 2005, p. 12111. The Commission considers that the figures provided by *[…]* and *[…]* are reliable estimates *[…]*.

(10) Around 85% of the bitumen produced in the Community is used for road construction and maintenance, as an adhesive in the production of asphalt where it is used to bind the stones together. The remaining 15% is used in other fields of construction, for example in the construction of airport runways and car parks, and in industrial applications such as roofing and pipe coating.

(11) Approximately 80% of the bitumen used for road construction and maintenance is not subject to further processing: this is called penetration bitumen.

(12) The remaining 20% of bitumen used in road construction and maintenance is accounted for by bitumen which is further processed, such as bitumen emulsions, which are produced by mixing penetration bitumen with water using an emulsifying agent (used in road maintenance more than in construction), and modified bitumen, which is produced by mixing penetration bitumen with a chemical product, usually polymers, in order to enhance performance (polymer modified bitumen or PMB).

(13) Penetration bitumen is produced in different grades of hardness for different applications: hard bitumen is generally used for high traffic areas, such as motorways, while soft bitumen is used in situations where the traffic demands are lower.

(14) The hardness of bitumen is measured by means of the penetration test, which basically consists in introducing a needle into bitumen at 25°C during five seconds with a weight of 100 gr. The lesser the penetration the harder the bitumen. Penetration bitumen is thus graded and named according to its hardness, ranging from very hard (with penetration 5) to soft (with penetration 900).[9]

(15) The product covered by this Decision is penetration bitumen, without any further processing, used for road construction and maintenance.[10] It will hereinafter be referred to as 'penetration bitumen' or simply 'bitumen'.

2 THE UNDERTAKINGS SUBJECT TO THE PROCEEDING

2.1 Repsol

(16) Repsol YPF is currently an international group of oil and gas companies, present in 28 countries, mainly in Spain and Latin America. Its shares are publicly listed.

(17) Repsol Productos Asfálticos S.A. (RPA) was established in 1968 under the name Aguas de Letur S.A. (Agulesa). Its business activities in the bitumen sector started in 1990, when Repsol Petróleo S.A. bought all its shares and changed its name to Repsol Productos Asfálticos S.A.

(18) The business activities of RPA are the production and commercialisation of bitumen products. One of the business activities of Repsol Petróleo S.A. is the production of

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9 Penetration bitumen is normally sold according to European CEN specification EN 12591 with the grade 40/60, 70/100, etc., describing the range of penetration (between 40 and 60 millimetre decimals, between 70 and 100 millimetre decimals, etc.) for a given bitumen product.

10 *[…]*.

penetration bitumen, which it then sells to RPA for its commercialisation and transformation.

(19) On 1 March 1991, RPA acquired part of the assets of Productos Asfálticos S.A. (Proas) after this company was divided without ceasing to exist. Proas was a producer and supplier of bitumen then owned 50% by Compañía Española de Petróleos S.A. (Cepsa) and 50% by Repsol Petróleo S.A. Also on 1 March 1991, RPA increased its capital and the newly issued shares were distributed equally between the two shareholders of Proas, Repsol Petróleo S.A. and Cepsa. Finally, on the same date, the two shareholders of Proas made an exchange of shares so that Cepsa became the sole shareholder of Proas and Repsol Petróleo S.A. became the sole shareholder of its subsidiary RPA.

(20) On 12 December 2001, RPA changed its name to Repsol YPF Lubricantes y Especialidades S.A. (Rylesa).

(21) During the period 1991 to 2002, RPA/Rylesa was a wholly-owned subsidiary of Repsol Petróleo S.A. (99.99%, all shares except one, owned by Repsol Comercial de Productos Petrolíferos S.A. since 1995), which in turn was a virtually wholly-owned subsidiary (99.97%) of Repsol YPF S.A., the ultimate parent company of the Repsol group.

(22) In addition to RPA/Rylesa, two other companies of the Repsol group are involved in the production and commercialisation of penetration bitumen in Spain:

(a) Petróleos del Norte S.A. (Petronor): one of its business activities is the production of bitumen which, between 1990 and 1998, it then sold to Asfalnor (see point (b)) and, on occasions, to RPA/Rylesa, for its commercialisation. Since 1999, Petronor has been selling bitumen directly to unrelated parties;[11]

(b) Asfalnor S.A. (Asfalnor): its business activity was the commercialisation of bitumen between 1990 and 1998. It bought bitumen from Petronor and, on occasions, from RPA. As from 1999, Petronor has been selling directly and Asfalnor has become its agent.[12]

(23) The shareholding of Petronor during the period 1991 to 2002 was as follows:

(a) 1991: Repsol S.A. - 56.19%; others - 43.81%;

(b) 31 December 1992: Repsol S.A. (later Repsol YPF S.A.) - 85.98%; others - 14.02%.

(24) The shareholding of Asfalnor during the period 1991 to 2002 was as follows:

(a) 1991: Petronor S.A. - 60%; others - 40%;

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[11] *[…]*, response to request for information of 6 April 2004, p. 08270, and response to request for information of 8 November 2005, p. 12062.

[12] *[…]*, response to request for information of 6 April 2004, p. 08269, and response to request for information of 8 November 2005, p. 12062.

(b) April 1992: Petronor S.A. - 60%; Repsol Petróleo S.A. - 20%; others - 20%;

(c) March 1993: Petronor S.A. - 60%; Repsol Petróleo S.A. - 40%;

(d) 30 September 1999: Petronor S.A. - 100%.

(25) The headquarters of Repsol YPF S.A. are located in Madrid. Repsol has four refineries in Spain, in La Coruña, Bilbao, Cartagena (Murcia) and Puertollano (Ciudad Real), but also produces bitumen in the refinery of Asfaltos Españoles S.A. (ASESA) (Tarragona), owned 50% by Repsol Petróleo S.A. and 50% by Cepsa. Repsol also has one bitumen depot in Vigo (Pontevedra).

(26) The consolidated total turnover of Repsol YPF in 2006 was EUR 51 355 million.[13] The combined turnover of RPA and Petronor (Asfalnor has had no sales to unrelated parties since 1999[14]) for penetration bitumen sold to unrelated parties in Spain in 2001, the last full year of the infringement, is indicated in Table 1 (see recital (67)).

(27) In this Decision, and unless otherwise specified, companies of the Repsol group which participated in the cartel will be referred to as 'Repsol'.

2.2 Cepsa-Proas

(28) Compañía Española de Petróleos S.A. (Cepsa) was established in 1929. It is currently an international group of companies in the energy sector present in several countries. Its shares are publicly listed.

(29) Productos Asfálticos S.A. (Proas) was created in 1957 as a producer and supplier of bitumen products. It was owned 50% by Cepsa and 50% by other shareholders. The 50% of its shares not owned by Cepsa were acquired by Repsol Petróleo S.A. in 1986.

(30) On 1 March 1991, Proas was divided without ceasing to exist and part of its assets and employees were sold and transferred to Repsol Productos Asfálticos S.A. (RPA). At the same time, an exchange of shares was carried out which made Cepsa the sole shareholder of Proas and Repsol Petróleo S.A. the sole shareholder of its subsidiary RPA.

(31) Since 1 March 1991, Proas has thus been a wholly-owned subsidiary of Cepsa. It commercialises bitumen produced by Cepsa and produces and commercialises other bitumen products.

(32) The headquarters of Cepsa are located in Madrid. Cepsa has two refineries, one in Huelva and the other one in Tenerife (Canary Islands), but also produces bitumen in the refinery of Asfaltos Españoles S.A. (ASESA), owned, as indicated above, 50% by Repsol Petróleo S.A. and 50% by Cepsa. Proas has seven bitumen depots throughout the Spanish peninsula and one in the Balearic Islands.

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13 *[…]*, response to request for information of 16 February 2007.

14 *[…]*, response to request for information of 8 November 2005, p. 12062.

(33) The consolidated total turnover of Cepsa in 2006 was EUR 18 474 million.[15] The turnover of Proas for penetration bitumen sold to unrelated parties in Spain in 2001, the last full year of the infringement, is indicated in Table 1 (see recital (67)).

(34) In this Decision, and unless otherwise specified, companies of the Cepsa group which participated in the cartel will be referred to as 'Proas', as the contemporaneous documents in the Commission's possession concerning the infringement mostly refer to this company.

2.3 BP

(35) BP plc is a public company, registered in England and Wales, whose shares are listed. BP plc is the holding company of a multi-national exploration, petroleum and petrochemicals group. BP plc has its international headquarters in London.

(36) BP plc first entered the Spanish market in 1954 when it acquired all the shares of the Spanish company Atlantic North Africa Company, S.A. After being acquired by BP plc, this company was renamed BP Española de Petróleos S.A. in 1956 and BP España S.A. in 1982.

(37) The successive shareholders of BP España S.A. have been as follows:

(a) 21 May 1991: BP plc sold all its shares in BP España S.A. to BP Europe Ltd.;

(b) 26 December 1991: BP Europe Ltd. sold its entire shareholding to BP Holdings International BV and thus the latter became the sole shareholder of BP España S.A.;

(c) 16 December 1994: BP Netherlands Holdings BV acquired 26% of the shares in BP España S.A.;

(d) 1 January 1996: BP Netherlands Holdings BV sold its shares to BP Holdings BV and BP Holdings BV sold the shares on to BP Holdings International BV, which again held all shares in BP España S.A.;

(e) 1 June 2003: BP Holdings International BV sold its shares to BP Global Investments Ltd. (formerly BP Europe Ltd.), which since then owns all shares in BP España S.A.

(38) During the period 1991 to 2002, BP Europe Ltd., BP Holdings International BV, BP Netherlands Holdings BV and BP Holdings BV were all wholly-owned direct or indirect subsidiaries of BP plc.

(39) BP España S.A. started importing bitumen into Spain from BP's refinery in Lavera in France in 1987. In 1988, BP España S.A. and Petróleos del Mediterráneo S.A. (Petromed) formed the joint venture BP Med S.A., which was responsible for the marketing of all oil products (including bitumen) in Spain under the BP brand.

[15] *[…]*, response to request for information of 23 February 2007.

(40) In 1991, BP España S.A. increased its interest in Petromed to 93%,[16] thus acquiring control over this company, which had a refinery in Castellón. BP España S.A.'s 50% stake in the joint venture was subsequently sold to Petromed, which thus held 100% in BP Med S.A. In 1992, Petromed changed its name to BP Oil España S.A. In 1994, BP Oil España S.A. absorbed BP Med S.A. and began the production and supply of bitumen in Spain. Until then, bitumen had been commercialised by BP Med S.A.

(41) In 1994, BP España S.A. still only owned 93% of BP Oil España S.A. (Petromed until 1992) and the rest was owned by minority shareholders. In 1999 and after buying the shares of minority shareholders, BP España S.A. became sole shareholder of BP Oil España S.A.

(42) In 1998, BP Oil España S.A. established BP Oil Refinería de Castellón S.A. as a wholly-owned subsidiary and transferred to it its Castellón refinery and the production of bitumen.

(43) BP España S.A. has its headquarters in Madrid and its business activity is the manufacturing and sale of, inter alia, petroleum derivates. BP Oil España S.A. also has its headquarters in Madrid and commercialises in Spain the bitumen produced by BP Oil Refinería de Castellón S.A.

(44) The consolidated total turnover of BP plc in 2006 was USD 265 906 million (EUR 211 776 million).[17] The turnover of BP Oil España S.A. for penetration bitumen sold to unrelated parties in Spain in 2001, the last full year of the infringement, is indicated in Table 1 (see recital (67)).

(45) In this Decision, and unless otherwise specified, companies of the BP group which participated in the cartel will be referred to as 'BP'.

2.4 Nynäs

(46) The Nynäs group is an international player in the bitumen manufacturing and marketing industry and a producer of naphtenic oils. AB Nynäs Petroleum, a Swedish company, is the ultimate holding company of this group.

(47) Nynäs Petróleo S.A. was incorporated in Spain on 22 April 1987 as Asfaltos Europeos S.A. The Nynäs group (AB Nynäs Petroleum and its direct and indirect subsidiaries) became involved with Asfaltos Europeos S.A. later in 1987 when Nynäs International BV acquired 50% of its shares. This shareholding increased in 1990 with the purchase of an additional 10% of the shares in Asfaltos Europeos S.A. and again on 22 May 1991 with the purchase of the remaining 40%.

(48) Nynäs International BV, a holding company for international subsidiaries was, in turn, a wholly-owned subsidiary of AB Nynäs Petroleum, the ultimate parent company of the Nynäs group.

(49) On 28 June 1993, the name of the Spanish company was changed from Asfaltos Europeos S.A. to Nynäs Petróleo S.A.

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16 *[…]*, response to request for information of 24 March 2004, p. 07794. *[…]*.

17 *[…]*, response to request for information of 16 February 2007.

(50) In 1999, AB Nynäs Petroleum acquired the entire issued share capital of Nynäs Petróleo S.A. from Nynäs International BV.

(51) On 12 June 2003, Nynäs International BV was wound up. Upon dissolution, the share capital of Nynäs International BV was repaid to AB Nynäs Petroleum. The shares of the various companies previously owned by Nynäs International BV are now largely owned by AB Nynäs Petroleum, but in a small number of cases those shares are owned by Nynäs Refining AB.

(52) On 24 June 2003, Nynäs Refining AB acquired the entire issued share capital of Nynäs Petróleo S.A. from AB Nynäs Petroleum. Nynäs Refining AB was then and still is a wholly-owned subsidiary of AB Nynäs Petroleum.

(53) Nynäs Petróleo S.A. has its headquarters in Madrid and its business activity is the sale and marketing of bitumen in Spain. The Nynäs group has its headquarters in Sweden. It has no production facilities in Spain but has one bitumen depot in Villagarcía de Arosa, Galicia.

(54) The consolidated total turnover of the Nynäs group in 2006 was EUR 1 941 million.[18] The turnover of Nynäs Petróleo S.A. for penetration bitumen sold to unrelated parties in Spain in 2001, the last full year of the infringement, is indicated in Table 1 (see recital (67)).

(55) In this Decision, and unless otherwise specified, companies of the Nynäs group which participated in the cartel will be referred to as 'Nynäs'.

2.5 Petrogal

(56) Galp Petróleos e Gás de Portugal, SGPS, S.A. was established on 22 April 1999 by grouping, essentially, the shares held directly by the Portuguese State in Petróleos de Portugal S.A. (Petrogal), Gás de Portugal, SGPS, S.A. (GDP), and Sociedade Portuguesa de Gás Natural S.A. (Transgás). Galp Petróleos e Gás de Portugal, SGPS, S.A., which changed its name to Galp Energia, SGPS, S.A. (Galp) on 13 September 2000, is Portugal's most important group of oil and gas companies.

(57) Petrogal was incorporated on 26 March 1976. It is, since 1999, a wholly-owned subsidiary of Galp. Prior to 1999, it was wholly-owned by the Portuguese State. Its business activities are oil refining and the production and commercialisation of oil derivates, such as bitumen, and gas.

(58) Galp's activities in Spain, which consist essentially in the holding of petrol stations and the supply of oil products, are carried out through Petrogal Española S.A. (now Galp Energia España S.A.), established on 27 February 1979.

(59) Petrogal Española S.A. (now Galp Energia España S.A.) was, from 1990 to 2003, owned 89.29% by Petrogal and 10.71% by Tagus, RE, S.A. The latter is an insurance company owned 98% by Petrogal. Since 2003, Petrogal Española S.A. (now Galp Energia España S.A.) has been a wholly-owned (100%) subsidiary of Petrogal.

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[18] *[…]*, response to request for information of 15 June 2007.

(60) Galp Energia España S.A. has its headquarters in Madrid and its business activity is the sale and marketing of bitumen in Spain. The headquarters of Galp are located in Lisboa. Galp has neither refineries nor bitumen depots in Spain, but has two refineries in Portugal (Porto and Sines).

(61) The consolidated total turnover of Galp in 2006 was EUR 12 576 million.[19] The turnover of Petrogal Española S.A. (now Galp Energia España S.A.) for penetration bitumen sold to unrelated parties in Spain in 2001, the last full year of the infringement, is indicated in Table 1 (see recital (67)).

(62) In this Decision, and unless otherwise specified, companies of the Galp group which participated in the cartel will be referred to as 'Petrogal', as the contemporaneous documents in the Commission's possession concerning the infringement refer to this company name.

3 SUPPLY OF PENETRATION BITUMEN

(63) In Spain there are three bitumen producers, Repsol, Cepsa and BP, which have a total of eight refineries in the Spanish territory (Repsol: 4 refineries; Cepsa: 2 refineries; Repsol/Cepsa: 1 co-owned refinery; BP: 1 refinery) and nine bitumen depots (one belonging to Repsol and eight belonging to Proas).

(64) In addition, there are importers, such as Nynäs and Petrogal, and resellers, who own a total of five bitumen depots (one of them belonging to Nynäs).

(65) Transport and warehousing capacity are key elements for the supply of penetration bitumen. Bitumen is transported by heated truck to the final customer either directly from the refinery or from a bitumen depot, normally located in coastal zones. Bitumen depots buy the bitumen either from Spanish refineries or from refineries located abroad. In addition, an adequate warehousing capacity is very important, as bitumen must be stored and supplied hot, customers do not have sufficient storage capacity in comparison to their consumption, the market is seasonal (demand increases in summer and decreases in winter) and service is almost "just in time".

(66) The most relevant factors for customers to choose a given supplier are supply reliability, including product quality and product range available, and price considerations.

(67) The sales values for penetration bitumen in Spain in 2001, the last full year of the infringement, are indicated in Table 1.

Table 1:

Sales values in Spain in 2001

Undertaking	Sales values in million

[19] *[…]*, response to request for information of 22 May 2007.

	EUR*
Repsol (RPA + Petronor)	97,5
Proas	90,7
BP (BP Oil España S.A.)	*[40-50]*
Nynäs (Nynäs Petróleo S.A.)	[14-15]**
Petrogal (Petrogal Española S.A)	13,0

Total market value in million EUR* **	286,4

[…]

* These figures exclude turnover in the Canary Islands, not covered by the cartel (see footnote 5).

** Non-confidential turnover figure.

*** *[…]*.

4 DEMAND FOR PENETRATION BITUMEN

(68) The customer segments of penetration bitumen for road construction in Spain are the following:

(a) Producers of bitumen emulsions and/or modified bitumen: these customers (around 10) use penetration bitumen as a raw material for the production of other bitumen products. This segment normally uses soft or high penetration bitumen, and has approximately 13% of the market;

(b) Fixed asphalt plants (where bitumen and stones are mixed into asphalt): these customers (around 250) buy penetration bitumen for the production of asphalt in plants whose location does not vary. Usually these customers extend themselves the asphalt they produce, although they can also resell the asphalt to a third company which extends it itself. This segment normally uses hard or low penetration bitumen, and has approximately 55% of the market;

(c) Mobile asphalt plants: these customers (around 100) buy penetration bitumen for the production of asphalt in plants whose location varies depending on the works that need to be undertaken. This segment normally uses hard or low penetration bitumen, and has approximately 25% of the market.

(69) The remaining 7% of the bitumen market is held by buyers of industrial bitumen.

(70) Suppliers of penetration (and industrial) bitumen may choose to serve their customers themselves or to do so through a reseller. In the latter case, resellers are not regarded as a customer type but as a sales channel.

(71) The evolution of penetration bitumen customer types in recent years has shown that the number of fixed plants for the production of asphalt, as well as the number of producers of bitumen emulsions and modified bitumen, has increased. With regard to mobile plants for the production of asphalt, there has been a trend towards the concentration of the sector to set up larger companies and the creation of new companies by personnel formerly employed by merged companies.

(72) Customers of penetration bitumen can be large companies of national scope, small or medium-sized enterprises ("SMEs") of national scope, or SMEs of regional or provincial scope, and their ownership can be public (municipalities, provincial or regional governments, State companies) or private. Public customers mainly buy bitumen emulsions.

(73) The demand for penetration bitumen is very much dependent on the investments that the various levels of the administration earmark to the construction of roads. Demand is also characterised as being seasonal, increasing significantly in the summer months and decreasing in winter.

5 TRADE BETWEEN MEMBER STATES

(74) A significant part of the supply of penetration bitumen in Spain comes from imports. Imports essentially started in 1986, after the Spanish oil industry was privatised, and have since then steadily increased. It is estimated that imports have accounted for 20% of total consumption of penetration bitumen in Spain in recent years.[20]

(75) Imports are made by truck, directly to the customer's storage facilities, or by sea, to import terminals. The areas most affected by imports are therefore those bordering France and Portugal and those surrounding coastal bitumen depots which store imported bitumen for its subsequent sale in the area - this is the case of Nynäs' depot in Villagarcía de Arosa (Galicia), and other depots in Gijón (Asturias), Alicante and Cádiz.

(76) Imports into Spain mainly come from France, Portugal, Italy, Belgium, the Netherlands, the United Kingdom and Sweden.[21]

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[20] *[…]*, response to request for information of 6 April 2004, p. 08307; *[…]*, response to request for information of 21 April 2004, p. 10205; *[…]*.

[21] *[…]*, response to request for information of 6 April 2004, p. 08306; *[…]*, response to request for information of 21 April 2004, p. 10206; *[…]*, response to request for information of 27 April 2004, p.

(77) Two of the importers in Spain, Nynäs and Petrogal, participated in the cartel. Other bitumen importers are *[…]*.

(78) In addition, exports of penetration bitumen are made from Spain to other Member States as well as to third countries:

(a) *[…]*[22]

(b) *[…]*[23]

(c) *[…]*[24]

C. PROCEDURE

1 THE COMMISSION'S INVESTIGATION IN THIS CASE

(79) *[…]*, *[…] […]*.[25] *[…]*.[26]

(80) *[…]*.[27] *[…]*,[28] *[…]*[29] *[…]*.[30]

(81) On 19 July 2002, the Commission granted BP conditional immunity from fines pursuant to point 8(a) of the Leniency Notice.[31]

(82) On 1 and 2 October 2002, inspections pursuant to Article 14 (3) of Council Regulation (EEC) No 17: First Regulation implementing Articles 85 and 86 of the Treaty[32] were carried out at the premises of the following companies in Spain and Portugal:[33]

– BP España S.A.;[34]

– *[…]*.;[35]

– Nynäs Petróleo S.A.;[36]

10542; *[…]*, response to request for information of 10 May 2004, p. 10748; *[…]*, response to request for information of 19 April 2004, p. 09248.

22 *[…]*, response to request for information of 6 April 2004, pp. 08626 and 08628.

23 *[…]*, response to request for information of 21 April 2004, pp. 10206 and 10212-10213.

24 *[…]*, response to request for information of 27 April 2004, p. 10626.

25 OJ C 45, 19.2.2002, pp. 3-5.

26 *[…]*.

27 *[…]*

28 *[…]*.

29 *[…]*.

30 *[…]*.

31 *[…]*.

32 OJ 13, 21.02.1962, p. 204-211.

33 Inspections were also carried out in the Netherlands, Belgium and Germany, but these did not concern the alleged infringements on the Spanish market.

34 *[…]*, inspection documents, pp. 00228-00488.

35 *[…]*.

– Petrogal Española S.A.;[37]

– Petrogal S.A. and Galp Energia, SGPS, S.A.;[38]

– Productos Asfálticos S.A. (Proas);[39]

– *[…]*;[40]

– Repsol YPF Lubricantes y Especialidades S.A. (formerly Repsol Productos Asfálticos S.A., "RPA").[41]

(83) *[…]*.[42]

(84) *[…]*.[43] *[…]*.[44]

(85) On 6 February 2004, the Commission sent a first round of requests for information pursuant to Article 11(3) of Regulation 17 *[…]*.[45]

(86) *[…]*.[46] *[…]*[47] *[…]*.[48] *[…]*.[49] *[…]*.[50] *[…]*.[51] *[…]*.[52] *[…]*.[53] *[…]*.[54]

(87) On *[…]*, Repsol filed by fax a leniency application pursuant to the Leniency Notice. *[…]*.[55]

(88) *[…]*.[56]

(89) On *[…]*, Proas filed by fax a leniency application pursuant to the Leniency Notice. *[…]*.[57]

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36 *[…]*, inspection documents, pp. 00564-02335.
37 *[…]*, inspection documents, pp. 02336-02368.
38 *[…]*, inspection documents, pp. 02369-02954.
39 *[…]*, inspection documents, pp. 02955-03466.
40 *[…][…]*.
41 *[…]*, inspection documents, pp. 03743-04075.
42 *[…]*.
43 *[…]*.
44 *[…]*.
45 Requests for information were sent to Repsol, Proas, BP, Nynäs and Petrogal, but also to *[…]*, Panasfalto, *[…]*, Asfaltos Naturales de Campezo S.A. and Corsán-Corviam S.A.
46 *[…]*, response to request for information of 24 March 2004, pp. 07777-07868.
47 *[…]*, response to request for information of 6 April 2004, pp. 08262-08326 (text) and 08327-08817 (annexes).
48 *[…]*, response to request for information of 20 April 2004, pp. 09674-09683.
49 *[…]*, response to request for information of 19 April 2004, pp. 09178-09532.
50 *[…]*, response to request for information of 21 April 2004, pp. 10166-10240 (text) and 10241-10493 (annexes).
51 *[…]*, response to request for information of 27 April 2004, pp. 10531-10661.
52 *[…]*, response to request for information of 10 May 2004, pp. 10672-10809 (text) and 10810-11451 (annexes).
53 *[…]*, response to request for information of 17 May 2004, pp. 11452-11529.
54 *[…]*, response to request for information of 1 June 2004, pp. 11535-11604.
55 *[…]*.
56 *[…]*, response to request for information of 22 April 2004, pp. 10494-10528.
57 *[…]*.

(90) *[…]*.[58]

(91) On 24 October 2005, the Commission sent a second round of requests for information pursuant to Article 18(2) of Regulation (EC) No 1/2003[59] *[…]*,[60] essentially concerning turnover. *[…]*[61]

(92) *[…]*.[62] *[…]*.[63] *[…]*.[64] *[…]*.[65] *[…]*.[66]

(93) On 29 March 2006, the Commission sent a third request for information pursuant to Article 18(2) of Regulation (EC) No 1/2003 to *[…]*.

(94) *[…]*.[67] *[…]*.[68] *[…]*[69] *[…]*[70]

(95) On 26 April 2006, the Commission sent a fourth request for information pursuant to Article 18(2) of Regulation (EC) No 1/2003 to *[…]*.

(96) *[…]*.[71]

(97) *[…]*.[72]

(98) On 22 May 2006, the Commission sent a fifth request for information pursuant to Article 18(2) of Regulation (EC) No 1/2003 to *[…]*.

(99) *[…]*.[73]

(100) By letter of 2 August 2006 and pursuant to point 26 of the Leniency Notice, the Commission informed Repsol of its intention to apply a reduction within a band of 30-50% of any fine imposed, as provided for in point 23(b) of the Leniency Notice.

(101) By letter of 2 August 2006 and pursuant to point 26 of the Leniency Notice, the Commission informed Proas of its intention to apply a reduction within a band of 20-30% of any fine imposed, as provided for in point 23(b) of the Leniency Notice.

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58 *[…]*.

59 OJ L 1, 4.1.2003, p. 1.

60 Requests for information were sent to Repsol, Proas, BP, Nynäs and Petrogal, but also to *[…]*, Panasfalto, *[…]*, Asfaltos Naturales de Campezo S.A., and Corsán-Corviam S.A.

61 The request for information for *[…]* was sent on 28 October 2005.

62 *[…]*, response to request for information of 4 November 2005, pp. 11978-11981.

63 *[…]*, response to request for information of 7 November 2005, pp. 11982-11985.

64 *[…]*, response to request for information of 8 November 2005, pp. 12060-12063.

65 *[…]*, response to request for information of 9 November 2005, pp. 12064, 12068-12090.

66 *[…]*, response to request for information of 18 November 2005, pp. 12109-12177.

67 *[…]*, response to request for information of 5 April 2006, pp. 13050-13064.

68 *[…]*, response to request for information of 6 April 2006, pp. 13068-13077.

69 *[…]*, response to request for information of 7 April 2006, pp. 13078-13080 and 13094-13105.

70 *[…]*, response to request for information of 21 April 2006, pp. 13114-13117.

71 *[…]*, response to request for information of 9 May 2006, pp. 13162-13168; *[…]*, response to request for information of 9 May 2006, pp. 13169-13171 and 13177-13182.

72 *[…]*.

73 *[…]*, response to request for information of 29 May 2006, pp. 13241-13243; *[…]*, response to request for information of 30 May 2006, pp. 13244-13248; *[…]*, response to request for information of 30 May 2006, pp. 13249-13256.

(102) On 22 August 2006 the Commission adopted a Statement of Objections addressed to BP, Repsol, Cepsa-Proas, Nynäs and Petrogal which was notified to the parties between 24 and 28 August 2006. The parties simultaneously received a CD-Rom that contained the accessible parts of the Commission's file.

(103) *[…]*.

(104) *[…]*.

(105) All the addressees of this Decision with the exception of Repsol Petróleo S.A., Repsol YPF S.A. and Compañía Española de Petróleos S.A. (Cepsa) availed themselves of their right to be heard orally. An Oral Hearing was held on 12 December 2006.

(106) On 16 February 2007 a request for information was sent to all parties to obtain confirmation or corrected figures concerning product turnover data previously provided and to obtain information on each party's group turnover for 2006.

2 RIGHTS OF DEFENCE

(107) Nynäs and Petrogal raised a number of procedural issues during the investigative phase and in response to the Statement of Objections which they claimed affected their rights of defence.

(108) During the stage of access to the Commission's file, Nynäs and Petrogal requested access to certain documents and parts of documents which the Commission considered to be non-accessible to parties in this proceeding as they related to products other than those covered by the Statement of Objections. Nynäs and Petrogal claimed that access to these documents was relevant for their defence as they may have provided evidence that a larger infringement concerning bitumen in general existed and that the role of these two undertakings in that larger infringement may thus have been peripheral.

(109) The Commission services in the first place and, subsequently, the Hearing Officer, responded to Nynäs and Petrogal's requests.[74]

(110) In line with the responses given to Nynäs and Petrogal by the Commission services and the Hearing Officer, the Commission confirms its view that evidence which has no relation to the allegations of fact and of law contained in the Statement of Objections is precluded from the administrative procedure. The Statement of Objections in this proceeding only concerned anti-competitive activities in the penetration bitumen sector, and the factual and legal allegations contained therein related only to this product. Access to documents or parts of documents concerning products other than those covered by the Statement of Objections was not granted because of the existence of objective factors (namely different products, participants, meetings and duration) which led to the conclusion that separate cartels existed, one concerning penetration bitumen and another possible cartel or cartels concerning other products. The Commission does not consider it is entitled to disclose evidence in its possession that

[74] Letter from the Commission services to Nynäs of 10 October 2006; letter from the Commission services to Petrogal of 19 October 2006; letters from the Hearing Officer to Nynäs of 31 October 2006 and 10 November 2006; letter from the Hearing Officer to Petrogal of 10 November 2006.

might incriminate other companies in other possible infringements if, as in this case, that evidence is not objectively linked to the objections raised against undertakings in this proceeding.[75] A party to this proceeding cannot thus correctly claim that, if evidence concerning products and infringements other than those covered by the Statement of Objections is not communicated to it, its rights of defence in connection with the Statement of Objections are affected, as the possible existence of anti-competitive arrangements concerning products other than penetration bitumen cannot affect its position in a proceeding which only concerns an infringement in the penetration bitumen market.

(111) In this connection Nynäs raised another argument based on the fact that the Statement of Objections mentioned an "asphalt table" (singular) while documents in the file talked about "asphalts table" (plural), thereby concluding that the "asphalts table" covered more than just penetration bitumen and referred to a broader arrangement. The Hearing Officer responded in writing to Nynäs.[76] The Commission confirms that both *[…]* used the singular and plural indistinctively *[…]* when referring to the "asphalt table", that is the meetings where penetration bitumen (referred to as asphalt) was discussed, and to the product itself ("asphalt/asphalts"), and thus that Nynäs' inaccurate reading of the file cannot be relied upon to presume a larger infringement.

(112) Nynäs and Petrogal complained in general terms that the strict conditions under which parties may have access at the Commission's premises to statements and documents provided voluntarily by undertakings under the Leniency Notice adversely affected their rights of defence. Nynäs put forward this claim before replying to the Statement of Objections, and the Hearing Officer responded to it in writing.[77] Petrogal made this argument in response to the Statement of Objections. Although neither Nynäs nor Petrogal specified how their rights of defence had been impeded, the Commission confirms that a balance must be struck between a monitored access where mechanical copies of the documents or recordings to which access is being given may not be made and the interests of leniency applicants who may risk civil and criminal proceedings in other jurisdictions if their statements or documents are used for purposes other than the application of Article 81 of the Treaty. The Commission considers that the possibility given to parties to listen to tape recordings, read the transcripts, take handwritten notes, type the information using the computer provided by the Commission, make use of the services of a stenographer or dictate the transcripts by using a recording device made available by the Commission adequately safeguards the rights of defence of undertakings having access to the file at the Commission's premises.

(113) *[…]*.[78] *[…]*.

(114) Nynäs alleged that the Commission disregarded its rights of defence in a question concerning meetings with competitors contained in a simple request for information pursuant to Article 11(3) of Regulation 17. The Commission services responded in

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75 See Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S* v *Commission* [2004] ECR I-123, paragraph 128. See also Case T-65/89 *BPB Industries* v *Commission* [1993] ECR11-389, paragraph 33.

76 Letter from the Hearing Officer to Nynäs of 10 November 2006.

77 Letter from the Hearing Officer to Nynäs of 31 October 2006.

78 *[…]*.

writing to Nynäs.[79] The Commission confirms that Nynäs' rights of defence could not have been affected as, in so far as Nynäs considered that the question violated its rights of defence, it would not be obliged to provide answers which might involve an admission on its part of the existence of an infringement and, in fact, it did not reply to the question.

(115) Nynäs finally complained that the Hearing Officer already stated in a letter of 31 October 2006 that the Commission had determined the infringement and that this did not engender confidence that anything put forward in response to the Statement of Objections would be given due consideration. Suffice it to say that reference was being made in that letter to the preliminary establishment of an infringement concerning penetration bitumen as different from other possible infringements concerning other products.

D. DESCRIPTION OF EVENTS

1 ORIGIN OF THE CARTEL[80]

(116) In 1957, the company Productos Asfálticos S.A. (Proas) was created for the production and supply of bitumen products in Spain.

(117) On 1 March 1991, Proas was divided without ceasing to exist and part of its assets was attributed to Repsol Productos Asfálticos S.A. (RPA). Further to an exchange of shares also carried out on 1 March 1991, Cepsa was made the sole shareholder of Proas and Repsol Petróleo S.A. was made the sole shareholder of its subsidiary RPA.

(118) The division of Proas entailed a distribution of its personnel among Proas and RPA. *[…]*.[81]

(119) BP, the third bitumen producer in Spain, began its own production of penetration bitumen in Spain in July 1991 further to its acquisition of control of Petromed, which had one refinery in Castellón[82] (see recital (40)). *[…]*.[83]

(120) Other bitumen suppliers active on the Spanish market coordinated their business with Repsol, Proas and BP. Nynäs, an importer, participated in the cartel at least as from 1991 and Petrogal, also an importer, did so at least as from 1995[84] (concerning the participation of Repsol, Proas, BP and Nynäs in the cartel in 1991, see also the contemporaneous evidence discussed in recitals (201) to (203)).

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79 Letter from DG COMP to Nynäs of 22 March 2004.
80 *[…]*.
81 *[…]*.
82 *[…]*.
83 *[…]*.
84 *[…]*.

2 DESCRIPTION AND CONTEMPORANEOUS EVIDENCE OF THE INFRINGEMENT

(121) For the purpose of clarity, the description of the infringement and the contemporaneous evidence in the Commission's possession will be set out successively in two parts relating to the two aspects of the collusion: (i) market sharing arrangements and (ii) price coordination discussions.[85]

2.1 Market sharing arrangements

2.1.1 Description of the market sharing arrangements

(122) The market sharing arrangements are described in this section *[…]*.[86]

(123) Subsequently, in section 2.1.2, a chronological overview will be given of the contemporaneous evidence in the Commission's possession, which consists of inspection documents and other contemporaneous documents *[…]*. This contemporaneous evidence confirms the existence of the market sharing arrangements as described in the statements referred to in the preceding recital.

2.1.1.1 Organisation of the cartel: the "asphalt table"

(124) *[…]* stated that the parties to the cartel carried out their contacts for the purpose of market sharing around a negotiating table called "asphalt table"[87] (see, for example, recital (247)). This is confirmed by a contemporaneous internal memorandum drawn up by *[…]* where it is stated that, in Spain, bitumen supply is discussed among the companies in the so-called "asphalts table" (see recital (229)).

(125) As from the beginning of the cartel, the members of the "asphalt table" or market sharing arrangements were Repsol, Proas, BP and Nynäs, although Repsol and Proas met Nynäs separately to negotiate its share.[88] At least from 1995, after Petrogal had been selling in Spain for some time, subsequent and separate negotiation meetings were likewise held by Repsol and Proas with this undertaking.[89] Repsol and Proas offered Petrogal a market share allocation in Petrogal's geographic area of influence, that is, near the Portuguese/Spanish border.[90]

(126) *[…]*.[91]

(127) When Repsol is referred to as a participant at the "asphalt table", this must be understood as designating all companies of the Repsol YPF group which were involved in sales of penetration bitumen in Spain from 1991 to 2002, that is, not only RPA/Rylesa but also Asfalnor and Petronor (see recital (22)).

(128) *[…]*, in the early years of the cartel, coordination meetings were attended by representatives of Repsol, Proas, BP and Nynäs but also of, *inter alia*, Petronor (close

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85 *[…]*.

86 In particular, the description of the market sharing arrangements is based on: *[…]*.

87 *[…]* response to request for information of 18 November 2005, p. 12127.

88 *[…]* response to request for information of 18 November 2005, p. 12127.

89 *[…]*.

90 *[…]*, response to request for information of 24 March 2004, p. 07807.

91 *[…]*, response to request for information of 18 November 2005, p. 12127.

to 90% owned by Repsol)[92] (see recital (470) *[…]*). *[…]* as far as Repsol was concerned, market sharing arrangements were carried out on behalf of and for all Repsol entities involved in the commercialisation of penetration bitumen in Spain, that is, including Asfalnor and Petronor (see *[…]*).

(129) The "asphalt table" or the cartel for the purpose of the market sharing arrangements was therefore composed of Repsol (including RPA/Rylesa, Asfalnor and Petronor), Proas and BP but also of Nynäs and Petrogal, even if these two undertakings participated only in the discussions concerning their area of influence and did so on a bilateral basis with Repsol and/or Proas and not with other members as well.

2.1.1.1.1 Phases leading to the annual market sharing agreement

(130) The procedure resulting in the market sharing agreement for the following year had several phases:[93]

(a) an in-house market analysis: each producer separately prepared a market study for the following year[94] estimating bitumen consumption in Spain. The sales staff of each company sent the data corresponding to their sales area to the central sales department, which gathered the data and put them together. Subsequently, the sales staff would hold meetings with the central sales department to explain and defend the sales figures which they had foreseen for their area. This phase took place around September of each year (see, for example, recitals (205), (231), (235), (244), (245), (259), (269), (270));

(b) an in-house pre-distribution of the market: with the estimated consumption data reviewed, each producer prepared a first draft market distribution document with a view to negotiation with competitors. This phase took place around October (see, for example, recital (287));

(c) an agreement on the size of the market: several meetings among the three bitumen producers took place with the goal of agreeing on the size of the market, that is, on the total bitumen consumption for the following year. This phase took place around November. During the first years of the cartel, these meetings lasted several days but, as from 1994, the duration of these meetings was reduced to two and a half days (see, for example, recitals (271), (286), (288));

(d) the market distribution negotiations: once the size of the market had been agreed by the producers, discussions on how the market should be distributed were held. This phase lasted two to three days in the early years of the cartel and was reduced to one day in the last years. This phase took place around December-January (see, for example, recital (254));

(e) the [annual] market sharing agreement: from 1994 to 2000, which is the period during which *[…]* was *[…]* of Repsol, any remaining open issues concerning the distribution of the market would be finally agreed over a lunch between

92 *[…]*.
93 *[…]*.
94 *[…]*.

[…] and *[…]*, *[…]* of Proas. These closing discussions were normally held in December-January. As indicated in recital (165), the document that reflected the market sharing agreement for a given year was called "PTT" or "Petete";

(f) information to and negotiation with Nynäs and Petrogal: once the distribution of the market had been agreed between the three bitumen producers, Repsol and/or Proas subsequently held a meeting with Nynäs and another meeting with Petrogal to inform them of and negotiate the sales volumes and customers that would correspond to each of them in their respective areas of influence[95] (see, for example, recitals (232), (247), (265), (273)).

(131) *[…]* extraordinary meetings, that is to say, other than those held in the context of the above-mentioned phases, were seldom called. Exceptions to this principle might have occurred where there were adverse market conditions, such as a much lower market demand than forecasted. Otherwise, day-to-day issues concerning the operation of the market sharing arrangements were dealt with during monitoring meetings or telephone calls (see section 2.1.1.3.1).[96]

(132) Contemporaneous documents reflecting the above-mentioned phases leading to the annual market sharing agreement were found during the inspections. *[…]*. All these contemporaneous documents are described in section 2.1.2.

2.1.1.1.2 Cartel participants

(133) *[…]*[97]

[…][…][98]

(134) *[…]*.[99]

(135) *[…]*.[100] *[…]*.

(136) *[…]*.[101] *[…]*.[102]

(137) *[…]*.[103] *[…]*.[104] *[…]*[105]

(138) The Commission *[…]* considers that, just like Repsol and Proas, BP had, at least until 1998, access to information concerning volumes and customers assigned by the "asphalt table" in the whole Spanish territory and not only in its area of influence.

(139) *[…]*.[106]

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95 *[…]* response to request for information of 5 April 2006, p. 13056. *[…]*.
96 *[…]*, response to request for information of 24 March 2004, p. 07810.
97 *[…]* response to request for information of 24 March 2004, p. 07810.
98 *[…]*, response to request for information of 21 April 2006, p. 13117.
99 *[…]*.
100 *[…]*.
101 *[…]*.
102 *[…]* response to request for information of 9 May 2006, pp. 13165-13166.
103 *[…]* response to request for information of 24 March 2004, p. 07811.
104 *[…]*, response to request for information of 9 May 2006, pp. 13166-13167.
105 *[…]*, response to request for information of 9 May 2006, p. 13178.

(140) *[…]*.[107]

(141) Confirmation that Nynäs and Petrogal were active participants in the cartel can be found in the contemporaneous evidence discussed in, for example, recitals (232), (236), (237), (238), (239), (247), (265), (273), (279), (280).

2.1.1.1.3 Logistics of the cartel with regard to market sharing

(142) Meetings of the "asphalt table" between the three producers took place in Madrid, usually in the following places[108] (see, for example, recitals (273), (274), (283)):

– *[…]*;

– *[…]*;

– *[…]*;

– *[…]*;

– *[…]*;

– *[…]*.

(143) As explained (see recital (130)), once the distribution of the market had been agreed between the three bitumen producers, Repsol and/or Proas subsequently held a meeting with Nynäs and another meeting with Petrogal to inform them of and negotiate the sales volumes that would correspond to each of them in their respective areas of influence. These separate meetings with Nynäs and Petrogal were normally held at *[…]*.[109]

(144) *[…]*, the "asphalt table" itself decided the date and the agenda of subsequent meetings. However, no formal agenda was set up as the meetings always dealt with the same issues: essentially volumes, works/projects and customers. Any change to the date foreseen for a subsequent meeting was communicated by telephone or fax to the other participants.[110] No official minutes of the meetings of the "asphalt table" were drawn up.[111]

(145) *[…]*, the coordinators of the "asphalt table" were a person from Repsol (*[…]*) and someone from Proas.[112] *[…]* Repsol and Proas convened the cartel meetings,[113] *[…]* the meetings were usually chaired by *[…]* of Repsol.[114]

(146) *[…]* decisions within the cartel were reached by consensus.[115]

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106 *[…]*, response to request for information of 9 May 2006, p. 13167.
107 *[…]*, response to request for information of 9 May 2006, p. 13180.
108 *[…]* response to request for information of 24 March 204, p. 07810.
109 *[…]*.
110 *[…]*.
111 *[…]*, response to request for information of 18 November 2005, p. 12154.
112 *[…]* response to request for information of 18 November 2005, p. 12127.
113 *[…]*, response to request for information of 24 March 2004, p. 07810; *[…]*.
114 *[…]*, response to request for information of 24 March 2004, p. 07811.

(147) With regard to the cost of the meetings of the "asphalt table", *[…]* the amount of the meetings held in *[…]*, and probably in *[…]*, was divided in three equivalent invoices, without however indicating who paid for them.[116] Given that BP *[…]* participated at the meeting held in *[…]* with Repsol and Proas,[117] and that the meetings with Nynäs and Petrogal were held at *[…]*, the Commission understands that the cost of at least certain meetings was split between Repsol, Proas and BP.

(148) In respect of the meetings held at *[…]*.[118] *[…]*[119] *[…]*, the Commission understands that the undertakings which paid the cost of the meetings alternately were Repsol and Proas.

(149) *[…]*.[120]

2.1.1.2 Contents of the market sharing arrangements: "PTT" or "Petete"

(150) The parties to the cartel agreed to partition and share among them the bitumen market in Spain[121] (see, for example, recitals (236), (238), (239), (240), (276), (279), (280)). They did so by negotiating on an annual basis how the market should be the following year.[122] Cartel participants first estimated the total consumption of bitumen in Spain for the following year and subsequently divided the market by distributing volumes and customers among them.

(151) In particular, the annual market sharing agreed by the cartel participants consisted of two aspects: (i) *volume allocation* and (ii) *customer (or works/project) allocation*.

(152) *Volume allocation* was determined on the basis of certain agreed theoretical quotas defined by reference to each supplier's production capacity, that is, according to the number of refineries and depots of each supplier (see, for example, recitals (254), (255), (256), (257), (259), (261), (262), (264), (265), (267), (272), (282), (284), (289)).[123]

(153) *[…]*.[124]

(154) *[…]* the quotas attributed by the cartel to each supplier were as follows:[125]

– Repsol : 50.3%;

– Proas : 39.7%;

– BP : 10%;

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115 *[…]*, response to request for information of 24 March 2004, p. 07796.
116 *[…]*.
117 *[…]*, response to request for information of 24 March 2004, pp. 07810-07811.
118 *[…]*.
119 *[…]*.
120 *[…]*, response to request for information of 5 April 2006, p. 13057.
121 *[…]*.
122 *[…]*.
123 *[…]*, response to request for information of 24 March 2004, p. 07798; *[…]*, response to request for information of 18 November 2005, pp. 12129 and 12162, *[…]*.
124 *[…]*, response to request for information of 24 March 2004, p. 07798.
125 *[…]*.

– Nynäs : 54 000 tonnes;

– Petrogal: 48 000 tonnes (*[…]*, this figure was not a very rigid amount).

The existence and the percentage of these theoretical quotas have been corroborated by contemporaneous documents *[…]*.

(155) The volumes subsequently allocated to each participant on the basis of the theoretical quotas (see, for example, recitals (224), (225), (246), (248), (253), (254), (264), (289)) were calculated on the basis of the available market foreseen for the following year, that is, total market consumption minus imports.[126]

(156) *[…]*, neither the theoretical quotas nor the absolute volume figures allocated to Nynäs and Petrogal were ever formally reviewed by the parties.[127] *[…]* these theoretical quotas remained historically stable until the "asphalt table" discontinued its meetings[128] (meetings were allegedly discontinued in 2002, after the Commission carried out inspections). As a result, *[…]* these quotas were not discussed during the cartel meetings.[129] However, *[…]* that, as from 1997, BP increased its sales above 10% of the market as it suspended its participation at meetings of the "asphalt table" for some years[130] (from October 1998 to 2000, see section 4).

(157) Volume allocation was followed by *customer (or works/project) allocation*: the volumes allocated to each supplier on the basis of the theoretical quotas were then matched to forecasted customer requirements per project[131] (see, for example, recitals (249), (252), (259), (262), (277), (289)).

(158) With a view to customer allocation, the participants at the "asphalt table" discussed market information from the preceding year and made forecasts for the following year. These forecasts were made on a province-by-province basis and on a works or project-by-project basis. In addition, a distinction was made between fixed mixing plants and mobile mixing plants (essentially used for big projects).[132]

(159) Customers were allocated to cartel participants mostly according to logistic reasons, such as the proximity of the project to the supplier that requested the customer or according to the geographic location of the mixing plants.[133]

(160) *[…]*.[134]

(161) However, other customer allocation criteria were also taken into account:[135]

– *ad hoc*, in respect of special customer projects;

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126 *[…]*.
127 *[…]*.
128 *[…]*, response to request for information of 18 November 2005, pp. 12129, 12143, 12168.
129 *[…]*, response to request for information of 24 March 2004, p. 07811.
130 *[…]* In its response to a request for information of 24 March 2004, p. 07798, *[…]* states that *[…]*.
131 *[…]*, response to request for information of 24 March 2004, p. 07798.
132 *[…]*.
133 *[…]*, response to request for information of 24 March 2004, p. 07798.
134 *[…]*.
135 *[…]*, response to request for information of 24 March 2004, p. 07799; *[…]*.

– traditional customer considerations; and

– data of the preceding year.

(162) Mechanisms were set up by the cartel participants in order to ensure that each supplier would obtain the customer or project allocated to it during the negotiations at the "asphalt table":

– in respect of what could be termed active sales, cartel participants offered prices higher than the price offered by the cartel participant chosen as supplier for the customer or project concerned.[136] Thus, for example, prices were on occasions discussed bilaterally in the context of tenders for special projects in order to ensure that the allocated geographical area between the participants was respected;[137]

– concerning what could be termed passive sales, if a cartel participant was approached by a customer not allocated to it, it quoted a high price and sometimes contacted the participant designated to supply the customer.[138]

(163) The above-mentioned mechanisms entailed discussions on prices among the cartel participants, whether prior to offers being made or after a non-designated supplier was approached, but the Commission considers these specific price discussions ancillary to the market sharing arrangements, as they were designed to ensure that the customer or project concerned would be attributed to the designated supplier. These price discussions are not to be confused with the general price coordination activities discussed in section 2.2., which constitute the second aspect of the infringement.

(164) Several contemporaneous documents, discussed in section 2.1.2, illustrate the contents of the market sharing arrangements as described in the preceding recitals, such as the existence of defined, theoretical, market quotas, the allocation of volumes and customers and the territorial market limitations imposed by the cartel on its participants.

(165) As indicated when discussing the phases of the yearly negotiations on market sharing (see recital (130)), the document which, at the end of the negotiations at the "asphalt table", reflected the market sharing agreement reached for a given year was called "PTT" or "Petete".[139] This, however, was also the name given to the document used as a basis for the market sharing negotiations (concerning the "PTT" or "Petete" see, for example, recitals (228), (231), (232), (235), (244), (245), (247), (249), (252), (254), (258), (261), (262), (263), (264), (271), (281), (284), (286), (287), (288), (289)).

(166) The three undertakings that cooperated with the Commission's investigation explained the meaning of the terms "PTT" or "Petete", which appear often in the documents collected by the Commission during the inspections.

136 *[…]*.

137 *[…]*, response to request for information of 24 March 2004, p. 07800.

138 *[…]*.

139 *[…]*, response to request for information of 24 March 2004, p. 07783.

(167) *[…]*.[140]

(168) *[…]*.[141]

(169) *[…]*. This denomination referred to a television programme for children in which a character called Petete would read a very thick book to children.[142]

(170) In the light of the contemporaneous documents collected during the inspections, examples of which are described in section 2.1.2, *[…]*, it can be concluded that the three permanent participants at the "asphalt table", Repsol, Proas and BP, all called "PTT" or "Petete" the internal document which reflected the volume and customer allocation agreements reached by the cartel participants.

(171) The document which reflected the market sharing agreement or "PTT" contained essentially the following data:[143]

- the works or projects forecasted;
- the volumes needed for each project;
- the names of customers (or mixing plants); and
- an allocation of the customer to one of the cartel participants. Customers were allocated to one of the five cartel participants through a system whereby each customer was allocated to a specific number which corresponded to a bitumen supplier (see, for example, recitals (213), (218), (225), (254), (259), (262), (289)).

(172) *[…]*, during the period in which BP suspended its participation at meetings of the "asphalt table" (from October 1998 to 2000, see section 4), the *[*employees*]* of Repsol and Proas provided BP with a complete copy of the document embodying the market sharing agreement or "PTT".[144]

(173) Examples of internal documents containing the market sharing agreement or "PTT/Petete" for a given year were found during the inspections. *[…]*. These documents are described in section 2.1.2.

2.1.1.3 Implementation of the market sharing arrangements

2.1.1.3.1 Monitoring of the market sharing arrangements

(174) The market sharing arrangements included a system of monitoring of the volumes and customers allocated to each participant.[145]

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140 *[…]*, response to request for information of 24 March 2004, p. 07783. *[…]*
141 *[…]*.
142 *[…]*, response to request for information of 18 November 2005, p. 12142.
143 *[…]*.
144 *[…]*.
145 *[…]*.

(175) This monitoring system aimed at managing and controlling the fulfilment of the agreements reached and included:[146]

- a regular exchange of information on sales volumes;
- discussions on any difficulties arisen in connection with the market sharing agreement or "PTT";
- a distribution of new works not included in the market distribution agreement or "PTT" and ancillary discussions on prices for such new works.

(176) *[…]*, three periods may be distinguished in connection with the monitoring of the market sharing agreements.

(177) In a first period running until 1995, monitoring meetings were held every 15 days between Repsol, Proas and BP.[147]

(178) *[…]*.[148]

(179) *[…]* these meetings were short, of around one or two hours, and were held around three days after the sales closing of each fortnight. They were held at *[…]*.[149]

(180) In general, the monitoring meetings held until 1995 were attended by *[…]* of each company plus one or two persons *[…]*.[150]

[…]

(181) *[…]*, each participant in the monitoring meetings prepared a summary table which included, in respect of sales made during the period subject to monitoring and the accumulated period for the year, the following information: '*total tonnes*', that is, actual volumes sold, '*theoretical tonnes*', that is, volumes allocated to the participant in the market sharing agreement, and '*difference*', that is, the difference between the two previous volumes.[151]

(182) As in the case of the document containing the market sharing agreement or "PTT", no monitoring document common to all participants was prepared but, rather, several documents existed with the same data, one prepared by each participant.[152] *[…]*.[153]

(183) *[…]*, in a second monitoring period which started around 1996, monitoring was carried out by telephone as it was deemed no longer necessary to meet for that purpose. Sales information was exchanged every 15 days.[154]

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146 *[…]*.
147 *[…]*.
148 *[…]*.
149 *[…]*.
150 *[…]*.
151 *[…]*.
152 *[…]*.
153 *[…]*.
154 *[…]*.

(184) *[…]*. In BP's case, these calls were conducted bilaterally with Repsol or Proas and it was one of these two undertakings which collected the sales data exchanged.[155]

(185) When in 1998 BP suspended its participation at the meetings of the "asphalt table", the exchange of sales information over the telephone every 15 days for monitoring purposes was maintained between Repsol and Proas. *[…]*, during this period, Repsol and Proas estimated BP's sales share as a ninth of their combined sales.[156]

(186) Later on, exchanges of information over the telephone for monitoring purposes were made on a monthly basis. However, *[…]*, this change entailed an increase in telephone contacts to assign new works not included in the market sharing agreement or "PTT" and agree on prices to offer to ensure that the new works were allocated to the designated participant.[157]

(187) *[…]*, during the third monitoring period, which started in 2001 and followed *[…]*, Repsol and Proas continued to exchange actual sales information on a monthly basis, although compensations were no longer made (on the compensation mechanism set up by the cartel, see section 2.1.1.3.2). Sales information was exchanged between *[…]* of Repsol and *[…]* of Proas.[158] Contacts over the telephone were likewise held between Repsol and Proas to determine the prices that should be offered for specific works or in order to attribute new works not included in the market estimation made with a view to the market sharing agreement or "PTT".[159]

(188) *[…]*, besides regular monitoring contacts, almost daily bilateral contacts were held over the telephone during the whole cartel period by staff of *[…]* Repsol and their counterparts in competing undertakings. The purpose of these contacts was to exchange sales information and discuss new works or prices with regard to specific customers. In addition, the *[…]* of Repsol and Proas had bilateral contacts, usually over lunch, several times a year, which the *[…]* of BP joined on occasions.[160]

(189) During the inspections, the Commission found contemporaneous internal documents prepared with a view to reporting to other cartel participants, where necessary and in the context of monitoring, sales (whether actual or manipulated) made during a given period. *[…]*. Examples of monitoring documents are described in section 2.1.2 (see, for example, recitals (204), (213), (219), (220), (221), (222), (223), (228), (230), (241), (242), (243), (267)).

2.1.1.3.2 Compensation mechanism

(190) *[…]*, the monitoring system in respect of the volumes and customers allocated to each participant also included a compensation mechanism designed to correct any differences arising with regard to the market sharing agreement or "PTT".[161]

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155 *[…]*, response to request for information of 24 March 2004, p. 07807; *[…]*.
156 *[…]*.
157 *[…]*.
158 *[…]*.
159 *[…]*.
160 *[…]*.
161 *[…]*.

(191) *[…]* the "asphalt table" set up a compensation mechanism for the benefit of participants that were adversely affected by the implementation of the agreements.

(192) Thus, when a difference with the market sharing agreements was detected which had a negative impact on one of the cartel participants (for example, when a participant was not able to sell its allocated volume), the number of tonnes that, in accordance with the volume allocation agreement, theoretically corresponded to that participant, was claimed from the participant that was over-selling (that is, selling over the volume allocated to it by the market sharing agreement).[162] *[…]*, another way to compensate a participant who signalled that it had under-sold was to add the un-sold volume to the following year's volume allocation in order to compensate the cartel participant for lack of sales.[163]

(193) In a preventive manner, and *[…]*, if a cartel participant signalled that it was in danger of significantly exceeding its allocated volume during a given year, it would normally be directed to cease supplies to a particular customer. Due to the long term business importance of mixing plants, supplies to special projects were usually sacrificed first.[164]

(194) *[…]* the compensation mechanism involved taking decisions on prices of certain projects already allocated in the market sharing agreement or "PTT" so as to ensure that the customer made the required switch.[165]

(195) In respect of the compensation mechanism, however, *[…]*, if sales were greater than planned, a cartel participant had, in addition to the option of declaring the additional volume to the cartel, in which event the cartel participant would be expected to make compensation to other cartel members, the option of not reporting the additional sales and concealing these volumes from the cartel.[166] *[…]* it was commonplace for sales data to be manipulated in order to generate minimum changes.[167]

(196) *[…]*, as from 2001, although the exchange of sales information for the purpose of monitoring the volumes and customers allocated to each participant still continued, the compensation mechanism was no longer applied.[168]

(197) Some examples illustrating the compensation mechanism set up by the cartel participants were found during the inspections. These documents are described in section 2.1.2 (see, for example, recitals (216), (217), (230), (259), (268)).

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162 *[…]*, response to request for information of 18 November 2005, pp. 12127 and 12130; *[…]*, response to request for information of 24 March 2004, p. 07800.

163 *[…]*, response to request for information of 24 March 2004, p. 07808; *[…]*.

164 *[…]*, response to request for information of 24 March 2004, p. 07808.

165 *[…]*, response to request for information of 24 March 2004, p. 07800.

166 *[…]*, response to request for information of 24 March 2004, p. 07798.

167 *[…]*, response to request for information of 24 March 2004, p. 07808.

168 *[…]*.

2.1.2 Contemporaneous evidence of the market sharing arrangements and their implementation

(198) In addition to *[…]* in section 2.1.1, proof of the market sharing arrangements is also provided by contemporaneous evidence collected during the inspections. Some contemporaneous documents were also provided by *[…]*[169] *[…]*.[170]

(199) The contemporaneous evidence in the Commission's possession will be presented in chronological order, starting in 1991 as, according to the evidence in the Commission's possession, the origin of the cartel dates back, at least, to 1991 (see section 4).

(200) It should also be noted that, where a document covers more than one year (for example, a sales chart covering years 1991 to 1997, or equivalent charts submitted for 1993, 1994, 1998 and 2001), reference to that document is made in the heading corresponding to the earliest year covered by the document (in the examples, in 1991 and in 1993 respectively).

1991

(201) In an internal note *[…]* explains how a quota was attributed by Repsol to an importer set up by Nynäs without consulting *[…]*, and how Repsol made sales to this and another importer without reporting those sales to other cartel participants. The note states the following:

[…][171]

[…][172]

(202) Nynäs Petróleo S.A. contests this document as being factually incorrect. Nynäs claims that Asfaltos Europeos was not founded in 1988 by Nynäs but in 1987 by a private individual, and asks that *[…]* in the document? Nynäs claims that the information reported in the memorandum concerning the dealings between Repsol and Nynäs with regard to the Belgian bitumen market is *[…]*, based on rumours and a misinterpretation of, according to Nynäs, lawful exchange agreements between Repsol and Nynäs.

(203) The Commission considers that the fact that the author of the memorandum, *[…]*, may not have known exactly all details of Nynäs' historic precedents or about Nynäs' trade relations with Repsol on the Belgian market does not detract from the value of his observations concerning Nynäs' contacts with Repsol on the Spanish market. In fact, this contemporaneous memorandum confirms *[…]* market sharing discussions were ongoing in 1991 among these four undertakings, whether on a bilateral or a multilateral basis. The reliability of this document is reinforced by another memorandum drafted *[…]* in February 1992, which also refers to the fact that Nynäs was assigned an identical market quota (see recital (206)).

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169 *[…]*.
170 *[…]*.
171 *[…]*.
172 *[…]*."

(204) With regard to the monitoring system set up by the cartel, *[…]* submitted a monitoring table entitled "*Asphalt sales*" listing bitumen sales from 1991 to 1997 for Repsol, Proas and BP. *[…]*, this table was most probably prepared on the basis of sales data exchanged between these competitors.[173]

1992

(205) During phase (a) of the yearly negotiations leading to the market sharing agreement or "PTT" (see recital (130)), each producer prepared an in-house market study for the following year with data gathered by sales staff from different areas and brought together by the central sales department. *[…]* submitted, in respect of 1992 and 1993, copies of the background documentation estimating sales on a province-by-province basis by type of customer (emulsion factories, fixed plants or big works) with a view to preparing the internal market study estimating total consumption of bitumen for the following year.[174]

(206) In connection with the contents of the market sharing arrangements, an internal memorandum of *[…]* dated February 1992 and entitled "*Bitumen Market Analysis 1992*" discusses the quotas attributed to each of the three bitumen producers in Spain *[…]*. The memorandum calculates the Spanish market (Peninsula and Balearic Islands) for penetration bitumen as amounting to 1 481 100 tonnes, and states that the domestic market:

[…][175]

(207) The memorandum also specifically points out the establishment of the above-mentioned *[…]*% market quota in respect of *[…]*:

[…][176]

(208) A section of the memorandum entitled "*Rigidity of market agreements*" reflects the problems encountered by *[…]* due to the imposition by the cartel of a limited geographic area in which *[…]*could sell:

[…][177]

(209) *[…]* that the description in the preceding recital shows some of the problems noted in relation to the market cooperation. *[…]*, a map attached to the memorandum[178] shows that the average prices as at March 1992 in the triangle allocated to *[…]* (400 km radius around *[…]*), were not as high as in other areas but, because of the existence of the market allocation, *[…]*could not expand in other Spanish regions.[179]

(210) For the future, the above-mentioned memorandum proposes the following coordination initiatives with competitors:

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173 *[…]*.
174 *[…]*.
175 *[…]*.
176 *[…]*.
177 *[…]*.
178 *[…]*.
179 *[…]*.

[…][180]

(211) *[…]* argues that *[…]*'s memorandum is contemporaneous evidence against the three bitumen producers but must be dismissed as evidence against *[…]* for 1992.

(212) The Commission considers, to the contrary, that the reference in the document to a market share of *[…]* when calculating the domestic market (total consumption minus imports) illustrates that market allocation discussions between Repsol, Proas and Nynäs concerning the market share that should correspond to Nynäs must have taken place already in 1992 and *[…]*. This is consistent with *[…]* and with a *[…]* contemporaneous document showing that Nynäs was part of the market sharing arrangements already in 1991 with a market quota allocated to it by the cartel (see recitals (120), (201) to (203)). The volume of 55 393 tonnes reported in this *[…]* memorandum is also consistent with the amount of 54 000 tonnes that, as reported by *[…]*, the cartel had allocated to Nynäs (see recital (154)), and with the phrase "Nynäs 55/56" handwritten on a *[…]* document of 1993 which *[…]* refers to the volume allocated to Nynäs by the cartel (see recital (213)).

1993

(213) In connection with the monitoring system set up by the cartel, *[…]* submitted several charts as examples of monitoring tables listing bitumen sales for Repsol, Proas and BP on the following periods, including also yearly accumulated sales data: December 1993 (second fortnight), December 1994 (first and second fortnights), December 1998 (second fortnight) and January to April 2001.[181] *[…]*.[182]

While in the charts covering 1993 and 1994 the suppliers are listed by name, (Repsol group, Cepsa and BPMed), the charts for 1998 and 2001 list suppliers by number: 1, 2 and 4. The charts covering 1993 and 1994 contain, per fortnight and accumulated, the following columns: "*Actual*" (in tonnes), "*Theoretical*" (in % and tonnes), and "*Difference*" (in tonnes). The charts covering 1998 and 2001 contain, per fortnight or month and accumulated, the following columns: actual sales ("*VR*" from the Spanish "ventas reales"), actual percentage of sales ("*%R*"), theoretical percentage of sales ("*%T*"), theoretical sales ("*VT*" from the Spanish "ventas teóricas"), and difference ("*DIF*").

It may be noted that, in all charts, the columns indicating the theoretical percentage of sales ("*Theoretical*" in % and "*%T*"), recall the theoretical quotas allocated by the cartel to the three main suppliers, namely: Repsol: 50.3%, Proas: 39.7% and BP: 10% (see recital (154)). It is thanks to the indication of these theoretical quotas that the numbers by which the three suppliers are referred to in the charts covering 1998 and 2001 may be discerned: 1: Repsol, 2: Proas and 4: BP.[183]

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180 *[…]*.

181 *[…]*.

182 *[…]*, response to request for information of 5 April 2006, p. 13057.

183 It may be noted that the letters "A" and "B" indicated in the charts covering 1998 and 2001 with theoretical quotas of 40.47% and 9.83% refer to Repsol and Asfalnor respectively, as shown by the charts covering 1993 and 1994. The theoretical quotas of these two companies add up to 50.3%, which is the total theoretical quota allocated by the cartel to the Repsol group.

Also worth noting is the handwritten scribble on the page which contains the sales chart for the first fortnight of December 1994:

[…]

The Commission considers that the above-mentioned amounts refer to the theoretical volumes allocated by the cartel to Petrogal and Nynäs, *[…]* (see recital (154)):

Petrogal : 48,000 tonnes;

Nynäs : 54,000 tonnes.

In response to a request for information, *[…]* confirmed that the phrases "*Petrogal 48*" and "*Nynäs 55/56*" refer to the thousands of tonnes negotiated with Petrogal and Nynäs respectively as their participation in the Spanish market.[184]

(214) *[…]* the document described in the preceding recital is unreliable as evidence, notably because the Commission does not mention that other annotations concerning other bitumen suppliers, namely *[…]*, also appear in the document, and because a *[…]* internal document which estimates imports in respect of Nynäs, Petrogal and the three other suppliers indicates the same amounts.[185] *[…]* further claims that *[…]* is commenting on a document which is not its own (*[…]*) and that the author of the annotations is unknown.

(215) The Commission notes that none of *[…]* has claimed that companies other than the five undertakings to which this Decision is addressed participated in the cartel and the Commission has found no evidence that other companies were involved. Furthermore, the amounts indicated in the document in respect of Nynäs and Petrogal correspond to the amounts reported by *[…]* as having been allocated by the cartel to these two undertakings and, in the case of Nynäs, to the market quotas and amount which appear in two *[…]* memoranda dated 1991 and 1992 (3.74%, 55,393 tonnes, see recitals (201) and (206)). With regard to the origin of the document, the Commission notes that *[…]* and that, in any event, the author of the handwritten notes on the document was, *[…]*.

(216) In connection with the compensation mechanism devised by the cartel, a handwritten internal note of *[…]* dated 3 June 1993 reflects customer allocation and price discussions in the context of the compensation mechanism. This note contains a chart with information on prices offered by *[…]* and by competitors and references to allocation of customers. The note reads as follows:

[…]

[…][186]

(217) In response to a request for information, *[…]* explained that the above-mentioned customer distribution and price arrangement:

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184 *[…]*, response to request for information of 5 April 2006, p. 13059.

185 *[…]*, response to request for information of 21 April 2004, p. 16023.

186 *[…]*, inspection document, p. 00379. *[…]*

[…][187]

[…] also explained that the other two companies involved in the discussions were Proas and Repsol, and that the reference to Repsol in connection with the price to be charged by *[…]* [188] *[…]* indicated that *[…]*, attended similar meetings to that reported in the internal note described in the preceding recitals.[189]

1994

(218) An internal chart found during the inspections prepared by *[…]* and dated 28 March 1994 contains the following columns: a list of projects, their geographic location, the volumes required for each project, a list of customers and a last column entitled "*A*" which lists a series of numbers.[190]

[…] the chart was prepared on the basis of available market data which may have been subsequently used to exchange information at the "asphalt table". *[…]* the letter "*A*" in the last column stands for the Spanish word "*adjudicatario*", that is, the operator that *[…]* estimated would supply the project/customer, and *[…]* each of the numbers in the column corresponds to a supplier as follows:[191]

– 1: Repsol

– 2: Proas

– 4: BP

– 5: Nynäs

– 7: Petrogal

– 9: imports

Whilst this document is internal to *[…]* and was prepared on the basis of market intelligence, it may be noted that the designation of suppliers by number and the meaning of each number as described by *[…]* are identical to the designation of suppliers by number and the meaning of each number as described by *[…]* in *[…]* "*PTT year 2000 under construction*", that is a document which, in the light of its title, was prepared in the context of the market sharing negotiations for 2002 (see recital (254)). The Commission also recalls that, *[…]*, in the document that reflected the market sharing arrangements, customers were allocated to one of the five cartel participants through a system in which each customer was allocated to a specific number whereby each number corresponded to a supplier (see recital (171)).

(219) In connection with the monitoring system set up by the cartel, a table prepared by *[…]* entitled "*Sales asphalt 1994*" shows sales of different kinds of penetration bitumen per customer, for the whole year and by fortnight, with partial subtotals and a total figure

187 *[…]*, response to request for information of 24 March 2004, p. 07789.
188 *[…]*, response to request for information of 24 March 2004, p. 07789.
189 *[…]*, response to request for information of 24 March 2004, p. 07789.
190 *[…]*, inspection document, pp. 02997-03008.
191 *[…]*, response to request for information of 18 November 2005, pp. 12128 and 12131.

called "*Sum Petete*" ("*Suma Petete*"). The table also includes data on "*Imports*", and a series of abbreviations such as "*Declared*", "*adjustments*", "*Declar. without adjus.*" and "*Declar. + Impor.*".[192]

(220) *[…]* [193]

(221) *[…]*[194]

(222) *[…]*[195]

(223) Also with regard to the monitoring system set up by the cartel, a chart entitled "*Total market summary 1994*" drawn up by *[…]* contains a list of the main bitumen suppliers, amongst which Repsol, Proas, BP, Petrogal and "other imports", the actual volumes sold by each of them (in four different areas of Spain plus the total), a column entitled "*theoretical*", which the Commission understands refers to the theoretical volumes resulting from the theoretical quotas allocated by the cartel to the three main operators, another column entitled "*difference*", which refers to the difference between the actual and the theoretical sales figures, and a final row entitled "*non-assigned*" ("S. Asignar").[196] This table prepared by *[…]* corresponds to *[…]*, that is, it contains information on actual sales, theoretical sales and the difference between the two (see recital (181)).

While, *[…]* stated that the chart was prepared on the basis of market information gathered by Proas' sales staff which might have been used to exchange information at the "asphalt table", Proas added that the phrase "*non-assigned*" means that, as the volume requirements for certain projects were not known, the "asphalt table" had not yet decided which operator would supply them.[197]

The total actual sales and the total theoretical sales reported in *[…]* chart in respect of Petrogal amount to 43 700 tonnes, which is a quite similar volume to that allocated to Petrogal by the "asphalt table" and which, according to *[…]*, was not a very rigid amount of 48,000 tonnes (see recital (154)).

1995

(224) *[…]* an internal document entitled "*Study sheet*" - "*BP 1995*" *[…]* contains columns with the following information: province, customer and volumes, the latter in a column entitled "*OK*".[198]

[…] a "study sheet" was a document used to take notes during meetings held with competitors to assess jointly the size of the market. *[…]*, the column entitled "*OK*" contains an estimate of the tonnes for BP's customers agreed jointly between Repsol,

192 *[…]*, inspection document, pp. 00272-00273.
193 *[…]*, response to request for information of 24 March 2004, pp. 07782-07783.
194 *[…]*, response to request for information of 24 March 2004, p. 07782.
195 *[…]*, response to request for information of 24 March 2004, p. 07783.
196 *[…]*, inspection document, p. 02996.
197 *[…]*, response to request for information of 18 November 2005, p. 12127.
198 *[…]*.

Proas and BP for 1995. *[…]* the study sheet *[…]* reflects the notes taken by *[…]* staff of the agreements reached at the meeting.[199]

(225) *[…]* document entitled "*Study sheet*" - "*Forecast 1995 Nynäs*" *[…]* contains two columns indicating province and customer and four other columns entitled 1, 2, 5 and 6 which list volumes.[200]

[…] the numbers heading the columns refer to the following suppliers:[201]

– 1: Repsol

– 2: Proas

– 5: Nynäs

– 6: Petrogal

[…] the volumes indicated in the "study sheet" were negotiated in a joint meeting by Repsol, Proas and Nynäs.[202]

The total volume negotiated for Nynäs as indicated in column 5 amounts to 56 000 tonnes, which corresponds, *[…]*, to the volume negotiated with Nynäs as its participation in the Spanish market (see recital (154)), and which also appears in *[…]* document dated 1993 (see recital (213)). A market quota for Nynäs and virtually the same volume are also mentioned in two *[…]* memoranda dated 1991 and 1992 (3.74%, 55,393 tonnes, see recitals (201) and (206)).

(226) *[…]* does not consider the document described in the preceding recital as reliable evidence. It claims that the author of the document, *[…]*, *[…]* ; that *[…]* is not sure whether *[…]*, attended the meeting and that therefore the fact that the meeting took place appears to be speculation on *[…]* part; that, according to *[…]*, a study sheet was used to make notes in meetings with competitors to assess jointly the size of the market and that *[…]* did not participate in this phase of the negotiations; that Repsol states that the meeting took place probably in January-March while meetings to assess the market size were held around November; and that a study sheet used for *[…]* differs from that used for *[…]*.

(227) In reply to these arguments, the Commission does not consider it a condition of the reliability as evidence of a document that its author *[…]*. Moreover, as the Court of Justice of the European Communities held in *Sumitomo* (Seamless steel tubes), an incriminating statement by a representative of a company admitting the existence of an infringement by that company entails considerable legal and economic risks, which makes it extremely unlikely that such a statement will be made unless the person making it had information provided by employees of the company who themselves

199 *[…]*, response to request for information of 5 April 2006, pp. 13059-13061.

200 *[…]*.

201 A last column entitled 7 is empty and corresponds to *[…]*, a supplier which was not a member of the cartel.

202 *[…]*, response to request for information of 5 April 2006, p. 13061.

had direct knowledge of the facts.[203] Given that *[…]*[204], the Commission considers this contemporaneous document as sufficiently reliable evidence that Nynäs participated in a meeting with Repsol in 1995, *[…]*. For the rest, suffice it to say that, regardless of what the initial function of a study sheet may be or how it may have been used in connection with other suppliers, the fact is that a study sheet was used in the above-mentioned meeting between at least Repsol and Nynäs to discuss and note down sales volumes to be allocated to Nynäs.

(228) Tables equivalent to the table *[…]* entitled "*Sales asphalt 1994*" described in recitals (219) to (222) were also found in respect of 1995, 1996 and 1997.[205] However, the tables for 1996 and 1997 are entitled "*PTT - Asphalt sales* 1996" and "*PTT - Asphalt sales 1997*", that is, they include the abbreviation "PTT" (or "Petete").[206] As indicated in recital (167), *[…]*, Petete was the name given to the market study used to allocate quotas to the participants and sometimes it was used to refer to the cartel itself.[207]

1996

(229) In an internal memorandum written on letterhead *[…]*, dated 9 April 1996 and entitled "*Bitumen - Exchanges with Repsol*", *[…]* confirms the existence of the "asphalt table" set up to discuss the supply of bitumen in Spain. In this memorandum, *[…]* reports that:

[…][208]

(230) A diary of one of *[…]* staff contains notes concerning a monitoring meeting between Proas and BP:

23 September 1996

[…] 24 September 1996

[…] [209]

[…] the lunch, possibly with *[…]*, was held in order to prepare the meeting of the following day.[210] The Commission understands that, during the meeting of the following day, sales data for the fortnight was exchanged between the two competitors.

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203 Joined Cases C-403/04P and C-405/04 P, *Sumitomo Metal Industries Ltd and Nippon Steel Corp.* v *Commission*, Judgment of 25 January 2007, not yet reported, at paragraphs 101-103.

204 *[…]*, response to request for information of 5 April 2006, p. 14787.

205 *[…]*, inspection documents, pp. 00274-00280.

206 *[…]*, inspection documents, pp. 00276-00280.

207 It may also be noted that, in respect of 1997, two different sales tables were found. One table, entitled "*PTT-Asphalt sales 1997*", contains data up to August 1997, while the other table, entitled "*PTT-Sales 1997*", contains data for the whole year as well as some additional columns entitled "*PTT to date*", "*Difference*", "*%Variation*", "*Total PTT 1997*", "*Pending*" and "*Observations*"; *[…]*, inspection documents, pp. 00278-00280. In response to a request for information, *[…]* explained that the difference between the two tables relates to a change in the level of detail provided after August 1997, and that *[…]* response to request for information of 24 March 2004, p. 07784.

208 *[…]*, inspection document, p. 02533. *[…]*

209 *[…]*, inspection document, 03263. *[…]*

210 *[…]*, response to request for information of 18 November 2005, p. 12159.

1997

(231) In connection with phase (a) of the yearly negotiations leading to the market sharing agreement for the following year (see recital (130)), a fax dated 5 November 1997 sent by *[…]* of *[…]* to the Eastern and South-western departments entitled "*PTT'98*" reads as follows:

[…] [211]

(232) Phase (f) of the yearly negotiations leading to the market sharing agreement for the following year consisted in informing and negotiating with Nynäs and Petrogal separately the sales volumes that would correspond to each of them in their respective areas of influence (see recital (130)). The Commission found the following entries in the diary of one of *[…]* staff relating to meetings scheduled between Proas and Nynäs or Petrogal probably to discuss, *[…]*, the "PTT" or market sharing arrangements and the works in Nynäs and Petrogal's areas of influence:[212]

11 December 1997

[…][213]

8 August 1997

[…][214]

8 July 1997

[…][215]

14 May 1997

[…][216]

[…].

(233) *[…]* argues that the diary annotation mentioned in the preceding recital concerning a meeting between Proas and Nynäs is not reliable evidence as *[…]* is not certain that the meeting was actually held.

(234) The Commission considers that, even if *[…]* cannot guarantee that the meeting actually took place, the scheduling of a meeting in the diary of one of *[…]* staff explicitly mentioning the phrase "PTT" next to the names of two competitors found to have participated in the cartel shows that, in 1997, Proas and Nynäs indicated their willingness to continue discussions on market sharing arrangements. This is also

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211 *[…]*, inspection document, pp. 03264-03265. *[…]*. See also *[…]*, response to request for information of 18 November 2005, p. 12159.

212 *[…]*, response to request for information of 7 April 2006, pp. 13100-13102. *[…]*.

213 *[…]*, inspection document, p. 03257. *[…]*.

214 *[…]*, inspection document, p. 03260. *[…]*.

215 *[…]*, inspection document, p. 03261. *[…]*.

216 *[…]*, inspection document, p. 03262. *[…]*.

evidence that neither of them publicly distanced itself from the cartel's objectives and methods. Finally, it is fully consistent with the information reported by *[…]* that Nynäs participated in the cartel as from 1991 and with a *[…]* contemporaneous document showing that Nynäs was part of the market sharing arrangements already in 1991 (see recitals (120), (201) to (203)).

[…].

1998

(235) In connection with phase (a) of the yearly negotiations leading to the market sharing agreement for the following year (see recital (130)), some notes on the diary of one of *[…]* staff read as follows:

12 November 1998

[…][217]

[…],[218] *[…]*.

(236) The contents of a meeting in which anticompetitive discussions were held between Repsol and Proas on the one hand and Petrogal on the other hand are recorded by the minutes drafted by *[…]* of a "*Meeting Petrogal on 17-09-98*". These minutes mention a proposal for a general agreement on the market and the coordinated revision of all business lines for the Iberian market. The minutes report the following:

[…] [219]

[…].[220]

A note in the diary of one of *[…]* staff records this meeting with Petrogal:

17 September 1998

[…] [221]

(237) *[…]* the document described in the preceding recital constitutes exculpatory evidence as it shows a fully autonomous and unilateral strategy on the Spanish bitumen market.

(238) On the contrary, the Commission considers that this document constitutes evidence of Petrogal's participation in market sharing discussions in 1998. In essence, the document shows that Petrogal had made a proposal to at least Repsol and Proas to *[…]*, which is not information which independent economic operators would be expected to share with competitors, and that it subsequently met with them to assess

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217 *[…]*, inspection document, p. 03247. *[…]*.

218 *[…]*, response to request for information of 18 November 2005, p. 12156. See also, for example, p. 03248, where a note on the same diary refers to an internal meeting with *[…]* to discuss the "PTT", and response to request for information from *[…]* in this respect, p. 12156.

219 *[…]*, inspection document, p. 03228. *[…]*

220 *[…]*, response to request for information of 18 November 2005, pp. 12151-12152.

221 *[…]*, inspection document, p. 03250. *[…]*

the situation. At the meeting Petrogal confirmed its wish not to complicate market conditions and informed Repsol and Proas that it would take the most convenient positions while awaiting a response from them on its proposal, thereby showing its readiness to continue to wait for a response from its competitors and to carry on the discussions in the future. In addition, and as shown in recital (242), Petrogal provided sales information to Repsol and Proas in the course of the meeting.

(239) The Commission considers that making a proposal to competitors to streamline business lines on the Iberian market, showing willingness to continue in the future discussions on its proposal for a general agreement and disclosing sales information to competitors are in contradiction with an autonomous and unilateral strategy on the market as alleged by Petrogal and demonstrate the anti-competitive object of such contacts.

(240) With regard to the contents of the market sharing arrangements, in an e-mail i*[…]* dated 20 January 1998 where investments in fixed assets for *[…]*, explains to *[…]*, that:

[…] [222]

[…] believes there is not really any reason for increasing production capacity of *[…]* as this would not result in a corresponding increase in market share because of the existence of the market sharing agreements, that is, the market rule.[223]

(241) In an e-mail dated 21 January 1998 sent by *[…]* entitled "*Bitumen figures*" he indicates the following:

[…] [224]

[…]. It cautions that information published by the refinery in the Annual Report could be reviewed by third parties, and that that could show divergences between various sets of figures produced *[…]*.[225] The Commission understands that these divergences refer to the official figures produced by *[…]* for the Annual Report and the figures put together by *[…]* to report to other cartel participants (concerning the practice of preparing specific sales figures to report to other cartel members, see also recitals (220) and (267)).

(242) In connection with the monitoring system set up by the cartel, the minutes prepared by *[…]* of the meeting entitled "*Meeting Petrogal on 17-09-98*" held between Repsol, Proas and Petrogal (see recital (236)) show how Petrogal provided its competitors with sales information which enabled them to monitor whether or not Petrogal was selling within the volumes allocated to it by the market sharing agreement or "PTT". The minutes report that:

[…] [226]

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222 *[…]*.
223 *[…]*.
224 *[…]*, inspection document, p. 00271. *[…]*
225 *[…]*, response to request for information of 24 March 2004, p. 07782.
226 *[…]*, inspection document, p. 03228. *[…]*

(243) Also in connection with the monitoring system, *[…]* submitted an internal chart entitled "*Chart data bitumen 1998*"[227] and explained *[…]* [228] that this was an internal follow-up chart which reported the actual sales volumes and the sales volumes declared to the "asphalt table", which were different. *[…]* explained, *[…]*, the meaning of some of the columns in the chart as follows:

– "*Regula.*": regularisation, that is, tonnes added to the actual tonnes sold by *[…]* in order to communicate them to competitors;

– "*Deduc*": deduction, that is, tonnes deducted from the actual tonnes sold by *[…]* in order to communicate them to competitors;

– "*D. mesa*": data declared to the "asphalt table";

– "*> o = S/CR*": greater or equal to data in tonnes contained in the public profit and loss statement;

– "*Dif.*": difference between actual data and declared data;

– "*Dif. Acum.*": accumulated difference between actual data and declared data.

1999

(244) In connection with phase (a) of the yearly negotiations leading to the market sharing agreement for the following year (see recital (130)), an e-mail sent by *[…]* to its *[…]*, dated 7 October 1999 and entitled "*PTT year 2000*", reads as follows:

[…] [229]

(245) Also with regard to phase (a) of the yearly negotiations, a note in the diary of one of *[…]* staff reads as follows:

15 November 1999

[…] [230]

In response to a request for information, Proas explained that this note refers to a Proas' internal meeting in order to finalise the market study with the sales delegates.[231]

(246) An internal chart prepared by *[…]* covering 1999 shows the allocation of sales volumes per province to, *inter alia*, BP, Nynäs, Petrogal, Proas, Repsol and imports. The chart includes the term "*Asignación*" ("Allocation") and a column entitled "*S/A*" (from the Spanish "Sin Asignar"), that is, "Not allocated".[232] *[…]*,[233] the Commission

227 *[…]*.
228 *[…]*, response to request for information of 5 April 2006, p. 13058.
229 *[…]*, inspection document, p. 03229. *[…]*
230 *[…]*, inspection document, 03244. *[…]*.
231 *[…]*, response to request for information of 18 November 2005, p. 12155.
232 *[…]*, inspection document, p. 03033.
233 *[…]*, response to request for information of 18 November 2005, p. 12134; Proas*[…]* response to request for information of 7 April 2006, p. 13097.

understands that this chart contains estimates of the volumes that would be supplied in the province concerned by the supplier designated by the usual participants of the "asphalt table".

[…] also prepared two versions of an equivalent chart covering 2000: one of the versions[234] contained the short form "*Asign.*" for "*Asignación*" ("Allocation"), and the second version[235] also contained the abbreviation "*S/R*" which, *[…]* means "not allocated" (from the Spanish "Sin Repartir"), that is that, although the volume requirements for a given project were known, the "asphalt table" had not yet agreed to which operator the project would be allocated.

(247) A note in the diary of one of *[…]* staff reads as follows:

14 January 1999

[…] [236]

[…] these were meetings held at *[…]* to discuss market issues[237] and, in particular, the projects of Nynäs and Petrogal in their geographic area of influence,[238] first with Repsol and subsequently with each of these two companies. The Commission regards this as a clear example of phase (f) of the negotiations leading to the yearly market sharing agreement (see recital (130)).

In response to the Statement of Objections *[…]* accepts that the diary entry suggests that a meeting with Nynäs had been arranged, but states, as does *[…]*, that there is no evidence that the meeting actually took place or of what was discussed.

The Commission considers that the scheduling of meetings in the diary of one of *[…]* staff first with Repsol and subsequently with Nynäs and Petrogal; *[…]* ; the date of the meeting (January 1999), which is fully consistent with *[…]* description of the phases of the market sharing negotiations and the timing of each phase; and the two corporate statements of *[…]* according to which the cartel between at least these four undertakings was ongoing in 1999, are factors which, considered as a whole, constitute evidence that Nynäs and Petrogal at least agreed to meet with competitors in 1999 to discuss market sharing arrangements.

Another note in the diary of one of *[…]* reads as follows:

20 April 1999

[…] [239]

[…] this was a bilateral meeting of the "asphalt table" with Repsol.[240]

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234 *[…]*, inspection document, pp. 03310-03314.
235 *[…]*, inspection document, pp. 03331-03332.
236 *[…]*, inspection document, p. 03246. *[…]*.
237 *[…]*, response to request for information of 18 November 2005, p. 12155.
238 *[…]*, response to request for information of 7 April 2006, pp. 13099-13100.
239 *[…]*, inspection document, p. 03245. *[…]*".
240 *[…]*, response to request for information of 18 November 2005, p. 12155.

(248) *[…]*, in October/November 1999 *[…]* of Repsol gave *[…] […]* at the time, a chart which contained the volume allocation for *[…]* as agreed by Repsol and Proas during a meeting at which *[…]* was not present. *[…]* made it clear this was no longer a practice *[…]* adhered to, but still took the chart with him. *[…]* gave a copy of the chart to *[…]*, purely for information, who kept it at his home.[241] This chart included the following columns: "province", "customer", "place of delivery" and "metric tonnes". *[…]* added two handwritten columns, the first one indicating import volumes per customer as estimated by him, and the second one indicating the volumes allocated to *[…]* in 1998. *[…]*, the purpose of these two handwritten columns was for *[…]* to compare the volumes allocated to *[…]* by Repsol and Proas for 2000 with the volumes allocated to *[…]* during the period of the cartel arrangements (that is, during the period in which *[…]* still participated at meetings of the "asphalt table")[242] *[…]*.

2000

(249) An Excel chart entitled "*Mercasfa2000*", prepared by *[…]* and sent by e-mail internally within this company on 20 January 2000, contains the following columns: "year", "province", "[Proas] sales delegation", "[Proas] sales department", "project name", "volume" (in metric tonnes), "customer", "type of customer" (emulsions factory - "*FE*" for "Fábricas Emulsiones"; big works - "*GO*" for Grandes Obras"; or fixed plant - "PF" for "Planta Fija"), "assigned" ("*Asign.*"), and "observations" ("*Observ.*").[243]

In the column entitled "*Asign.*", the names of the five participants at the "asphalt table" are mentioned, namely Repsol, Proas, BP, Nynäs and Petrogal. In addition, the indication "Imp.", which the Commission understands to mean 'imports', and the names of other operators (importers or construction companies) not covered by this Decision are occasionally mentioned.

In respect of one specific project allocated to Repsol, the column entitled "Observations" contains the following indication: "to negotiate" ("*A negociar*").[244]

[…] the five bitumen suppliers indicated in the column entitled "*Asign.*" ("Allocated") found by the Commission to have been involved in market sharing arrangements (namely Repsol, Proas, BP, Nynäs and Petrogal) were determined by agreement of the "asphalt table", attended by its usual participants.[245]

This internal chart illustrates the essential contents of the market sharing agreement or "PTT" *[…]* (see recital (171)), and thus constitutes an example of the market sharing agreement or "PTT" for 2000.

(250) *[…]* claims that the chart described in the preceding recital is dated 20 January 2000 and that, although the season for selling bitumen had not started at that time, *[…]* professes to be able to state the operator that finally supplied the volume, adding that the chart includes names of suppliers not alleged to be involved in the cartel.

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241 *[…]*.
242 *[…]*.
243 *[…]*, inspection document, pp. 03315-03327.
244 *[…]*, inspection document, p. 03322.
245 *[…]*.

(251) The Commission notes that, in respect of this chart, *[…]* the suppliers Repsol, Proas, BP, Nynäs and Petrogal listed in the column "*Asign.*" ("Allocated") were determined by agreement of the "asphalt table", without stating which operator finally supplied the volume.[246] The Commission further notes that, regardless of when the bitumen selling season may start, the date of January 2000 for the market sharing agreement or "PTT" for 2000 to be concluded is fully consistent with the phases of the yearly market sharing discussions *[…]* (see recital (130)). Finally, the fact that bitumen suppliers not found to be involved in the cartel are included in the "PTT" is in accordance with the rationale of a document which, *[…]*, attempted to gather and reflect in one single record all developments in the Spanish bitumen market in a given year (see recital (169)).

(252) An internal chart prepared by *[…]*, sent by e-mail within the company on 14 July 2000 and entitled "*[…]*",[247] illustrates the negotiation process to allocate volumes and customers within the cartel.

This chart only contains volume and customer allocation regarding *[…]*, and includes the following columns: "year", "province", "*[…]* sales delegation", "*[…]* sales department", "project name", "TM-PTT" (that is, volume in tonnes of the project in accordance with the "PTT"), "customer", "type of customer" (emulsions factory - "*FE*" for "Fábricas Emulsiones"; big works - "*GO*" for Grandes Obras"; or fixed plant - "PF" for "Planta Fija"), "*[…]*" (volume of the project in metric tonnes in accordance with *[…]*) and "observations" ("*Observ.*").

The column entitled "observations" contains, in respect of each project, volume and customer, comments such as the following:

[…] [248]

[…] [249]

The final rows of the chart are grouped under the title "*[…]*". In respect of the projects, volumes and customers listed in these rows, the column "observations" indicates that *[…]* or that *[…]*, and to whom (Repsol, Proas or imports) those projects, volumes and customers had originally been allocated in the "PTT".

[…] all the data contained in the chart concerning *[…]* was obtained from the "asphalt table"[250] and, in particular, *[…]* the discussion on the volumes and customers to be assigned to BP took place between Repsol and Proas, which met at *[…]* request to decide whether or not they would agree with *[…]* demands.[251] As an example, *[…]* [252] *[…]*.[253]

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246 *[…]*, response to request for information of 7 April 2006, pp. 13103.
247 *[…]*, inspection document, pp. 03333-03335.
248 *[…]*, response to request for information of 18 November 2005, p. 12157.
249 *[…]*, inspection document, pp. 03333-03335. *[…]*.
250 *[…]*, response to request for information of 18 November 2005, p. 12164.
251 *[…]*, response to request for information of 7 April 2006, p. 13104.
252 *[…]*, response to request for information of 18 November 2005, p. 12164.
253 *[…]*, response to request for information of 9 May 2006, p. 13177.

(253) *[…]* submitted two internal charts under the cover "*[…] market year 2000*", one entitled "*[…]*" and the other one untitled.[254]

The untitled chart contains the following columns: "province", "place of supply", "Tons", "TONS", "Import", "excess estim." and "comments". The column entitled "comments" contains handwritten annotations, such as "OK" and certain volumes next to "OK". *[…]* explained the meaning of the columns as follows:

– "*Tons*": tonnes estimated by Repsol and Proas in the "PTT";

– "*TONS*": tonnes estimated by *[…]*;

– "*Import*": imported tonnes estimated by Repsol and Proas;

– "*excess estim.*": difference between the column "Tons" and the sum of the columns "TONS" and "Import".

[…] "*OK*" before the handwritten volumes means the tonnes *[…]* negotiated and agreed between Repsol, Proas and BP.[255]

The chart entitled "*[…]*" contains four columns: "province", "customer", "place of supply" and "MT" (metric tonnes). *[…]* this is a typed summary table of the agreement reached with *[…]*.[256] This summary table thus lists in typed form the volumes handwritten in the untitled table.

(254) *[…]* submitted a document under the cover "*PTT year 2000 under construction*".[257] The document consists of a set of tables, each of them corresponding to a Spanish province. Each table contains three columns entitled "customer" (classified per type, that is, emulsion factories, fixed plants or big works), "project" and "consumption", that is, the volumes required for each project. Next to the volumes required per project, handwritten annotations are made which indicate to which supplier the volumes are allocated. The suppliers are designated by number. *[…]* [258] *[…]* the numbers designate, *inter alia*, the following suppliers:

– 1: Repsol

– 2: Proas

– 4: BP

– 5: Nynäs

– 7: Petrogal

– 9: Imports

254 *[…]*.
255 *[…]*, response to request for information of 5 April 2006, p. 13063.
256 *[…]*, response to request for information of 5 April 2006, p. 13062.
257 *[…]*.
258 *[…]*.

It may be noted that the designation of suppliers by number and the meaning of each number as described by *[…]* are identical to the designation of suppliers by number and the meaning of each number as described by *[…]* in one of its documents (see recital (218)).

[…] the handwritten annotations indicating to which supplier the volumes required per project are allocated were made by Repsol's staff, probably during a meeting between Repsol and Proas, and were negotiated by Repsol and Proas. *[…]* the typed volumes required per project are estimated volumes for 2000 already agreed by Repsol and Proas.[259] *[…]*, the Commission considers that this document reflects market distribution negotiations between Repsol and Proas and thus as an example of phase (d) of the annual market sharing arrangements (see recital (130)).

(255) An internal chart prepared by *[…]* covering 2000 and entitled "*Theoretic distribution by fortnights/Theoretic distribution by fortnights cumulated*" lists the theoretical sales made by Proas, Repsol and BP each fortnight of the month separately and cumulatively.[260] An equivalent chart was also found for 1999.[261]

[…] these theoretic sales forecasts were calculated on the basis of the theoretical market quotas allocated by the cartel participants to Repsol, Proas and BP, that is 50.3%, 39.7% and 10% respectively. *[…]* these theoretical quotas were determined on the basis of the bitumen production capacity of each producer, that is, taking into account their number of refineries and factories (or depots), and *[…]* they were maintained historically stable until the end of the "asphalt table" (see recitals (152) and (156)).[262]

(256) Whilst the chart described in the preceding recital makes sales forecasts on the basis of the theoretical quotas determined by the cartel, a similar internal chart prepared by *[…]* covering 2000 contains sales data *ex-post* also by reference to the theoretical quotas determined by the cartel. Thus, in accordance with the monitoring system set up by the cartel, the chart lists, on a fortnight and cumulated basis, first, the actual sales and market shares of Repsol, Proas and BP; secondly, the theoretical market quotas determined by the cartel plus the theoretical sales volumes that should result from them (see recitals (152) and (154)) and, thirdly, the deviation between the actual and the theoretical sales volumes.[263] This chart thus makes it possible to compare, both in sales volume and market quota terms, the actual sales trends of each supplier with the theoretical sales trends that should have resulted from the theoretical market quotas determined by the cartel.

(257) *[…]*, in October-November 2000, *[…]* of Repsol and *[…] […]*, had a meeting during which sales volumes were discussed. *[…]* took a number of handwritten notes during that meeting which he gave to *[…]*, after the meeting.[264] A copy of the notes was kept by *[…]* at his home. *[…]* told *[…]* that he would be contacted to attend a meeting with Repsol and Proas to discuss the notes. *[…]* felt it was necessary to attend this meeting

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259 *[…]*, response to request for information of 5 April 2006, p. 13062.
260 *[…]*, inspection document, p. 03184.
261 *[…]*, inspection document, p. 03185.
262 *[…]*, response to request for information of 18 November 2005, p. 12143.
263 *[…]*, inspection document, pp. 03351-03371.
264 *[…]*.

for two reasons: (i) it would be useful to obtain information; and (ii) in view of *[…]* dependence on the supply relationship with Repsol, it would not be sensible not to accept an invitation from Repsol. Repsol has not contested this sequence of events.

In preparation of the meeting, *[…]* drafted a summary table listing *[…]* customers and volumes, which he kept at his home (in connection with this meeting, see also recital (262)).[265] This table included the following columns: "province", "customer", "customer's site", "estimated volume" (in two columns: one typed up prior to the meeting and the other handwritten during the meeting), "good" (which referred to the volumes as agreed during the meeting), "imports", "historic" (which referred to the volumes proposed during the cartel arrangements in 1997-98) and "comments" (some of which typed up before the meeting and some others handwritten during or after the meeting indicating the volumes estimated by Repsol and Proas to be allocated to BP per province)[266] *[…]*.

2001

(258) The diary of a member of *[…]* staff contains the following note, which refers to the "PTT", on an undated page of February 2001:

[…] [267]

[…] the note refers to a *[…]* internal ["PTT"] meeting attended by *[…]* team.[268]

(259) An inspection document found at *[…]* premises contains three internal charts prepared by *[…]* in February 2001. *[…]*, the sales data of competitors reported in these three internal charts is based on market information gathered by *[…]*.[269] However, these tables are important as they constitute the starting point of the negotiations leading to the market sharing agreement for a given year. As explained in this Decision (see recital (130)), the first phase of such negotiations consists in the preparation by each producer of an internal market analysis based on available sales information gathered by the sales staff of each producer. Indeed, prior to negotiations on volume and customer allocation, bitumen producers had to negotiate and agree on the estimated total size of the bitumen market for the following year as well as on the market left for distribution.

(a) A first chart entitled "*Composition distribution of Petete*" estimates the total bitumen market in 2001 at 1,577,300 tonnes, indicating that it contains data as at 14 February 2001. For the purpose of the calculation, the chart contains information on total theoretical volumes that would correspond to Repsol, Proas, BP (according to the theoretical quotas allocated by the cartel to each producer) and imports, the volumes allocated to each supplier ("*Asignadas*") for the year in question and the difference for each supplier between the total theoretical volumes and the allocated volumes ("*Diferencia*").[270] The chart also

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265 *[…]*.
266 *[…]*.
267 *[…]*, inspection document, p. 03181. *[…]*".
268 *[…]*, response to request for information of 7 April 2006, p. 13098.
269 *[…]*, response to request for information of 18 November 2005, pp. 12130, 12132, 12133.
270 *[…]*.

contains the abbreviations or terms "*S/R*", "*Dispute 1-2*", "*Quotas*", "*Imbalance*" and "*Difference*".[271]

[…] [272]

– "*S/R*" (from the Spanish "sin repartir"): "not yet allocated", that is, although the volume requirements for a given project were known, the "asphalt table" had not yet agreed on the operator to whom the project would be allocated;

– "*Dispute 1-2*": volumes in dispute between possible suppliers, in this case 1 being Repsol and 2 being Proas. When there was a dispute between two cartel members as to who should supply a given project, the project was usually allocated to the supplier who offered the lowest price even if, on occasions, an agreement was reached concerning specific projects;

– "*Quotas 1.267*": the figure refers to the ratio between the theoretical quotas established for Repsol and Proas;

– "*Imbalance 1.194*": the figure refers to the ratio between the differences (between actual and allocated volumes) of Repsol and Proas. In accordance with the compensation mechanism set up by the cartel (see section 2.1.1.3.2), when an imbalance was detected between the actual and the allocated sales volumes of one participant, the un-sold volume was claimed from the participant who had over-sold;

– "*Difference -0.073*": the figure refers to the difference between the ratios for "quotas" and "imbalance".

(b) A second internal chart includes a calculation made by *[…]* of the bitumen volumes available "*for distribution*" ("*Para reparto*") in 2001, by taking the total bitumen market as calculated in the previous chart, net of imports, and applying to it the theoretical quotas attributed by the cartel to Repsol, Proas and BP. After a further deduction of bitumen volumes supplied by these three producers for uses other than road construction (for the production of polymer modified bitumen and bitumen emulsions), and of volumes accounted for by *[…]*,[273] a final net volume of bitumen is obtained. This final volume is indicated in a column entitled "*for distribution*".[274] The Commission understands that this volume is the bitumen volume left for allocation among the cartel participants.

The quotas mentioned in the chart for 2001 in respect of the three bitumen producers are as follows:

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271 *[…]*, inspection document, p. 03011.

272 *[…]*, response to request for information of 18 November 2005, p. 12129.

273 *[…]*.

274 *[…]*, inspection document, p. 03012. A different version of the same chart for 2001, which includes a higher estimated amount for imports, can be found in p. 03180. See also *[…]*, response to request for information of 18 November 2005, p. 12130.

– Repsol : 50.3%

– Proas : 39.7%

– BP : 10%

It will be noted that the quotas as contained in *[…]* internal document are identical to the theoretical quotas indicated by *[…]* (see recital (154)).[275]

It will also be noted that the quotas contained in *[…]* internal document are almost identical to the quotas indicated by *[…]* in an internal memorandum dated February 1992 and entitled "*Bitumen Market Analysis 1992*" (see recital (206)). The quotas indicated by *[…]* in its memorandum were rounded to 50% (instead of 50.3%) for Repsol, 40% (instead of 39.7%) for Proas and 10% for BP.

(c) A third internal chart entitled "*Market by provinces 2001*" summarises on a province-by-province basis the volumes allocated to bitumen suppliers in Spain. The various bitumen suppliers are referred to by number, and two columns are entitled "*S/R*" and "*Encuent.*". Finally, this chart bears a handwritten note indicating that *[…]*.[276]

[…] indicated to which bitumen supplier each number in the chart refers (see recital (218)), and that "*S/R*" (from the Spanish "sin repartir") means "not yet allocated" (see above in this recital (259)). The abbreviation "*Encuent.*" (from the Spanish "encuentros") refers to disputes between two suppliers with regard to the allocation of a certain volume (see above in this recital (259)). Finally, the handwritten annotation refers to the fact that the sales figures contained in the chart are final.[277]

(260) *[…]* claims that *[…]* chart entitled "*Market by provinces 2001*" described in the preceding recital, paragraph (c), must be interpreted as a retrospective analysis of sales in 2001 as it is undated and shows that *[…]* had no idea of what volume *[…]* actually sold. The Commission notes that this document is dated 12 February 2001, as indicated on the chart. Given that the document is *[…]* ; that its date is in line with the phases of the annual negotiations *[…]* (see recital (130)), which indicate that the yearly negotiations were normally finished in January; and that the indications "*S/R*" ("not yet allocated") and "*Encuent.*" refer to disputes between two suppliers with regard to the allocation of a certain volume, the Commission considers that this chart is a prospective document reflecting the outcome of market sharing negotiations for the year 2001.

(261) *[…]* submitted a document which, like the document prepared by *[…]* described in recital (259), contains a chart entitled "*Composition distribution of Petete*", although indicating that it contains data as at 20 (instead of 14) February 2001, and a chart which calculates the bitumen volumes available "*for distribution*" ("*Para reparto*"), which also lists the theoretical quotas allocated by the cartel to the three main

275 Identical quotas are also mentioned in a different version of the same chart for 2001, p. 03180.

276 *[…]*, inspection document, pp. 03013-03014.

277 *[…]*, response to request for information of 18 November 2005, p. 12132.

suppliers, namely 50.3% for Repsol, 39.7% for Proas and 10% for BP. The essential difference between the charts found at *[…]* premises and those submitted by *[…]* concerns the volume estimated for imports, which results in different volumes being allocated to each of the three suppliers. The charts have exactly the same layout and formal characteristics.[278]

[…] explained that, as the methodology for the functioning of the "asphalt table" stems from Proas' division (see recitals (117) and (118)), this document generally reflected the current stage of the "PTT" and was used to prepare the subsequent round of negotiations. *[…]*.[279]

(262) *[…]* a meeting took place in February 2001, probably on the 23rd, at *[…]* in Madrid and was attended by *[…]* for Repsol; *[…]* for Proas; and *[…]* for BP[280] (in connection with this meeting, see also recital (257)).

During the meeting, the participants discussed the total market volume of bitumen in Spain, the volumes represented by each customer and the allocation of customers to suppliers along the lines of the meetings held before 1998 *[…]*.

At the meeting, *[…]* received two documents.

(a) The first document was prepared by *[…]* and provides the market volume of bitumen in Spain to be discussed among the producers and the allocation per producer.[281] *[…]*.

A first chart in the document estimates the total bitumen market in 2001 at 1,577,300 tonnes, and then calculates the bitumen volume available "*for distribution*" ("*Para reparto*") in 2001, by taking the total bitumen market net of imports and applying to it the theoretical quotas attributed by the cartel to Repsol, Proas and BP. After a further deduction of bitumen volumes supplied by the three producers for uses other than road construction (for the production of polymer modified bitumen and bitumen emulsions), and of volumes accounted for by *[…]*, a final net volume of bitumen is obtained. This final volume is indicated in a column entitled "*for distribution*".

A final chart entitled "*Composition distribution of Petete*" allocates the volume available for distribution to each of the three producers, indicating that it contains data as at 23 February 2001. The chart indicates in a first column the total theoretical volumes that would correspond to Repsol, Proas, *[…]* (according to the theoretical quotas allocated by the cartel to each producer) and imports; in a second column the volumes allocated to each supplier ("*Asignadas*") for the year in question; and, in a third column, the difference for each supplier between the total theoretical volumes and the allocated volumes ("*Diferencia*"). The chart also contains the abbreviations or terms "*S/R*" (from the Spanish "Sin Repartir") which means "not yet allocated", and

278 *[…]*.
279 *[…]*, response to request for information of 5 April 2006, p. 13059.
280 *[…]*.
281 *[…]*.

"*Dispute 1-2*", which refers to volume disputes between Repsol (1) and Proas (2) (in this case none).

The document described above *[…]* is virtually identical to a document found at *[…]* premises and to a document *[…]*, both of which refer to the market distribution for 2001 (see recitals (259) and (260)). The document found at *[…]* premises also estimates the total market volume at 1,577,300 tonnes, indicating that it contains data as at 14 (instead of 23) February 2001, and the document *[…]* indicates that it contains data as at 20 February 2001.

(b) The second document *[…]* during the meeting was prepared by *[…]* as a back-up to the above-mentioned document prepared by *[…]*. This document, entitled *[…]*, lists *[…]* customers and, *[…]*, the volumes that *[…]* and *[…]* estimated that *[…]* was selling to its customers.[282] *[…]*.

The document contains the following columns: "province", "[Proas] sales delegation", "[Proas] sales department", "project name", "metric tonnes", "customer", "type of customer" (emulsion factories, fixed plants or big works) and a last column entitled "assigned to". "*[…]*" is mentioned throughout the last column.

This document is very similar to other charts prepared by *[…]* for 2000 entitled "*Mercasfa2000*" and "*[…]*" (see recitals (249) and (252)).

(263) A note in the diary of one of *[…]* staff dated 5 November 2001 reads as follows:

[…] [283]

[…] the note refers to discussions between representatives of *[…]* and Repsol about certain data in order to subsequently update the "PTT".[284]

(264) *[…]* submitted a document under the cover "*PTT asphalt year 2001 under construction*", equivalent to the one described for the year 2000 (see recital (254)) but which includes, in addition, the background charts used to prepare the summary tables per province.[285]

(265) *[…]* an untitled chart under the cover "*Nynäs market year 2001*" which contains the following columns: "province", "customer type" (emulsion factories, fixed plants, big works), "customer", "project", "total market" and "Nynäs". The columns "total market" and "Nynäs" list the estimated volumes required per project. Outside the chart, next to the column "Nynäs", some handwritten volumes are added. *[…]* the volumes in the chart were jointly prepared by Repsol and Proas and subsequently communicated to Nynäs.[286] *[…]* the volumes were communicated by Repsol in a meeting held at Nynäs' offices in Madrid.[287]

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282 *[…]*.

283 *[…]*, inspection document, p. 03238. *[…]*.

284 *[…]*, response to request for information of 18 November 2005, p. 12155.

285 *[…]*.

286 *[…]*.

287 *[…]*, response to request for information of 5 April 2006, p. 13064.

(266) In connection with the preceding recital, *[…]* admits that a meeting took place in early 2001 at its offices in Madrid. However, it states that, contrary to what *[…]* reported, *[…]* of Repsol did not attend, claiming that this is indicative of the unreliability of *[…]* effort at compiling evidence, and denies that the chart submitted by *[…]* to the Commission was communicated to it at this meeting.

The Commission notes that *[…]* only stated that the volumes, and not the chart, were communicated by Repsol to Nynäs at the meeting, that *[…]* admits that the meeting was held and that it does not deny that the volumes negotiated by Repsol and Proas were communicated to it.

[…], confirmed at the Oral Hearing on 12 December 2006 that the meeting with Nynäs was held and provided details in connection thereto. *[…]* stated that, *[…]*, the market study had already been made and the time had come to negotiate with Nynäs and Petrogal. With a view to the meeting with Nynäs, he prepared the chart *[…]* under the cover "*Nynäs market year 2001*", which included the volumes estimated for the total market and the volumes estimated for Nynäs in its area of influence. *[…]* and, in fact, *[…]*, who according to Nynäs did not attend the meeting, took the chart to Nynäs' office (it was *[…]* of Repsol who could not attend because he was on sick leave). *[…]* made the handwritten annotations on the chart as a result of Nynäs' comments, opinions and negotiations with *[…]* of Nynäs, who certainly attended the meeting, and probably *[…]*. *[…]* continued to say that the meetings with Nynäs took place at Nynäs' offices at *[…]*, in a meeting room which was like an aquarium (that is, with glass walls), where there was a paper board on which the customers on a province basis and the tonnes negotiated were written. The paper sheets were then glued to the walls such that at the end of the meeting the walls were filled with paper sheets. *[…]* said this could be confirmed by *[…]* as they attended the meeting. Having been offered the possibility, Nynäs did not comment at the Oral Hearing on the details of the meeting provided by *[…]*. Nynäs also did not make any subsequent written submission.

(267) With regard to the monitoring system set up by the cartel, twelve charts, one per month, prepared by *[…]* for 2001, report monthly sales information under the title "*Monthly report*" in respect of Repsol, Proas and BP. The sales information is provided in the following columns: "quotas" (namely 50.3% for Repsol, 39.7% for Proas and 10% for BP, that is, the theoretical market quotas allocated by the cartel to each producer - see recital (154)), "actual monthly sales", "theoretical monthly sales", "monthly difference", "actual cumulated sales", "theoretical cumulated sales" and "cumulated difference".[288]

[…] the sales information reported in the monthly tables was obtained from the "asphalt table"[289] and, in particular, from *[…]* of Repsol and *[…]* of BP.[290]

[…], as from 2001, montly sales tables were no longer taken to the "asphalt table" and *[…]*, in any event, the sales information contained in the tables described in this recital is not truthful, even if it is listed as "actual". *[…]* explained that these tables are more of a "theoretical and concealed" study which intended to indicate that *[…]* had not

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288 *[…]*, inspection document, pp. 03339-03350. Note that a reference to 2001 is made in the tables for January and October.

289 *[…]*, response to request for information of 18 November 2005, p. 12168.

290 *[…]*, response to request for information of 7 April 2006, p. 13105.

reached its theoretical quota in an attempt to obtain/sell more. *[…]* proof of the fact that the sales figures reported in the charts are not truthful but theoretical is the fact that BP's [actual] sales figures always match the theoretical sales figures resulting from its theoretical quota (10%).[291]

(268) A diary belonging to a member of *[…]* staff contains a note dated 25 June 2001 which reads as follows:

[…] [292]

[…] it had lost the customer *[…]*, a historical customer of *[…]*, to BP, which had offered better prices, and t*[…]*.[293] *[…]* the persons involved in the discussions concerning the transfer of *[…]* to *[…]* were *[…]* of *[…]* and *[…]* of BP, and *[…]* that this customer transfer was made in the framework of market sharing discussions at the "asphalt table".[294]

2002

(269) In connection with phase (a) of the yearly negotiations leading to the market sharing agreement for the following year (see recital (130)), a *[…]* internal e-mail dated 18 February 2002 reads as follows:

[…] [295]

(270) Also with regard to phase (a) of the yearly negotiations, several preparatory charts found during the inspection at *[…]* estimate, for 2002, per Spanish province (although some provinces are missing) and on a customer or project basis, the volumes required and the supplier most likely to supply such volumes. The suppliers include Repsol, Proas, Nynäs and Petrogal (BP is only mentioned once as the documents concern provinces outside BP's area of influence, *[…]*), as well as other bitumen suppliers not involved in the market sharing arrangements. Worksheets used to prepare the charts are often attached to the latter.[296]

[…] these charts are partial studies intended for the sales team with a view to the preparation of total charts. The charts were prepared *[…]*. *[…]* the information prepared by *[…]* was subsequently checked with Repsol at the "asphalt table", regardless of whether or not Repsol and *[…]* agreed on the estimates made.[297]

(271) In phase (c) of the yearly negotiations leading to the market sharing agreement, the size of the market (or total consumption) for the following year had to be agreed among producers (see recital (130)) as a prior step to the distribution of the market. An example of this phase is an internal chart prepared by *[…]* entitled "*Market by Autonomous Communities*" (Spanish regions). This chart contains forecasts made by Proas and Repsol of market volumes in 2002 per region, compares the two forecasts

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291 *[…]*, response to request for information of 18 November 2005, p. 12168.
292 *[…]*, inspection document, p. 03240. *[…]*
293 *[…]*, response to request for information of 7 April 2006, p. 13099.
294 *[…]*, response to request for information of 9 May 2006, p. 13178.
295 *[…]*, inspection document, p. 03282. *[…]*
296 *[…]*, inspection document, pp. 03394-03466.
297 *[…]*, response to request for information of 18 November 2005, pp. 12174-12177.

between themselves as well as with the "*PTT 2001*" (that is, with what the Commission understands to be the figures agreed per region in 2001), and finally a last column entitled "*agreed*" lists the market volumes agreed per region for 2002.

A graph annexed to this chart illustrates in three different colours the consumption volumes forecasted for 2002 and per region by (i) Proas, (ii) Repsol and (iii) the volumes agreed.[298]

[…] the document was prepared in December 2001/January 2002, that it reflects the [volume] forecasts made by Proas and Repsol [for 2002] per region and *[…]* the column entitled "*agreed*" reflects the agreement [on the total market per region] reached by Repsol and *[…]*.[299]

(272) In a document dated 8 March 2002 drafted by *[…]*, then *[…]* in *[…]*, he writes the following:

[…] [300]

[…] this was most probably a document intended to be attached to an e-mail or fax, possibly addressed to *[…]* at Repsol. *[…]* referred to a request by Repsol that the balance of the volumes allocated to each of them should be continuous, with which *[…]* did not agree[301] (see also recital (276)).

(273) A note in the diary of a member of *[…]* staff dated 17 April 2002 reads as follows:

[…] [302]

[…] these are meetings of the "asphalt table" attended by the "usual participants"[303] (the usual participants at the "asphalt table" are listed in section 2.1.1.1.2).

The Commission notes that the meetings of the "asphalt table" were held at *[…]* (see recital (142)).

More significant is that *[…]* stated, in connection with a series of meetings held at *[…]* in February, March, April and May 2002 between Repsol and Proas, that these two companies also had separate meetings with BP, Nynäs and Petrogal in the same period[304] (see recital (283)). The note in the diary of a member of *[…]* referred to in this recital confirms that, in April 2002, separate meetings were held by Repsol and/or Proas with Petrogal, Nynäs and BP.

(274) *[…]* accepts in its response to the Statement of Objections that *[…]* attended a meeting at *[…]* in April 2002, as indicated by *[…]* and as described in the preceding recital. *[…]* stated that *[…]* [305]

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298 *[…]*, inspection document, pp. 03374-03375.
299 *[…]*, response to request for information of 18 November 2005, p. 12170.
300 *[…]*, inspection document, p. 03111. *[…]*
301 *[…]*, response to request for information of 18 November 2005, p. 12139.
302 *[…]*, inspection document, p. 03236.
303 *[…]*, response to request for information of 18 November 2005, p. 12154.
304 *[…]*.
305 *[…]*, response to Statement of Objections, pp. 16 and 53.

(275) In response to the Statement of Objections *[…]* claims that it is unable to confirm whether the meetings in April 2002 between Repsol and Petrogal referred to in recital (273) took place, but that the fact that Repsol and Petrogal may have met in April 2002 does not mean that the meetings were contacts of phase (f) of the market sharing arrangements.

[…], confirmed at the Oral Hearing held on 12 December 2006 that, with a view to the market sharing arrangements for 2002, a meeting was held on 11 April 2002 between Repsol, Proas and Petrogal to discuss the tonnes to be allocated to Petrogal. Having been offered the possibility, *[…]* did not comment at the Oral Hearing on *[…]* confirmation of the meeting. Petrogal also did not make any subsequent written submission.

The Commission considers that the *[…]* statements made by *[…]*, the entry in a diary of one of *[…]* staff confirming *[…]* statement and the *[…]* statement made by *[…]* constitute evidence that Repsol and Petrogal met in 2002 to discuss market sharing arrangements.

(276) An internal memorandum of *[…]* dated 9 May 2002 entitled "*Some actions which would seem convenient to consider in the asphalt business*" illustrates how the market quotas established by the parties did not always reflect each participant's actual position on the market but how the parties wished to avoid abrupt breaches of the equilibriums reached thanks to the cartel:

[…] [306]

It may be noted that, in connection with the maintenance of current equilibriums desired by *[…]*, *[…]* communicated to *[…]* on 8 March 2002 its disagreement with the principle of a continuous balance of the volumes allocated to each of them (see recital (272)).

(277) An internal chart prepared by *[…]* dated June 2002 and entitled "*Summary Forecasts/Sales as at June 2002*" reports, in respect of the Spanish Eastern provinces, a total year sales forecast and estimated actual sales as at June 2002 for Proas, Repsol, BP and imports. The chart also indicates the percentage of sales realised by each company until that moment resulting from a comparison of the forecasted and actual sales data. A last column is entitled "*At zero*".[307]

Similar internal charts for the whole year 2002 were prepared by *[…]* in respect of the Spanish Northern and Central provinces, which also included the difference in percentage terms between forecasted and actual sales for, *inter alia*, Repsol, Proas, BP, Petrogal, Nynäs and other imports. The charts for the whole of 2002 contained as well a row entitled "*Zero*".[308]

[…] the phrases "*At zero*" and "*Zero*" mean "Not allocated", that is that, as it was not then known which constructor would build a given project nor the volumes required

306 *[…]*, inspection document, pp. 03835-03836. *[…]*.
307 *[…]*, inspection document, p. 03096.
308 *[…]*, inspection document, pp. 03096-03101.

by it, it was not yet possible to allocate the supply for that project to one of the operators of the "asphalt table".[309]

(278) An internal e-mail sent by *[…]* of *[…]* to *[…]* of *[…]* on 29 August 2002 and entitled "Exchanges" refers to a meeting with Cepsa aimed at avoiding a war between Petrogal and Cepsa and discusses the convenience of a meeting with Repsol:

[…] [310]

In response to the Statement of Objections *[…]* argues that this e-mail is unclear about the product market, that it is unclear whether the meetings took place and, if so, what was discussed, and that the e-mail seems to relate to swap agreements.

[…].[311] Given that the e-mail is entitled "Exchanges" and that *[…]* has reported that it has concluded exchange agreements only in respect of certain types of penetration bitumen, the Commission considers that the e-mail refers to penetration bitumen. While, in the e-mail, the meeting with Repsol is considered convenient by *[…]*, a meeting was actually scheduled with Proas/Cepsa for a specific date and with a clear purpose in the context of exchange agreements: to clarify the market situation and not to enter into a war with Proas. The Commission thus considers this document as evidence that avoiding a war with a competitor was one of the goals of *[…]* business strategy regarding penetration bitumen in Spain and that *[…]* took steps to put it into practice.

(279) An internal e-mail to *[…]* staff dated 6 September 2002 and entitled "Nynäs" reports the following:

[…][312]

[…] explained that *[…]* of Nynäs Spain, believed that, as *[…]* was a supplier [of penetration bitumen] of *[…]*, *[…]* could have an influence on Shell's sales policy. *[…]*, explained that this was not possible as *[…]* was not even the only supplier of *[…]*.[313]

(280) *[…]* admitted in response to the Statement of Objections that, as described in the preceding recital, *[…]* called Proas complaining about the supply by a competitor to a customer allocated to Nynäs, stating that *[…]* [314]

(281) An internal chart prepared by *[…]* covering 2002, with a handwritten date seemingly reading 2 April 2002 and with the handwritten indication "*PTT'02*", contains an allocation of sales volumes per province to, *inter alia*, Repsol, Proas, BP, Nynäs and Petrogal. It contains the indication "*Asign*." and a column entitled "*0*" ("Zero").[315]

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309 *[…]*, response to request for information of 18 November 2005, p. 12134.

310 *[…]*, inspection document, p. 02523. *[…]*

311 *[…]*, response to request for information of 19 April 2004, p. 09238. *[…]*.

312 *[…]*, inspection document, p. 03328. *[…]*

313 *[…]*, response to request for information of 18 November 2005, p. 12162.

314 *[…]*, response to Statement of Objections, p. 53.

315 *[…]*, inspection document, pp. 03105-03106. See also *[…]*, inspection document, p. 03372; *[…]*, inspection document, pp. 03194-03196, which contains a chart with an allocation of sales volumes to,

[…] the indication "*Asignación*", or in short "*Asign.*", that is, "Allocation", refers to the operator that finally supplied the volumes in the province concerned, and that the operator was determined further to an agreement reached at the "asphalt table".[316] *[…]* "*0*" means "Not allocated", that is, as it was not yet known which constructor would build a given project nor the volumes required by it, it was not yet possible to allocate the supply of the volume for that project to one of the cartel participants.[317] As in the case of the equivalent chart prepared by *[…]* covering 1999 (see recital (246)), the Commission understands that this chart for 2002 contains estimates of the volumes that would be supplied in the province concerned by the supplier determined by the usual participants of the "asphalt table".

(282) The document mentioned in the preceding recital that contains the chart covering 2002 also includes a calculation made by *[…]* to arrive at the volumes available "*for distribution*". Thus, to the adjusted total volumes for 2002 as calculated per province and per operator in the chart, the theoretical quotas assigned by the cartel to Repsol, Proas and BP are applied. Subsequently, certain deductions are made of bitumen volumes supplied by these three producers for uses other than road construction (for the production of polymer modified bitumen and bitumen emulsions), and of volumes accounted for by *[…]*.[318] A last column entitled "*for distribution*" contains a final net volume of bitumen which the Commission understands is the bitumen volume left for distribution among the cartel participants.[319]

The quotas mentioned in the chart in respect of the three bitumen producers are as follows:

– Repsol : 50.3%

– Proas : 39.7%

– BP : 10%

Once more, the theoretical quotas as contained in *[…]* internal document for 2002[320] are identical to the theoretical quotas indicated by *[…]* (see recital (154)).

Likewise, the theoretical quotas contained in *[…]* internal document are almost identical to the quotas indicated by *[…]* in an internal memorandum dated February 1992 and entitled "*Bitumen Market Analysis 1992*" (see recitals (206) and (259)), which were rounded to 50% for Repsol, 40% for Proas and 10% for BP.

(283) *[…]* submitted a list of meetings held with competitors, some of which concerned the market sharing arrangements. Repsol also submitted contemporaneous evidence in

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inter alia, Repsol, Proas, BP, Nynäs and Petrogal, in the area of Valencia for 2002, and equivalent charts also for the area of Valencia for 2001, pp. 03230-03235.

316 *[…]*, response to request for information of 18 November 2005, p. 12134.

317 *[…]*, response to request for information of 18 November 2005, p. 12134.

318 *[…]*.

319 *[…]*, inspection document, p. 03105. A different version of the calculation of the bitumen volume available "*for distribution*" in 2002 is contained in *[…]*, inspection document, pp. 03132, 03179 and 03376. See also *[…]*, response to request for information of 18 November 2005, pp. 12130, 12138.

320 See also *[…]*, inspection document, pp. 03132 and 03179, where identical quotas are indicated in a different version of the calculation of the bitumen volume available "*for distribution*" in 2002.

respect of some of those meetings, essentially copies of invoices issued by the hotels or restaurants where the meetings were held.[321] *[…]*, the object of some of the meetings was the estimation of the size of the bitumen market and its subsequent distribution among cartel participants. The meetings cover the years 1996 to 2002.[322] The participants in most of those meetings were representatives of Repsol and Proas. However, *[…]*, in connection with a series of meetings held at *[…]* in February, March, April and May 2002 between Repsol and Proas, *[…]* these two companies also had separate meetings with BP, Nynäs and Petrogal in the same period (see also recital (136)).[323]

[…] statement that Repsol and Proas also held separate meetings with BP, Nynäs and Petrogal at *[…]* in the period February to May 2002 is confirmed by a note in the diary of a member of *[…]* staff dated 17 April 2002 which records meetings at *[…]* between Repsol and/or Proas and, separately, Petrogal, Nynäs and BP (see recital (273)). That a meeting between Repsol and Petrogal was held in April 2002 was confirmed by *[…]* at the Oral Hearing held on 12 December 2006 (see recital (275)).

(284) A document obtained during the inspections with the handwritten indication "*PTT 02*" was found at the premises of *[…]*.[324] The cover page of the document bears the name "Cepsa" and its logo. The "*PTT 02*" is a collection of various documents.

(a) The document includes several draft versions of an internal chart prepared by *[…]* covering 2002 which contains an allocation of sales volumes per province to, *inter alia*, Repsol, Proas, BP, Nynäs and Petrogal. It contains the indication "*Asign.*" and a column entitled "*0*" ("Zero"). The definitive version of the chart is dated 30 April 2002, as handwritten on the page.[325]

[…] the indication "*Asignación*", or in short "*Asign.*", that is, "Allocation", refers to the operator that finally supplied the volumes in the province concerned, and that the operator was determined further to an agreement reached at the "asphalt table".[326]

[…] "*0*" means "Not allocated", that is, as it was not then known which constructor would build a given project nor the volumes required by it, it was not yet possible to allocate the supply for that project to one of the operators of the "asphalt table".[327]

(b) The document also includes several charts covering 2001 which contain an allocation of sales volumes per province to, *inter alia*, Repsol, Proas, BP, Nynäs and Petrogal. As in the case of the charts covering 2002, the charts for 2001 also contain the indication "*Asign.*" and, on occasions, a column entitled "*0*".[328]

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321 *[…]*.
322 *[…]*.
323 *[…]*.
324 *[…]*, inspection document, pp. 03107-03132.
325 *[…]*, inspection document, p. 03109.
326 *[…]*, response to request for information of 18 November 2005, p. 12134.
327 *[…]*, response to request for information of 18 November 2005, p. 12134.
328 See, for example, pp. 03115, 03117-03120.

(c) A preparatory chart included in the document lists certain volumes allocated to Proas in the region of Galicia. The page containing this chart bears the following handwritten annotation:

[…] [329]

The same chart also contains the following handwritten annotations in respect of two volumes which are highlighted:

[…]

[…] "comp./RPA" means "competitor RPA", that is that, in respect of the highlighted volume and customer, Proas was competing with Repsol.[330] By analogy, the Commission understands that "*100% PR."* next to the other highlighted volume and customer means that 100% of that volume and customer was finally allocated to Proas.

(285) With regard to the chart referred to in paragraph (c) of the preceding recital *[…]* claims that it was also a competing supplier of the customer for which Proas and Repsol were competing ("*1,000 – comp./RPA*"), and that this shows that either Repsol and Proas did not know about this or there was no need for them to take this into account. The Commission notes that the chart was prepared for use in phases of the annual negotiations (see recital (130)) prior to the phase where volumes and customers were negotiated by Repsol and Proas with Nynäs.

(286) An internal chart prepared by *[…]* entitled "*Proposal […] PTT 2002*" contains sales information structured in the following columns: province, emulsion factories ("*F.E.*" for "Fábricas Emulsiones"), fixed plants ("*P.F.*" for "Plantas Fijas"), big projects ("*G.O.*" for "Grandes Obras"), small amounts ("*Menudeo*") and total. A last column highlighted in red print is entitled "Agreed" ("*Pactado*").[331]

[…], in respect of the sales figures reported in the column "Agreed", that they were agreed by Repsol, Proas and BP and *[…]*, in particular, the persons who participated in the meetings held in 2001 were the following: *[…]* for BP, *[…]* for Repsol, and representatives of *[…]* for Proas. According to *[…]*, the figures were negotiated in the autumn of 2001 at the "asphalt table" and an agreement was reached in mid-December 2001. *[…]* the chart, which has no date, was created by *[…]* staff around 28 December 2001.[332]

The Commission understands that the sales figures agreed on a province basis between the three main operators refer to the agreement on the total size of the market, which was a prerequisite for the allocation of volumes and customers in a subsequent phase (see recital (130)(c) concerning the negotiation phases).

(287) Another preparatory chart drawn up by *[…]* entitled "*Proposal […] PTT 2002*" contains the following columns: "province", "bitumen market 2001" ("*Mercasfalt*

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329 *[…]*, inspection document, p. 03110. *[…]*

330 *[…]*, response to request for information of 18 November 2005, p. 12138.

331 *[…]*, inspection document, p. 03224. See also *[…]*, inspection document, p. 03286.

332 *[…]*, response to request for information of 18 November 2005, p. 12150.

2001"), "bitumen market forecast 2002" ("*Mercasfalt prev. 2002*"), and "difference".[333]

[…] the chart compares the consumption figures of 2001 with *[…]* forecast for 2002[334] (see recital (130)(b) concerning the negotiation phases). It may be noted that the consumption figures contained in this chart do not coincide with the consumption figures finally agreed as reported in *[…]* chart entitled "*PTT 2002*" (see recital (288)).

(288) A final internal chart prepared by *[…]* entitled "*PTT 2002*" consists of only two columns: "province" and "Agreed" (see recital (130)(c) concerning the negotiation phases). The consumption figures reported in the column "Agreed" correspond to the consumption figures negotiated and agreed in 2001 between Repsol, Proas and BP at the "asphalt table" (see recital (286)). The chart is dated 28 December 2001,[335] the same date on which, *[…]*, its internal table entitled "*Proposal […] PTT 2002*" was prepared (see recital (286)).

(289) *[…]* a document under the cover "*PTT Asphalt Year 2002*" *[…]* consists of a chart with the following columns: "province", "customer type" (emulsion factories, fixed plants, big works), "project", "volume requirements per project", "supplier" designated by number, a column entitled "*0*" and "observations". In the chart, the volume requirements per project are allocated to one supplier or shared among several suppliers.[336]

[…] in respect of another document[337] the suppliers designated by each number (1: Repsol, 2: Proas, 4: BP, 5: Nynäs, 7: Petrogal, 9: imports; see recital (254)) and that "*0*" means "Pending" ("Pendiente"). In order to understand the meaning of "Pending", the Commission considers that the explanation *[…]* about the meaning of "*0*" can also apply to *[…]*, given that the charts prepared by the two operators are very similar and contain the same data. *[…]*, "*0*" means "Not allocated", that is, as it was not then known which constructor would build a particular project nor the volumes required by it, it was not yet possible to allocate the supply for that project to one of the operators of the "asphalt table"[338] (see recital (277)).

2.2 Price arrangements

(290) In addition to the market sharing arrangements, cartel participants discussed and coordinated bitumen prices. The Commission considers that these price coordination activities were undertaken to support the market sharing arrangements, as they ensured that price differentials among suppliers would not disrupt the volume and customer allocation agreed.

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333 *[…]*, inspection document, p. 03226.

334 *[…]*, response to request for information of 18 November 2005, p. 12151.

335 *[…]*, inspection document, p. 03133. See also *[…]*, inspection document, pp. 03224 and 03286. Another *[…]* internal chart entitled "*Definitive PTT 2002*", undated, contains a column entitled "Agreed" with figures which, in respect of certain geographic departments, are slightly different from those contained in the chart entitled "*PTT 2002*" referred to in this recital; *[…]*, inspection document, p. 03285.

336 *[…]*.

337 *[…]*.

338 *[…]*, response to request for information of 18 November 2005, p. 12134.

(291) The price arrangements will first be described on the basis of the voluntary submissions made by *[…]*.[339] A chronological overview of the contemporaneous documents in the Commission's possession confirming the price arrangements as described in the above-mentioned submissions will be presented thereafter.

2.2.1 Description of the price arrangements

(292) *[…]* submitted *[…]* two contemporaneous documents (see recitals (310) and (313)) which revealed that discussions among the cartel participants did not concern only market sharing arrangements.

(293) *[…]* informed the Commission that the two main market players, Repsol and Proas, took decisions from time to time to increase or decrease bitumen prices in Spain. *[…]* was informed by these operators whenever they were considering implementing a price change, that increases of bitumen prices followed increases in oil prices and that, on these occasions, *[…]*[340]

(294) *[…]* confirmed *[…]* the existence of price arrangements relating to the bitumen market in Spain[341] (see, for example, recital (312)). These statements *[…]* indicate that agreements were reached on price variations and the time of their implementation (see, for example, recitals (315), (316), (317), (318)).

(295) *[…]* reported that "generic changes" to bitumen prices or changes to the bitumen "reference price" and the time of their implementation were agreed uninterruptedly from 1991 to May 2002 between Repsol and Proas and, to a lesser extent, BP. These meetings normally followed a significant increase or decrease of oil prices or a change in the exchange rate between the USD and the Spanish Pta, as confirmed by the faxes announcing price variations sent by Repsol and Nynäs to its customers (see, for example, recital (318)).[342]

(296) *[…]* stated that the agreements on price variation and the time of their implementation were communicated to other market operators throughout the period 1991 to 2002 in either bilateral meetings or by telephone, but not in writing.[343]

(297) *[…]* explained that "generic price changes" referred to price agreements other than concrete price agreements reached on specific occasions by suppliers on the price to offer to a given customer or in respect of new projects[344] (that is, projects not included in the market sharing agreement or "PTT") (see recital (163)).

(298) *[…]* explained that the "reference price" was the price applied by each market operator prior to the meetings of the "asphalt table" where price changes were discussed. In the

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339 In particular, the description of the price arrangements is based on: (i) *[…]*; (ii) *[…]*; response to request for information of 5 April 2006, p. 13052-13054; (iii) *[…]*; response to request for information of 7 April 2006, pp. 13094-13097; response to request for information of 9 May 2006, p. 13182.

340 *[…]*.

341 *[…]*.

342 *[…]*, response to request for information of 5 April 2006, p. 13053; Pr*[…]*; *[…]*, inspection document, pp. 04063, 04065, 04059-04060, 04064; *[…]*, inspection document, pp. 02335/00021-02335/00064.

343 *[…]*; *[…]*, response to request for information of 5 April 2006, pp. 13052-13053; *[…]*, response to request for information of 7 April 2006, pp. 13094-13096. It may be noted that *[…]*.

344 *[…]*, response to request for information of 5 April 2006, p. 13052; *[…]*.

case of *[…]*, the reference price was the price communicated to its customers by letter.[345]

(299) *[…]* explained that "variation" of the price meant an increase or decrease of the price by an absolute amount (for example, EUR *[…]* per tonne), rather than an agreement on a minimum or maximum price (see, for example, recitals (315), (316), (317), (318)). This variation or price change was applied to penetration bitumen in general, without specifying the type of penetration bitumen (40/60, 70/100, etc.), and referred to the price and sales conditions applied by each supplier (for example, ex-works, delivered, etc.).[346]

(300) That market operators requested price increases as indicated by *[…]* (see recital (293)) was confirmed by *[…]*, who explained that, whenever an important increase of oil prices occurred, the *[…]* of other suppliers with a smaller market share (BP, Petrogal and Nynäs) usually contacted Repsol and Proas to ask for an agreement to increase prices. They did so because their inferior logistic position made their margins more sensitive to cost variations.[347]

(301) This was finally corroborated by *[…]*, which stated that all market operators, including BP, Nynäs and Petrogal, took the initiative on different occasions to request price increases[348] and that, for the period 1991 to 2002, requests by operators for an increase or decrease of prices were made each year.[349] *[…]*, Repsol being the market leader (having the best geographic distribution of refineries and being a privileged interlocutor of the Spanish Administration as it was partly publicly owned until 1997), if it did not accept the price variation proposed by one of the market operators, the price variation was not implemented[350] (see, for example, recitals (310), (313)).

(302) *[…]* reported that, until 2000, generic price changes were usually decided bilaterally, typically over lunches, between *[…]* of Repsol and Proas. Subsequently, the *[…]* of these companies informed other market actors of the price decisions made.[351]

(303) As from 2001, generic price changes were agreed over lunches between *[…]* of Proas and *[…]* of Repsol. *[…]* five meetings were held concerning the dates on which price changes should be implemented:

– 15 January 2001: price change with effect from 1 February 2001;

– 22 January 2001: price change with effect from 1 February 2001;

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345 *[…]*, response to request for information of 7 April 2006, p. 13095; *[…]*, response to request for information of 9 May 2006, p. 13182.

346 *[…]*, response to request for information of 5 April 2006, p. 13052; *[…]*, response to request for information of 7 April 2006, p. 13095.

347 *[…]*, response to request for information of 5 April 2006, pp. 13052, 13054. *[…]*.

348 *[…]*, response to request for information of 7 April 2006, p. 13095; *[…]*, response to request for information of 9 May 2006, p. 13182.

349 *[…]*, response to request for information of 9 May 2006, p. 13182.

350 *[…]*, response to request for information of 7 April 2006, pp. 13094-13095; *[…]*, response to request for information of 9 May 2006, p. 13182.

351 *[…]*.

– 24 October 2001: price change with effect from 16 November 2001 (see recital (316));

– 21 March 2002: price change with effect from 1 April 2002 (see recitals (316), (317), (318));

– 17 May 2002: price change with effect from 1 June 2002[352] (see recital (318)).

(304) *[…]* corroborated that *[…]*, Repsol's representative in the price discussions with Proas until 2000, was subsequently replaced by *[…]* [353]

(305) *[…]* reported that, within the other market operators, the persons to whom price change agreements were communicated at different points in time were the following:[354]

– BP : *[…]* ;

– Nynäs : *[…]* ;

– Petrogal : *[…]*.

[…], whenever price change agreements resulted from bilateral meetings between Repsol and BP, Proas was also informed.[355]

(306) In connection with the communication of price variation agreements to other market operators, *[…]* stated that, given that suppliers with a smaller market share (BP, Petrogal and Nynäs) contacted Repsol and Proas to ask for a decision to increase prices further to increases of oil prices, these other suppliers normally knew that a meeting to discuss bitumen price changes would take place and were expecting its outcome.[356] *[…]* corroborated that, although price variation meetings were held bilaterally between Repsol and Proas or between Repsol and BP, other market suppliers were aware that such meetings were taking place.[357]

(307) *[…]* reported that other market operators more or less followed the agreed price variation[358] (see, for example, recitals (311), (313), (314), (315)).

(308) On the basis of the price variation agreements reached, each company determined its net prices to customers.[359]

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352 *[…]*.
353 *[…]*.
354 *[…]*, response to request for information of 5 April 2006, p. 13053.
355 *[…]*, response to request for information of 7 April 2006, p. 13096.
356 *[…]*, response to request for information of 5 April 2006, pp. 13052, 13054; *[…]*, response to request for information of 9 May 2006, p. 13168.
357 *[…]*, response to request for information of 7 April 2006, p. 13096.
358 *[…]*, response to request for information of 5 April 2006, p. 13054; *[…]*, response to request for information of 7 April 2006, pp. 13096-13097.
359 *[…]*.

2.2.2 Contemporaneous evidence of the price arrangements

(309) Inspection documents and contemporaneous documents submitted by *[…]* illustrate the statements made by *[…]* that price discussions and price coordination took place among the cartel participants and by *[…]* that price increases or decreases were not decided unilaterally by each supplier.

(310) In an e-mail internal to *[…]* dated 15 March 1994 which comments on the market situation for February 1994, *[…]*, reports:

[…] [360]

This e-mail *[…]* shows that prices were not determined independently by each operator. It also confirms *[…]* statement that, Repsol being the market leader, if it did not accept the price variation proposed by one of the market operators (in this case *[…]*), the price variation was not implemented (see recital (301)).

(311) In an e-mail internal to *[…]* entitled "*Market Price reduction*" dated 6 November 1998, *[…]*, states that:

[…] [361]

This *[…]* inspection document reveals that price movements took place globally, at the same time (with effect from 1 November 1998) and by an identical amount (in this case *[…]* Pta per tonne), which, in the light of the statements made by *[…]*, the Commission considers illustrates the price coordination activities manipulating when price increases or decreases should be implemented and by which amount.

(312) An undated internal chart prepared by *[…]* entitled "*Influence of price differences on average discounts*" includes the following columns: "dates change of price", "tariff *[…]*", "tariff RPA", and "actual market variation". The dates of price changes date back to 21 October 1996 and run until 8 February 2000.[362]

[…] the dates indicated in the document refer to the dates on which *[…]* changed prices, and that Repsol changed prices on close but not on the same dates, as this depended on factors such as how long it would take each company to obtain relevant information from customers, or on oil prices.[363] *[…]* the prices in the chart reflect a price agreement reached between Repsol and *[…]*, but *[…]* Repsol's prices were estimated by *[…]* as Repsol did not publicise its prices as it did not have a price list.[364]

(313) An e-mail internal to *[…]* dated 4 April 2000 *[…]* reports about price movements in Spain. In that e-mail *[…]* explains the following:

[…] [365]

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360 *[…]*.
361 *[…]*, inspection document, p. 00375.
362 *[…]*, inspection document, p. 03337.
363 *[…]*, response to request for information of 18 November 2005, p. 12165.
364 *[…]*, response to request for information of 7 April 2006, p. 13105.
365 *[…]*.

In this e-mail *[…]* explains that prices were not driven by unconstrained market forces but by other factors, in this case Repsol's decision to increase prices only by a certain amount thereby indicating the absence of free choice for other market operators.

(314) An internal e-mail of *[…]*, *[…]* to *[…]*, dated 18 October 2000, states that:

[…] [366]

In response to this e-mail, *[…]* sent an e-mail on 19 October 2000 to *[…]* in which he instructs the following:

[…] [367]

(315) The two above-mentioned e-mails internal to *[…]* show once more that price movements took effect globally, within a few days and by almost identical amounts, as reported by *[…]*. The exchange of e-mails confirms that Petrogal was willing to implement a price variation simultaneously with its competitors and for a similar amount, instead of choosing not to increase prices or to increase them by an amount lower than that announced by its competitors.

As will be seen in the following recitals, while Petrogal implemented the price variation on 23 October 2000, Nynäs did so on 20 October 2000[368] (see recital (316)), Proas also on 20 October 2000[369] (see recital (318)), *[…]*[370] (see recital (318)) and Repsol on 25 October 2000[371] (see recital (316)), that is, the five suppliers increased prices on exactly the same date or within a few days of each other.

In addition, the price increases communicated by each of the suppliers were within very similar ranges: *[…]* to *[…]* Pts/Mt for Proas and Petrogal, and an identical amount of *[…]* Pts/Mt for Repsol and *[…]*.

(316) Contemporaneous evidence confirming that *[…]* was at least informed of the outcome of price variation meetings (see recital (305)) and agreed to go along with the results is provided by a price list found at its premises with the following notice:

[…] [372]

This notice is again consistent with *[…]* statements that agreed price variations were global (the notice refers to *[…]*), consisted of an absolute amount (*[…]*) and were implemented on a specific date (*[…]*). In the case of Nynäs' price list, the new prices were to apply on exactly the same date as one of the dates provided by *[…]* on which price changes were to be implemented (16 November 2001, recital (303)), and the

366 *[…]*, inspection document, p. 02368. *[…]*
367 *[…]*, inspection document, p. 02368. *[…]*
368 *[…]*, inspection document, p. 02335/00031.
369 *[…]*, inspection document, p. 00485.
370 *[…]*, inspection document, p. 00485.
371 *[…]*, inspection document, p. 04063.
372 *[…]*, inspection document, pp. 02335/00011 and 02335/00012. *[…]*

amount of the reduction announced by Nynäs (*[…]*) differed by less than one Euro from the reduction announced by Repsol (*[…]*).[373]

Additional contemporaneous evidence are a number of faxes sent by *[…]* to some of its customers informing them that a price increase would take effect on 1 April 2002, which also coincides exactly with another of the dates *[…]* on which price changes were to be implemented (1 April 2002, recital (303)), by an amount which was either exactly the same as that announced by Repsol (+EUR *[…]*) or almost the same (+EUR *[…]* or +EUR *[…]*).[374]

Finally, other faxes sent by *[…]* to some customers announced the implementation of a price variation on dates very close to dates announced by Repsol to its own customers.[375]

The preceding account can be summarised as follows:

Nynäs	Repsol
3 April 2000	10 April 2000[376]
20 October 2000	25 October 2000
16 November 2001 • *[…]* Pts	16 November 2001 • *[…]* Pts
27 May 2002 and 3 June 2002	1 June 2002
1 April 2002 • +EUR *[…]*/EUR *[…]*/+EUR *[…]*	1 April 2002 • +EUR *[…]*

(317) In line with the announcement of a price increase of EUR *[…]* to EUR *[…]* made by Repsol and Nynäs to apply as from 1 April 2002, *[…]* had a meeting with one of its customers on 23 May 2002 to communicate a price increase of also EUR *[…]*.[377] Given the equivalence in the amount of the price increase announced by Repsol, Nynäs and *[…]* and the proximity in time of the announcements, the Commission considers the fax reporting the meeting held by *[…]* with one of its customers as evidence of the implementation by Proas of the price coordination activities undertaken by cartel participants.

(318) Finally, contemporaneous evidence also shows that *[…]* was at the very least informed of the outcome of price variation meetings (see recital (305)) and that it acquiesced to follow the agreed price developments. A *[…]* internal table entitled "*Variation Prices Paving*" indicates the precise price variation amounts and the specific dates of their

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373 See *[…]*, inspection document, p. 04061.

374 *[…]*, inspection document, pp. 02335/00021, 02335/00026, 02335/00028, 02335/00039, 02335/00046, 02335/00064; *[…]*, inspection document, p. 04060.

375 See (i) *[…]*, inspection document, 3 June 2002: p. 02335/00047; 27 May 2002: pp. 02335/00023, 02335/00024, 02335/00025, 02335/00027, 02335/00032, 02335/00033, 02335/00036, 02335/00037, 02335/00038, 02335/00040, 02335/00043, 02335/00048, 02335/00049, 02335/00057, 02335/00062; *[…]*, inspection document, 1 June 2002: p. 04059; (ii) *[…]*, inspection document, 20 October 2000: 02335/00031; *[…]*, inspection document, 25 October 2000: p. 04063; (iii) *[…]*, inspection document, 3 April 2000: 02335/00022; *[…]*, inspection document, 10 April 2000: p. 04064.

376 *[…]*.

377 *[…]*, inspection document, p. 03277.

implementation by *[…]*, Repsol and Proas from 2000 to mid-2002.[378] Furthermore, *[…]* price variation table and several faxes sent by *[…]* to its customers show a clear concurrence of the dates of implementation of the price variations and, where information is available, of the price variation amounts:

[…][379]	Nynäs[380]
16 May 1999	15 May 1999
19 December 1999	6 December 1999
5 April 2000	3 April 2000
22 October 2000	20 October 2000
2 April 2002 • +EUR *[…]* 28 May 2002	1 April 2002 • +EUR *[…]*/ +EUR *[…]* 27 May 2002 and 3 June 2002

E. LEGAL ASSESSMENT

1 JURISDICTION

(319) The Commission is the competent authority to apply Article 81 of the Treaty since the cartel had an appreciable effect on trade between Member States (see section 2.5 below).

(320) In response to the Statement of Objections Nynäs claimed that, because the investigation only concerned practices in Spain, it should have been dealt with by the Spanish Competition Authority. Nynäs argued that the Commission's decision to retain jurisdiction was arbitrary and against the principles of legitimate expectations, subsidiarity and proportionality, and motivated purely by administrative concerns as opposed to the protection of competition. As a result of the Commission retaining jurisdiction over the case, any fines imposed would be arbitrarily higher.

(321) The Commission does not accept this claim. Regulation (EC) No 1/2003 retained the system of parallel competences of the Commission and the Member State competition authorities to apply Articles 81(1) and 82 of the Treaty and extended to the Member State competition authorities the competence to apply Article 81(3) of the Treaty. In particular, Regulation (EC) No 1/2003 did not modify the Commission's competence to investigate any suspected infringements and to adopt decisions under Articles 81 and 82 of the Treaty, including infringements that have their main effects in one Member State.

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378 *[…]*, inspection document, p. 00485. *[…]*

379 *[…]*, inspection document, p. 00485.

380 *[…]*, inspection document, pp. 02335/00021-02335/00034, 02335/00036-02335/00041, 02335/00043-02335/00044, 02335/00046-02335/00050, 02335/00055, 02335/00057, 02335/00059, 02335/00062, 02335/00064.

(322) The Commission Notice on cooperation within the Network of Competition Authorities[381] sets out principles for the division of work between the Commission and the Member State competition authorities. However, neither Regulation (EC) No 1/2003 nor the Commission Notice creates rights or expectations for undertakings to have their case dealt with by a specific competition authority, nor precludes the Commission from acting on a suspected breach of Articles 81 or 82 of the Treaty limited to the territory of a single Member State.[382]

2 APPLICATION OF ARTICLE 81 OF THE EC TREATY

2.1 Article 81(1) of the EC Treaty

(323) Article 81(1) of the Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which directly or indirectly fix purchase or selling prices or any other trade conditions, limit or control production and markets, or share markets or sources of supply.

2.2 The nature of the infringement

2.2.1 Agreements and concerted practices

2.2.1.1 Principles

(324) Article 81 of the Treaty prohibits *agreements* between undertakings, decisions by associations of undertakings and *concerted practices.*

(325) An *agreement* can be said to exist when the parties, expressly or implicitly, jointly adopt a plan determining the lines of their respective action (or abstention) on the market. It does not have to be made in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The agreement may be express or implicit in the behaviour of the parties, since a line of conduct may be evidence of an agreement. Furthermore, it is not necessary, in order for there to be an infringement of Article 81 of the Treaty, for the participants to have agreed in advance upon a comprehensive common plan. The concept of *agreement* in Article 81 of the Treaty may apply to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement.

(326) An "*agreement*" for the purposes of Article 81 of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract in civil law. Moreover, in the case of a complex cartel of long duration, the term "agreement" can properly be applied not only to any overall plan or to the terms expressly agreed upon but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose, as well as to the

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381 OJ C 101, 27.4.2004, p. 43.

382 See Case T-339/04 *France Télécom* v *Commission*, Judgment of 8 March 2007, paragraphs 77-89, and in particular 79 and 89.

measures designed to facilitate the implementation of price initiatives.[383] As the Court of Justice, upholding the judgement of the Court of First Instance, pointed out in *Commission* v *Anic Partecipazioni SpA*,[384] it follows from the express terms of Article 81 of the Treaty that an agreement may consist not only of an isolated act but also of a series of acts or continuous conduct.

(327) In its judgement in joined cases *Limburgse Vinyl Maatschappij N.V. and others* v *Commission* (PVC II),[385] the Court of First Instance stated that "it is well established in the case law that for there to be an agreement within the meaning of Article [81] of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way".

(328) Also, if an undertaking is present at meetings in which the parties agree on certain behaviour on the market, it may be held liable for an infringement even where its own conduct on the market does not comply with the conduct agreed.[386] It is, indeed, well established case law that "the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose is not such as to relieve it of full responsibility for the fact that it participated in the cartel, if it has not publicly distanced itself from what was agreed in the meetings".[387] Such distancing should take the form of an announcement by the company, for instance, that it would take no further part in the meetings (and therefore did not wish to be invited to them).

(329) Although Article 81 of the Treaty draws a distinction between the concept of *"concerted practice"* and that of *"agreements between undertakings"* or of *"decisions by associations of undertakings"*, the object is to bring within the prohibition of that article 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 81 of the Treaty as a *concerted practice* even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the coordination of their commercial behaviour.[388] Furthermore, the process of negotiation and preparation culminating effectively in the adoption of an overall plan to regulate the market may well also (depending on the circumstances) be correctly characterised as a concerted practice.

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383 Case T-7/89 *Hercules* v *Commission* [1991] ECR II-1711, at paragraph 256.

384 Case C-49/92P *Commission* v *Anic Partecipazioni SpA* [1999] ECR I - 4125, at paragraph 81.

385 Joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij NV, Elf Atochem SA, BASF AG, Shell International Chemical Company Ltd, DSM NV and DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst AG, Société artésienne de vinyle, Montedison SpA, Imperial Chemical Industries plc, Hüls AG and Enichem SpA* v *Commission* [1999] ECR II-931, at paragraph 715.

386 Case T-334/94 *Sarrió* v *Commission* [1998] ECR II-01439, paragraph 118.

387 *Ibidem.* See also Case T-141/89 *Tréfileurope Sales* v *Commission* [1995] ECR II-791, paragraph 85; Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 232; and Case T-25/95 *Cimenteries CBR* v *Commission* [2000] ECR II-491, paragraph 1389.

388 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, etc. *Suiker Unie and others* v *Commission*.

(330) The criteria of coordination and cooperation laid down by the case law of the Court, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the commercial policy which it intends to adopt in the common market. Although that requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.[389]

(331) Although in terms of Article 81 of the Treaty the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period. Such a concerted practice is caught by Article 81 of the Treaty even in the absence of anti-competitive effects on the market.[390]

(332) Moreover, it is established case law that the exchange between undertakings, in pursuance of a cartel falling under Article 81 of the Treaty, of information concerning their respective deliveries, which not only covers deliveries already made but is intended to facilitate constant monitoring of current deliveries in order to ensure that the cartel is sufficiently effective, constitutes a concerted practice within the meaning of that article.[391]

(333) In the case of a complex infringement of long duration, it is not necessary for the Commission to characterise the conduct as exclusively one or other of these forms of illegal behaviour.[392] The concepts of *"agreement"* and *"concerted practice"* are fluid and may overlap. The anti-competitive behaviour may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when considered in isolation some of its manifestations could accurately be described as one rather than the other. It would however be artificial analytically to sub-divide

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389 Joined Cases 40-48/73, etc. *Suiker Unie and others* v *Commission* [1975] ECR 1663, at paragraphs 173 and 174.

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

391 See, in this sense, Cases T-147/89, T-148/89 and T-151/89, *Société Métallurgique de Normandie* v *Commission, Trefilunion* v *Commission and Société des treillis et panneaux soudés* v *Commission*, respectively, at paragraph 72.

392 Joint Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij NV et al.* v *Commission*, ECR [1999], p. II-00931, para. 696 (the *"PVC II"* judgement). See the Court of First Instance in the PVC II judgment, where it is stated that *« [i]n the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both forms of infringement are covered by Article [81] of the Treaty»*.

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. Article 81 of the Treaty lays down no specific category for a complex infringement of the present type.[393]

(334) In *PVC II*,[394] the Court of First Instance confirmed that "[i]n the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [81] of the Treaty".

2.2.1.2 Application to this case

(335) The facts described in this Decision demonstrate that, during the entire period of the cartel, Repsol, Proas, BP, Nynäs and Petrogal (the latter since 1995) entered, to different extents, into the following arrangements with regard to the Spanish market for bitumen: allocation of volumes and customers (see recitals (124) to (173), (201), (205) to (209), (218), (224), (225), (229), (231) to (237), (244) to (255), (257) to (265) and (269) to (289)); ensuring the implementation of the volume and customer allocation by a monitoring system based on either regular or informal ad hoc meetings and contacts, the exchange of confidential information on sales volumes and a compensation scheme designed to correct any deviations from the volume and customer allocation agreements reached (see recitals (174) to (197), (202), (210) to (217), (219) to (223), (226), (230), (241) to (243), (256), (267) and (268)); and coordination of price variations and of the time of their application (see recitals (290) to (359)).

(336) This overall scheme qualifies as an agreement between undertakings within the meaning of Article 81 of the Treaty in the sense that, during the bilateral and multilateral meetings of the cartel members, the undertakings concerned expressed their joint intention to conduct themselves on the market in a specific way. This behaviour consisted essentially in following a jointly preconceived volume and customer allocation system, price coordination and refraining from competition with regard to customers allocated to the other participating competitors.

(337) That the cartel scheme may be qualified as an agreement is illustrated by the fact that, in some of its internal documents, *[…]* refers to the consumption volumes per province or per region for the following year decided by the cartel participants as "agreed" ("*Pactado*") (see recitals (271) and (285)).

(338) The term agreement applies not only to the overall scheme, but also to the implementation of what had been agreed in pursuance of the same common purpose of controlling the market. As such, one of the actions taken to ensure the implementation of the overall plan was the sharing of market information which made it possible to review implementation of the volume and customer allocation agreement as well as the adoption of a compensation scheme in order to adjust divergences with the agreement.

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

394 Case T-317/94 *Weig* v *Commission* [1998] ECR 1998 II-1235, at paragraph 264.

(339) Some factual elements of the illicit arrangement could also aptly be characterised as a concerted practice. While there was clearly an agreement behind the actions taken to ensure implementation through the exchange of confidential market information and the adoption of a compensation scheme, the operation of this agreement through the regular or ad hoc exchange of sales volume information between the undertakings could also be regarded as adherence to a concerted practice to facilitate the coordination of the parties' commercial behaviour. As such, the suppliers in question were able to monitor current market shares and customer demand in order to ensure adequate effectiveness of the agreement as well as the joint control of the market. These arrangements, even if they may not exactly qualify as agreements, would at least meet the criteria to be considered as a concerted practice. Likewise, even if not all cartel participants formally concluded an agreement to coordinate price variations and the date of their implementation, they did not determine their pricing policy independently. They instead entered into direct or indirect contacts the object or effect of which was either to influence the pricing policy of other suppliers or to disclose to them the pricing policy which they themselves intended to apply. In this way, the bitumen suppliers which agreed on or were informed of the price variations and the date of their implementation and remained active on the Spanish bitumen market can be presumed to have taken into account the information agreed with or received from their competitors to determine their own pricing conduct on the market throughout the cartel period. These direct or indirect contacts to coordinate prices can be regarded as a concerted practice contrary to Article 81 of the Treaty even in the absence of anti-competitive effects on the market.

(340) Based on the foregoing, the different elements of behaviour of the addressees of this Decision can be considered to form part of an overall scheme to share the market and coordinate prices of bitumen in Spain. The Commission considers that this complex of infringements presents all the characteristics of an agreement and/or concerted practice in the sense of Article 81 of the Treaty.

2.2.1.3 Arguments of Nynäs and Petrogal on the market sharing arrangements and Commission's conclusion

(341) Nynäs and Petrogal contest the Commission's findings concerning their participation in market sharing arrangements as set out in the Statement of Objections. The Commission has already answered these parties' arguments on specific contemporaneous documents when presenting the contemporaneous evidence on a chronological basis. In this section the Commission will assess the parties' arguments of a general nature. It should be noted that Nynäs' arguments discussed in this section were put forward by Nynäs Petróleo S.A.

(342) Nynäs contests the reliability of the *[…]* statements made by *[…]* claiming that it is not clear whether those who have contributed are direct witnesses with personal knowledge of the matters with which the statements deal. The Commission notes that, in accordance with case law, a statement made by a person acting in the capacity of a representative of a company and admitting the existence of an infringement by that company entails considerable legal and economic risks, which makes it extremely unlikely that such a statement will be made unless the person making it had information provided by employees of the company who themselves had direct knowledge of the facts. In those circumstances, the fact that the representative of the company may not himself have direct knowledge of the facts does not affect the

probative value of such a statement.[395] The Commission further notes that the statements provided by *[…]* are consistent and do not contradict one another.

(343) Nynäs and Petrogal deny having been members of the "asphalt table" and contend that the "asphalt table" was only composed of Repsol, Proas and BP. Petrogal argues that the term "companies" in a *[…]* memorandum referring to discussions at the "asphalt table" (see recital (229)) relates only to the three bitumen producers, without however providing any evidence supporting this claim. In response to these arguments the Commission considers that the phrase "asphalt table" refers to the discussions leading to the market sharing arrangements, and that the form in which these discussions took place and the number of undertakings that participated in each precise contact with that anti-competitive object are immaterial once it has been established that Repsol, Proas, BP, Nynäs and Petrogal participated therein. The "asphalt table" was thus composed of Repsol, Proas and BP but also of Nynäs and Petrogal, even if these two undertakings participated only in market sharing discussions concerning their area of influence and did so on a bilateral basis with Repsol and/or Proas and not with other cartel members as well.

(344) Both Petrogal and Nynäs admit having participated in discussions with an anti-competitive object: Petrogal from 1995 to 1997 and Nynäs in 2001 and 2002. These two undertakings, however, allege that the extent of their participation in those meetings was limited. Petrogal claims that it never negotiated a market quota with other cartel participants but rather that they fixed and allocated to it a quota of 48,000 tonnes. At the Oral Hearing held on 12 December 2006 *[…]* stated that it *[…]* and that, in practical terms, the quota was *de minimis*. Nynäs likewise argues that it never negotiated or agreed on the allocation of volumes with competitors. In reply to these arguments the Commission first points out that it has not found any evidence showing that other cartel participants imposed anti-competitive behaviour on either Petrogal or Nynäs. In fact, *[…]* stated that Petrogal was "offered" a market share allocation by Repsol and Proas in its area of influence (see recital (125)), and Petrogal itself states in its response to the Statement of Objections that a representative of Repsol "invited" a representative of Petrogal to cooperate with the "asphalt table" (see recital (474)). More importantly, the Commission notes that, as Petrogal and Nynäs participated in meetings with an anti-competitive object, namely the definition and acceptance of a market quota, and did not publicly distance themselves from what occurred at those meetings, they gave the impression to the other participants that they subscribed to the results of the meeting and would act in conformity with them.[396] Petrogal and Nynäs tacitly approved the unlawful behaviour of their competitors in accepting a market quota and did not report this fact to public authorities, thereby effectively encouraging the continuation of the infringement and compromising its discovery.[397] The Commission finally observes that, in accordance with settled case law, the finding that the quota accepted by Petrogal had an anti-competitive object is sufficient to declare it

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395 Judgement of 25 January 2007 in Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries Ltd and Nippon Steel Corp. v Commission*, paragraph 103.

396 See, for example, Joined Cases T-67/00, T-68/00, T-71/00 and 78/00, *JFE Engineering Corp.* v *Commission* [2004] ECR-II 2501, paragraph 327.

397 Judgement of 28 June 2005 in Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri A/S et al*., paragraph 143.

contrary to Article 81 of the Treaty and it is not necessary to establish that the quota, whether *de minimis* or otherwise, had an anti-competitive effect.[398]

(345) Nynäs and Petrogal contend that they did not participate in the negotiations among cartel participants which preceded the discussions they had with Repsol and Proas. The Commission notes that Nynäs and Petrogal participated in the discussions affecting their area of influence, that is, the area in which they had business interests and thus where market sharing arrangements may have proved beneficial to them. In this way, Nynäs and Petrogal contributed, at their own level and for their area of influence, to the pursuit of the common objective of distorting competition on the Spanish bitumen market, and it is immaterial that they did not participate in discussions concerning market sharing in areas where they had no sales.[399] In any event, once it has been proved that Nynäs and Petrogal held discussions with an anti-competitive object concerning their area of influence, their participation in the cartel can already be established.[400]

(346) Petrogal claims that the Commission has not adduced evidence that Petrogal allocated customers with its competitors and states that its customers are basically wholesalers and producers of bitumen emulsions and modified bitumen, whilst according to the Statement of Objections customer allocation was made on a works or project basis. In this respect the Commission notes the following factors: Petrogal does not contend that its customers were exclusively wholesalers and processors; *[…]* provided in their *[…]* statements a thorough and consistent description of how customer allocation was carried out, including the criteria used which were, inter alia, traditional customer considerations and data of the preceding year, which are criteria which applied regardless of the type of customer; and *[…]* reported in their *[…]* statements that the discussions with Petrogal concerned *[…]* and *[…]* (see recital (130)(f) and *[…]*). Once more, the fact that it has been established that Petrogal agreed to have discussions with its competitors with an anti-competitive object when accepting a market quota suffices to ascertain Petrogal's participation in the cartel.[401]

(347) Nynäs contends that the Commission has not adduced evidence that Nynäs had knowledge of the market sharing arrangements on a national basis or of its involvement outside its area of influence. The Commission recalls that Nynäs accepted to discuss volumes and customers in its area of influence with Repsol and Proas, the two largest operators on the Spanish bitumen market, both of which had business interests throughout the Spanish territory, and that it requested, at least in 2002, assistance to Proas to resolve a dispute with a non-cartel participant concerning a customer in Nynäs' area of influence (see recital (279)). The fact that Nynäs only participated directly in the market sharing arrangements concerning its own area of influence or that it may have only known the volume and customer allocation in its own area of influence do not preclude holding it responsible for the overall cartel as, in the Commission's view, Nynäs knew, or should have known, that the discussions in

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

399 See, for example, Joined Cases T-67/00, T-68/00, T-71/00 and 78/00, *JFE Engineering Corp.* v *Commission* [2004] ECR-II 2501, paragraph 370.

400 Judgement of 25 January 2007 in Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries Ltd and Nippon Steel Corp.* v *Commission*, paragraph 47.

401 Idem.

which it participated with Repsol and Proas, especially by means of regular meetings organised over several years, were part of an overall plan intended to distort competition on the Spanish bitumen market and that the overall plan included discussions with other bitumen suppliers. Likewise, the fact that Nynäs and the other cartel participants played different roles in the pursuit of the common objective of sharing the Spanish bitumen market does not mean that there was no identity of anti-competitive object and, therefore, of infringement, as each undertaking contributed, at its own level, to the pursuit of that common object.[402]

(348) Nynäs and Petrogal argue that they were not involved in the monitoring of the market sharing arrangements or in the compensation mechanism. With regard to Petrogal, the Commission notes that, at least in 1998, and in accordance with the minutes of a meeting between Repsol, Proas and Petrogal drawn up by *[…]*, Petrogal handed sales information to Repsol and Proas which enabled the latter to monitor whether or not Petrogal was selling within the volumes allocated to it by the market sharing agreement or "PTT" (see recital (242)). The Commission considers that this contemporaneous document is evidence that Petrogal allowed its competitors to verify its sales data against the volumes allocated to it in the "PTT" by providing that information itself, and that whether the handing of sales information to competitors was done on a regular basis or in a less structured manner is irrelevant once Petrogal's course of action has been proved. In any case, the fact that Nynäs and/or Petrogal may not have participated in monitoring or compensation discussions does not preclude the fact that, as indicated above, Nynäs and Petrogal contributed at their own level to the pursuit of the common objective of distorting competition on the Spanish bitumen market. Furthermore, it is sufficient for the Commission to establish that Nynäs and Petrogal participated in meetings during which agreements of an anti-competitive nature were concluded, such as the discussion and/or acceptance of market quotas and customer allocation in their area of influence, in order to prove that they participated in the cartel.[403]

(349) Nynäs and Petrogal finally claim that they did not implement the market sharing arrangements, and that they sold above the volumes allocated to each of them by the cartel participants. Petrogal specifies that, as from a certain moment, abiding by the allocated quota was not in its commercial interest. Firstly, the Commission notes that it is settled case law that an undertaking which, despite colluding with its competitors, follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit.[404] Secondly, the Commission notes that, also in accordance with case law, where the Commission has succeeded in gathering documentary evidence sufficient to demonstrate the existence of an agreement of an anti-competitive nature, there is no need to examine the question whether the undertaking concerned had a commercial interest in the agreement.[405]

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402 Joined Cases T-67/00, T-68/00, T-71/00 and 78/00, *JFE Engineering Corp.* v *Commission* [2004] ECR-II 2501, paragraph 370.

403 Judgement of 25 January 2007 in Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries Ltd and Nippon Steel Corp.* v *Commission*, paragraph 47.

404 Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 230.

405 Judgement of 25 January 2007 in Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries Ltd and Nippon Steel Corp.* v *Commission*, paragraph 46.

(350) The Commission concludes by recalling that, in the light of case law,[406] what is required in investigations of infringements of Article 81 involving secret cartels is that the body of evidence as a whole allows the Commission to infer that an infringement has taken place.

(351) In view of the foregoing, the Commission concludes that it has been established that Repsol, Proas, BP, Nynäs and Petrogal all participated in discussions concerning the sharing of the Spanish bitumen market as described in detail in the factual part of this Decision.

2.2.1.4 Arguments of Nynäs and Petrogal on price coordination and Commission's conclusion

(352) Nynäs and Petrogal contest the Commission's findings concerning their participation in price discussions as set out in the Statement of Objections. The Commission has already responded to these parties' arguments on specific contemporaneous documents when presenting the contemporaneous evidence on a chronological basis. In this section the Commission will assess the parties' arguments of a general nature. It should be noted that the Nynäs' arguments discussed in this section were put forward by Nynäs Petróleo S.A.

(353) Nynäs contests the Commission's finding that it was involved in price coordination with other cartel members. It argues that economic factors compelled it, as a fringe player on the market, to follow the prices set by the price and market leaders, Repsol and Proas, and that it could be of little relevance to market prices whether the fringe players also participated or were informed of the discussions that Repsol and Proas held. Nynäs refers to the "Stackelberg" model and explains that *[…]* ; that, *[…]* ; and that *[…]*. With regard to some of the contemporaneous documents adduced by the Commission, Nynäs claims that the fact that price variations were applied by Nynäs and Repsol with a difference of four, five or seven days shows absence of coordination as to the date of implementation of the price variation; that when price decreases are applied by Nynäs and Repsol on the same date "no inference can be drawn from the coincidence of dates"; and that the "broad coincidence of dates" between some *[…]* and Nynäs price changes is not evidence for a commodity product such as bitumen. Nynäs also contends that a difference of six days in December 1999 in the application by Nynäs and *[…]* of a price variation, and a difference of EUR *[…]* in the prices applied by Nynäs and *[…]* on 1 and 2 April 2002 respectively "strongly suggests" that there was no price collusion between these undertakings. Nynäs further notes a difference of EUR *[…]* in the prices applied by Nynäs and Repsol five days apart in October 2000, wondering that, "if price changes were agreed, why was Nynäs pricing competitively at a level certain to attract additional sales?" Nynäs finally argues that its prices were competitive as they responded closely to movements in oil prices.

(354) The Commission notes that the fact that Repsol and Proas could be perceived as price leaders is no obstacle to price coordination having taken place. These two undertakings *[…]* agreed on price variations and the time at which they should be

406 Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg a.o.* v *Commission* [2004] ECR I-0123, paragraphs 55-57; Joined Cases T-44/02, T-54/02, T-56/02, T-60/02 and T-61/02 *Dresdner Bank AG and Others* v *Commission*, Judgement of 14 October 2004, not yet reported, paragraphs 62-65.

implemented and subsequently communicated their conclusions to other market players (BP, Nynäs and Petrogal). The contemporaneous evidence adduced by the Commission in recitals (316) and (318) *[…]* showing that Nynäs applied price variations of exactly the same or a very similar amount and on exactly the same date or within a few days' of Repsol and *[…]*. The Commission also notes that Nynäs' statement that the application of a EUR *[…]* difference in the prices applied by Nynäs and Repsol in October 2000 shows that Nynäs was pricing competitively to attract additional sales is in stark contradiction with the "Stackelberg" model to which Nynäs previously refers to explain price equivalence between the price leaders and the fringe players. Also in contradiction with the "Stackelberg" model is the fact that, based on the documentation in the Commission's possession, Nynäs sent, despite being a fringe player, a letter to its customers on at least two occasions (in 2000 and 2002) announcing a price increase a few days before Repsol, the price leader.[407] The Commission further observes that Nynäs' argument that its prices were competitive as they responded to oil prices is nullified by the statements made by *[…]* (see recitals (293), (295) and (300)) that coordinated price variations followed, in particular, (increases or decreases of) oil prices. Finally, since the Commission relies on documentary evidence in order to prove price coordination, it is of no avail to Nynäs to attempt to prove that the conduct that it adopted on the market could be explained other than by the existence of an anti-competitive agreement.[408]

(355) Petrogal contests having participated in price coordination activities with other cartel members. It states that the Commission has based its objections against Petrogal in this respect only on ambiguous and vague declarations by *[…]*, and adds that *[…]* did not mention price arrangements *[…]*. Petrogal contends that what happened is that Repsol and Proas unilaterally decided on price increases, taking only into account their own interests, mostly because of increases in oil prices, and that Petrogal followed such increases on the basis of information it obtained through its customers. At the Oral Hearing held on 12 December 2006 Petrogal showed one fax from one of its customers reporting a decrease of prices by Repsol and Proas on 15 and 16 November 2001 respectively.

(356) The Commission notes that it has based its findings on *[…]* as well as *[…]*, and on contemporaneous documents *[…]* found by the Commission during the inspections *[…]*. The Commission considers that the *[…]* information *[…]* is detailed and consistent (as shown in recitals (295) to (299) and (301) to (308)), and notes that it has been corroborated by *[…]*. The Commission finally notes that Petrogal has only adduced one fax from one of its customers reporting a price variation implemented by Repsol and Proas and that, in fact, this one document refers to a price decrease. The Commission does not consider that a document which is intended to be used by a customer to negotiate a price decrease with Petrogal by reference to its competitors' new, lower, prices can be regarded as evidence that Petrogal was informed of price variations by customers. Naturally, Petrogal's customers would not have an interest in immediately and diligently informing Petrogal of an increase of prices by its competitors.

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407 See pages 02335/31, 04063, 02335/23, 04059.

408 Joined Cases T-67/00, T-68/00, T-71/00 and 78/00, *JFE Engineering Corp.* v *Commission* [2004] ECR-II 2501, paragraphs 181-187.

(357) The Commission finally recalls that, in the light of the case law,[409] what is required in investigations of infringements of Article 81 involving secret cartels is that the body of evidence as a whole allows the Commission to infer that an infringement has taken place.

(358) To conclude, as described in sections 2.2.1 and 2.2.2, *[…]* the existence of price coordination activities between the cartel participants which is also illustrated by contemporaneous documents found during the inspections. In view of this evidence, the Commission considers that price coordination activities consisting of an agreement or a concerted practice relating to (i) the variation of the bitumen price by an absolute amount, and (ii) the date of application of the price variation, were undertaken at different points in time and in different degrees of participation by the five members of the cartel, namely Repsol, Proas, BP, Nynäs and Petrogal, from at least 1991 (1995 in the case of Petrogal) to 1 June 2002 *[…]*.

(359) The participation in price coordination activities was carried out by cartel members either through a direct participation in price variation meetings, typically between Repsol and Proas and, on occasions, BP, through a system of at least occasional requests to Repsol and Proas by BP, Nynäs and Petrogal for an agreement on a price increase or, at the very least, through a communication mechanism which ensured that market operators which had not participated in the price variation meetings, typically BP, Nynäs and Petrogal, were informed of the decisions reached in those meetings.

2.2.2 Single and continuous infringement

2.2.2.1 Principles

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

(361) As the Court of Justice stated in *Commission* v *Anic Partecipazioni*, the agreements and concerted practices referred to in Article 81 of the Treaty necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged. It follows that infringement of that article may result not only from an isolated act but also from a series of acts or from a continuous course of conduct.[410]

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409 Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg a.o.* v *Commission* [2004] ECR I-0123, paragraphs 55-57; Joined Cases T-44/02, T-54/02, T-56/02, T-60/02 and T-61/02 *Dresdner Bank AG and Others* v *Commission*, Judgement of 14 October 2004, not yet reported, paragraphs 62-65.

410 Case C-49/92P *Commission* v *Anic Partecipazioni* [1999] ECR I-4325, paragraphs 78-81, 83-85 and 203.

(362) Although a cartel is a joint enterprise, each participant in the agreement may play its own particular role. One or more may exercise a more dominant role than others. Internal conflicts and rivalries or even cheating may occur, but will not, however, prevent the arrangement from constituting an agreement/concerted practice for the purposes of Article 81 of the Treaty where there is a single common and continuing objective.

(363) 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 anti-competitive 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.[411] In this regard, the Courts have consistently stated that "an undertaking may be held responsible for an overall cartel even though it is shown that it participated directly only in one or some of the constituent elements of that cartel, if it is shown that it knew, or should have known, that the collusion in which it participated was part of an overall plan and that the overall plan included all the constituent elements of the cartel".[412]

2.2.2.2 Application to this case

(364) The conduct described in this Decision constitutes a single and continuous infringement of Article 81 of the Treaty.

(365) For the period from at least March 1991 to at least September 2002, the evidence described in the factual part of this Decision shows the existence of a single and continuous collusion in the Spanish market for bitumen between Repsol, Proas, BP, Nynäs and Petrogal (the latter since 1995).

(366) As explained earlier, the infringement comprised two facets: the market sharing arrangements and the price coordination activities. The Commission considers that the price coordination activities, which consisted of agreements to increase or decrease bitumen prices by an equivalent amount and to implement them at the same time, were a necessary support element to the market sharing arrangements as they ensured that the volume and customer allocation agreements would not be undermined by the application by suppliers of independent pricing policies.

(367) Thus, the parties expressed their joint intention to behave on the market in a certain way and adhered to a common plan to limit their individual commercial conduct in following a jointly preconceived volume and customer allocation scheme, a sales

411 See *Commission v Anic Partecipazioni*, quoted above, at paragraph 83.

412 Cases T-295/94, T-304/94, T-310/94, T-311/94, T-334/94, T-348/94, *Buchmann* v *Commission, Europa Carton* v *Commission, Gruber + Weber v Commission, Kartonfabriek de Eendracht* v *Commission, Sarrió* v *Commission* and *Enso Española* v *Commission*, at paragraphs 121, 76, 140, 237, 169 and 223, respectively. See also Case T-9/99, *HFB Holding and Isoplus Fernwärmetechnik* v *Commission*, paragraph 231.

information exchange system and a price coordination mechanism. The collusion was in pursuit of a single anti-competitive economic aim: preventing or distorting competition in the bitumen market in Spain by agreeing on customer and volume allocation as well as by coordinating their pricing policy. The participants in this unlawful dual conduct knew that it was part of an overall plan in pursuit of the same common unlawful object.

(368) The fact that the organisation of the cartel arrangements varied slightly over time (for example, with regard to the intensity of and participants in the monitoring and compensation schemes or price coordination discussions), and that BP suspended its participation in cartel meetings during the last months of 1998 and 1999, did not lead to any modification of the objective and the method of the common scheme. Moreover, it certainly did not lead to the termination of the infringement.

(369) It is natural that arrangements over a period as long as that of the present infringement involve organisational changes, a variation in the participant undertakings, their respective importance in the cartel or changes in the intensity and regularity of meetings. However, in this case there is a clear continuity of meetings (and of most of the individuals attending them), and of the method and implementation of the cartel. Indeed, throughout the duration of the infringement, the arrangements focused on volume and customer allocation in order to maintain market shares and on price coordination designed to support those market shares.

(370) Given the common object which the suppliers consistently and uninterruptedly pursued of eliminating competition in the bitumen market in Spain through market sharing and ancillary price arrangements, the Commission considers that the conduct in question constitutes a single and continuous infringement of Article 81of the Treaty.

2.3 Restriction of competition

(371) The complex of agreements and/or concerted practices in this case had the object and effect of restricting competition in a substantial part of the Community, namely Spain.

(372) Article 81 of the Treaty expressly mentions as restrictive of competition agreements which:

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

(373) In the complex of agreements and arrangements considered in this case, the following elements can be identified as relevant in order to find an infringement by object of Article 81 of the Treaty:

- the establishment of market quotas;
- on the basis of these market quotas, the allocation of volumes and customers to each participant;

– the monitoring of the implementation of the market and customer sharing agreements through the exchange of information on sales volumes;

– the establishment of a compensation mechanism to correct deviations from the market and customer sharing agreements;

– the agreement on the variation of bitumen prices and the moment at which the new prices would apply; and

– the participation in regular meetings and other contacts in order to agree the above restrictions and to implement and/or modify them as required.

(374) These kinds of arrangements have as their object the restriction of competition within the meaning of Article 81 of the Treaty.

(375) It is settled case-law that, for the purpose of the application of Article 81 of the Treaty, there is no need to take into account the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved.[413] The same applies to concerted practices.[414]

(376) In this case, however, the Commission considers that, on the basis of the elements which are put forward in this Decision, it has also proved that the cartel agreements were implemented and that actual anti-competitive effects of the cartel arrangements were likely to take place:

(a) the implementation of the cartel agreements was ensured by the monitoring scheme set up by the participants whereby they regularly or on ad hoc basis exchanged confidential information on sales volumes. In the absence of proof to the contrary, the Commission assumes that the cartel participants took into account the information exchanged in determining their own conduct in the market (see recitals (174), (175), (178), (181), (183), (184), (186), (187), (189));

(b) the implementation of the cartel's decisions was also ensured by daily contacts between some competitors and by frequent contacts between other competitors (see recital (188));

(c) the regular review of volumes sold in the context of monitoring meetings or contacts made it possible to solve any difficulties arisen in connection with the market sharing arrangements and to assign new volumes and customers not included in the market sharing agreement for the current year (see recitals (175), (186), (187));

(d) the decisions of the cartel members with regard to customer allocation were implemented by making certain customers turn to another cartel member by quoting an artificially high price (see recital (162)). Also, in the context of

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

414 See paragraph (331).

monitoring contacts, cartel members agreed on prices to offer for new and not yet assigned volumes and customers to ensure that they were allocated to the designated participant (see recitals (175), (186));

(e) any differences which would arise with respect to the market sharing agreements were corrected through a compensation mechanism whereby participants who had over-sold had to transfer part of their volumes to participants who had under-sold. Cartel members then also agreed on prices for certain projects already allocated to ensure that the customer made the required switch (see recitals (190) to (194));

(f) that the market sharing and price coordination arrangements were implemented is also shown by the contemporaneous evidence described in this Decision: with regard to the implementation of the market sharing arrangements, see recitals (202), (213) to (217), (219) to (223), (226), (230), (242), (243), (256), (267), (268); with regard to the implementation of the price coordination activities, see recitals (310) to (318). The fact that the participants sometimes did not completely respect the arrangements does not imply that they did not implement the cartel agreement (see recitals (220), (241), (243) and (267)). As the Court of First Instance stated in *Cascades*, "an undertaking which, despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit".[415]

2.4 Application of Article 81(3) of the EC Treaty

(377) The provisions of Article 81(1) of the Treaty may be declared inapplicable pursuant to Article 81(3) 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.

(378) Restriction of competition being the sole object of the market sharing and price arrangements which are the subject of this Decision, there is no indication that the agreements and concerted practices between the bitumen suppliers in Spain entailed any efficiency benefits or otherwise promoted technical or economic progress. Hardcore cartels, like the one which is the subject of this Decision, are, by definition, the most detrimental restrictions of competition, as they benefit only the participating suppliers but not consumers.

(379) Accordingly, the conditions for exemption provided for in Article 81(3) are not met in this case and the prohibition imposed by Article 81(1) remains fully applicable.

2.5 Effect on trade between Member States

(380) The continuing market sharing and price arrangements between the suppliers of bitumen in Spain had an appreciable effect upon trade between Member States.

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[415] Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 230. See also Joined Cases T-71, 74, 87 and 91/03 *Tokai Carbon Co. Ltd and others* v *Commission*, [2005] ECR II-10, paragraph 297.

(381) Article 81 of the Treaty is aimed at agreements which might harm the attainment of a single market between the Member States, whether by partitioning national markets or by affecting the structure of competition within the common market.

(382) According to the case law of the Court of Justice, "in order that an agreement between undertakings may 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".[416] In any event, whilst Article 81 of the Treaty "does not require that provisions have actually affected trade between Member States, it does require that it be established that the agreements are capable of having that effect".[417]

(383) As demonstrated in the section dealing with "Trade between Member States" (see chapter B, section 5), the bitumen market in Spain is characterised by a noteworthy volume of trade with other Member States. Indeed, 20% of the consumption of bitumen in Spain is accounted for by imports (for example, from France, Portugal and Italy), and a very important share of these imports is accounted for by Nynäs and Petrogal, the two importers which participated in the cartel. In addition, the three bitumen producers in Spain, which accounted for 85% of the market in 2001, exported to, amongst others, *[…]* throughout the period of duration of the cartel.

(384) The application of Article 81 of the Treaty to a cartel is not, however, limited to that part of the members' sales which actually involve the transfer of goods from one State to another. Nor is it necessary, in order for these provisions to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States.[418]

(385) In this case, the cartel arrangements covered the whole territory of Spain (save for the Canary Islands) and virtually all bitumen trade in Spain (98% in 2001, the last full year of the infringement, according to the parties' estimates of their individual market share). The existence of volume and customer allocation mechanisms and price coordination arrangements must have resulted, or were likely to result, in the automatic diversion of trade patterns from the course they would otherwise have followed.[419] As stated by case law, an agreement or concerted practice extending over the whole territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about.[420]

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416 Joined Cases C-215/96 and C-216/96, *Bagnasco*, [1999] ECR I-135), at paragraphs 47 and 48.

417 See Case 56/65 *Société Technique Minière* [1966] ECR 282, paragraph 7; Case 42/84 *Remia* and Others [1985] ECR 2545, paragraph 22 and Joined Cases T-25/95 and others, *Cimenteries CBR* [2002] ECR II-491. See also Case C-306/96 *Javico* [1998] ECR I-1983, paragraphs 16 and 17; and Case T-374/94 *European Night Services* [1998] ECR II-3141, paragraph 136.

418 Judgment in Case T-13/89, *Imperial Chemical Industries v Commission* [1992] ECR II-1021, at paragraph 304.

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

420 This principle was recently confirmed by the Court of Justice in its judgement of 19 February 2002 in Case C-309/99 *Wouters* [2002] ECR I-1577 at paragraph 95. See also the earlier judgement of the Court of Justice of 17 October 1972 in Case 8/72 *Vereeniging van Cementhandelaren* v *Commission* [1972]

3 ADDRESSEES OF THIS DECISION

3.1 Principles

(386) The subject of Article 81 of the Treaty is the "*undertaking*", a concept which is not identical with that of legal personality for the purposes of national law. The term 'undertaking' is not defined in the Treaty, but it may refer to any entity engaged in commercial activities. Although Article 81 of the Treaty is applicable to undertakings and the concept of undertaking is of an economic nature, acts enforcing the Community competition rules must be addressed to legal entities.[421] A decision concerning an infringement of Article 81 of the Treaty may therefore be addressed to one of several entities having their own legal personality and forming part of an undertaking, and thus to a group as a whole, or to subgroups, or to subsidiaries.

(387) It is accordingly necessary to define the undertaking that will be held accountable for the infringement of Article 81 of the Treaty by identifying one or more legal persons to represent the undertaking. According to the case law, "*Community competition law recognises that different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Articles 81 EC and 82 EC if the companies concerned do not determine independently their own conduct on the market*".[422] If a subsidiary does not determine its own conduct on the market independently, its parent forms a single economic entity with the subsidiary and may thus be held liable for an infringement committed by its subsidiary on the ground that they both constitute one undertaking.

(388) Parent companies can thus be considered liable for the infringements of Article 81 of the Treaty committed by their subsidiaries where the latter are not able to autonomously determine their behaviour on the market.[423] According to established case-law, when a parent company owns, directly or indirectly, the totality (or almost the totality) of the shares of a subsidiary at the time the latter commits an infringement, it can be presumed that the subsidiary follows the policy laid down by the parent company and thus does not enjoy such an autonomous position.[424] It is

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ECR 977, paragraph 29, and the judgement of the Court of first Instance of 21 February 1995 in Case T-29/92 *SPO e.a.* v *Commission* [1995] ECR II-289, paragraph 229.

421 Although an 'undertaking' within the meaning of Article 81 of the Treaty is not necessarily the same as a company having legal personality, it is necessary for the purposes of applying and enforcing decisions to identify an entity possessing legal or natural personality to be the addressee of the measure. See judgment of the Court of First Instance in joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij NV and others* v *Commission (PVC II)*, [1999] ECR II-931, at paragraph 978.

422 See the judgment of the Court of First Instance in Case T-203/01, *Michelin v Commission*, [2003] ECR II-4071, at paragraph 290.

423 Judgments of the Court of Justice in Case 48/69, *Imperial Chemical Industries v. Commission*, [1972] ECR 619, paragraphs 132-133, and Case 170/83, *Hydrotherm*, [1984] ECR 2999, paragraph 11, and judgment of the Court of First Instance in Case T-102/92, *Viho* v *Commission*, [1995] ECR II-17, paragraph 50, cited in Case T-203/01, *Michelin v Commission*.

424 Judgment of the Court of Justice in Case 107/82, *AEG v Commission*, [1983] ECR 3151, paragraphs 50 and 51, and Case C-310/93P, *BPB Industries & British Gypsum* v *Commission*, [1995] ECR I-865, paragraph 11; judgments of the Court of First Instance in Case T-354/94, *Stora Kopparbergs Bergslags AB* v *Commission*, [1998] ECR II-2111, paragraph 80; Joined Cases T-305/94 et al., *LVM and others* v *Commission (PVC II)*, paragraphs 961 and 984; Case T-203/01 *Michelin v Commission*, paragraph 290; Joined Cases T-71, 74, 87 and 91/03, *Tokai Carbon Co. Ltd and others* v *Commission*, [2005] ECR II-

likewise established that "*the Commission can generally assume that a wholly-owned subsidiary essentially follows the instructions given to it by its parent company without needing to check whether the parent company has in fact exercised that power*".[425] In those circumstances, it is for the parent company to reverse that presumption by adducing sufficient evidence.[426] The fact that it has been shown that a parent company is responsible for the conduct of its subsidiary does not in any way exonerate the subsidiary of its own responsibility. The subsidiary continues to be individually accountable for the anticompetitive practices in which it took part. Any responsibility on the part of the parent company, by reason of the influence and control it exercises over its subsidiary, is additional.

(389) It is also established case law that the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility that its conduct may be attributed to the parent company.[427]

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

(391) When an undertaking that has committed an infringement of Article 81 of the Treaty subsequently disposes of the assets which contributed to the infringement and withdraws from the market in question, it continues to be answerable for the infringement if it has not ceased to exist[428]. If the undertaking which has acquired the assets carries on the violation of Article 81 of the Treaty, liability for the infringement should be apportioned between the seller and the acquirer of the infringing assets, each undertaking being responsible for the period of the infringement in which it participated through these assets in the cartel. However, if the legal person initially answerable for the infringement ceases to exist and loses its legal personality, being

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10, paragraphs 59 and 60; Case T-325/01, *DaimlerChrysler* v *Commission*, [2005] ECR II-3319, paragraphs 217-221; Case T-43/02, *Jungbunzlauer AG*, judgment of 27 September 2006 (not yet published), paragraph 125, and Case T-223/01, *Akzo Nobel NV v Commission*, judgment of 27 September 2006 (not yet published), paragraph 82.

425 See the judgment of the Court of First Instance of 15 June 2005 in *Tokai*, quoted in footnote (424), at paragraph 60; in the same sense see the judgment of the Court of First Instance in Case T-354/94, *Stora Kopparbergs Bergslags* v *Commission*, [1998] ECR II-2111, at paragraph 80, upheld by the Court of Justice in Case C-286/98P, *Stora Kopparbergs Bergslags* v *Commission*, at paragraphs 27-29, and the judgment of the Court of Justice in Case 107/82, *AEG* v *Commission*, paragraph 50. In Case T-314/01, *Avebe v Commission*, judgment of 27 September 2006 (not yet published), the Court of First Instance stated at paragraph 136 that "*the Court of Justice recognised that when a parent company holds 100% of the shares in a subsidiary which has been found guilty of unlawful conduct, there is a rebuttable presumption that the parent company actually exerted a decisive influence over its subsidiary's conduct*".

426 See Case T-314/01 *Avebe v Commission*, at paragraph 136: "*In that situation, it is for the parent company to reverse that presumption by adducing evidence to establish that its subsidiary was independent*".

427 See judgment of the Court of Justice in *Imperial Chemical Industries* v *Commission*, cited above, and judgment of the Court of First Instance in *Limburgse Vinyl Maatschappij NV and others (PVC II)*, cited above.

428 Judgment of the Court of First Instance in Case T-6/89, *Enichem Anic* v *Commission (Polypropylene)*, [1991] ECR II-1623; and judgment of the Court of Justice in Case C-49/92P, *Commission* v *Anic Partecipazioni*, [1999] ECR I-3125, paragraphs 47-49.

purely and simply absorbed by another legal entity, that latter entity must be held answerable for the whole period of the infringement and thus liable for the activity of the entity that was absorbed.[429] The mere disappearance of the person responsible for the operation of the undertaking when the infringement was committed does not allow it to evade liability.[430] Liability for a fine may thus pass to a successor where the corporate entity which committed the violation has ceased to exist in law.

3.2 Application to this case

(392) In application of the principles described above, this Decision is addressed to (i) the legal entities whose participation in the infringement has been established, and (ii) the legal entities which constitute a single economic entity with the former by having exercised decisive influence on them. The legal entities to which this Decision is addressed which constitute one undertaking are therefore held jointly and severally responsible for the infringement of Article 81 of the Treaty.

3.2.1 Repsol

3.2.1.1 Commission's findings

(393) It has been established (see chapter D, section 2.1.1.1.2) that it was the staff of Repsol Productos Asfálticos S.A. (RPA), which changed its name on 12 December 2001 to Repsol YPF Lubricantes y Especialidades S.A. (Rylesa), who participated in the cartel. RPA/Rylesa also participated in the cartel for and on behalf of Petronor and Asfalnor (see recitals (127) to (129)). Employees of RPA/Rylesa (together with Proas) initiated the collusive contacts with competitors in 1991 and continued them until the end of the infringement (see section 4 below).

(394) During the period 1991 to 2002, RPA/Rylesa was a virtually wholly-owned subsidiary of Repsol Petróleo S.A. (99.99%), which in turn was a virtually wholly-owned subsidiary (99.97%) of Repsol YPF S.A., the ultimate parent company of the Repsol group.

(395) In 1991, Petronor was owned 56.19% by Repsol S.A. (the ultimate parent company of the group, subsequently called Repsol YPF S.A.), and this shareholding increased to 85.98% on 31 December 1992. As to Asfalnor, this was owned 60% by Petronor in 1991 and, in April 1992, companies of the Repsol group already owned 80% of it (60% Petronor and 20% Repsol S.A.) (see recitals (23) and (24)).

(396) The Commission considers, in the light of the case law (see recitals (387) and (388)) and the shareholding relationship between RPA/Rylesa, Repsol Petróleo S.A. and

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

430 See judgment of the Court of First Instance in Case T-305/94, *Limburgse Vinyl Maatschappij NV and others (PVC II)*, cited above, paragraph 953.

Repsol YPF S.A., that RPA/Rylesa and Repsol Petróleo S.A. followed the policy laid down by their respective parent companies without enjoying an autonomous position on the market and therefore that these legal entities and Repsol YPF S.A. constituted one undertaking.

(397) In addition to the presumption based on ownership that parents exercise decisive influence over their wholly-owned or almost wholly-owned subsidiaries, the Commission found other factors which show that RPA/Rylesa (which also participated in the cartel for and on behalf of Petronor and Asfalnor), Repsol Petróleo S.A. and Repsol YPF S.A. belonged to a single economic entity and thus constituted one undertaking:

(a) one of the business activities of Repsol Petróleo S.A. is the production of bitumen which it subsequently sells to *[…]* for its transformation and commercialisation, thereby creating vertical links and synergies within the Repsol group. Indeed, *[…]*,[431] from 1991 to 2002 *[…]* communicated its bitumen requirements to *[…]*;

(b) vertical links and synergies within the Repsol group were also created by the sales made by *[…]* (between 1990 and 1998) of bitumen produced by *[…]* and by the agency services provided by *[…]* (as from 1999) to *[…]*;

(c) the financial results of RPA/Rylesa were consolidated with those of Repsol YPF S.A., and thus the profit or loss of the former, including any benefits resulting from the cartel, were reflected in the profit or loss of the whole Repsol group;

(d) RPA/Rylesa, Repsol Petróleo S.A. and Repsol YPF S.A. all include the label "Repsol" in their name;

(e) RPA/Rylesa prepared a report on a monthly basis with accounting data necessary to monitor its activities from a budgetary viewpoint which it provided to the *[…]* of RPA/Rylesa's Sole Administrator.[432] In addition to a balance sheet and a profit and loss statement, this report included information on sales evolution, margins and investments;

(f) *[…]* were part of Repsol's Bitumen Unit, headed by *[…]*, and this company took all relevant decisions of commercial policy concerning sales of bitumen (prices, sales conditions) made by *[…]* (as from 1999) and *[…]* (until 1998).[433]

3.2.1.2 Arguments of the parties

(398) In their replies to the Statement of Objections, Rylesa, Repsol Petróleo, S.A. and Repsol YPF, S.A. contested the attribution of liability to Repsol Petróleo, S.A. and Repsol YPF, S.A.

(399) Rylesa argued that there is no evidence of the direct participation of Repsol Petróleo and Repsol YPF in any infringement by RPA/Rylesa and that none of the elements retained by the Commission in the Statement of Objections proved that Repsol

431 *[…]*, response to request for information of 30 May 2006, p. 13252.
432 *[…]*, response to request for information of 30 May 2006, p. 13251.
433 *[…]*, response to request for information of 30 May 2006, p. 13255.

Petróleo or Repsol YPF exercised influence over the commercial activity of RPA/Rylesa.

(400) Rylesa claimed that the Statement of Objections was only based on a presumption of exercise of decisive influence derived from the ownership of shares and that such presumption should be rebuttable when it can be shown, as in this case, that the subsidiary acted in the market in an autonomous and independent way. As evidence of its autonomy and to rebut the presumption applied by the Commission, Rylesa mainly argues the following:

(a) the production of bitumen is a totally marginal activity within the businesses of Repsol Petróleo and Repsol YPF, which makes it unreasonable to think that the parent companies would have an interest in controlling the commercial activity of Rylesa;

(b) the Asphalt Unit, which included RPA/Rylesa and Asfalnor, was managed by RPA/Rylesa without any intervention from Repsol Petróleo or Repsol YPF;

(c) there is no overlapping between Repsol Petróleo's board members and the sole administrators of RPA/Rylesa;

(d) all the management powers related to Rylesa were formally attributed by RPA/Rylesa's Articles of Association to *[…]*, who in turn empowered *[…]* of Rylesa to take commercial decisions. Neither the Articles of Association nor Spanish law enabled Repsol Petróleo to give instructions on commercial policy to its subsidiary;

(e) in practice, all commercial decisions were always taken by *[…]* of RPA/Rylesa or its *[…]*. It was them, and only them, who negotiated and signed all the commercial contracts of the subsidiary with clients or suppliers and RPA/Rylesa was perceived by the latter as an autonomous entity;

(f) the contents of the monthly and annual reports which RPA/Rylesa sent to Repsol Petróleo did not enable the parent company to control the management of the business of RPA/Rylesa, and are therefore a further proof of its autonomy.

(401) Repsol Petróleo restates some of RPA/Rylesa's arguments (no evidence of the parents' participation in the infringement, marginal interest of the activity for the Repsol group, powers of *[…]* and *[…]*, lack of relevant content in the monthly reports) and analyses some of the elements indicated by the Commission in the Statement of Objections.

(402) Repsol Petróleo contends that intra-group sales cannot serve as evidence of a decisive influence of the parent because bitumen is a marginal product for Repsol Petróleo, *[…]*, so that the prices applied downstream by Rylesa to its clients were not relevant for Repsol Petróleo. It added that intra-group synergies are essentially pro-competitive and cannot be used to increase a sanction and that the fact that the full name of RPA/Rylesa included the word "Repsol" is not at all relevant.

(403) Repsol YPF claimed that it cannot be held liable for the infringements of the subsidiary of its subsidiary, mainly because it did not participate in any way in the

alleged anticompetitive conduct of RPA/Rylesa, which had sole responsibility for the Asphalts Business Unit.

(404) According to Repsol YPF, the "evidence" retained by the Commission to reinforce the presumption based on ownership consists only of a set of circumstantial indicia. In order to rebut the presumption, the parent company has to prove a negative fact, which is disproportionate by nature. All this results in practice in a concept of no-fault liability incompatible with the general principles of the law of sanctions.

3.2.1.3 Appraisal by the Commission and conclusion

(405) In accordance with case law, the Commission considers that, for the purposes of attributing liability within a group of companies, a parent company can be presumed to have exercised a decisive influence over its wholly-owned subsidiaries and therefore to constitute with them a single undertaking unless it submits evidence to the contrary. The parent companies and/or subsidiary can always reverse this presumption by producing sufficient evidence that the subsidiary "*decided independently on its own conduct on the market rather than carrying out the instructions given to it by its parent company and such that they fall outside the definition of an 'undertaking"*[434]. However, the Commission considers that the presumption cannot be rebutted by a general statement, as that put forward by Repsol, that the parent company was not directly involved in or was not even aware of the cartel or that it gave no instructions to its subsidiary in this respect.

(406) The contention that Rylesa's activities were marginal within the Repsol group disregards the fact that Rylesa's financial results are consolidated with those of the Repsol group, implying that its profit or loss, albeit marginal as compared to the total result of the group, are reflected in the profit or loss of the whole group. More importantly, any benefits resulting from the cartel were reflected in the profit or loss of the whole Repsol group. The fact that bitumen activities represent a small proportion of the group turnover does not in any way prove that the group allowed Rylesa complete autonomy in defining its conduct on the market.[435]

(407) The argument that RPA/Rylesa managed the Asphalts Business Unit, which included Asfalnor, combined with the fact that Asfalnor was a subsidiary of Petronor and Repsol YPF but not of RPA/Rylesa, in fact confirms the decisive influence exercised over all these subsidiaries by the parent company, Repsol YPF, as otherwise it cannot be explained why Asfalnor and Petronor should follow RPA/Rylesa's instructions.

(408) The Commission notes that the formal delegation of the daily management powers of a subsidiary to its directors or managers and the exercise of those powers in the negotiation and signing of contracts, required by the separate legal personality of the subsidiary, does not negate the decisive influence of the parent company but can be used to highlight it, given that it is the parent company, as sole shareholder, who nominates the sole administrator and has the ultimate power to remove it. As concerns the day-to-day business, the empowerment of local management in case of a wholly-

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434 Court of First Instance in Joined Cases T-71/03 etc., *Tokai Carbon and Others v Commission*, already cited, paragraph 61.

435 Judgment of 26 April 2007 in Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, *Bolloré SA and Others v Commission*, paragraph 144.

owned subsidiary is practically a universal feature of a well-run business needing specialised knowledge. In fact, legislation in all Member States requires a company, as a separate legal entity, to have its own board and managers responsible for the activities of the company. It would in fact be unexpected if a parent company, having set up (or acquired) a wholly-owned subsidiary for carrying out a certain activity, continued to remain involved in the daily management of that subsidiary. The presumption cannot therefore be rebutted simply by describing such typical features of a business organisation, which in no way prove the full autonomy of the subsidiaries. Lastly, the argument that Rylesa was perceived by third parties as an autonomous entity is irrelevant, as the notion of undertaking is an objective one and does not depend on third parties' perception. In any event, no evidence has been submitted of the alleged independence of Rylesa's *[…]*.

(409) It is also irrelevant that Rylesa is an "indirect" subsidiary of Repsol YPF, as indirect control is sufficient for the presumption of exercise of decisive influence over a subsidiary to apply.[436]

(410) In view of the foregoing, the Commission considers that Rylesa, Repsol Petróleo S.A. and Repsol YPF S.A. have not produced sufficient evidence to rebut the presumption of exercise of decisive influence by showing the independence of their respective subsidiaries, and that some of the arguments put forward may even be used to confirm that such influence was actually exercised by the parent companies.

(411) This conclusion is further based on the additional factors found by the Commission which support the conclusion that these three entities constituted a single undertaking, as discussed hereafter.

(412) As regards Rylesa's claims that its monthly and annual reports do not contain enough elements to enable its parent company to control its commercial activities, the Commission considers that the existence of such reporting obligations shows that the parent company had put in place a mechanism which allowed it to supervise its subsidiary's activities with a view to ensuring that they were in accordance with the commercial objectives and strategies set by the parent. In this connection, the allegation that the parent acted as a mere financial investor is not supported by evidence.

(413) The Commission notes that intra-group sales and synergies are clear evidence of the existence of a single undertaking including the subsidiary and the parent companies. The claim that Rylesa's sales to its customers were irrelevant for Repsol Petróleo S.A. cannot be reconciled with the fact that Rylesa's profits or losses stemming from those sales were consolidated with the accounts of its parent.

(414) Finally, the presence of the brand "Repsol" on the name of RPA/Rylesa cannot be considered irrelevant, as it shows inter-dependence between the parent and its subsidiaries. In this sense, the brand "Repsol" and its commercial value were actually used by the subsidiaries to further its commercial activities, and RPA/Rylesa's

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436 Judgement of 27 September 2006, Case T-330/01 *Akzo Nobel v Commission*, paragraph 78 ff. See also the CFI judgments in *Michelin II*, cit., paragraph 290 and in *Stora*, cit., paragraphs 78-86 (in particular with regard to two companies belonging to the Feno group, namely Feldmühle and CBC).

behaviour on the market could affect the reputation of the entire Repsol group. This circumstance no doubt led the parent company to control its subsidiary closely.

(415) The Commission concludes, on the basis of the presumption that a parent exercises decisive influence over its wholly-owned subsidiaries and taking into account the additional factors found by the Commission, that Repsol YPF, S.A., Repsol Petróleo, S.A. and Rylesa constituted one undertaking throughout the period of the infringement and that they should thus be held jointly and severally liable for it.

3.2.2 Proas

3.2.2.1 Commission's findings

(416) It has been established (see chapter D, section 2.1.1.1.2) that it was the staff of Proas who participated in the cartel. Employees of this legal entity (together with RPA) initiated the collusive contacts with competitors in 1991 and continued them until the end of the infringement (see section 4 below).

(417) During the period 1991 to 2002, Proas was a wholly-owned subsidiary of Cepsa (100%).

(418) The Commission considers, in the light of the case law (see recitals (387) and (388)) and the shareholding relationship between Proas and Cepsa, that Proas followed the policy laid down by its parent company without enjoying an autonomous position on the market and that these two legal entities therefore constituted one undertaking.

(419) In addition to the presumption based on ownership that parents exercise decisive influence over their wholly-owned subsidiaries, the Commission found other factors which show that Proas and Cepsa belonged to a single economic entity and thus constituted one undertaking:

(a) Proas commercialised all bitumen produced by its parent company Cepsa in its refineries,[437] thereby creating vertical links and synergies within the Cepsa group. Indeed, *[…]*,[438] Proas communicated its bitumen requirements to Cepsa on a monthly basis;

(b) the financial results of Proas are consolidated with those of Cepsa,[439] and thus the profit or loss of the former, including any benefits resulting from the cartel, are reflected in the profit or loss of the whole Cepsa group;

(c) by means of monthly reports, Proas' *[…]* informed *[…]*, appointed by Cepsa, of the subsidiary's sales, imports and exports, products, market and financial situation so as to enable Cepsa to supervise Proas' results;[440]

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437 See *[…]*, response to request for information of 21 April 2004, *[…]*, pp. 10468-10472.

438 *[…]*, response to request for information of 21 April 2004, p. 10169 and response to request for information of 29 May 2006, pp. 13242-13243.

439 *[…]*, response to request for information of 21 April 2004, p. 10169 and response to request for information of 29 May 2006, pp. 13242-13243.

440 *[…]*, response to request for information of 21 April 2004, p. 10169 and response to request for information of 29 May 2006, pp. 13242-13243.

(d) Proas associated itself with the name Cepsa in commercial relations: for example, the exchange agreements concluded by Proas with Nynäs in Spain in 1999, 2000 and 2001 are entitled “Agreement between Nynäs Petróleo S.A. and Proas (Cepsa)”[441] and contemporaneous documents relating to the infringement refer to Proas as "Cepsa" (see, for example, recitals (206), (210), (213), (216), (273), (278), (284)).

3.2.2.2 Arguments of the parties

(420) In its reply to the Statement of Objections, Cepsa contested the attribution of liability for the illicit behaviour of Proas claiming that the latter always acted as an autonomous entity, without forming an economic unity with Cepsa, and that Cepsa never exercised a decisive influence on Proas. Cepsa's main arguments in support of these claims are the following:

(a) the management of Proas and most of its directors did not change after the acquisition by Cepsa of 100% of Proas' shareholding and remained in place throughout the infringement;

(b) several members of Proas' Board were independent;

(c) the basis for the newly liberalized business of Proas was established from 1986 to 1991, a period in which Cepsa only owned 50% of Proas' shareholding. When Cepsa acquired control of Proas, it did not change the existing commercial policy;

(d) bitumen sales in the Spanish market only account for *[…]* % of Cepsa's total turnover;

(e) other factors show Proas' particular autonomy within the Cepsa group: different working conditions, pension funds, headquarters, internal organisation, participation in professional associations;

(f) Proas has all the necessary tools to operate as an autonomous entity: it has its own budget, assets and workers, establishes its own objectives and takes its own commercial, operative and investment decisions, without Cepsa's financial backing. The supply agreement it has with Cepsa does not prevent it from buying bitumen from other suppliers. It has its own research and development centre and owns intellectual property rights;

(g) Proas is perceived as an independent entity by third parties and never acts in the name or on behalf of Cepsa;

(h) Cepsa did not participate in the infringement nor did it instruct Proas to participate. There was never a representative of Cepsa at the cartel meetings and there is no evidence of meetings between Cepsa and Proas on matters related to the cartel. In January 2003, a few months after learning about Proas' infringing behaviour, Cepsa launched an antitrust compliance program throughout the group;

441 *[…]*, inspection document, pp. 02166, 02151, 02154.

(i) Cepsa's situation is different from that of other cartel participants as there is no evidence of knowledge of the cartel by the parent company and the entity participating in the cartel was not at the same time a producer and a distributor of bitumen;

(j) monthly reports to the Proas *[…]* (appointed by Cepsa) do not contain details of Proas' commercial policy;

(k) although Proas' results were included in Cepsa's consolidated accounts, Proas had financial, economic and commercial autonomy;

(l) exchange agreements concluded between Proas and Nynäs do not contain any reference to Cepsa, apart from its logo, and were signed by Proas' executives.

3.2.2.3 Appraisal by the Commission and conclusion

(421) In accordance with the case law, the Commission considers that, for the purposes of attributing liability within a group of companies, a parent company can be presumed to have exercised a decisive influence over its wholly-owned subsidiaries and therefore to constitute with them a single undertaking unless it submits evidence to the contrary. The parent companies and/or subsidiary can always reverse this presumption by producing sufficient evidence that the subsidiary "*decided independently on its own conduct on the market rather than carrying out the instructions given to it by its parent company and such that they fall outside the definition of an 'undertaking"*[442]. However, the Commission considers that the presumption cannot be rebutted by a general statement that Cepsa was not directly involved in or was not even aware of the cartel or that it gave no instructions to Proas in this respect.

(422) The Commission notes that the elements invoked by Cepsa to show Proas' autonomy, in particular when compared to other subsidiaries of the Cepsa group (management and commercial policy unchanged after acquisition of control, some independent Board members, different working conditions, pension funds, headquarters, internal organisation, professional associations, research and development centre, intellectual property rights), were not motivated by constraints on Cepsa's influence but rather the result of a deliberate decision by Cepsa to maintain certain elements unchanged when it acquired the remaining 50% of Proas' shares.

(423) The contention that Proas' activities were marginal within the Cepsa group and the statements about its commercial, financial and economic autonomy disregard the fact that Proas' financial results are consolidated with those of the Cepsa group. This means that Proas' profit or loss, as well as its assets and debts, are reflected in the accounts of the whole group, and that the vertical industrial links between the two entities must have led the parent company to influence the economic independence of the subsidiary. More importantly, any benefits resulting from the cartel were reflected in the profit or loss of the whole Cepsa group. In any event, the presumption cannot be rebutted simply by describing the typical features of a business organisation, which in no way prove the full autonomy of the subsidiaries (see recital (408) above).

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442 Court of First Instance in Joined Cases T-71/03 etc., *Tokai Carbon and Others v Commission*, already cited, paragraph 61.

(424) The claim that Proas was perceived as an autonomous entity by third parties contradicts the available evidence, namely the presence of Cepsa's logo on some of Proas' contracts, and is, in any event, irrelevant as the notion of undertaking is objective and does not depend on third parties' perception.

(425) In view of the foregoing, the Commission considers that Cepsa has not produced sufficient evidence to rebut the presumption that a parent exercises decisive influence over its wholly-owned subsidiary by showing Proas' independence.

(426) This conclusion is further based on the additional factors found by the Commission which support the conclusion that these two entities constituted a single undertaking, as discussed hereafter.

(427) With regard to Proas' claim that its monthly reports to Cepsa do not contain enough elements to enable the latter to control its commercial activities, the Commission considers that the existence of such reporting obligations shows that the parent company had put in place a mechanism which allowed it to supervise its subsidiary's activities with a view to ensuring that they were in accordance with the commercial objectives and strategies set by the parent.

(428) The presence of Cepsa's logo on some of the contracts concluded by Proas cannot be considered irrelevant, as it shows inter-dependence between the parent and its subsidiary. In this sense, the brand "Cepsa" and its commercial value were actually used by Proas to further its commercial activities, and Proas' behaviour on the market could affect the reputation of the entire Cepsa group. This circumstance no doubt led the parent company to control its subsidiary closely.

(429) Finally, the fact that Proas did not produce bitumen but only distributed it reinforces the argument that vertical ties and synergies existed between Cepsa and Proas which are not negated by the fact that Proas occasionally bought bitumen from other producers[443].

(430) The Commission concludes, on the basis of the presumption that a parent exercises decisive influence over its wholly-owned subsidiaries and taking into account the additional factors found by the Commission, that Cepsa and Proas constituted one undertaking throughout the period of the infringement and that they should thus be held jointly and severally liable for it.

3.2.3 BP

(431) It has been established (see chapter D, section 2.1.1.1.2) that it was the staff of BP España S.A. and of BP Oil España S.A., both with headquarters in Madrid, who participated in the cartel. Employees of these legal entities held collusive contacts with competitors from 1991 and continued them until BP filed its immunity application (see section 4 below).

(432) From 1991 to 2002, BP España S.A. was an indirect wholly-owned subsidiary of BP plc.

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443 Judgment of 26 April 2007 in Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, *Bolloré SA and Others v Commission*, paragraph 144.

(433) From 1991 to 1999, BP España S.A. owned 93% of BP Oil España S.A. From 1999 to 2002, BP España S.A. was the sole shareholder of BP Oil España S.A.

(434) The Commission considers, in the light of the case law (see recitals (387) and (388)) and the shareholding relationship between BP Oil España S.A., BP España S.A. and BP plc, that BP Oil España S.A. and BP España S.A. followed the policy laid down by their respective parent companies without enjoying an autonomous position on the market and therefore that these two legal entities and BP plc constituted one undertaking.

(435) In addition to this presumption based on ownership, the Commission found other factors which show that BP Oil España S.A., BP España S.A. and BP plc constituted a single undertaking. These can be summarized as follows: the existence of a group business structure which included a bitumen business unit at a European or a wider level to which the *[…]* in Spain reported; a series of internal e-mails exchanged between BP entities in which bitumen prices in Spain are discussed and market sharing is mentioned; the vertical links and synergies between different entities within the BP group; the consolidation of financial results of BP Oil España S.A. and BP España S.A. with those of BP plc; and the inclusion of the brand "BP" in the names of BP Oil Refinería de Castellón S.A., BP Oil España S.A., BP España S.A. and BP plc.

(436) In its reply to the Statement of Objections, BP did not challenge the Commission's findings concerning liability. The Commission thus concludes, on the basis of the presumption that a parent exercises decisive influence over its wholly-owned subsidiaries and taking into account the additional factors found by the Commission, that BP plc, BP Oil España S.A. and BP España S.A. constituted one undertaking throughout the period of the infringement and that they should thus be held jointly and severally liable for it.

3.2.4 Nynäs

3.2.4.1 Commission's findings

(437) It has been established (see chapter D, section 2.1.1.1.2) that it was the staff of Nynäs Petróleo S.A., with headquarters in Madrid, who participated in the cartel. Employees of this legal entity held collusive contacts with competitors from 1991 and continued them until the end of the infringement (see section 4 below).

(438) From 22 May 1991 to 1999, Nynäs Petróleo S.A. was a wholly-owned subsidiary of Nynäs International BV, a holding company for international subsidiaries. Nynäs International BV was, in turn and for the same period, a wholly-owned subsidiary of AB Nynäs Petroleum, the ultimate parent company of the Nynäs group.

(439) In 1999, AB Nynäs Petroleum acquired the entire issued share capital of Nynäs Petróleo S.A. from Nynäs International BV. From 1999 to 2003, Nynäs Petróleo S.A. was a wholly-owned subsidiary of AB Nynäs Petroleum.

(440) On 12 June 2003, Nynäs International BV was wound up. Upon dissolution, the share capital of Nynäs International BV was repaid to AB Nynäs Petroleum. AB Nynäs Petroleum thereby became the economic successor of Nynäs International BV and

took over liability for previous infringements committed by Nynäs International BV, as the latter ceased to exist as a separate legal entity.

(441) On 24 June 2003, Nynäs Refining AB acquired the entire issued share capital of Nynäs Petróleo S.A. from AB Nynäs Petroleum. Nynäs Refining AB was then and still is a wholly-owned subsidiary of AB Nynäs Petroleum.

(442) The Commission considers, in the light of the case law (see recitals (387) and (388)) and the shareholding relationship between Nynäs Petróleo S.A., Nynäs International BV and AB Nynäs Petroleum, that Nynäs Petróleo S.A. and Nynäs International BV followed the policy laid down by their parent companies without enjoying an autonomous position on the market, and therefore that these two legal entities and AB Nynäs Petroleum constituted one undertaking.

(443) While both Nynäs International BV and AB Nynäs Petroleum wholly owned Nynäs Petróleo S.A. at various points in the period 1991-2002, Nynäs claimed that this legal relationship did not involve an exercise of control over Nynäs Petróleo S.A. Nynäs also stated that, despite the legal structure of the Nynäs group, the group had an operational structure for which the relationship between parent and subsidiary companies was largely irrelevant as the Nynäs group was operationally organised in geographic or business units.[444] The Commission does not consider that this constitutes sufficient evidence of the absence of exercise of a decisive influence by the parent companies over their wholly-owned subsidiaries.

(444) In addition to the presumption based on ownership that parents exercise decisive influence over their wholly-owned subsidiaries, the Commission found other factors which confirm that Nynäs Petróleo S.A., Nynäs International BV and AB Nynäs Petroleum belonged to a single economic entity and thus constituted one undertaking.

(445) These factors concern the operational structure of the Nynäs group as established by AB Nynäs Petroleum and show that Nynäs Petróleo S.A. did not enjoy an autonomous position on the market. They can be summarised as follows:[445]

(a) as indicated, the Nynäs group is operationally structured in geographic or business units. Thus, from 1991 to 2002, certain operational functions of the Nynäs group's bitumen business, such as marketing strategy, policy and sales, were coordinated by a company or a business unit separate from Nynäs Petróleo S.A. *[…]*[446]. The precise functions coordinated by the bitumen business unit were and are detailed in an agreement *[…]*, by virtue of which the individual subsidiaries consent to certain of their marketing strategy and policy functions being centralised, carried out and coordinated by this bitumen business unit;

(b) a reporting structure ensures that AB Nynäs Petroleum maintains an overall view of the performance of the Nynäs group. Each bitumen subsidiary must produce several reports: *[…]*. Essentially, these reports contain an income statement, balance sheet, key figures and a cash-flow report. The monthly reports provided by

444 For example, there exist currently three entities known as "Businesses": Nynäs Refining, Nynäs Bitumen and Nynäs Naphtenics.

445 *[…]*, response to request for information of 10 May 2004, pp. 10676-10710.

446 *[…]*.

Nynäs Petróleo S.A. to the bitumen business unit also included general margin and price information and general information about volumes and customers;

(c) another reporting obligation imposed on bitumen subsidiaries concerns a report to a regional team within the bitumen business unit, which provides an overall coordinating function for the sales and marketing of bitumen;

(d) decisions on overall corporate objectives, high level group strategies, policies, budget and planning, major projects and functional coordination are taken by AB Nynäs Petroleum (sales and marketing functions being reserved for the business units). Nynäs Petróleo S.A. could thus not have, on its own will, deviated from the instructions given by AB Nynäs Petroleum on group-wide coordination and strategy. The fact that AB Nynäs Petroleum was not directly involved in the commercial activities of Nynäs Petróleo S.A. is not decisive for the question whether AB Nynäs Petroleum and Nynäs Petróleo S.A. should be considered to constitute a single economic unit, as division of tasks is a normal phenomenon within a group of companies;

(e) operational decisions are taken by the management of the bitumen business unit and are adopted and carried out by the management of Nynäs Petróleo S.A.;

(f) the *[…]* of Nynäs Petróleo S.A. (*[…]*) has authority to enter into all contracts but subject to precisely defined financial thresholds.[447] Above these thresholds, there is a requirement for presidential approval;

(g) although the management of Nynäs Petróleo S.A. is in principle responsible for pricing decisions, prices charged to a customer *[…]* (*[…]*) were passed to Nynäs NV for information purposes, and staff of Nynäs NV also occasionally visited this customer to maintain good customer relations;

(h) although the customer intimacy philosophy of the Nynäs group requires the majority of powers to be delegated to individual subsidiaries, these have agreed, as discussed above, to certain powers in the area of coordination of strategy, planning and marketing being centralised in the bitumen business unit and managed by the company where the business unit lies. This means that a central administration has the role of minimising costs by exploring advantages of scale and internal synergies;

(i) *[…]*. The Commission considers that the sale and marketing in Spain by Nynäs Petróleo S.A. of bitumen produced by other companies of the Nynäs group, whose logistics were also organised by other companies of the Nynäs group, creates vertical links and synergies within the group;

(j) the financial results of Nynäs Petróleo S.A. are consolidated with those of AB Nynäs Petroleum and thus the profit or loss of the former, including any benefits resulting from the cartel, are reflected in the profit or loss of the whole Nynäs group;

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447 See *[…]*, response to request for information of 10 May 2004, p. 10697.

(k) Nynäs Petróleo S.A., Nynäs International BV and AB Nynäs Petroleum all include the label "Nynäs" in their name.

(446) Further to the above factors, additional evidence that Nynäs Petróleo S.A. was not an autonomous entity within the Nynäs group but constituted an undertaking together with other Nynäs entities up to AB Nynäs Petroleum was contained in many documents found by the Commission during the inspection at the premises of Nynäs Petróleo S.A. These documents show that:

(a) managers of Nynäs Petróleo S.A. often participated at manager meetings *[…]* with managers of other Nynäs entities where issues were jointly reviewed and tasks distributed. Issues discussed at these meetings included prices and hedging, team dynamics, Nynäs vision and strategy, new structure of the group's sales department, corporate marketing strategy, the group's sales/price and image strategy and new group meeting structure;[448]

(b) Nynäs Petróleo S.A. participated in strategy meetings with staff of other Nynäs entities *[…]* to discuss issues related to the Spanish market and subsequently sent reports to participants or received instructions or information on actions to be taken;[449]

(c) Nynäs Petróleo S.A. reported to or discussed with staff of other Nynäs entities *[…]* developments on the Spanish and Portuguese markets, *[…]* and meetings with competitors (for example, Petrogal, *[…]*);[450]

(d) Nynäs Petróleo S.A. received instructions from staff of other Nynäs entities *[…]* concerning issues such as how to market certain products, credit limits, the use of a marketing database accessible to the group's marketing and sales people and the calculation of Spanish exchange rates;[451]

(e) Nynäs Petróleo S.A. proposed, on its own initiative or on request, its own key annual objectives or action plans for a given period to other Nynäs entities *[…]* [452]

3.2.4.2 Arguments of the parties

(447) In its reply to the Statement of Objections, AB Nynäs Petroleum contested the attribution of liability to it for the illicit behaviour of Nynäs Petróleo S.A. Its main arguments can be summarised as follows:

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448 See, for example, pp. 01508-01512, 01527, 01531-01534, 01535-01553, 01554-01561, 01562- 01597, 01643-01661, 01674-01684, 01692-01695, 01699-01704, 01705-01710, 01724, 01727-01730, 01739, 01758-01778, 01779, 01781.

449 See, for example, pp. 01503, 01598, 01606-01607, 01608, 01743, 01752-01754, 01755-01756, 01832-01834, 01844-01861, 01927, 01937-01938, 02311-02312.

450 See, for example, pp. 01138-01142, 01152, 01153-01154, 01462-01463, 01741, 01802-01830, 01381, 01876-01877, 01881-01882, 01883-01885, 01891-01898, 01899-01902, 01928-01930, 01955-01957, 01961-01962, 01979, 02000, 02014, 02032, 02036-02038, 02086-02091, 02178-02180, 02181-02182, 02190, 02197, 02199, 02208-02214, 02215-02218, 02285, 02290-02291, 02292-02294, 02308.

451 See, for example, pp. 01155, 01182, 01504, 01663, 02300.

452 See, for example, pp. 01790-01791, 01792-01795, 01798-01800.

(a) the Commission misinterpreted case law as it considered the influence exerted by the parent company over its subsidiary in general terms and not in the context of the infringement concerned;

(b) the Commission failed to identify the appropriate addressee within the Nynäs group, because: (i) in cases where the infringement is alleged to operate on a single national market and there is no evidence of knowledge or of some kind of actual involvement of the parent company in the infringement, the Commission has generally imposed the fine only on the national subsidiary company which is responsible for the infringement; and (ii) if there was only a single undertaking in the Nynäs group (which is denied by Nynäs) the Statement of Objections should have been addressed to AB Nynäs Petroleum alone;

(c) attribution of liability to AB Nynäs Petroleum in this case is unreasonable and discriminatory, because: (i) the Commission has applied a lesser standard of proof in relation to AB Nynäs Petroleum than it has in the case of Petrogal, in which it claims to have found evidence of actual knowledge of the infringement by the parent company; and (ii) the Commission has not applied the presumption in order to hold the Portuguese state liable, despite the fact that it owned 100% of Petrogal until 1999, which contrasts with the treatment given to private shareholders;

(d) there is no justification for the attribution of liability to Nynäs International BV, which was, in any event, a financial holding company, which makes the attribution of liability to AB Nynäs Petroleum as its economic successor irrelevant;

(e) there is no policy justification for imputing liability to AB Nynäs Petroleum, as it has not sought to direct the Commission to some insolvent or impecunious entity within the Nynäs group;

(f) Nynäs Petróleo S.A. had substantial delegated authority in relation to Spanish customers and AB Nynäs Petroleum had no responsibility for the sales and marketing policy of Nynäs Petróleo S.A.

3.2.4.3 Appraisal by the Commission and conclusion

(448) With regard to Nynäs' argument that the Commission allegedly misinterpreted case law, the Commission considers, in accordance with the case law that, in order to hold a parent company liable for an infringement of its subsidiary, it suffices that both parent and subsidiary constitute one "undertaking", that is to say, an economic unit which consists of a unitary organisation of personnel, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the competition rules.[453] Case law consistently refers to an absence, on the part of the subsidiary, of autonomy in determining its

[453] See judgments of the Court of First Instance in Case T-11/89, *Shell v Commission*, [1992] ECR II-757, paragraph 311; Case T-352/94, *Mo och Domsjö v Commission*, already cited, paragraph 87; Cases T-137-94, *ARBED v Commission*, [1999] ECR II-303, paragraph 90 (subsequently annulled, but on another point) and T-145/94, *Unimetal v Commission*, [1999] ECR II-585, paragraph 600, and Case T-9/99, *HFB et al. v Commission*, [2002] ECR II-1487, paragraph 54.

course of action in the market and not, more specifically, with respect to the infringement.[454]

(449) The Commission rejects Nynäs' claims concerning the identification of the appropriate addressee of a Commission act within the Nynäs group. As explained in recital (386), a decision concerning an infringement of Article 81 of the Treaty may be addressed to one of several entities having their own legal personality and forming part of an undertaking, and thus to a group as a whole, or to subgroups, or to subsidiaries. In addition, the Commission imputes liability to the entities which exercise decisive influence on a case by case basis, which implies a degree of discretion.[455] In this respect, the Commission generally follows the policy of attributing liability to the parent company which has exercised a decisive influence over a wholly-owned subsidiary regardless of whether it may consider the subsidiary to be insolvent or impecunious.

(450) The Commission notes that AB Nynäs Petroleum has not provided any evidence to rebut the presumption of decisive influence as it has only made general statements about its subsidiary's autonomy. In fact, the statement by AB Nynäs Petroleum that it was Nynäs NV (now Nynäs Belgium AB) which had the delegated power to make strategic, operational and policy decisions in the bitumen business is another indication that control was actually exercised, as this can only be explained, in the absence of any shareholding links between Nynäs NV and Nynäs Petróleo, S.A., by the exercise of decisive influence on the latter by Nynäs NV on behalf AB Nynäs Petroleum. When a supervising company is a sister company of a supervised subsidiary directly involved in the anti-competitive behaviour, it may be assumed that the powers of the supervising company can only be based on a decision of the parent company to leave it to that supervising company to oversee the supervised company's business and to instruct the latter to obey the decisions of its supervising sister company[456]. In other words, the ultimate parent company has decided to exercise its influence over its subsidiary through another company of the group. The ultimate parent company has not given up its exercise of the decisive influence but has just decided to exercise it differently, through delegation.

(451) Similarly, the mere assertion that Nynäs International BV was a financial holding company does not suffice to rebut the presumption. Even if it were, AB Nynäs

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454 See judgments of the Court of Justice in Case 48/69, *Imperial Chemical Industries v Commission*, cited above, paragraph 134 and Case 107/82, *AEG v Commission*, cited above, paragraph 50.

455 See Case T-65/89, *BPB Industries v Commission*, [1993] ECR II-389, paragraph 154, and Case T-203/01, *Michelin v Commission*, previously cited, paragraph 290.

456 See paragraph 129 of the CFI's judgment of 27 September 2006 in Case T-43/02, *Jungbunzlauer v Commission*, not yet reported and not available in English. "*Sur la base des déclarations communes (…), la Commission pouvait à juste titre estimer que, (…), les activités de Jungbunzlauer GmbH se limitaient à la simple production d'acide citrique alors que la direction des activités du groupe, y compris en ce qui concerne ce produit, était confiée à Jungbunzlauer de sorte que Jungbunzlauer GmbH ne déterminait pas de façon autonome son comportement sur ce marché, mais appliquait, pour l'essentiel, les instructions données par Jungbunzlauer. En effet, la Commission pouvait valablement en déduire que la société mère commune à Jungbunzlauer GmbH et à Jungbunzlauer avait décidé de confier à cette dernière la tâche de conduire l'ensemble des activités du groupe et, par conséquent, également celles liées au comportement du groupe sur le marché faisant l'objet de l'entente, à savoir celui de l'acide citrique.*"

Petroleum would still be liable for exercising decisive influence over Nynäs Petróleo S.A. throughout the entire period of the infringement.

(452) As regards the delegation of authority to the Spanish subsidiary, it has already been explained (see recital (408)) that recourse to local expertise and the empowerment of local management in case of a wholly-owned subsidiary are practically universal features of a well-run business needing local or specialised knowledge. In fact, legislation in all Member States requires a company, as a separate legal entity, to have its own board and managers responsible for the activities of the company. It would in fact be unexpected if a parent company, having set up (or acquired) a wholly-owned subsidiary for carrying out a certain activity, continued to remain involved in the daily management of that subsidiary. The presumption cannot therefore be rebutted simply by describing such typical features of a business organisation, which in no way prove the full autonomy of the subsidiaries.

(453) Finally, although the presumption that a parent exercises decisive influence over its wholly-owned subsidiaries would suffice in the absence of evidence for its rebuttal, in order to hold AB Nynäs Petroleum liable for the infringement of Nynäs Petróleo, S.A. the Commission has put forward a significant number of additional factors which support the conclusion that the two entities constituted a single undertaking.

(454) The Commission concludes, on the basis of the presumption that a parent exercises decisive influence over its wholly-owned subsidiaries and taking into account the additional factors found by the Commission, that AB Nynäs Petroleum, Nynäs International BV and Nynäs Petróleo S.A. constituted one undertaking from 22 May 1991 to 1 October 2002. The Commission also considers that AB Nynäs Petroleum is the economic successor of Nynäs International BV. Accordingly, Nynäs Petróleo S.A. and AB Nynäs Petroleum should be held jointly and severally liable for the infringement.

3.2.5 Petrogal

3.2.5.1 Commission's findings

(455) It has been established (see chapter D, section 2.1.1.1.2) that it was the staff of Petrogal Española S.A. (now Galp Energia España S.A.), with headquarters in Madrid, who participated in the cartel. Employees of this legal entity held collusive contacts with competitors from 1995 and continued them until the end of the infringement (see section 4 below).

(456) Petrogal Española S.A. (now Galp Energia España S.A.) was, from 1990 until 2003, 89.29% owned by Petróleos de Portugal S.A. and 10.71% by Tagus, RE, S.A. The latter is an insurance company 98% owned by Petróleos de Portugal S.A. Since 2003, Petrogal Española S.A. (now Galp Energia España S.A.) has been a wholly-owned subsidiary of Petróleos de Portugal S.A.

(457) In view of the foregoing, Petróleos de Portugal S.A. was, for the period during which Petrogal participated in the infringement (1995-2002, see section 4 below), the owner of Petrogal Española S.A. (now Galp Energia España S.A.), either directly (89.29%) or indirectly through its almost wholly-owned subsidiary Tagus, RE, S.A. (10.71%).

(458) Petróleos de Portugal S.A. has been, in turn, a wholly-owned subsidiary of Galp Energia, SGPS, S.A. since 1999. Prior to 1999, it was wholly-owned by the Portuguese State.

(459) The Commission considers, in the light of the case law (see recitals (387) and (388)) and the shareholding relationship between Petrogal Española S.A. (now Galp Energia España S.A.), Petróleos de Portugal S.A. and Galp Energia, SGPS, S.A., that Petrogal Española S.A. (now Galp Energia España S.A.) and Petróleos de Portugal S.A. followed the policy laid down by their respective parent companies without enjoying an autonomous position on the market, and therefore that these two legal entities and also, from 22 April 1999, Galp Energia, SGPS, S.A., constituted one undertaking.

(460) In addition to this presumption based on ownership that parents exercise decisive influence over their wholly-owned subsidiaries , the Commission found other factors which indicate that Petrogal Española S.A. (now Galp Energia España S.A.), Petróleos de Portugal S.A. and Galp Energia, SGPS, S.A. belonged to a single economic entity and thus constituted one undertaking:[457]

(a) from 1991 to 2000, Petrogal Española S.A. (now Galp Energia España S.A.) reported information to Petróleos de Portugal S.A. and, as from 2001, also to Galp Energia, SGPS, S.A. This information consisted of the annual report, produced annually, and the balance sheet, the profit and loss statement and the management report, produced on a monthly basis. Management reports included information on sales and costs in respect of all business lines of Petrogal Española S.A. (now Galp Energia España S.A.);

(b) the control of the achievement of the objectives fixed for Petrogal Española S.A. (now Galp Energia España S.A.) was carried out by Petróleos de Portugal S.A.

(c) the business activity of Petróleos de Portugal S.A. is, inter alia, the production of bitumen which it subsequently sells to Petrogal Española S.A. (now Galp Energia España S.A.) for its commercialisation in Spain, thereby creating vertical links and synergies within the Galp group;

(d) the financial results of Petrogal Española S.A. (now Galp Energia España S.A.) are consolidated with those of Galp Energia, SGPS, S.A., and thus the profit or loss of the former, including any benefits resulting from the cartel, are reflected in the profit or loss of the whole Galp group;

(e) before Petrogal Española S.A. changed its name, it shared the trading name "Petrogal" with its majority shareholder Petróleos de Portugal - Petrogal S.A. After its name change, Galp Energia España S.A. and the ultimate parent company of the Galp group, Galp Energia, SGPS, S.A., both include the label "Galp" in their name.

(461) The Commission found additional evidence that Petrogal Española S.A. and Petróleos de Portugal S.A. were not autonomous entities within the Galp group but constituted

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457 *[…]*, response to request for information of 19 April 2004, pp. 09204-09205, and response to request for information of 30 May 2006, pp. 13246-13248.

an undertaking up to Galp Energia, SGPS, S.A. in the following documents and e-mails internal to the Galp group:

(a) internal memorandum written on letterhead "Galp", found by the Commission during the inspection at the premises of Petróleos de Portugal S.A. and dated 9 April 1996, in which, amongst others, the following issues are discussed: "Current balance Galp Especialidades - Repsol - Petrogal Espanhola"; "Repsol/Petrogal Espanhola"; "Meeting in Madrid (96.03.21) Petrogal/Repsol/Petrogal Espanhola"; "Profit Petrogal Espanhola"; "Profit Petrogal Portuguesa"; "Profit Petrogal Portuguesa + Petrogal Espanhola".[458]

In addition, this memorandum shows that the Portuguese entities of the Galp group were perfectly aware of the existence of the "asphalt table" (see recital (229));

(b) e-mail of 19 October 2000 from *[…]* of Petróleos de Portugal S.A. to *[…]* of Petrogal Española S.A. in which the former gives precise instructions to his Spanish colleague on how much and by when bitumen prices should be increased in Spain (see recital (314)). In the same e-mail, *[…]* asks his colleague in the Spanish subsidiary to forward to him information on prices:

[…] ;[459]

(c) e-mail of 29 August 2002 from *[…]* of Petrogal Española S.A. to *[…]* of Petróleos de Portugal S.A., in which meetings of Petrogal Española S.A. with Cepsa and Repsol are discussed (see recital (278)). An additional factor which, in this e-mail, reveals that the Spanish and the Portuguese entities of Petrogal are part of the same undertaking is the fact that *[…]* mentions to his colleague in the Portuguese parent company the difficulties stemming from the fact that, in the Spanish subsidiary, *[…]* and requests *[…]*.[460]

3.2.5.2 Arguments of the parties

(462) In their joint reply to the Statement of Objections, Galp Energia España S.A., Petróleos de Portugal, S.A. and Galp Energia, SGPS, S.A. contested the attribution of liability to the two parent companies for the illicit behaviour of their Spanish subsidiary for the period before March 1998 (they also denied its participation in the cartel after that date, a claim which is examined in section 4).

(463) They explained that, in the course of 1997, the Spanish key executives of Petrogal Española S.A. were replaced by Portuguese ones as a result of a process called "Iberisation" with the aim of gradually unifying the management of each business in the Iberian Peninsula. Petrogal argues that, before the initiation of that process, Petrogal Española S.A. enjoyed a fully autonomous position on the Spanish bitumen market and was known to be extremely independent from its Portuguese parent in the conduct of its business. According to Petrogal, the Statement of Objections contained no evidence to the contrary.

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458 *[…]*, inspection document, pp. 02530-02533.

459 *[…]*, inspection document, p. 02368. *[…]*

460 *[…]*, inspection document, p. 02523. *[…]*

3.2.5.3 Appraisal by the Commission and conclusion

(464) The Commission first notes that it is contradictory for the parties to affirm that the so-called "Iberisation" process of management unification throughout the Iberian Peninsula started in 1997 and claim at the same time that Petróleos de Portugal S.A. exercised no decisive influence over Petrogal Española S.A. before March 1998.

(465) In any event, the Commission observes that, as a result of the presumption based on ownership that parents exercise decisive influence over their wholly-owned subsidiaries, it is Petrogal which, in order to avoid parental liability, must submit sufficient evidence of the autonomous behaviour of the Spanish subsidiary before 1998. Petrogal's argument in this respect is that, before 1997, the Spanish business "was known to be extremely independent". Such a general statement cannot be considered sufficient to rebut the presumption.

(466) With regard to the internal documents found by the Commission as additional evidence of the exercise of decisive influence, Petrogal simply claims in its reply to the Statement of Objections that they do not prove that Petrogal Española S.A. was not autonomous in the period before March 1998. The Commission rejects this claim and considers that these contemporaneous documents constitute clear examples of the actual exercise of decisive influence over Galp Energia España S.A. by its parent company before and after 1998.

(467) The Commission concludes, on the basis of the presumption that a parent exercises decisive influence over its wholly-owned subsidiaries and taking into account the additional factors found by the Commission, that Petróleos de Portugal, S.A. and Galp Energia España, S.A. constituted one undertaking throughout the entire period in which the latter participated in the infringement and they should thus be held jointly and severally liable for it, and that Galp Energia, SGPS, S.A. formed part of the same undertaking from its establishment on 22 April 1999 until the end of the infringement and should accordingly be also held jointly and severally liable for that period.

4 DURATION OF THE INFRINGING BEHAVIOUR

4.1 Starting date for each undertaking

(468) *[…]*.[461] *[…]*[462] *[…]*.[463] *[…]*.[464] *[…]*[465]

(469) *[…]*.[466]

(470) *[…]*.[467]*[…]*[468]

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461 *[…]*, response to request for information of 24 March 2004, pp. 07793-07794.
462 *[…]*, response to request for information of 24 March 2004, p. 07794; *[…]*.
463 *[…]*, response to request for information of 24 March 2004, p. 07796.
464 *[…]*, response to request for information of 24 March 2004, p. 07796.
465 *[…]*, response to request for information of 24 March 2004, pp. 07794 and 07796.
466 *[…]*.
467 *[…]*.
468 *[…]*.

(471) Given that *[…]* coincide in declaring that the cartel was ongoing in 1991; that Proas under its current form and RPA were established on 1 March 1991 (see paragraph (117)); that *[…]* state that Nynäs was part of the cooperation arrangements already in 1991; and that the first contemporaneous document in the Commission's possession pointing to Nynäs' participation in the cartel, *[…]*, confirms that this company was participating in the cartel in October 1991 through a quota (see recitals (201) to (203)) which must have been agreed at the latest towards the beginning of that year (see recital (130)), the Commission considers that the cartel started at least as early as 1 March 1991 between Repsol, Proas and Nynäs Petróleo, S.A.

(472) The starting date for the infringement by AB Nynäs Petroleum is considered to be the date on which its wholly-owned subsidiary Nynäs International BV acquired 100% of the shares of Asfaltos Europeos S.A. (currently Nynäs Petróleo S.A.), that is 22 May 1991 (see recital (47)).

(473) With regard to BP, and given that this company acquired control over Petromed in July 1991, the Commission considers that BP started its participation in the cartel at least as early as 1 August 1991.

(474) *[…]*. Petrogal explains in its response to the Statement of Objections that Repsol contacted it *[…]* to invite it to cooperate with the "asphalt table", and that the three bitumen producers then requested Petrogal to reduce its sales in 1995 to an amount which was eventually fixed at 48 000 tonnes. Petrogal argues that, because sales of bitumen start in March of each year, the starting date of Petrogal's contacts with other members of the "asphalt table" should be March 1995.

(475) The Commission notes that *[…]* states that the first anti-competitive contact with Repsol occurred on an undetermined date between January 1995 and March 1995, and that it is therefore clear that, on an undetermined date between January 1995 and March 1995, Repsol and Petrogal already had an anti-competitive discussion concerning a market quota for Petrogal, even if the quota would not be implemented until later when sales of bitumen would start. In accordance with the case law, the mere fact of making an agreement whose aim is to restrict competition in itself constitutes a breach of Article 81(1) of the Treaty irrespective of whether the agreement is actually implemented.[469] This means that the starting point to be taken when establishing the duration of an infringement is the date an anti-competitive agreement is made and not the date the agreement is implemented. In view of the case law, *[…]* statement that it was invited to hold anti-competitive discussions on an undetermined date between January 1995 and March 1995, and the fact that the quota for Petrogal was normally discussed in December/January (see recital (130)(f)), the Commission considers that the starting date of Petrogal's anti-competitive contacts with other cartel members should be 31 January 1995 (and not 1 March 1995 as contended by *[…]* as this is only the date when the quota accepted by Petrogal on an undetermined date between January 1995 and March 1995 was to be implemented). Within the Petrogal group, the starting date for Galp Energia, SGPS, S.A. is considered to be the date on which it was established, that is to say, 22 April 1999 (see recital (56)).

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469 Case T-241/01, *Scandinavian Airlines System AB* v *Commission* [2005] ECR-II 2917, paragraphs 184-188.

4.2 Uninterrupted functioning of the cartel

(476) *[…]*[470] *[…]* the Commission understands that the uninterrupted functioning of the cartel refers to all participants at least until 1998.[471] The Commission considers that the fact that BP's participation in the infringement may have been less intense during the two years (last months of 1998 and 1999) in which it did not participate in meetings of the "asphalt table" is not sufficient to conclude that BP interrupted its participation in the infringement.

(477) *[…]* corroborate the uninterrupted functioning of the cartel from 1991 to October 2002 with regard to the participation of Repsol, Proas, BP and Nynäs.[472]

(478) With regard to Petrogal, *[…]* confirmed *[…]* the uninterrupted functioning of the cartel *[…]*.[473] *[…]* confirmed at the Oral Hearing held on 12 December 2006 that he had had meetings with certain regularity with *[…]* of Petrogal and *[…]* of Repsol at the offices of Petrogal (see recital (232)).

(479) As regards Nynäs, the Commission also recalls the statement made at the Oral Hearing held on 12 December 2006 by a Proas' employee confirming that Nynäs had been involved in the market sharing arrangements since 1991 and that, as from 1997 and until 2002, he had himself participated in the discussions with *[…]* and *[…]* of Nynäs and *[…]* of Repsol at Nynäs' offices (see recital (234)).

(480) In addition *[…]*, the Commission has in its possession contemporaneous evidence showing that the cartel was always operational from 1991 to 2002 (see section 2.1.2).

(481) In view of the foregoing and of the starting dates of participation in the cartel for each undertaking as determined in section 4.1, the Commission considers that the cartel functioned uninterrupted from at least 1 March 1991 to at least 1 October 2002 in respect of Repsol, Proas and Nynäs[474], from at least 1 August 1991 to at least 20 June 2002 in respect of BP (the latter being the date on which BP filed its immunity application with the Commission), and from at least 31 January 1995 to at least 1 October 2002 in respect of Petrogal.[475]

4.3 End date for each undertaking

(482) *[…]* the meetings of the "asphalt table", the market sharing arrangements and the price discussions ceased in October 2002, further to the inspections carried out by the Commission.[476]

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470 *[…]*, response to request for information of 24 March 2004, p. 07793.

471 *[…]*.

472 *[…]*.

473 *[…]*.

474 In the case of AB Nynäs Petroleum, from the date its wholly-owned subsidiary, Nynäs International BV, acquired 100 % ownership of Asfaltos Europeos S.A. (currently Nynäs Petróleo S.A.), i.e. 22 May 1991 (see recital (47)), to 1 October 2002.

475 In the case of Galp Energia, SGPS, S.A. from the date it was incorporated, 22 April 1999 (see recital (56)), to 1 October 2002.

476 *[…]*.

(483) The Commission has no evidence showing that Repsol, Proas, Nynäs or Petrogal continued to participate in the cartel beyond 1 October 2002.

(484) *[…]*. The Commission has no evidence that BP continued its involvement in the cartel after 20 June 2002, the date on which it filed its immunity application with the Commission. The Commission therefore considers that BP's participation in the cartel ended on 20 June 2002.

4.4 Arguments of the parties on duration and Commission's conclusion

(485) Nynäs and Petrogal contest the Commission's determination of the duration of their participation in the infringement.

(486) In response to the Statement of Objections Nynäs admits having had anti-competitive contacts with cartel participants in 2001 and 2002 but claims that the Commission has no evidence proving Nynäs' participation in the cartel during the 1990s.

(487) The Commission considers it established that Nynäs Petróleo S.A. participated in the infringement at least from 1 March 1991 to 1 October 2002 on the basis of (i) the consistent statements made by *[…]* concerning the period of Nynäs' participation as summarised in sections 4.1, 4.2 and 4.3 of this legal assessment, and (ii) the contemporaneous documents described in the factual part of this Decision which illustrate and confirm the statements provided by *[…]* concerning the period of Nynäs' participation, as set out in recitals (201), (202), (206), (211), (213), (214), (225), (226), (232), (247), (249), (250), (260), (265), (266), (273), (274), (279), (280), (283), (316) and (318).[477]

(488) For its part, Petrogal admits in its response to the Statement of Objections having participated in the cartel from March 1995 to March 1998 but contends that, as from March 1998, it regained its autonomous market behaviour. In order to demonstrate that it did not participate in the cartel after 1998, Petrogal reviews the trends of its sales during the periods 1998 and 1999-2002 and states that, in 1997, it made clear to the bitumen producers that, from then on, it would end its contacts with them. Petrogal finally notes that *[…]* stated that in 2002 neither Nynäs nor Petrogal were in the "asphalt table".[478]

(489) The Commission first notes that Petrogal has provided no evidence supporting its allegation that, in 1997, it communicated to the bitumen producers that it would cease anti-competitive contacts with them. In order to terminate the infringement, an undertaking must clearly distance itself from the cartel. The Court of First Instance ruled in *Union Pigments* that, in the absence of an explicit withdrawal, the Commission may still consider that the infringement has not yet been terminated.[479] In

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477 The Commission notes that the contemporaneous evidence described in these recitals *[…]* covers the years 1991, 1992, 1993, 1995, 1997, 1999, 2000, 2001 and 2002, that is, nine years out of the almost twelve which lasted Nynäs' participation in the cartel.

478 *[…]*, response to request for information of 7 April 2005, p. 16408.

479 Case T-62/02 *Union Pigments AS* v *Commission*, [2005] ECR II-5057, paragraph 94: "In any event, the applicant has not proved that it did cease participating in the cartel as soon as the Commission intervened. It did not inform the other participants of its withdrawal until 15 July 1998". To the same effect, Case T-241/01 *Scandanavian Airlines Systems AB* v *Commission* [2005] ECR II-2917, paragraphs 190-201.

Westfalen Gassen the Court of First Instance followed the same approach.[480] In *Archer Daniels Midland* (sodium gluconate) the Court of First Instance referred to the requirement "to distance itself openly from the cartel objectives and the methods to be used for implementing those objectives", in the absence of which the undertaking can be said not to have withdrawn from the cartel.[481] With regard to Petrogal's sales trends and alleged autonomous market behaviour as from 1998, the Commission recalls that it is settled case law that an undertaking which despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit.[482] In addition, also in accordance with the case law, the mere fact of making an agreement whose aim is to restrict competition, such as the discussions on the market quota to be allocated to Petrogal, in itself constitutes a breach of Article 81(1) of the Treaty irrespective of whether the agreement or, in this case the quota, is actually implemented.[483] More importantly, the Commission adduces evidence in this Decision that, in 1998, Petrogal engaged in anti-competitive discussions with Repsol and Proas concerning market sharing and handed them its sales data (see recitals (236), (237) and (242)). Finally, the Commission considers that *[…]* statement whereby in 2002 neither Nynäs nor Petrogal were in the "asphalt table" is erroneous in the light of *[…]* own previous and subsequent submissions concerning the participation of these undertakings in anti-competitive discussions in 2002 but, more importantly, of the evidence adduced by the Commission proving the participation of these two undertakings in the cartel in 2002.

(490) The Commission considers established that Petrogal participated in the infringement at least from 31 January 1995 to 1 October 2002 on the basis of (i) the consistent statements made by *[…]* itself concerning the period of Petrogal's participation as summarised in sections 4.1, 4.2 and 4.3 of this legal assessment, and (ii) the contemporaneous documents described in the factual part of this Decision which illustrate and confirm the statements provided by *[…]* concerning the period of Petrogal's participation, as set out in recitals (229), (232), (236), (237), (242), (247), (252), (273), (275), (278), (283), (314) and (315).[484]

(491) In addition, the Court of Justice has ruled, as regards whether or not the Commission had produced sufficient evidence of the continuation of an infringement, that "the fact that such evidence was not adduced for certain specific periods does not preclude the infringement from being regarded as having been established during a more extensive overall period than those periods, provided that such a finding is based on objective and consistent indicia. In the context of such an infringement, extending over a number of years, the fact that the infringement is demonstrated at different periods,

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480 Judgment of 5 December 2006 in Case T-303/02 *Westfalen Gassen Nederland* v *Commission*,not yet reported paragraphs 138-139: "the applicant failed to show to the requisite legal standard that it terminated its participation in the cartel before December 1995, by adopting fair and independent competitive conduct in the relevant market. Furthermore, it must be observed that the applicant did not withdraw from the cartel in order to report it to the Commission".

481 Judgment of 27 September 2006 in Case T-329/01 *Archer Daniels Midland* v *Commission*, not yet reported, paragraph 247.

482 Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 230.

483 Case T-241/01, *Scandinavian Airlines System AB* v *Commission* [2005] ECR-II 2917, paragraphs 184-188.

484 The Commission notes that the contemporaneous evidence described in these recitals *[…]* covers the years 1996, 1997, 1998, 1999, 2000 and 2002, that is six years out of the almost eight which lasted Petrogal's participation in the cartel.

which may be separated by more or less long periods, has no impact on the existence of that agreement, provided that the various actions which form part of the infringement pursue a single aim and come within the framework of a single and continuous infringement."[485]

(492) In the same vein, the Court of Justice has also ruled that "[i]n the context of an overall agreement extending over several years, a gap of several months between the manifestations of the agreement is immaterial. The fact that the various actions form part of an overall plan owing to their identical object, on the other hand, is decisive."[486] For example, in *Ventouris* the Court of First Instance considered that the Commission was right in concluding that the infringement continued for several years even if more than a year separated the anticompetitive events which were documented[487], and this despite the fact that the applicant considered that there was only evidence of isolated incidents.

(493) In view of sections 4.1, 4.2 and 4.3 and the Commission's answer to the parties' arguments on duration as set out in this section, the Commission concludes that the periods of participation in the cartel of each undertaking are the following:

– Repsol : from 1 March 1991 to 1 October 2002;

– Proas : from 1 March 1991 to 1 October 2002;

– BP : from 1 August 1991 to 20 June 2002;

– Nynäs : Nynäs Petróleo S.A. from 1 March 1991 to 1 October 2002; AB Nynäs Petroleum from 22 May 1991 to 1 October 2002.

– Petrogal : Galp Energia España S.A. and Petróleos de Portugal S.A. from 31 January 1995 to 1 October 2002; Galp Energia, SGPS, S.A. from 22 April 1999 to 1 October 2002.

F. REMEDIES

1 ARTICLE 7 OF REGULATION (EC) NO 1/2003 (ARTICLE 3 OF REGULATION NO 17)

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

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485 Case C-113/04P *TU* v *Commission*, Judgment of 21 September 2006, not yet reported, paragraph 169.

486 *Aalborg*, cited above, paragraph 260.

487 Case T-59/99 *Ventouris* v *Commission* [2003] ECR I-5257, paragraphs 190-193.

(495) Given the secrecy in which the cartel arrangements were carried out, it is not possible to declare with absolute certainty that the infringement has ceased. It is therefore necessary for the Commission to require the undertakings to which this Decision is addressed to bring the infringement to an end (if they have not already done so) and henceforth to refrain from any agreement, concerted practice or decision of an association of undertakings which would have the same or a similar object or effect.

2 ARTICLE 23(2) OF REGULATION (EC) NO 1/2003 (ARTICLE 15(2) OF REGULATION NO 17)

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

(497) Pursuant to Article 15(2) of Regulation No 17 and Article 23(3) of Regulation (EC) No 1/2003, the Commission must, in fixing the amount of the fine, have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in those Regulations. In doing so, the Commission will set the fines at a level sufficient to ensure deterrence. Moreover, the role played by each undertaking party to the infringement will be assessed on an individual basis. In particular, the Commission will reflect in the fines imposed any aggravating or mitigating circumstances pertaining to each undertaking. Finally, the Commission will apply, as appropriate, the provisions of the Leniency Notice.[488]

3 THE BASIC AMOUNT OF THE FINES

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

3.1 Gravity

(499) In assessing the gravity of the infringement, the Commission takes account of its nature, its actual impact on the market where this can be measured, and the size of the relevant geographic market.

3.1.1 Nature of the infringement

(500) It is clear from Chapter D of this Decision that the infringement in this case consisted of both horizontal market sharing arrangements and price coordination activities. Each of these two restrictions on its own is, by its very nature, among the worst kinds of infringements of Article 81 of the Treaty. The case law has confirmed that this kind of restrictions may warrant the classification of "very serious" infringements solely on

[488] Commission Notice on the immunity from fines and reduction of fines in cartel cases, OJ C 45 of 19.09.2002, pp. 3-5.

the basis of their nature, without it being necessary for such conduct to cover a particular geographical area or to have a particular impact.[489]

3.1.2 Actual impact on the market

(501) It is not possible to measure the actual impact on the market of this cartel, due *inter alia* to insufficient information on likely bitumen net price developments in Spain in the absence of the arrangements. The Commission is not required to precisely demonstrate the actual impact of the cartel on the market and to quantify it; it can confine itself to estimates of the probability of such an effect.[490] In any event, the Commission considers that the cartel agreements were effectively implemented (see recital (376)) and that the cartel arrangements are likely to have actually had anti-competitive effects. The fact that the participants sometimes did not completely respect the arrangements does not imply that they did not implement the cartel.

(502) In response to the Statement of Objections, Proas argues that the cartel had limited effects taking into account the economic context and, in particular, that the Spanish government allegedly exerted strong pressure to limit price increases of all oil products, as well as the characteristics of the Spanish bitumen market (big customers with bargaining power, growing imports, no influence of bitumen on investments in new refining capacity, constant correlation between oil prices and bitumen prices).

(503) The Commission observes that Proas' statements about government pressure to limit price increases of all oil products are unsupported by any evidence, at least in relation to penetration bitumen, which is the product concerned by this Decision, and that the alleged characteristics of the Spanish bitumen market, even if they had been proved, could have mitigated but would not have precluded the impact on the market of the anticompetitive arrangements.

(504) For its part, Nynäs Petróleo S.A. claims that its limited involvement in the cartel had no impact because Nynäs exceeded its alleged quotas by a significantly higher percentage than other suppliers, it operated in the most competitive area of Spain and sold bitumen at similar average prices in Spain and Portugal.

(505) With regard to Nynäs, the Commission considers that its alleged failure to respect its quota is not related to the gravity of the infringement but, at most, to the possible application of an attenuating circumstance.[491] Its claim about the degree of competition in the region in which Nynäs operated, apart from being irrelevant to judge the gravity of an infringement covering the whole Spanish market, is not supported by any evidence showing that prices in that region were significantly lower than in the rest of Spain throughout the cartel period. Finally, the comparison between the average prices allegedly applied by Nynäs in Spain throughout the period of the infringement and those applied by the same company in Portugal cannot lead to any conclusion about the impact of the cartel in Spain, in particular in the absence of any evidence showing that market conditions in the two countries were identical and that

489 Joined Cases T-49/02 to T-51/02 *Brasserie nationale a.o. v Commission*, 27.7.05, paragraphs 178 and 179; Case T-38/02 *Groupe Danone v Commission*, in particular paragraphs 147-148 and 152 and Case T-241/01 *SAS v Commission*, in particular paragraphs 84,-85, 122, 130-131.

490 Case T-241/01 *SAS v Commission*, in particular paragraph 122.

491 See Case T-62/02, *Union Pigments* v *Commission*, [2005] ECR II-5057, paragraph 106.

the two markets were totally separate so that the level of prices in both areas would not necessarily move in parallel. Finally, the Commission notes that Nynäs contributed with its actions to the functioning of the cartel as a whole and not just in the region in which it operated.

3.1.3 Size of the relevant geographic market

(506) It is not disputed that the infringement at issue relates to penetration bitumen sold in Spain (excluding the Canary Islands). Various parties have argued that the Commission should take into account that the size of the geographic market is rather small and that the infringement therefore cannot be classified as "very serious". The Commission does not accept this conclusion. While it may be true that the geographic market concerned is relatively small compared to the size of the whole internal market, Spain still forms a substantial part of that internal market.[492] As to the classification of the infringement as very serious or serious, as already mentioned (see recital (500)), in cases of manifest violations of the competition rules, this classification is determined primarily by the nature of the infringement even if the geographic market concerned may be limited and the actual impact on that market not measurable.[493]

(507) In their reply to the Statement of Objections, Nynäs and Petrogal claim that their involvement in the infringement was only at the local/regional level in which they were active and that this should be taken into account by the Commission when assessing the gravity of the infringement in their particular cases.

(508) In response to these arguments, the Commission observes that the gravity of an infringement must be assessed taking into account the size of the geographical market in which the infringement took place, that is, Spain in this case, and not the specific geographic area in which each of the cartel members normally operated. Indeed, through their participation, Nynäs and Petrogal contributed to the functioning of the cartel as a whole. The Commission also recalls that the cartel consisted in the allocation of market shares, and that as a result the geographic scope of the activities of each undertaking was also based on the illicit agreements concluded with its competitors. The Commission finally notes that the smaller geographic scope of Nynäs and Petrogal's activities is reflected in their turnover and that this will be taken into account at the time of setting the fines to be imposed on each of these undertakings, as explained in the section concerning "differential treatment".

3.1.4 Conclusion on gravity

(509) In view of the nature of the infringement, the Commission considers that Repsol, Proas, BP, Nynäs and Petrogal have committed a very serious infringement of Article 81 of the Treaty. This conclusion is irrespective of whether the cartel had a measurable

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492 Joined Cases T-49/02 to T-51/02, *Brasserie Nationale* v *Commission*, judgment of 27 July 2005, paragraph 176, and Case T-38/02, *Groupe Danone* v *Commission*, judgment of 25 October 2005, paragraph 150.

493 Joined Cases T-49/02 to T-51/02 *Brasserie nationale a.o.* v *Commission*, judgement of 27 July 2005, paragraphs 178-179; Case T-38/02 *Groupe Danone* v *Commission*, judgment of 25 October 2005, in particular paragraphs 147-148 and 152; and Case T-241/01 *SAS* v *Commission*, judgement of 18 July 2005, in particular paragraphs 84-85, 122, 130-131.

impact on the market, and takes account of the fact that the collusion concerned only the Spanish market.

(510) The likely starting amount of the fine to be imposed in respect of very serious infringements is, in accordance with the Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty[494] ("the Guidelines on fines"), above EUR 20 million. In this case, the Commission will take into account the market value concerned (in 2001, the last full year of the infringement, the value of the Spanish market for bitumen was EUR 286,4 million) as well as the fact that the infringement was limited to sales of bitumen in one Member State. On this basis, the starting amount for the calculation of the fines is set at EUR 40 000 000. This conclusion would not be different if the actual sales value of the cartel participants in 2001, which amounted to EUR [258,7-259,7] million, was considered.

3.2 Differential treatment

(511) Within the category of very serious infringements, the scale of likely fines makes it possible to apply a differential treatment to undertakings in order to take account of differences in their effective economic capacity to cause significant damage to competition. This is appropriate where, as in this case, there are considerable disparities between the market shares of the undertakings which participated in the infringement. For this purpose, the undertakings concerned can be classified into different categories according to their relative importance in the relevant market.

(512) In order to determine the individual weight of each participant in the infringement, market shares based on sales value for penetration bitumen in Spain in 2001, the last full year of the infringement, will be used.[495]

(513) As this case concerns a cartel between sellers of the same product in the same business area, namely penetration bitumen in Spain, the Commission considers that it is appropriate to make a single ranking of the relative weight of each undertaking involved. The categories of undertakings have been determined in such a manner as to ensure that the differences between the undertakings' shares of the total estimated market within the same category are smaller than between the shares of undertakings in different categories. The sales data upon which the categories are based were supplied by the undertakings in response to requests for information.

(514) The sales figures for penetration bitumen in Spain in 2001 show that Repsol and Proas were the largest operators, with shares of the total estimated market of between [30-40]% and [30-40]%. They are placed in a first category. BP, with a share of *[10-20]*% of the market, is placed in a second category. Nynäs and Petrogal, with shares of between [0-10]% and [0-10]%, are placed in a third category.

(515) On this basis, the appropriate starting amounts of the fines to be imposed on each undertaking in this proceeding are as follows:

- First category : Repsol and Proas EUR 40 000 000;

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494 OJ C 9, 14.1.1998, p. 3.

495 See recital (67).

-	Second category	:	BP	EUR 18 000 000;
-	Third category	:	Nynäs and Petrogal	EUR 5 500 000.

3.3 Sufficient deterrence

(516) Within the category of very serious infringements, the scale of likely fines also makes it possible to set the fines at a level which ensures that they have a sufficient deterrent effect taking into account the size of each undertaking involved.

(517) In its reply to the Statement of Objections, Repsol YPF argues that the Commission should not take into account the world-wide turnover of the Repsol group as the economic weight of this group will have already been taken into account when setting the basic amount of the fine. According to Repsol, a multiplier should only be applied to increase the deterrence of sanctions for large companies when the initial amount is too low, either because the infringement is not very serious or because the company was a marginal player.

(518) In the same sense, Proas claims that, for the purpose of calculating the starting amount of the fine, only Proas' turnover, and not that of the Cepsa group, should be taken into account on grounds of proportionality and because the product concerned only represented a small amount of Cepsa's global turnover.

(519) The Commission rejects Repsol YPF's argument that it should not rely on its economic weight to establish differential treatment for a grouping (leading to the "basic amount" mentioned by Repsol) and to apply a multiplier. While differential treatment is based on the turnover of each participant in the cartelised market, which gives a proper indication of their respective weight during the infringement, the multiplier is based on the size of the undertaking, which enables the Commission to increase the amount of the fine for deterrence purposes.

(520) As regards Proas' arguments, the Commission recalls that effective deterrence is an essential objective of its policy as regards fines. In this respect, it is sufficient to point out, first, that when an undertaking for the purpose of Article 81 of the Treaty has committed an infringement, the Commission is entitled to take account of its overall size. Second, large multinational undertakings are, in view of their size, in a different situation from that of smaller undertakings in that a difference of treatment is objectively justified. The Commission considers this approach to be non-discriminatory and proportional.

(521) In summary, the Commission considers it appropriate, in order to set the amount of the fine at a level which ensures that it has a sufficient deterrent effect, to apply a multiplication factor to the fines imposed. The Commission notes that, in 2006, the most recent financial year preceding this Decision, the total turnover of the undertakings in this proceeding were as follows: BP: EUR 211 776 million; Repsol EUR 51 355 million; Cepsa/Proas EUR 18 474 million; Galp/Petrogal EUR 12 576 million; Nynäs EUR 1 941 million. On this basis, the Commission considers it appropriate not to apply a multiplier to the fine to be imposed on Proas, Nynäs and Petrogal, and to multiply the fine to be imposed on BP by 1,8 and the fine to be imposed on Repsol by 1,2.

(522) Accordingly, the appropriate starting amounts of the fines to be imposed on each undertaking are as follows:

All amounts are in EUR

Repsol	48 000 000
Proas	40 000 000
BP	32 400 000
Nynäs	5 500 000
Petrogal	5 500 000

3.4 Duration of the infringement

(523) As set out in section E-4, the undertakings should be held liable for the infringement at least in respect of the following periods:

- Repsol and Proas: from 1 March 1991 to 1 October 2002, namely a period of 11 years and 7 months.

- Nynäs (Nynäs Petróleo S.A.): from 1 March 1991 to 1 October 2002, namely a period of 11 years and 7 months. AB Nynäs Petroleum, from 22 May 1991 to 1 October 2002, namely a period of 11 years and 4 months.

- BP: from 1 August 1991 to 20 June 2002, namely a period of 10 years and 10 months.

- Petrogal (Galp Energia España S.A. and Petróleos de Portugal S.A.): from 31 January 1995 to 1 October 2002, namely a period of 7 years and 8 months. Galp Energia, SGPS, S.A., from 22 April 1999 to 1 October 2002, namely a period of 3 years and 5 months.

(524) In line with the Guidelines on fines, for infringements lasting longer than one year the starting amount will be increased by 10% for each full year and by 5% for each additional period of at least six months but less than a year.

(525) The percentage increases to be applied to the starting amount for each undertaking are therefore as follows:

Repsol	115%
Proas	115%
BP	105%
Nynäs - Nynäs Petróleo S.A. - AB Nynäs Petroleum	 115% 110%

Petrogal - Galp Energia España S.A. and Petróleos de Portugal S.A. - Galp Energia, SGPS, S.A.	 75% 30%

3.5 Conclusion on the basic amounts

(526) The basic amounts of the fines to be imposed on each undertaking are therefore as follows:

All amounts are in EUR

Repsol	103 200 000
Proas	86 000 000
BP	66 420 000
Nynäs - Nynäs Petróleo S.A. - AB Nynäs Petroleum	 11 825 000 11 550 000
Petrogal - Galp Energia España S.A. and Petróleos de Portugal S.A. - Galp Energia, SGPS, S.A.	 9 625 000 7 150 000

4 AGGRAVATING AND ATTENUATING CIRCUMSTANCES

4.1 Aggravating circumstances

4.1.1 Role of leader of the infringement

(527) Where an infringement has been committed by several undertakings, it is appropriate, when setting the fines, to consider the relative gravity of the participation of each of them, which implies, in particular, establishing their respective roles in the infringement during the period of their participation.[496]

(528) The Guidelines on fines lay down, as one of the aggravating circumstances which can result in an increase in the basic amount of the fine, 'the role of leader in or instigator of the infringement'.[497] The role of 'ringleader' played by one or more undertakings in a cartel must be taken into account in setting the fine in so far as undertakings which

[496] Case T-15/02 *BASF AG* v *Commission*, Judgement of 15 March 2006, not yet reported, paragraph 280.

[497] Section 2, third indent.

have played such a role must bear a special responsibility by comparison with other undertakings.[498]

(529) In accordance with case law, it is necessary to distinguish between the concept of leader in and that of instigator of an infringement. Whereas instigation is concerned with the establishment or enlargement of a cartel, leadership is concerned with its operation. In order to be described as a leader, it is sufficient that the undertaking was a significant driving force for the cartel, which may be inferred in particular from the fact that it took upon itself responsibility for developing and suggesting the conduct to be adopted by the members of the cartel, even if it was not necessarily in a position to impose it upon them.[499]

(530) In the Statement of Objections, the Commission stated that, in assessing the fine to be imposed on each individual undertaking, it would take account, inter alia, of the role played by each undertaking in the collusive arrangements, in particular the leading role played by Repsol and Proas, as described in the factual part of the Statement of Objections.

(531) In its reply to the Statement of Objections, Rylesa claims that it was not a cartel leader but just the market leader, *[…]*.

(532) Proas also denies having played a leading role in the cartel, *[…]*.

(533) However, in the light of the evidence set out in this Decision, the Commission considers that both Repsol and Proas played the role of leaders of the infringement in respect of both the market sharing arrangements and the price coordination activities.

(534) This conclusion is based on the following grounds, described in detail in the factual part of this Decision:

(a) the coordinators of the "asphalt table" were a person from Repsol and a person from Proas (see recital (145));

(b) Repsol and Proas convened the cartel meetings, and the meetings were usually chaired by a person from Repsol (see recital (145));

(c) when cartel meetings were held at hotels, invoices were usually paid by either Repsol or Proas (see recital (148));

(d) as reported by *[…]*, Repsol and Proas bilaterally decided on changes to bitumen prices and the moment at which they would be implemented and subsequently communicated the decisions made to the other market operators (see recital (302));

(e) as from the beginning of the cartel with regard to Nynäs, and as from the moment it joined the cartel in 1995 with regard to Petrogal, Repsol and Proas organised meetings with each of these two undertakings separately to negotiate their market shares in their area of sales (see recital (130)). BP was only present during the negotiations concerning its area of influence but did not attend the negotiations

498 Case T-15/02 *BASF AG* v *Commission*, Judgement of 15 March 2006, not yet reported, paragraph 281.

499 Case T-15/02 *BASF AG* v *Commission*, Judgement of 15 March 2006, not yet reported, paragraph 374.

dealing with Repsol and Proas' position (see recital (137)) or those held with Nynäs and Petrogal. This shows that, rather than market sharing negotiations taking place among the five cartel participants on an equal footing, negotiations were held bilaterally between Repsol and Proas on the one hand and each of the other three cartel participants on the other hand;

(f) from 1994 to 2000 (that is, during seven out of the almost twelve years of the duration of the cartel), any remaining open issues concerning the distribution of the market in connection with the annual market sharing agreement were agreed by Repsol and Proas (see recital (130));

(g) contemporaneous evidence of 1991 and 1992 *[…]* reports that *[…]*, and that Nynäs was allocated a 3.74% of the market *[…]* (see recitals (201) and (206));

(h) Petrogal was offered a market share allocation by Repsol and Proas in Petrogal's geographic area of influence (see recital (125));

(i) during the period in which BP suspended its participation at the meetings of the asphalt table, either Repsol or Proas provided it with a copy of the market sharing agreement (see recital (172));

(j) *[…]* fortnightly calls for monitoring purposes were held by BP with either Repsol or Proas and *[…]* one of these two undertakings collected BP's data on sales volumes (see recital (184));

(k) in the context of monitoring contacts held as from 2001, Repsol and Proas determined prices for new works and allocated new works not included in the annual market sharing agreement (see recital (187));

(l) *[…]* the volumes to be supplied by Nynäs in 2001 which, *[…]*, were jointly prepared by Repsol and Proas and subsequently communicated to Nynäs (see recital (265));

(m) the estimated data on market volumes for 2002 included in certain charts *[…]* was subsequently checked with Repsol at the "asphalt table" (see recital (270));

(n) *[…]* a certain document contains the market consumption by region forecasted by Repsol and Proas for 2002 and the agreement reached by these two undertakings on those consumption volumes (see recital (271)).

(535) In view of the foregoing, the Commission concludes that both Repsol and Proas were significant driving forces of the cartel, as they allocated market shares to new cartel members, took decisions on the total size of the market, agreed on any remaining issues connected with market allocation, negotiated bilaterally and separately with the other cartel participants the volumes and customers to be allocated to them in their respective areas of influence, collected data on sales volumes from other cartel participants, convened and chaired cartel meetings and paid for most of them, bilaterally agreed on price variations and the time of their implementation and subsequently communicated the agreements reached to other market operators.

(536) Taking into account the many elements that define the roles of Repsol and Proas as leaders of the cartel, the Commission concludes that the basic amount of the individual fine to be imposed on each of these two undertakings should be increased by 30%.

4.2 Attenuating circumstances

4.2.1 Passive or "follow my leader" role

(537) In response to the Statement of Objections, Nynäs and Petrogal claim that they only played a passive or "follow-my leader" role in the cartel, and that this factor should be taken into account by the Commission as an attenuating circumstance.

(538) They both based their claim essentially on the following factors:

(a) no participation in several of the phases of the process leading to the annual market sharing agreement. Nynäs also argued that it had no knowledge of the overall market arrangements;

(b) sporadic participation in the cartel meetings and not being members of the "asphalt table";

(c) no participation in the organisation, administration and funding of such meetings;

(d) no participation in the monitoring and compensation arrangements;

(e) no involvement in any pricing infringement.

(539) It has been established in this Decision (Chapter D, Section 2) that Nynäs and Petrogal participated in both the market sharing arrangements and the price coordination aspects of the cartel. They negotiated or at the very least accepted their entry in the cartel, thereby becoming members of the "asphalt table", by agreeing to abide by certain maximum volumes of sales in their respective areas of influence and by discussing customer distribution in those areas. To that effect, they held annual negotiations or at the very least annual discussions with Repsol and/or Proas thus participating in the phases of the annual negotiations which were of interest to them, namely those which concerned their area of influence. By holding at their own premises the annual market sharing discussions with Repsol and/or Proas, Nynäs and Petrogal were not unrelated to the organisation, administration and funding of such meetings. Finally, Nynäs and Petrogal also requested or were at least informed of price variations and agreed to apply them in parallel to their competitors.

(540) A clear example of Nynäs' active involvement in the cartel is set out in recitals (279) and (280), *[…]*.

(541) A clear example of Petrogal's active involvement in the cartel is set out in recitals (236) to (239), *[…]*. Another explicit example of Petrogal's will to actively participate in collusive contacts is an internal e-mail of 2002 in which Petrogal Española S.A. informs Petróleos de Portugal S.A. of a scheduled meeting with Cepsa aimed at *[…]* (see recital (278)).

(542) Nynäs' argument that it did not have knowledge of the national scope of the market sharing arrangements has been addressed by the Commission in recital (347). The

Commission considers that Nynäs knew, should have known or at least could reasonably have foreseen that the market sharing arrangements concerned the whole Spanish territory given that Nynäs held anti-competitive discussions on this matter with Repsol and/or Proas, the two largest bitumen operators on the Spanish market with business interests throughout the Spanish territory.

(543) The Commission considers that, even if the conduct of Nynäs and Petrogal may have been less active than that of other participants (because, for example, they did not participate in the compensation mechanism or in all the phases of the discussions leading to the annual market sharing agreement), that cannot justify a reduction of the fine on the ground that they adopted an exclusively passive or 'follow my leader' role. Indeed, their conduct does not call into question the full involvement of Nynäs and Petrogal in the infringement, as demonstrated by the fact that, throughout the entire duration of the infringement, they negotiated or at least agreed with Repsol and/or Proas the limitation of their sales volumes and the allocation of customers in their areas of influence and coordinated with them price variations and the time of their implementation. In addition, the Commission has found no evidence that either Nynäs or Petrogal attempted to clearly distance themselves from the illegal behaviour or not to use it to their advantage.

(544) For example, that Nynäs made no efforts to distance itself from the cartel arrangements and was willing to listen to its competitors' proposals without disclosing its intended course of action is illustrated by its comment in respect of a meeting held with Repsol and Proas in April 2002, according to which *[…]* (see recital (274)).

(545) In view of the foregoing, it cannot be considered that Nynäs and Petrogal played an exclusively passive role in the infringement.

4.2.2 Non-implementation in practice of the agreements

(546) Nynäs Petróleo S.A. and Petrogal claim that, unlike the other participants, they did not implement the cartel agreements.

(547) Nynäs contends that it did not participate in the monitoring and compensation arrangements and could therefore not give the appearance of complying with the cartel agreements, that its sales figures were well above its allocated volumes and that it followed an independent pricing policy.

(548) Petrogal argues that its sales figures show that it did not respect the quota allocated by the members of the "asphalt table".

(549) In the Commission's view, the fact that an undertaking which participated in an infringement with its competitors did not always behave on the market in the manner agreed between them is not a matter which must be taken into account as a mitigating circumstance when determining the amount of the fine to be imposed. An undertaking which, despite colluding with its competitors, follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit.[500]

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500 See judgment of the Court of First Instance in *Cascades SA* v *Commission*, cited above, at paragraph 230; judgment of the Court of First Instance in Joined Cases T-71/03 etc., *Tokai Carbon Co. Ltd and others* v *Commission*, already cited, at paragraph 297; judgment of the Court of First Instance in Case

The mere fact of cheating at the expense of the other cartel members cannot therefore be admitted automatically as a mitigating circumstance.

(550) In order for the Commission to be able to appreciate the existence of a mitigating circumstance, each undertaking must demonstrate that, during the period in which it was party to the offending agreements, it actually avoided implementing them by adopting competitive conduct on the market or, at the very least, that it clearly and substantially breached the obligations relating to the implementation of the cartel to the point of disrupting its very operation.[501]

(551) In this case, neither Nynäs nor Petrogal explicitly announced that they would refrain, or provided any conclusive evidence that they refrained, from applying the agreements and thus adopted truly competitive behaviour. In this respect, the Commission considers that their allegation of having sold in excess of their allocated quotas or Nynäs' statement, unsupported by evidence, that it followed an independent pricing policy, are clearly insufficient to prove such competitive conduct. In fact, with regard to the price coordinaton activities and as shown in recitals (314) to (318), both Petrogal and Nynäs implemented the price increases agreed in the last years of the cartel and for a similar amount, without there being any evidence that they contributed or attempted to contribute to the failure of the application of those price increases.

(552) In addition, neither Nynäs nor Petrogal have shown that they clearly and substantially opposed the implementation of the cartel, to the point of disrupting the very functioning of it, or avoided giving the appearance of adhering to the agreement so as not to incite other undertakings to implement the cartel. As they did not clearly distance themselves from what was agreed at the anti-competitive meetings which they attended, they retained responsibility for participation in the cartel. It would otherwise be too easy for undertakings to reduce the risk of being required to pay a heavy fine if they were able to take advantage of an unlawful cartel and then benefit from a reduction in the fine on the ground that they had played only a limited role in implementing the infringement, when their attitude encouraged other undertakings to act in a way that was more harmful to competition.[502]

(553) In view of the foregoing, the Commission rejects Nynäs and Petrogal's claim for the application of an attenuating circumstance on the ground that they did not implement the cartel arrangements.

4.2.3 Early termination of the infringement

(554) Proas claims that the fact that the infringement was terminated as soon as the Commission carried out inspections should be taken into account as an attenuating circumstance.

T-44/00 *Mannesmannröhren-Werke AG* v *Commission*, [2004] ECR II-729 at paragraphs 277-278, and judgment of the Court of First Instance in Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, at paragraph 142.

501 T-26/02, *Daichii v Commission*, para 113.

502 Case T-44/00 *Mannesmannröhren-Werke AG* v *Commission*, cited above, at paragraphs 277-279 and Joined Cases T-259/02 to T-264/02 and T-271/02, *Raiffeisen Zentralbank Österreich a.o. v Commission*, 14 December 2006, paragraph 491.

(555) The Commission does not accept this claim. Cartel infringements are by their very nature very serious infringements of Article 81 of the Treaty. Participants in these infringements normally realise very well that they are engaged in illegal activities. In the Commission's view, in such cases of deliberate illegal behaviour, the fact that a company terminates this behaviour as soon as the Commission intervenes does not merit any particular reward other than that the period of participation in the infringement by the company concerned is shorter than it would otherwise have been. Indeed, if the infringement had continued after the intervention of the Commission, this would have constituted an aggravating circumstance. The fact that an undertaking voluntarily puts an end to the infringement before the Commission has opened its investigation is sufficiently taken into account in the calculation of the duration of the infringement period and does not constitute an attenuating circumstance.[503]

4.2.4 Existence of a reasonable doubt on the part of the undertaking as to whether the restrictive conduct constituted an infringement

(556) Proas claims that, taking into account the previous existence of a monopoly in the Spanish oil sector and the pressures which the Spanish government continued to apply, directly or through Repsol, after the liberalisation, there was considerable confusion among the companies as to whether the restrictive conduct constituted an infringement, which should be considered as an attenuating circumstance.

(557) The Commission has already examined this argument in the context of the gravity of the infringement (see recital (503)) and reasserts its conclusion that Proas' statements about government pressures are unsupported by any evidence, at least in relation to the product concerned, penetration bitumen.

4.2.5 Effective co-operation outside the Leniency Notice

(558) Proas has argued that its effective co-operation during the inspection, before the leniency application, when answering the requests for information and in general throughout the proceeding, should be regarded as an attenuating circumstance.

(559) These arguments cannot be accepted. First of all, the cooperation during the inspection cannot constitute an attenuating circumstance as the undertakings are required to submit to inspections ordered by decision and are subject to penalties in case they do not submit to the inspection.[504] Moreover, companies subject to an inspection ordered by decision are under a duty not merely to submit passively but to cooperate actively with the investigation.[505]

(560) Secondly, the Commission has assessed the value of evidence concerning the infringement provided on a voluntary basis by different undertakings under the Leniency Notice, irrespective of whether it was supplied by means of a formal leniency application or in the form of voluntary self-incriminating information provided in reply to a request for information. To the extent that such cooperation

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503 Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-242/01, *Tokai Carbon Co. Ltd and Others* v *Commission*, 29 April 2004, at paragraph 341.

504 Article 20(4) and Article 23(1)c of Regulation (EC) No 1/2003.

505 See, for example, Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 27; Case T-34/93 *Société Générale* v *Commission* [1995] ECR II-545, paragraph 72.

merited a reduction, this has been granted under the Leniency Notice.[506] The Commission considers that there are no exceptional circumstances present in this case that could justify granting Proas a reduction for effective cooperation falling outside the scope of the Leniency Notice.

4.2.6 Other factors

(561) Nynäs claims that, in order to avoid unfairness and ensure a proportionate response to the infringement, the Commission should take into account the level of the fine likely to have been imposed by the Spanish national competition authority, to which the Commission should have transferred the case when it decided to divide the investigation along national lines.

(562) The Commission has already established its competence to apply Article 81 of the Treaty in this case (see recitals (319) to (322)) and therefore rejects this claim, which is based on a purely hypothetical assessment of the potential level of fines which a national competition authority might have imposed if the case had been transferred to it.

(563) Nynäs has also argued that it should receive a reduction of the fine for having introduced a compliance programme and a series of measures to increase staff awareness in respect of competition law. Whilst the Commission welcomes measures taken by undertakings to avoid the recurrence of cartel infringements in the future, such measures cannot change the reality of the infringement and the need to sanction it in this Decision, the more so as the infringement concerned is a manifest breach of Article 81 of the Treaty.[507]

(564) Petrogal claims as additional mitigating circumstances that it was a small player in the Spanish bitumen market and that no company of the Galp group has ever had a fine imposed on it by a decision of a national competition authority or the Commission.

(565) The Commission considers that the volume of sales in the relevant market has already been taken into account when calculating the starting amount of the fine and cannot therefore constitute a mitigating circumstance. The fact that a repeated infringement of the same type by the same undertaking may be considered by the Commission as an aggravating circumstance does not entail that the absence of earlier fining decisions by that undertaking should be regarded as an attenuating circumstance.

(566) Finally, although, as explained above (see recitals (537) to (545)), an exclusively passive or 'follow my leader' role has not been found to constitute a mitigating circumstance in this case, the Commission also evaluated the participation of Nynäs and Petrogal in certain aspects of the infringement in view of the arguments they presented (see recital (538)). The Commission thus compared the role of these two undertakings with that of the other three undertakings which participated in the cartel and considered whether a reduction of the basic amount was justified.

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506 *[…]*. See also Case T-15/02, *Basf* v *Commission*, [2006] ECR II-497, at paragraph 586.

507 See Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-242/01 *Tokai Carbon Co. Ltd and Others* v *Commission*, paragraph 343.

(567) In this connection, the Commission notes that, while it has been established that Nynäs and Petrogal participated in the market sharing and customer allocation arrangements holding annual negotiations or at least discussions with the cartel leaders, evidence shows that their involvement in other aspects of the infringements, namely the monitoring and compensation mechanisms and the price coordination activities, was less regular or active than that of the other three participants. It is not excluded that a less regular or active participation in these aspects of the infringement was just a consequence of their small market share on the Spanish bitumen market, which has already been taken into account by the Commission in establishing the starting amounts of the fine. However, the Commission finds it appropriate, given the specific circumstances of this case, to distinguish the different role played by Nynäs and Petrogal by taking into account their more limited involvement in the above-mentioned aspects of the infringement and to reduce the basic amount of each of the individual fines to be imposed on Nynäs and Petrogal by 10%.

4.3 Conclusion on aggravating and attenuating circumstances

(568) As a result of aggravating circumstances, the basic amount of the fines to be imposed on Repsol and Proas should be increased by 30%, to EUR 134 160 000 for Repsol and to EUR 111 800 000 for Proas. As a result of attenuating circumstances, the basic amount of the fines to be imposed on Nynäs and Petrogal should be reduced by 10% to EUR 10 642 500 for Nynäs Petróleo S.A., to EUR 10 395 000 for AB Nynäs Petroleum, to EUR 8 662 500 for Galp Energia España S.A. and Petróleos de Portugal S.A., and to EUR 6 435 000 for Galp Energia SGPS S.A.

5 APPLICATION OF THE LENIENCY NOTICE

(569) As indicated in Chapter C, Section 1, this investigation was initiated further to an immunity application filed by BP. Subsequently, Repsol and Proas each filed an application for a reduction of fines.

5.1 BP

(570) BP was the first undertaking to inform the Commission about a secret cartel concerning sales of penetration bitumen in Spain. BP applied for immunity on *[…]*.

(571) Prior to the application, the Commission had not undertaken any inspection into the alleged cartel nor did it have in its possession sufficient evidence to order an inspection. On the basis of the information provided by BP, the Commission was able to adopt a decision to carry out surprise inspections. On 19 July 2002, the Commission granted BP conditional immunity from fines pursuant to point 8(a) of the Leniency Notice. The unannounced inspections took place on 1 and 2 October 2002.

(572) In the Statement of Objections addressed to BP the Commission provisionally found that BP had failed to meet its obligations under point 11(a) of the Leniency Notice and that a final decision on whether or not the Commission would grant BP immunity from fines would be taken in any final decision adopted. In view of the specific circumstances of this case, the Commission ultimately concluded that BP cooperated genuinely, fully, on a continuous basis and expeditiously throughout the administrative procedure and that it provided the Commission with all evidence that came in its

possession or was available to it relating to the infringement, thereby fulfilling the conditions set out in point 11(a) of the Leniency Notice. BP also met its obligations pursuant to points 11(b) and (c) of the Leniency Notice as it ended its involvement in the infringement no later than the time at which it submitted evidence under point 8(a) of the Leniency Notice and did not take steps to coerce other undertakings to participate in the infringement.

(573) In view of the foregoing, the Commission considers that BP has fulfilled all conditions of point 11 of the Leniency Notice and thus qualifies for immunity from any fines that would otherwise have been imposed on it.

5.2 Repsol

(574) Repsol was the second undertaking to approach the Commission under the Leniency Notice. *[…]*.

(575) The Commission obtained information on various aspects of the infringement, *[…]*. The documents submitted by Repsol *[…]*, enabled the Commission to complement its assessment *[…]*.

(576) The overall quality and quantity of the evidence provided by Repsol *[…]* strengthened, both by its very nature and by its level of detail, the Commission's ability to prove the infringement. Indeed, the evidence submitted by Repsol provided significant added value as it consisted of incriminating information on the conduct of the cartel participants which enabled the Commission to prove several facts related to the infringement.

(577) In addition, in accordance with the evidence in the Commission's possession, Repsol terminated its involvement in the suspected infringement at the latest at the time at which it first submitted the evidence.

(578) By letter of 2 August 2006 and pursuant to point 26 of the Leniency Notice, the Commission informed Repsol of its intention to apply a reduction within a band of 30-50% of any fine imposed, as provided for in point 23(b) of the Leniency Notice.

(579) In determining, pursuant to point 23 of the Leniency Notice, the percentage of reduction of the fine for which Repsol qualifies within the band of 30% to 50%, the Commission has taken into account the extent to which the evidence submitted by Repsol represented added value but also the time at which Repsol submitted this evidence. In this respect, the Commission notes that Repsol filed its leniency application over a year and a half after the Commission carried out surprise inspections and only after the Commission had sent detailed requests for information to the undertakings investigated.

(580) In view of the foregoing, the Commission considers that Repsol is entitled to a reduction of 40% of the fine that would otherwise have been imposed on it.

5.3 Proas

(581) Proas was the third undertaking to approach the Commission under the Leniency Notice. *[…]*.

(582) *[…]*.

(583) *[…]*. The incriminating information provided by Proas enabled the Commission to ascertain what inspection documents contained evidence of the cartel and to rely for its findings on information explained by a cartel participant rather than on conjecture. *[…]*.

(584) The overall quality and quantity of the evidence provided by Proas *[…]* strengthened, both by its very nature and by its level of detail, the Commission's ability to prove the infringement. The evidence submitted by Proas represented significant added value as it consisted of incriminating information on the conduct of the cartel participants which helped the Commission prove several facts related to the infringement. *[…]*.

(585) In addition, in accordance with the evidence in the Commission's possession, Proas terminated its involvement in the suspected infringement at the latest at the time at which it first submitted the evidence.

(586) By letter of 2 August 2006 and pursuant to point 26 of the Leniency Notice, the Commission informed Proas of its intention to apply a reduction within a band of 20-30% of any fine imposed, as provided for in point 23(b) of the Leniency Notice.

(587) In determining, pursuant to point 23 of the Leniency Notice, the percentage of reduction of the fine for which Proas qualifies within the band of 20% to 30%, the Commission has taken into account the extent to which the evidence submitted by Proas represented added value but also the time at which Proas submitted this evidence. In this respect, the Commission notes that Proas filed its leniency application over a year and a half after the Commission carried out surprise inspections and only after the Commission had sent detailed requests for information to the undertakings investigated.

(588) In view of the foregoing, the Commission considers that Proas is entitled to a reduction of 25% of the fine that would otherwise have been imposed on it.

5.4 Arguments by Repsol and Petrogal concerning leniency and Commission's appraisal

5.4.1 Repsol

(589) Repsol argues that BP did not report the existence of the cartel for the period 1998-2002 and that this has two consequences: (i) BP's immunity should be withdrawn for the whole cartel period or at least for the period 1998-2002, and (ii) Repsol should not be sanctioned for the period 1998-2002: it claims that, as it provided evidence of the infringement in that period for the first time, it should obtain either full immunity pursuant to points 8-11 of the Leniency Notice or de facto immunity pursuant to the last paragraph of point 23 of the Leniency Notice.

(590) Repsol's first argument intends to devalue the cooperation of another undertaking and to criticise the allegedly unduly favourable, and therefore allegedly unlawful, treatment accorded by the Commission to BP by granting it immunity. The Commission first notes that BP *[…]*. The fact that BP only *[…]* at a later stage does not, considering the circumstances in this case, lead the Commission to conclude that

BP did not show a genuine spirit of cooperation.[508] The Commission further notes that Repsol's argument cannot secure a more favourable treatment for itself in the form of immunity pursuant to point 8 of the Leniency Notice as immunity was no longer available when Repsol filed its leniency application. Finally, the Commission recalls that, in accordance with case law, Repsol may not rely in support of its claim on an allegedly unlawful act committed in favour of a third party, in this case BP.[509]

(591) With regard to Repsol's second argument, the Commission notes that, Repsol not having met the conditions of point 8 of the Leniency Notice, the Commission only examined whether Repsol qualified for de facto immunity for the period 1998 to 2002 pursuant to the last paragraph of point 23 of the Leniency Notice. Repsol claims that any fine to be imposed on it should not take into account this period.

(592) The Commission notes that, prior to receiving Repsol's leniency application, it already had in its possession information showing that the cartel was still in place during the period 1998 to 2002. This information consisted of contemporaneous documents collected during the unannounced inspections (see recitals (235), (236), (241), (242), (244), (245), (246), (247), (249), (252), (255), (256), (258), (259), (263), (267), (268), (269), (270), (271), (272), (273), (276), (277), (278), (279), (281), (282), (284), (286), (287), (288), (311), (312), (314), (316), (317) and (318)).

(593) In accordance with the last paragraph of point 23 of the Leniency Notice and on the basis of the contemporaneous documents collected during the inspections, the facts in question, that is, that the cartel also existed during the period 1998 to 2002, were not unknown to the Commission prior to receiving Repsol's leniency application. Therefore, and for that reason alone, the Commission considers that Repsol does not qualify for an exemption from fines for the period 1998 to 2002 pursuant to the last paragraph of point 23 of the Leniency Notice.

5.4.2 Petrogal

(594) Petrogal contends that Repsol and Proas provided incorrect information on Petrogal in their leniency applications and that this should lead the Commission not to grant a reduction of the fine to these two undertakings. Petrogal also alleges that it did not apply for leniency because it had very little information on the cartel and feared retaliation by the three market leaders, and that it would be unreasonable for the three bitumen producers, which are large groups, to obtain leniency while Petrogal, being a minor market player, cannot benefit from it because of its limited role in the cartel.

(595) Petrogal's first argument intends to devalue the cooperation of other undertakings and to criticise the allegedly unduly favourable, and therefore allegedly unlawful, treatment accorded by the Commission to Repsol and Proas by granting them a reduction of the fine. The Commission notes that Petrogal's argument cannot secure a

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508 Case C-301/04 P, *Commission* v *SGL Carbon AG a.o.*, Judgement of 29 June 2006, at paragraphs 68-70; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 P, *Dansk Rørindustri A/S a.o.* v *Commission*, judgement of 28 June 2005, at paragraphs 395-399.

509 See, for example, Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-242/01 *Tokai Carbon Co. Ltd and Others* v *Commission*, paragraphs 316 and 398, and Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03, *Tokai Carbon Co. Ltd and Others* v *Commission*, already cited, paragraph 373.

more favourable treatment for itself and that, in accordance with case law, Petrogal may not rely in support of its claim on an allegedly unlawful act committed in favour of third parties, in this case Repsol and Proas.[510]

(596) With regard to Petrogal's second argument, the Commission notes that its leniency programme is open to all undertakings which participate or have participated in a cartel regardless of their size and role in the infringement. In particular, given that one of the aims of the Commission's leniency programme is to facilitate the detection of cartels, any of the cartel members can apply for immunity. The Commission further notes that whether or not to apply for leniency is a decision that undertakings no doubt take in the light of the risks and benefits that may result therefrom, and that once that decision has been taken it is of no use to fault other undertakings for having decided otherwise or the Commission for having used the evidence provided by those undertakings. In any event, the question that must be asked is not whether Petrogal was in a position to co-operate with the Commission but whether it did, in fact, co-operate and in such a way that it assisted the task of the Commission. The mere willingness of an undertaking to co-operate is of no significance. The Leniency Notice provides for a reduction of the fine only in favour of an undertaking which provides the Commission with information, documents or other evidence which contribute to establishing the infringement and not in favour of an undertaking which is merely willing to co-operate, or limits itself to co-operating, with the Commission.[511] Similarly, according to settled case law, a reduction in the fine on account of cooperation during the administrative procedure is justified *only* if the conduct of the undertaking enabled the Commission to establish the existence of an infringement with less difficulty and, where appropriate, bring it to an end.[512] Finally, Petrogal's argument shows that it was well aware of the illegal nature of its competitors' behaviour but, by not reporting this illegality to public authorities, Petrogal effectively encouraged the continuation of the infringement and compromised its discovery.[513]

6 THE AMOUNTS OF THE FINES IMPOSED IN THIS PROCEEDING

(597) The fines to be imposed pursuant to Article 15(2) of Regulation No 17 and Article 23(2) of Regulation (EC) No 1/2003 should therefore be as follows:

> Repsol YPF Lubricantes y Especialidades S.A., Repsol Petróleo S.A. and Repsol YPF S.A., jointly and severally liable for the payment of EUR 80 496 000;
>
> Productos Asfálticos S.A. and Compañía Española de Petróleos S.A., jointly and severally liable for the payment of EUR 83 850 000;

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510 See, for example, Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-242/01 *Tokai Carbon Co. Ltd and Others* v *Commission*, paragraphs 316 and 398, and Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03, *Tokai Carbon Co. Ltd and Others* v *Commission*, already cited, paragraph 373.

511 Case T-241/01 *Scandanavian Airlines Systems AB* v *Commission* [2005] ECR II-2917, paragraphs 212 and 213.

512 Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraph 36.

513 See, in this sense, the judgement of 28 June 2005 in Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri A/S et al*. ("Pre-insulated Pipes"), paragraph 143.

BP Oil España S.A., BP España S.A. and BP plc, jointly and severally liable for the payment of EUR 0;

Nynäs Petróleo S.A.: EUR 10 642 500; of which, AB Nynäs Petroleum, jointly and severally liable for the payment of EUR 10 395 000; and

Galp Energia España S.A. and Petróleos de Portugal S.A., jointly and severally liable for the payment of EUR 8 662 500; of which, Galp Energia, SGPS, S.A., jointly and severally liable for the payment of EUR 6 435 000.

HAS ADOPTED THIS DECISION:

Article 1

The following undertakings infringed Article 81 of the Treaty by participating, during the periods indicated, in a complex of agreements and concerted practices in the penetration bitumen business which covered the territory of Spain (excluding the Canary islands) and which consisted in market sharing arrangements and price coordination:

Repsol YPF Lubricantes y Especialidades S.A., Repsol Petróleo S.A. and Repsol YPF S.A., from 1 March 1991 to 1 October 2002;

Productos Asfálticos S.A. and Compañía Española de Petróleos S.A., from 1 March 1991 to 1 October 2002;

BP Oil España S.A., BP España S.A. and BP plc, from 1 August 1991 to 20 June 2002;

Nynäs Petróleo S.A., from 1 March 1991 to 1 October 2002; AB Nynäs Petroleum, from 22 May 1991 to 1 October 2002;

Galp Energia España S.A. and Petróleos de Portugal S.A., from 31 January 1995 to 1 October 2002; Galp Energia, SGPS, S.A., from 22 April 1999 to 1 October 2002.

Article 2

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

Repsol YPF Lubricantes y Especialidades S.A., Repsol Petróleo S.A. and Repsol YPF S.A., jointly and severally liable for the payment of EUR 80 496 000;

Productos Asfálticos S.A. and Compañía Española de Petróleos S.A., jointly and severally liable for the payment of EUR 83 850 000;

BP Oil España S.A., BP España S.A. and BP plc, jointly and severally liable for the payment of EUR 0;

Nynäs Petróleo S.A.: EUR 10 642 500; of which, AB Nynäs Petroleum, jointly and severally liable for the payment of EUR 10 395 000; and

Galp Energia España S.A. and Petróleos de Portugal S.A., jointly and severally liable for the payment of EUR 8 662 500; of which, Galp Energia, SGPS, S.A., jointly and severally liable for the payment of EUR 6 435 000.

The fines shall be paid in Euros, within three months of the date of the notification of this Decision, to the following account:

Account No:

0050915991 of the European Commission with:

ING BANK N.V.
Financial Plaza
Bijlmerdreef, 109
NL-1102 BW AMSTERDAM

Code IBAN: NL22INGB0050915991
Code SWIFT: INGBNL2AXXX

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.

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:

Repsol YPF Lubricantes y Especialidades S.A.
Edificio Tucumán
Glorieta Mar Caribe, 1-2ª
E - 28043 Madrid
Spain

Repsol Petróleo, S.A.
Pº Castellana 278-280
E - 28046 Madrid
Spain

Repsol YPF
P° Castellana 278-280
E - 28046 Madrid
Spain

Productos Asfálticos S.A. (Proas)
Av. Ribera del Loira, 50
E - 28042 Campo de las Naciones (Madrid)
Spain

Compañía Española de Petróleos S.A. (CEPSA)
Av. Partenón, 12

E - 28042 Campo de las Naciones (Madrid)
Spain

BP Oil España S.A.
Av. de Bruselas, 36
Arroyo de la Vega
E - 28108 Alcobendas (Madrid)
Spain

BP España S.A.
Av. de Bruselas, 36
Arroyo de la Vega
E - 28108 Alcobendas (Madrid)
Spain

BP plc
4th Floor, 20 Canada Square,
London E14 5NJ
United Kingdom

Nynäs Petróleo S.A.
García de Paredes 86 1A
E - 28010 Madrid
Spain

AB Nynäs Petroleum
P.O. Box 10700
SE - 121 29 Stockholm
Sweden

Galp Energia España S.A.U.
Anabel Segura, 16
Edificio Vega Norte I
Arroyo de la Vega
E - 28100 Alcobendas (Madrid)
Spain

Petróleos de Portugal S.A.
Edifício Galp Energia
Rua Tomás da Fonseca
P - 1600-209 Lisboa
Portugal

Galp Energia, SGPS, S.A.
Edifício Galp Energia
Rua Tomás da Fonseca
P - 1600-209 Lisboa
Portugal

This Decision shall be enforceable pursuant to Article 256 of the Treaty.

Done at Brussels, 03-10-2007

For the Commission
Neelie KROES
Member of the Commission