

**COMMISSION DECISION**

**of 11 June 2008**

*notified under document number C(2008)2626 final*

**relating to a proceeding under Article 81 of the EC Treaty  
and Article 53 of the EEA Agreement**

**Case COMP/38.695 – Sodium Chlorate**

(ONLY THE ENGLISH AND FRENCH TEXTS ARE AUTHENTIC)

(Text with EEA relevance)

*On 11 June 2008, the Commission adopted a decision relating to a proceeding under Article 81 of the EC Treaty. In accordance with the provisions of Article 30 of Council Regulation (EC) No 1/2003<sup>1</sup>, the Commission herewith publishes the names of the parties and the main content of the decision, including any penalties imposed, having regard to the legitimate interest of undertakings in the protection of their business secrets.*

**Remark :**

Throughout the decision, '(...)' signifies a passage which was removed for publication purposes by the Commission.

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<sup>1</sup> 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).



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# **COMMISSION DECISION**

**of**

**relating to a proceeding under Article 81 of the EC Treaty  
and Article 53 of the EEA Agreement**

**Case COMP/38.695 – Sodium Chlorate**

**(Only the English and French texts are authentic)**

**(Text with EEA relevance)**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

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<sup>2</sup>, and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission decision of 27 July 2007 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 of 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<sup>3</sup>,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions<sup>4</sup>,

Having regard to the final report of the hearing officer in this case<sup>5</sup>,

Whereas:

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<sup>2</sup> OJ L 1, 4.1.2003, p.1. Regulation as last amended by Regulation (EC) No 1419/2006 (OJ L 269, 28.9.2006, p. 1).

<sup>3</sup> OJ L 123, 27.4.2004, p. 18. Regulation as amended by Regulation (EC) No 1792/2006 (OJ L 362, 20.12.2006, p. 1).

<sup>4</sup> OJ [...].

<sup>5</sup> OJ [...].

## **1. INTRODUCTION**

- (1) From at least 21 September 1994 and until at least 9 February 2000, the addressees of this decision discussed and entered into agreements and concerted practices contrary to Article 81 of the Treaty and Article 53 of the Agreement on the European Economic Area (hereinafter “the EEA Agreement”), with a view to allocating sales volumes, fixing prices, exchanging commercially sensitive information on prices and sales volumes and monitoring the execution of the anti-competitive arrangements for sodium chlorate (hereinafter “SC”) in the EEA.

## **2. THE INDUSTRY SUBJECT TO THE PROCEEDINGS**

### **2.1. The product**

- (2) SC (its chemical formula represented by  $\text{NaClO}_3$ ) is a strong oxidizing agent manufactured by the electrolysis of a sodium chloride water solution in a diaphragm-less cell. Hydrogen gas is the only by-product. The main raw materials are sodium chloride (560 kilogram per metric ton of SC) and water (510 kilogram per metric ton of SC). The cost of electricity accounts for approximately 70% of the production costs. SC can be produced as a crystal product or as a solution product. Its largest application (90%) is for the manufacturing of chlorine dioxide which is used in the pulp and paper industry for the bleaching of chemical pulp. Other applications include drinking water purification, textile bleaching, herbicides and uranium refining.

### **2.2. Undertakings subject to the present proceeding**

#### *2.2.1. EKA Chemicals AB and Akzo Nobel NV*

- (3) EKA Chemicals AB (hereinafter “EKA”) is a company incorporated under Swedish law and based in Bohus, Sweden. It was founded in 1895 under the name Elektrokemiska Aktiebolaget. In 1986, Elektrokemiska Aktiebolaget was acquired by Nobel Industrier and renamed EKA Nobel AB.
- (4) On 25 February 1994, Nobel Industrier was acquired by the Akzo Nobel group of companies, which is active in the areas of healthcare, coatings, chemicals, and, until the end of 1999, fibres. The ultimate holding company of the group is Akzo Nobel NV, based in Arnhem, the Netherlands. In April 1996, EKA Nobel AB changed its name to the current one: EKA Chemicals AB.
- (5) From the acquisition by the Akzo Nobel group until 12 December 2003, EKA was controlled by its 100% owner Akzo Nobel AB, which in turn was controlled by Akzo Nobel NV (until 19 December 2002 directly through Akzo Nobel NV's 100% ownership of Akzo Nobel AB). From 19 December 2002 to 12 December 2003, Akzo Nobel NV exercised control over EKA through the following three wholly-owned intermediary companies: Akzo Nobel Chemicals Holding AB, Akzo Nobel International AB and Akzo Nobel AB.
- (6) On 12 December 2003, following the restructuring of the Akzo Nobel group, Akzo Nobel NV acquired direct control over EKA, which was thereafter wholly owned by Akzo Nobel NV. Since 30 September 2004, EKA has been wholly owned by Akzo

Nobel Chemicals International BV, a company based in Amersfoort, the Netherlands, which in turn is wholly owned by Akzo Nobel NV.

- (7) Although the highest entity within the undertaking that participated in the infringement is Akzo Nobel NV (or its predecessors), the undertaking will be referred to hereinafter in this Decision as "EKA", given that this was the name of the legal entity forming part of the Akzo Nobel group which was directly involved in the infringement and to which part of the evidence in support of this Decision refers.
- (8) From 1992 to 1995, EKA Nobel AB had two divisions dealing with SC in the EEA: the Electro Chemicals Division (for sales outside Sweden, Norway and Denmark) and the Bleaching Chemicals Division (dealing with customers in Sweden, Norway and Denmark). A third division dealt with SC in North America. In 1995, the Electro Chemicals Division and the Bleaching Chemicals Division were merged into one division called Bleaching Chemicals.
- (9) Since 1994, the Akzo Nobel group has been organised on the basis of a two-layer structure: a corporate centre based in the Netherlands and directly below it approximately 20 business units. The corporate centre co-ordinates the most important tasks in the areas of finance, legal affairs and human resources and is also responsible for the general strategy of the group. Each business unit has its own General Manager, management team and supporting services responsible for its operational management. The business unit management operates within the limits of the financial and strategic targets set out by the corporate centre and is bound by the "Business Principles" and "Corporate Directives" applicable to the entire Akzo Nobel group and set by the corporate centre. The person in charge of each organisational unit at a specific level has a duty to report on the unit's activities to a higher level. The business unit "Pulp & Paper Chemicals" is responsible for the production and sales of SC in the EEA. EKA is part of this business unit.
- (10) In the financial year ending on 31 December 2007, EKA had a consolidated world-wide turnover of EUR (...). The world-wide consolidated turnover of Akzo Nobel NV amounted to EUR 10 217 million.
- (11) The EEA-wide turnover of EKA relating to the SC business in the financial year ending on 31 December 1999, the last full year of the infringement, was EUR 94.1 million.

#### 2.2.2. *Arkema France SA and Elf Aquitaine SA*

- (12) Arkema France SA was established under the name Atochem SA in 1983. The company was created from the merger of Chloé Chimie (a joint venture company owned by Elf Aquitaine, CFP and Rhône-Poulenc), Ato Chimie and a part of the chemical business of the group Produits Chimiques Ugine Kuhlmann.
- (13) In 1992, Atochem SA changed its name to Elf Atochem SA. Between 1992 and 2000, Elf Aquitaine SA (hereinafter "Elf Aquitaine") was the main shareholder of Elf Atochem SA with 97,55% of the shares. On 17 April 2000, after a takeover of the Elf group by the TotalFina group, the company changed its name to Atofina SA.

- (14) From April 2000 to 18 May 2006, Elf Aquitaine owned 96,48% of Atofina's shares. In turn, 99,43% of Elf Aquitaine's shares were held by Total SA (formerly TotalFinaElf SA), a company listed on the Paris Stock Exchange.
- (15) On 4 October 2004, Atofina SA changed its name to Arkema SA. On 18 April 2006, Arkema SA changed its name to Arkema France SA. On the latter date, a company named Daja34 SA changed its name to Arkema SA and acquired the entirety of shares of Arkema France SA. Since 18 May 2006, Arkema SA has been listed on the Paris Stock Exchange. None of the current shareholders of Arkema SA (mainly investment funds) owns more than 10% of the shares. The Total group holds 4,16% of the shares of Arkema SA.
- (16) In this Decision the undertaking involved in the infringement is referred to as "Atochem". However, where appropriate, Arkema France SA is hereinafter also referred to as "Arkema".
- (17) In the financial year ending on 31 December 2007, Atochem had a consolidated world-wide turnover of EUR 3 254 million. The world-wide consolidated turnover of Elf Aquitaine SA amounted to EUR 139 389 million.
- (18) The EEA-wide turnover of Atochem relating to the SC business in the financial year ending on 31 December 1999, the last full year of the infringement, was EUR 19.960 million.

#### 2.2.3. *Finnish Chemicals Oy and Erikem Luxembourg SA (in liquidation)*

- (19) The Finnish Chemicals group of companies is active in the chemicals, energy, heating and electricity production sectors as well as harbour services. Finnish Chemicals Oy (hereinafter "Finnish Chemicals") is a limited liability company based in Äetsä, Finland. Finnish Chemicals supplies chemical solutions and intermediate products for pulp and paper, crop protection and water treatment.
- (20) On 19 December 1996, 100% of the shares of Finnish Chemicals were acquired by Erikem Oy, a wholly owned subsidiary of Erikem Luxembourg SA (hereinafter "ELSA"). The acquisition was cleared by the Commission on 13 February 1997. On 30 June 1997, Erikem Oy and Finnish Chemicals merged and the new entity kept the name Finnish Chemicals. It was wholly owned by ELSA until 30 January 2003.
- (21) Between February 2003 and 1 April 2005, Finnish Chemicals was owned by several private equity funds. On 1 April 2005, all the shares in Finnish Chemicals were acquired by Kemira Oyj, a Finnish undertaking based in Helsinki. Meanwhile, ELSA has been put into liquidation. In April 2008, the liquidation of ELSA was still going on.
- (22) Until the end of 1998, Finnish Chemicals' production and sales were organised in a single business unit. In 1999, the business was divided into separate business units responsible for pulp and paper related chemicals, specialty and fine chemicals and anti-sap stain agents. During 2002 and 2003, Finnish Chemicals' business was further reorganised into two different divisions, namely Pulp and Paper Chemicals (Finnchem) and Fine and Specialty Chemicals. Finnchem became responsible for the production of SC and sales to the pulp industry. Fine and Specialty Chemicals became

responsible for sales to non-pulp industries. Both divisions appointed their own directors, who were responsible for the respective divisions' business activities.

- (23) In the financial year ending on 31 December 2007, Finnish Chemicals had a consolidated world-wide turnover of EUR (...). The world-wide consolidated turnover of ELSA in 2006 (its last full financial year) amounted to EUR 509 943.
- (24) The EEA-wide turnover of Finnish Chemicals relating to the SC business in the financial year ending on 31 December 1999, the last full year of the infringement, was EUR 55.6 million.

#### 2.2.4. *Aragonesas Industrias y Energia SA (now Aragonesas Industrias y Energia SAU) and Uralita SA*

- (25) Aragonesas Industrias y Energia SA (hereinafter "Aragonesas"), based in Madrid, Spain, was established in 1992. Aragonesas belonged to the Chemical Division of the Uralita group headed by Uralita SA (hereinafter "Uralita").
- (26) Until 1994, Aragonesas was a 100% subsidiary of Uralita SA. In December 1994, Uralita created a holding company called Energia y Industrias Aragonesas EIA SA (hereinafter "EIA") to which the entire chemical business was transferred. Aragonesas became a 100% subsidiary of EIA. The other two subsidiaries of EIA were Aragonesas Delsa SA (hereinafter "Delsa") and Aiscondel SA (hereinafter "Aiscondel"), both 100% owned by EIA. Initially, Uralita held 98,84% of shares in EIA.
- (27) As of 1 January 1995, Uralita's shareholding was reduced to 50,53%. On 31 December 1996, the shareholding of Uralita in EIA was increased to 50,71%.
- (28) Between 1997 and 2000, Uralita held between 49,44% and 50,56% of the shares in EIA. During this period, EIA continued to own all the shares in Aragonesas.
- (29) After 31 December 2000, Uralita's shareholding in EIA again exceeded 50% and continued to grow until December 2001, when it reached about 84%.
- (30) None of the remaining shareholders of EIA held a significant percentage of the shares in the period from 1995 to 1999.
- (31) In 2003, Uralita and EIA merged. EIA was absorbed by Uralita in this upstream merger. Thus, Aragonesas became again a 100% subsidiary of Uralita.
- (32) On 2 June 2005, Uralita sold its Chemical Division to Ercros Industrial SAU (hereinafter "Ercros"). At this time, the Chemical Division comprised the following companies: Aragonesas, Delsa, Saldosa SA and Aiscondel. Subsequent to this acquisition, Ercros restructured the Chemical Division. On 22 December 2005, Aiscondel took over Aragonesas and Delsa. These subsequent upstream mergers took effect as of 1 January 2005. The new legal entity took the name Aragonesas Industrias y Energia SAU.
- (33) The oxidants product line, in which SC was included, was part of the Chemical Division, one of the five Divisions into which Aragonesas was divided. The Chemical

Division also manufactured hydrogen peroxide, sodium chlorite and sodium hypochlorite.

- (34) In the financial year ending on 31 Decemer 2007, Aragonesas had a consolidated world-wide turnover of EUR (...). The world-wide consolidated turnover of Uralita amounted to EUR 1 095 million.
- (35) The EEA-wide turnover of Aragonesas relating to the SC business in the financial year ending on 31 December 1999, the last full year of the infringement, was EUR 0-20 million.

#### 2.2.5. *Other manufacturers*

- (36) (...)

#### 2.2.6. *Industry Associations*

- (37) (...)

### 2.3. **Description of the sector**

#### 2.3.1. *Supply*

- (38) The following is based on the information obtained from EKA, Finnish Chemicals, Atochem, Aragonesas and (...). The capacity figures given below relate to the year 2002. They have not, however, changed since then to any appreciable extent.
- (39) The main producers of SC in the EEA are located in Sweden, Finland, France, Spain and Portugal.
- (40) EKA is the largest SC producer in the EEA, where it has five production plants: two in Sweden (Alby and Stockvik), one in Norway (Mo i Rana), one in Finland (Oulu, also referred to as Veitsiluoto) and one in France (Bordeaux, also referred to as Ambès). The total annual capacity of EKA is approximately (...) tonnes. EKA sells approximately (...) tonnes of SC per year in the EEA, of which about (...) tonnes are sold in Sweden, Finland and Norway. During the period of the infringement, EKA sold SC also in all other EEA countries, with the exception of Ireland, Greece, the Netherlands and Luxembourg.
- (41) Finnish Chemicals is the second-largest producer in the EEA with two plants in Finland (Äetsä and Joutseno). It also operates the captive plant of UPM-Kymmene in Finland (Kuusankoski). The total annual capacity of Finnish Chemicals is (...) tonnes. In 1999, Finnish Chemicals sold some (...) tonnes of SC in the EEA, the majority of which (some (...) tonnes) was sold in the Nordic countries. It also had sales in most countries in continental Europe.
- (42) Atochem has one plant producing SC in France (Jarrei) with an annual capacity of 85 000 tonnes. In 1999, Atochem's annual SC sales amounted to approximately 40 000 tonnes of which about 34 000 tonnes was sold in France, Spain and Portugal. Atochem also sold in Germany, Austria, Belgium, Denmark, Italy, the Netherlands, and the United Kingdom.

- (43) Aragonesas has one production plant of (...) tonnes of annual capacity in Spain. In 1999, Aragonesas sold approximately (...) tonnes of SC, most of which was intended for Spain and France. Aragonesas also sold some quantities of SC in Portugal and Greece.
- (44) (...)
- (45) In 1999, the world-wide market for SC amounted to some 2.6 million tonnes, whereas the EEA market amounted to some 480 000 tonnes. The value of the sales of SC made in the EEA in 1999 totalled approximately EUR 203 million.
- (46) Based on the 1999 sales figures provided by EKA, Finnish Chemicals, Atochem, Aragonesas and (...), the sales and approximate market shares of the SC producers in the EEA in the financial year from 1 January to 31 December 1999, which was the last full year of the infringement, were as set out in Table 1:

**Table 1 – Combined sales and market shares of SC in the EEA (1 January – 31 December 1999)**

Undertaking	Sales in thousand EUR	Market share
EKA	94.100	40-55%
Finnish Chemicals	55.687	25-40%
Atochem	19.960	0 - 10%
Aragonesas	0 -20.000	0 - 10%
(...)	(...)	(...)
(...)	(...)	(...)

- (47) As can be seen from Table 1, EKA was the market leader in 1999 with a market share of some 40-55% in the EEA. Finnish Chemicals was the second largest producer accounting for approximately 25-40% of the sales. The market shares of Atochem and Aragonesas were considerably smaller, not exceeding 10%, respectively.

#### 2.3.2. Demand

- (48) More than 90% of the demand for SC is concentrated in the pulp and paper industry, where it is mainly used for the bleaching of paper pulp. The main customers of SC are pulp mills and there are about 55 pulp mills using SC in Europe. About one half of the pulp mills are located in the Nordic countries and the other half in continental Europe.
- (49) Between 1988 and 1993, there was a strong growth in demand for SC in the EEA. This was the result of a regulation-driven substitution of SC for chlorine as a bleaching agent for chemical pulp. As of 1993-1994, the consumption of SC stagnated since, by that time, the pulp industry had gradually completed the technological

changes in the bleaching lines. Currently, SC is one of the main bleaching chemicals in the EEA.

- (50) Moreover, in Belgium and France, in addition to pulping, there is a significant SC market for other applications, such as herbicides. In Austria, Denmark, Italy, the Netherlands and the United Kingdom, the market consists only of non-pulp applications of SC.
- (51) With regard to Germany, the SC market is notably small. There has not been any production of SC for the open market in Germany after the only plant that was operational closed down in May 1993 and demand for SC remained negligible throughout the relevant period.

## **2.4. Inter-State trade**

- (52) During the period of the infringement, the Community producers sold SC throughout a substantial part of the territory of the EEA both directly to end-users and through a network of subsidiaries or independent distributors.
- (53) Therefore, during the period considered in this Decision, the market was characterised by important trade flows between Member States and/or the Contracting Parties to the EEA Agreement.

## **3. PROCEDURE**

### **3.1. The Commission's investigation**

- (54) On 28 March 2003, (...) EKA's representatives made an application under section A (immunity) or alternatively section B (reduction of fines) of the Notice on Immunity from fines and reduction of fines in cartel cases ("the 2002 Leniency Notice"). (...)
- (55) (...) On 30 September 2003 the Commission granted EKA conditional immunity from fines in accordance with point 15 of the 2002 Leniency Notice.
- (56) On 10 September 2004, requests for information pursuant to Article 18(2) of Regulation (EC) No 1/2003 were sent to Finnish Chemicals, Atochem and Aragonesas.
- (57) Atochem's reply of 18 October 2004 also included an application for immunity from fines or alternatively for a reduction of fines under the 2002 Leniency Notice.
- (58) On 29 October 2004, Finnish Chemicals (...) applied for reduction of fines under section B of the 2002 Leniency Notice (...)
- (59) (...)
- (60) (...)
- (61) (...)
- (62) (...)

(63) (...)

(64) (...).

(65) (...)

### **3.2. Statement of Objections and Oral Hearing**

(66) On 27 July 2007, the Commission initiated proceedings and adopted a Statement of Objections, addressed to EKA, Akzo Nobel NV, Finnish Chemicals, ELSA, Atochem, Elf Aquitaine, Aragonesas and Uralita. The Statement of Objections was notified to the parties in the period between 31 July 2007 and 1 August 2007. Between 31 July and 2 August 2007, the parties received a DVD-Rom that contained the accessible parts of the Commission's file.

(67) Within the prescribed deadline, EKA, Akzo Nobel NV, Finnish Chemicals, ELSA, Atochem, Elf Aquitaine, Aragonesas and Uralita communicated to the Commission in writing their views on the objections raised against them.

(68) EKA, Akzo Nobel NV, Finnish Chemicals, ELSA, Atochem, Elf Aquitaine and Uralita exercised their right to be heard orally. An Oral Hearing was held on 20 November 2007.

## **4. DESCRIPTION OF THE EVENTS**

### **4.1. General remarks**

(69) EKA, Finnish Chemicals, Atochem, and Aragonesas participated in anti-competitive meetings and other contacts to share markets by allocating sales volumes, as well as to fix prices of SC in the EEA. In the case of EKA and Finnish Chemicals, the starting date is 21 September 1994, for Atochem, 17 May 1995, for Aragonesas, 16 December 1996. For ELSA, the starting date is, 13 February 1997. For EKA, Finnish Chemicals, Atochem and Aragonesas, the participation lasted at least until 9 February 2000.

(70) The price increases agreed among the competitors were subsequently implemented on the market by means of the renegotiation of SC prices with the respective customers. Compliance was monitored mostly in bilateral meetings and telephone conversations during which the parties exchanged commercially sensitive information on the negotiations with customers, including contracted sales volumes and prices. The participation of the major producers in these arrangements is described in detail in section 4.3.

(71) The participants pursued a strategy of stabilising the SC market, the ultimate aim of which was to allocate the SC sales volumes among each other, to coordinate the pricing policy towards the customers and thereby to maximize the margins.

(72) Before setting forth in detail the events in section 4.3, the basic objectives and principles of the anti-competitive arrangements are briefly described in sections 4.2.1 to 4.2.3.

## **4.2. Basic principles and functioning of the cartel**

### *4.2.1. Market sharing by allocation of sales volumes*

- (73) In the period of the infringement, the main SC producers had numerous contacts concerning sales volumes. The competitors continuously discussed the volumes that each of them should be allowed to supply to individual customers or to a specific geographic area within a given period of time. In doing so, they respected, at least to a certain degree, the existing market shares.

### *4.2.2. Price fixing*

- (74) Price fixing was a second cornerstone of the collusive arrangements. The SC producers usually agreed on target prices to be achieved in individual contracts with customers, normally followed by more intense contacts among competitors during the preparatory phase preceding the negotiations with customers. In this phase, the competitors discussed the price to be communicated to the customers. Where necessary, further discussions were held in the course of the negotiations (for example, when a particular customer refused to accept a given price increase). Once the contracts with customers had been concluded, the producers had various follow-up contacts focused mainly on the outcome of the negotiations.

### *4.2.3. Exchange of information*

- (75) Exchange of commercially sensitive information formed a significant aspect of the collusive behaviour. Representatives of the undertakings involved informed each other about prices they wished to see quoted on the market and prices they intended to charge to individual customers. Furthermore, exchange of detailed information on prices negotiated with specific customers took place. Exchange of information concerning sales volume to be delivered to customers occurred in a similar manner. On numerous occasions, in the course of bilateral contacts, the participants also informed each other about pricing intentions, sales volumes and/or the expected conduct of other SC producers. Thus, by exchanging various types of sensitive information, the participants were able to foresee their competitors' market behaviour, to anticipate better the development of the SC market and to influence it.

### *4.2.4. Functioning of the cartel*

- (76) The SC producers maintained frequent contacts in the form of bi- and multilateral meetings and telephone calls without, however, following a fixed scheme (a list of contacts among SC producers as referred to in this Decision is set out in Annex I). At the top management level, discussions took place during multilateral meetings, often at the fringes of the CEFIC SC working group meetings. The participants usually discussed the total demand for SC in the EEA and made a prognosis per country for the upcoming year. Target prices for the next year, half year or quarter were also dealt with. The parties tried to assess developments in the market in order to ensure the necessary stability for the envisaged price increases. According to Atochem, a list of shared customers and of the sales volumes which each of the participating SC producers was allowed to supply to those customers was drawn up in the very beginning of the cartel. Atochem has not, however, presented any such list to the Commission.

- (77) Subsequently, corresponding instructions were issued to sales managers who implemented the arrangements at the operational level. (...)
- (78) The contacts among competitors were usually intensified towards the end of each calendar year (between October and December) to reflect the annual negotiations of contracts between SC manufacturers and their customers. The negotiations with customers were often continued at the beginning of the following year. Therefore, in the period under investigation, frequent contacts among competitors also occurred in January and February of every year. On the other hand, the mid-year periods (from March to September) were quieter, with a lower number of illicit contacts.

### **4.3. The cartel history**

#### *4.3.1. Operation of the cartel in the period 1994 – 2000*

- (79) (...)
- (80) Between 1994 and 2000, numerous bi- and multilateral meetings as well as telephone calls occurred (...)

##### *4.3.1.1. 1994 Meeting (...) in September*

- (81) (...)
- (82) (...)
- (83) (...)
- (84) (...)
- (85) (...)
- (86) (...)
- (87) (...)
- (88) (...)
- (89) (...)
- (90) (...)
- (91) It is therefore concluded that, in the course of the meeting on 21 September 1994, (...) and (...) exchanged commercially sensitive information, discussed current SC prices as well as possible price adjustments for 1995 and, moreover, expressed their intentions to respect the existing market shares in the Nordic countries.

##### *4.3.1.2. 1995 Contacts among competitors in May and June*

- (92) (...)
- (93) (...)

(94) (...)

(95) (...)

(96) (...)

(97) (...)

(98) (...)

(99) It is concluded that in the course of the meeting on 17 May 1995, (...) exchanged sensitive information by having exhaustively discussed the tonnages supplied by each of them to individual customers or particular countries in the first four months of 1995 and by having compared these figures with the situation in 1994. Moreover, the Commission observes that in their telephone calls in May and June 1995 (...)and (...)exchanged information regarding prices and/or pricing periods for customers (...).

#### *4.3.1.3.1995 - Contacts among competitors between September and December*

(100) (...)

(101) (...)

(102) (...)

(103) (...)

(104) (...)

(105) (...)

(106) (...)

(107) The Commission notes that in September 1995, at least in the case of customers in (...),(...)informed (...)on prices (both in terms of price level and pricing periods) to be charged. Moreover, the possibility of sharing the SC volumes supplied to the customer (...) was discussed. Further evidence submitted by (...)and (...)shows that in 1996 (...)eventually increased the prices charged to two of its (...) customers by (...) and (...) (compared to 1995), while Finnish Chemicals' prices for the same customers were raised by (...) and (...) respectively. In the case of customers (...),(...)and (...)went one step further by agreeing in October 1995 that the overall target price increase for the next year should exceed (...) and by delineating precisely the tonnages (...)would be allowed to supply to (...), as well as by setting the minimum prices to be charged to these customers.

(108) (...)

(109) (...)

(110) (...)

(111) The Commission observes that in their contacts towards the end of 1995 (...)and (...)explored the possibilities to raise SC prices in 1996 by means of mutual

coordination of their price quotations to individual customers and sought to achieve an agreement on allocation of sales volumes in relation to “shared” customers, that is to say, to customers which were supplied by both competitors.

#### *4.3.1.4.1995 - Summary*

- (112) The evidence in the Commission's file shows that in 1995 regular contacts between the main competitors, in particular (...)and (...), occurred. Moreover, (...) (see recitals (...)) was also involved in some of these contacts. From an overall perspective, the evidence demonstrates that the competitors exchanged commercially sensitive information, including sales figures, and that efforts were made to allocate sales volumes among them as well as to coordinate their pricing strategies towards the customers. There are also indications in the Commission's file that some of the price arrangements were implemented successfully.

#### *4.3.1.5.1996 - Telephone contacts among competitors*

(113) (...)

(114) (...)

(115) (...)

#### *4.3.1.6.1996 – Telephone contacts among competitors between January and May*

(116) (...)

(117) (...)

(118) (...)

(119) (...)

#### *4.3.1.7.1996 – Telephone contacts among competitors in November and December*

(120) (...)

(121) (...)

(122) (...)

(123) (...)

(124) (...)

(125) (...)

(126) (...)

- (127) The Commission concludes from the evidence referred to in recitals (...) that (...)and (...)reached an agreement on minimum prices for 1997 to be quoted to several customers. Furthermore, the Commission considers that the evidence referred to in recital (...) shows that a compensation mechanism existed between (...)and (...),

which facilitated the allocation of sales volumes. This is clear from (...) commitments to abstain from supplying the customer (...), as well as from the arrangements allowing in turn (...) to sell agreed volumes of SC to the customer (...).

(128) (...)

(129) (...)

(130) (...)

(131) (...)

(132) (...)

(133) (...)

(134) The Commission concludes that towards the end of 1996 the main SC producers coordinated their negotiation strategies in relation to customers (...). The evidence (...) shows that (...) also participated at least in one illicit contact. Furthermore, the Commission observes that (...) and (...) respected the fact that (...) was the major supplier of (...)

#### *4.3.1.8.1996 – Meetings among competitors*

(135) (...)

(136) (...)

(137) (...)

(138) (...)

#### *4.3.1.9.1996 - Summary*

(139) Compared to 1995, the contacts amongst competitors were intensified in 1996. (...) and (...), in particular, had frequent contacts by telephone. Moreover, the evidence clearly shows also the involvement of (...) (see recitals (...)) and (...) (see recital (...)). The explicit coordination of pricing strategies to be pursued during the negotiations with individual customers as well as the allocation of sales volumes/customers formed an important part of the discussions, whilst such coordination efforts were facilitated by the ongoing extensive exchange of information among the competitors.

#### *4.3.1.10.1997 - Telephone contacts among competitors*

(140) (...)

(141) (...)

#### *4.3.1.11.1997 – Telephone contacts among competitors in January and February*

(142) (...)

(143) (...)

(144) (...)

(145) (...)

(146) (...)

(147) (...)

(148) (...)

(149) (...)

(150) (...)

(151) (...)

(152) (...)

(153) The Commission considers that, in January and February 1997, (...), (...) and (...) discussed prices to be quoted to individual customers (...). The evidence further shows that information about the current state of the negotiations with customers (...) was shared among competitors. The Commission further observes that competitors engaged in discussions on allocation of SC sales volumes for certain customers (...). In this context, (...) expressed its dissatisfaction with (...) growing presence in (...) and called upon (...) to respect the market shares.

(154) (...)

#### *4.3.1.12.1997 – Meeting in Turku on 14 October*

(155) (...)

(156) (...)

(157) (...)

(158) (...)

(159) (...)

(160) (...)

(161) (...)

(162) (...)

(163) (...)

(164) (...)

(165) The Commission concludes that, at the fringes of the meeting in Turku, (...)and (...) reached an agreement on the level of price increases for 1998 with regard to customers (...). Furthermore, the competitors sought to agree on the tonnages each of them

would be allowed to supply to (...). Moreover, the issue of (...) failure to respect the market shares in (...) was addressed. (...) and (...) also agreed to increase prices in (...), subject to obtaining the support of other competitors. Several times reference is made to (...) position as concerns issues discussed between the two competitors.

#### *4.3.1.13.1997 – Telephone calls in November and December*

(166) (...)

(167) (...)

(168) (...)

(169) (...)

(170) (...)

(171) (...)

(172) The Commission concludes that at the end of 1997 (...), (...) and Atochem reviewed their sales volumes and market shares in (...). Whilst (...) expressed its concerns about (...) taking too strong a position (...), (...) and (...) specified the respective market shares and/or tonnages they intended to supply to customers in specific countries in 1998. Further, as in the previous year, (...) and (...) coordinated their pricing strategies towards (...).

#### *4.3.1.14.1997 – Summary*

(173) In 1997, the competitors continued their frequent collusive contacts. Compared to 1996, the evidence in the Commission's possession shows a more intensive involvement of (...), which was particularly concerned about the growing presence of (...). On the other hand, as regards the content of the contacts, no fundamental changes seem to have occurred. As in the previous year, the competitors exchanged sensitive commercial information, discussed allocation of sales volumes for individual customers and made efforts to coordinate their pricing strategies during the periodic renegotiation of supply contracts with the customers.

#### *4.3.1.15.1998 - Telephone contacts among competitors between January and March*

(174) (...)

(175) (...)

(176) (...)

(177) (...)

(178) (...)

(179) (...)

(180) (...)

(181) The Commission considers (...) that at least (...), (...) and (...) coordinated their negotiation efforts with regard to (...) customers by exchanging information on their price quotations as well as on the SC consumption of individual customers. (...) and (...) also exchanged information concerning the price negotiations with customers (...).

*4.3.1.16.1998 – CEFIC meeting in Brussels on 28 January*

(182) (...)

(183) (...)

(184) (...)

(185) (...)

(186) The Commission observes that in the course of the meeting the (...) participants reviewed the size of the SC markets (...) and made attempts to allocate the market shares in those countries amongst themselves. The participants further informed each other of their rejection of any price reductions in (...)

*4.3.1.17.1998 – Meeting in Helsinki at the beginning of June*

(187) (...)

(188) (...)

(189) (...)

(190) (...)

(191) (...)

(192) (...)

*4.3.1.18.1998 – Meeting in Turku on 5 October and further telephone contacts*

(193) (...)

(194) (...)

(195) (...)

(196) (...)

(197) (...)

(198) (...)

(199) (...)

(200) (...)

(201) (...)

(202) (...)

(203) The Commission concludes that (...) and (...) continued the practice of sales volumes allocation in (...) among themselves. The evidence in the Commission's file shows that an agreement on the volumes to be supplied to individual customers existed for 1998. At the end of the year, the volumes actually supplied to these customers were reviewed and the competitors attempted to make a similar arrangement for the year 1999. The available evidence also confirms the existence of a compensation mechanism established between (...) and (...). Furthermore, there is evidence that (...) and (...) coordinated their pricing negotiations with certain customers (see recital (...)) and discussed the desired level of SC price for the next year (see recital (...)).

#### *4.3.1.19.1998 - Meeting in Paris on 9 October*

(204) (...)

#### *4.3.1.20.1998 - Conflict concerning (...)*

(205) (...)

(206) (...)

(207) (...)

(208) (...)

(209) (...)

(210) (...)

(211) (...)

(212) (...)

(213) (...)

(214) (...)

(215) (...)

(216) The Commission concludes that at the end of 1998 a conflict arose between (...), (...) and (...), caused by the fact that (...) saw its position (...) jeopardised by other suppliers (...)

#### *4.3.1.21.1998 – Further telephone contacts between October and December*

(217) (...)

(218) (...)

(219) (...)

(220) (...)

(221) (...)

(222) With regard to these telephone calls, it is concluded that (...), (...), (...) and (...) agreed to maintain the partitioning of the (...) market in 1999. To this end, they discussed the expected consumption (...) in 1999 and attempted to allocate concrete sales volumes among themselves with regard to individual customers. Moreover, the competitors exchanged information concerning the negotiations with (...) customers and expressed their intention to increase the prices slightly compared to 1998 or at least to preserve the 1998 prices.

#### *4.3.1.22.1998 – Summary*

(223) In 1998, the competitors continued to have frequent contacts, usually focused on allocation of sales volumes and on pricing strategies towards individual customers. However, (...), the cooperative spirit was giving way to an atmosphere of mutual distrust. (...)

#### *4.3.1.23.1999 – Introduction*

(224) (...)

(225) (...)

(226) (...)

(227) (...)

#### *4.3.1.24.1999 - Telephone contacts among competitors in the first half of the year*

(228) (...)

(229) (...)

(230) (...)

(231) (...)

(232) (...)

(233) (...)

(234) (...)

(235) (...)

(236) The Commission draws the conclusion that (...) and (...) agreed on the allocation of sales volumes (...) and exchanged information concerning prices (...).

*4.3.1.25.1999 – Conflict (...)*

(237) (...)

(238) (...)

(239) (...)

(240) (...)

(241) (...)

(242) (...)

(243) (...)

(244) (...)

(245) (...)

(246) (...)

(247) (...)

(248) The Commission observes that the controversy (...) became the central point of the contacts among SC producers in 1999. (...)

(249) (...)

*4.3.1.26.1999 - Contacts among competitors between October and December*

(250) (...)

(251) (...)

(252) (...)

(253) (...)

(254) (...)

(255) (...)

(256) (...)

(257) (...)

(258) (...)

(259) (...)

(260) (...)

(261) (...)

(262) (...)

(263) (...)

(264) It is concluded that, following the significant changes on the SC market (...),(...) attempted to find a new balance among the main SC producers. To this end, (...) insisted on continuing the discussions between competitors with the aim of reaching a general agreement on sales volumes which would cover all countries to which SC was supplied. Furthermore, (...) repeated its threat to interrupt any cooperation with (...) and (...) and to pursue its own market policy (...) in the event that no amicable solution of the current tension among the main market players could be found. (...) The evidence in the Commission's possession further shows that both (...) and (...) were involved in these discussions (see for example, recitals (...)).

#### *4.3.1.27.1999 – Further contacts among competitors in December*

(265) (...)

(266) (...)

(267) (...)

(268) (...)

(269) (...)

(270) (...)

(271) The Commission considers (...) that towards the end of 1999 the competitors continued their contacts aimed at coordinating the pricing strategies and allocating sales volumes for individual customers. (...) In the same manner, the competitors attempted to agree on market shares (...). The Commission notes that (...) and (...) took the position of (...) into consideration when discussing the market shares. (...)

#### *4.3.1.28.1999 - Summary*

(272) Although the main competitors continued having contacts, the nature of the contacts changed in 1999, (...).(...), the spirit of cooperation with a view to fixing prices and allocating sales volumes which had prevailed until that time was replaced by a distinct tension in the relations between the competitors. However, collusive contacts among the main market players continued. (...) and (...) were attempting to call (...) to order and, later on in the year, when direct contacts between (...) and (...) were interrupted, (...) tried to take up a mediating role with the ultimate aim of achieving a new general agreement between the competitors. (...) was also involved in the illegal discussions.

#### *4.3.1.29.2000 – Introduction*

(273) (...)

#### *4.3.1.30.2000 – Telephone contacts among competitors in January*

(274) (...)

(275) (...)

(276) (...)

(277) (...)

(278) In the Commission's view, (...) in the beginning of 2000 (...), (...) and (...) coordinated their positions in the ongoing pricing negotiations with individual customers. (...) the competitors informed each other about the SC volumes as agreed or negotiated with the customers. Again, (...) repeated its threat (...).

*4.3.1.31.2000 – Meeting in Helsinki in January*

(279) (...)

(280) (...)

(281) (...)

(282) The Commission considers that (...) and (...) met with a view to clarifying, at a general level, their current positions and to finding out whether the cooperation among the competitors could and should be continued in any form. It is further noted that (...) was still attempting to play the mediating role between (...) and (...) in re-establishing such cooperation. To the Commission's knowledge, the efforts of (...) to restore the old order failed. (...)

*4.3.1.32.2000, February – CEFIC meeting in Brussels*

(283) (...)

*4.3.1.33.2000 - Summary*

(284) (...)

## APPLICATION OF ARTICLE 81 OF THE TREATY AND ARTICLE 53 OF THE EEA AGREEMENT

### **4.4. Relationship between the Treaty and the EEA Agreement**

- (285) The arrangements described in section 4.3 applied to a substantial part of the territory of the EEA.
- (286) The EEA Agreement, which contains provisions on competition analogous to the Treaty, entered into force on 1 January 1994. The infringement described in this Decision is deemed to have started at the latest on 21 September 1994 (see recital (487)). As from that date, the competition rules of the EEA Agreement (primarily Article 53 of the EEA Agreement) were applicable to the arrangements to which objection is taken.
- (287) Insofar as the arrangements affected competition in the common market and trade between Member States, Article 81 of the Treaty is applicable. Insofar as they affected competition in the EFTA States which are part of the EEA ("EFTA/EEA States") and trade between Member States and EFTA/EEA States or among EFTA/EEA States, they fall under Article 53 of the EEA Agreement.

### **4.5. Jurisdiction**

- (288) In this case the Commission is the competent authority to apply both Article 81 of the Treaty and Article 53 of the EEA Agreement on the basis of Article 56 of the EEA Agreement, since the cartel had an appreciable effect on trade between Member States.

### **4.6. Application of Article 81 of the Treaty and Article 53 of the EEA Agreement**

#### *4.6.1. Article 81 of the Treaty and Article 53(1) of the EEA Agreement*

- (289) Article 81 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 trading conditions, limit or control production and markets, or share markets or sources of supply.
- (290) Article 53(1) of the EEA Agreement (which is modelled on Article 81(1) of the Treaty) contains a similar prohibition. However the reference in Article 81(1) to trade "between Member States" is replaced by a reference to trade "between Contracting Parties" and the reference to competition "within the common market" is replaced by a reference to competition "within the territory covered by the ... [EEA] Agreement".

#### *4.6.2. The nature of the infringement*

##### *4.6.2.1. Agreements and concerted practices*

##### *Principles*

- (291) Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement prohibit anti-competitive *agreements* between undertakings, *decisions of associations of undertakings* and *concerted practices*.
- (292) An *agreement*, within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement, can be said to exist when the parties adhere to a common plan which limits or tends to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in 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. 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(1) of the Treaty would apply to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement.<sup>6</sup>
- (293) In its judgment in *Limburgse Vinyl Maatschappij NV and others v Commission* (PVC II)<sup>7</sup>, the Court of First Instance of the European Communities stated that “*it is well established in the case law that for there to be an agreement within the meaning of Article [81(1)] of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way*”<sup>8</sup>.
- (294) Although Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement draw a distinction between the concept of “*concerted practices*” and “*agreements between undertakings*”, the object is to bring within the prohibition of those Articles a form of coordination between undertakings by which, without having reached the stage where an agreement properly so-called has been concluded, they knowingly substitute practical cooperation between them for the risks of competition<sup>9</sup>.
- (295) The criteria of coordination and cooperation laid down by the case-law of the Court of First Instance and the Court of Justice of the European Communities, 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 he 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

<sup>6</sup> Case T-9/99 *HFB and Others v Commission* [2002] ECR II-1487, paragraphs 196 and 207.

<sup>7</sup> 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 N.V. and others v Commission (PVC II)*, [1999] ECR II-931, paragraph 715.

<sup>8</sup> The case-law of the Court of Justice and the Court of First Instance in relation to the interpretation of Article 81 of the Treaty applies equally to Article 53 of the EEA Agreement. See recitals No 4 and 15 as well as Article 6 of the EEA Agreement, Article 3(2) of the EEA Surveillance and Court Agreement, as well as Case E-1/94 of 16.12.1994, recitals 32–35. References in this text to Article 81 therefore apply also to Article 53.

<sup>9</sup> Case 48/69 *Imperial Chemical Industries v Commission* [1972] ECR 619, paragraph 64.

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<sup>10</sup>.

- (296) Thus conduct may fall under Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement as a *concerted practice* even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the coordination of their commercial behaviour<sup>11</sup>. 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.
- (297) Although in terms of Article 81(1) 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(1) of the Treaty even in the absence of anti-competitive effects on the market<sup>12</sup>.
- (298) Moreover, it is established case-law that the exchange, between undertakings, in pursuance of a cartel falling under Article 81(1) 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<sup>13</sup>.
- (299) 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 the forms of illegal behaviour referred to in this section. 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 what is clearly a continuing common enterprise having one and the same overall objective 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 type involved in this case<sup>14</sup>.

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<sup>10</sup> Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73 *Suiker Unie and others v Commission* [1975] ECR 1663, paragraphs 173 and 174.

<sup>11</sup> Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, paragraphs 255-261.

<sup>12</sup> Case C-199/92 *P Hüls v Commission* [1999] ECR I-4287, paragraphs 158-167.

<sup>13</sup> See, to that effect, 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, paragraph 72.

<sup>14</sup> Case T-7/89 *Hercules v Commission*, paragraph 264.

- (300) In its judgment in PVC II<sup>15</sup>, the Court of First Instance 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 those forms of infringement are covered by Article [81] of the Treaty”.
- (301) An agreement for the purposes of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement 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 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 measures designed to facilitate the implementation of price initiatives<sup>16</sup>. As the Court of Justice, upholding the judgment of the Court of First Instance, pointed out in *Commission v Anic Partecipazioni SpA*<sup>17</sup>, 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.
- (302) It is also 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”<sup>18</sup>. Such distancing should have taken 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).

#### *Application in this case*

- (303) The facts described in section 4.2 demonstrate that EKA, Finnish Chemicals, Atochem and Aragonesas were involved in anti-competitive arrangements aimed at sharing markets by allocating sales volumes (see recitals (...)). They also, on various occasions throughout the period of the infringement, agreed to increase and/or to maintain or stabilise the prices for SC in the EEA market (see recitals (...)).
- (304) Further co-ordination took place in the form of exchanges of information to facilitate and/or monitor the implementation of the arrangements on prices (see recitals (...)). These exchanges of information may be characterised as concerted practices that facilitated the coordination of the parties' commercial behaviour. According to the

<sup>15</sup> Judgment of the Court of First Instance in Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and others v Commission* (PVC II), cited above, paragraph 696.

<sup>16</sup> Case T-7/89 *Hercules v Commission*, cited above, paragraph 256.

<sup>17</sup> Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, paragraph 81.

<sup>18</sup> See, *inter alia*, Case T-334/94 *Sarrio SA v Commission*, [1998] ECR II-1439, paragraph 118, 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; Joined Cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others v Commission* [2000] ECR II-491, paragraph 1389; Case T-329/01 *Archer Daniels Midland v Commission* [2006] ECR II-3255, paragraph 247; and Case T-303/02 *Westfalen Gassen Nederland v Commission* [2006] ECR II-4567, paragraphs 138–139.

case-law, exchanges of information are incompatible with the rules on competition if they reduce or remove the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted<sup>19</sup>. More precisely, the Court of Justice has stated that *"it is inherent in the Treaty provisions on competition that every economic operator must determine autonomously the policy which it intends to pursue on the common market. Thus, according to [...] case-law, such a requirement of autonomy precludes any direct or indirect contact between economic operators of such a kind as either to influence the conduct on the market of an actual or potential competitor or to reveal to such a competitor the conduct which an operator has decided to follow itself or contemplates adopting on the market, where the object or effect of those contacts is to give rise to conditions of competition which do not correspond to the normal conditions of the market in question, taking into account the nature of the products or the services provided, the size and number of the undertakings and also the volume of the market"*<sup>20</sup>.

- (305) Concerning the involvement of Aragonesas, the company admits having taken part in the illicit meeting which took place on the occasion of the CEFIC assembly on 28 January 1998 (see recital (...)). Moreover, the contemporaneous documentary evidence in the Commission's possession shows that contacts aimed at allocation of sales volumes and price fixing occurred between Aragonesas and other cartel members (see recitals (...)). Aragonesas' participation in the anti-competitive arrangements is further clearly indicated by EKA. Therefore, Aragonesas was directly involved in the cartel arrangements. In addition, given EKA's and Finnish Chemicals' generally known significant presence in the Nordic countries, Aragonesas knew or at least should have known that the arrangements concerning Spain, Portugal and France were not agreed upon in isolation from other countries. For instance, in the meeting on 28 January 1998, in addition to the SC markets in Spain, Portugal and France, Belgium, where Aragonesas was not active, was also discussed together with (...). Moreover, Aragonesas was involved in illicit contacts in which customer negotiations were discussed in a broader perspective than just with reference to countries where Aragonesas was present (see recitals (...)). As pointed out (...), the Scandinavian market had an influence on other markets (...).
- (306) The undertakings concerned clearly adhered to a global plan having as a single objective the restriction of competition between them by sharing markets and fixing prices. This limited their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It is within this common framework that the various arrangements took place, each of which was intended to deal with one or more consequences of the normal pattern of competition and, by interacting, contributed to achieve the single anti-competitive objective.
- (307) The Commission further concludes that, in line with the case-law referred to in section 4.6.2.1, the behaviour of the undertakings concerned can be characterised, with regard to the sales of SC, as a single and complex infringement consisting of various actions which can be classified as either an agreement or a concerted practice, within which the competitors knowingly substituted practical co-operation between them for the risks of competition. Furthermore, given that the concertation among the participating

<sup>19</sup> Case C-7/95P *John Deere v Commission* [1998] ECR I-3111, paragraph 90, and Case C-194/99P *Thyssen Stahl v Commission* [2003] ECR I-10821, paragraph 81.

<sup>20</sup> Case C-238/05 *ASNEF-EQUIFAX and Administración del Estado*, [2006] ECR I-11125, paragraph 52; see also Case T-202/98 *Tate & Lyle v Commission* [2001] ECR II-2035, in particular paragraphs 42-61.

undertakings occurred on a continuous and regular basis which lasted for more than five years, those undertakings must have taken account of the information exchanged with competitors in determining their own conduct on the market.

- (308) On the basis of the above, the complex of infringements in this case is considered to present all the characteristics of an agreement and/or a concerted practice within the meaning of Article 81 of the Treaty and Article 53 of the EEA Agreement.

#### 4.6.2.2. Single and continuous infringement

##### *Principles*

- (309) A complex cartel may under certain conditions be viewed as a *single and continuous infringement* for the time frame in which it existed. The Court of First Instance pointed out, inter alia, in the *Cement* cartel case that the concept of ‘single agreement’ or ‘single infringement’ presupposes a complex of practices adopted by various parties in pursuit of a single anti-competitive economic aim.<sup>21</sup> The agreement 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 an infringement of Article 81 of the Treaty.
- (310) It would be artificial to split up such continuous conduct, characterised by a single objective, by treating it as consisting of several separate infringements, when what was involved was a single infringement which progressively manifested itself in both agreements and concerted practices.<sup>22</sup>
- (311) Although a cartel is a joint enterprise, each participant in the arrangement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries, or even cheating may occur, which will, however, not 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.
- (312) 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 unlawful purpose and the same anti-competitive 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. That 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, or been aware of, them and was prepared to take the risk<sup>23</sup>.
- (313) In fact, as the Court of Justice stated in *Commission v Anic Partecipazioni*<sup>24</sup>, the agreements and concerted practices referred to in Article 81(1) of the Treaty

<sup>21</sup> Joined Cases T-25/95 and others, *Cement*, ECR [2000] II-491, paragraph 3699.

<sup>22</sup> Case T-1/89 *Rhône-Poulenc S.A. v Commission* [1991] ECR II-867, paragraphs 125–126.

<sup>23</sup> *Commission v Anic Partecipazioni*, cited above, paragraph 83.

<sup>24</sup> *Commission v Anic Partecipazioni*, cited above, paragraphs 78–81, 83–85 and 203.

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, as reiterated by the Court of Justice in the *Cement* cases, that an infringement of Article 81 of the Treaty may result not only from an isolated act but also from a series of acts or from a continuous conduct. When the different actions form part of an ‘overall plan’, because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.<sup>25</sup>

#### *Application in this case*

- (314) The evidence referred to in section 4.3 shows the existence of a complex, single and continuous infringement between EKA, Finnish Chemicals, Atochem and Aragonesas with regard to the sales of SC in the EEA. The infringement was in pursuit of a single anti-competitive economic aim: the increase or stabilisation of the price in the EEA for SC and the allocation of sales volumes. It has been further shown in section 4.3 that the infringement covered a substantial part of the territory of the EEA and that, particularly on account of the limited number of both SC producers and customers, even local changes of the existing supplier-customer structure were capable of having an impact on the Community/EEA SC market (see for example recitals (...) regarding the interdependence between the Nordic and the continental SC market). More particularly, volumes taken by a competitor in one country would have made it necessary to re-balance the supplies in other parts of the market.
- (315) That plan found application in a series of specific instances which are further documented in this Decision. The actions taken by the undertakings involved, which were aimed at allocating SC sales volumes and fixing its price, were complementary in nature, since each of them was intended to deal with one or more consequences of the normal pattern of competition and, by interacting, contributed to the realisation of the set of anti-competitive effects intended, within the framework of a global plan having a single objective.<sup>26</sup> The existence of a single and continuous infringement is further supported by the fact that the cartel followed a similar pattern throughout the years.
- (316) First, the parties were, on a regular basis, in contact to allocate SC sales volumes among themselves (see recitals (...)). The competitors respected that certain customers were supplied only by one party (see recital (...)). Supplies to other customers were shared among the competitors so that each was allowed to sell only the agreed amount of SC to such customers. A compensation mechanism existed in order to keep the balance on the market (see recitals (...)). Numerous bilateral and multilateral meetings took place and there were also frequent telephone contacts between competitors.

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<sup>25</sup> 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 and Others v Commission* [2004] ECR I-123, paragraph 258. See also *Commission v Anic Participazioni*, cited above, paragraphs 78–81, 83–85 and 203, and the judgment of 12 December 2007 in Joined Cases T-101/05 and T-111/05 *BASF and UCB v Commission*, not yet published in the ECR, paragraphs 159-161.

<sup>26</sup> *BASF and UCB v Commission*, cited above, paragraphs 179-181, 208.

- (317) Second, throughout the whole period of the infringement, the competitors were in regular contact to propose and enter into price agreements (see recitals (...)) and to coordinate and monitor their implementation (see recitals (...)). The price-fixing arrangements usually took the form of discussions of prices to be communicated to customers. Further contacts occurred, on a regular basis, in the course of the negotiations with customers. Once the contracts with customers had been concluded, the producers had various follow-up contacts focused mainly on the outcome of the negotiations.
- (318) Third, within the four participating undertakings, the same persons, representing the management of the respective companies, participated in the meetings and in the telephone contacts.
- (319) Further, with regard to Aragonesas' participation, the fact that Aragonesas might not have participated directly in all the constituent elements of the overall cartel cannot relieve it of responsibility for the infringement of Article 81 (1) of the Treaty. Taking into account the indications of its involvement in various aspects of the cartel, the Commission considers that Aragonesas knew, or at least should have known, about the existence of the continuing infringement the common object of which was to increase or stabilise prices in the EEA for SC and to allocate sales volumes (see recital (305)). Aragonesas participated both in price-fixing (see recitals (...)) and volume-allocation (see recitals (...)) arrangements; the available evidence further shows Aragonesas' presence in a discussion concerning, *inter alia*, the local SC market in Belgium (recital (...)), as well as its involvement in illicit contacts aimed at stabilising SC prices and/or allocating sales volumes on a Community/EEA-wide level (recital (...)).
- (320) It is concluded that the conduct of the addressees of this Decision constitutes a single and continuous infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement.

#### 4.6.3. *Restriction of competition*

- (321) The complex of agreements and/or concerted practices in this case had the object and effect of restricting competition in the Community and the EEA.
- (322) Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement expressly include as restrictive of competition agreements and concerted practices which<sup>27</sup>:
- (a) directly or indirectly fix selling prices or any other trading conditions;
  - (b) share markets or sources of supply.
- (323) These are the essential characteristics of the arrangements under consideration in this case. The cartel has to be considered as a whole and in the light of the overall circumstances, but the principal aspects of the complex of agreements and concerted practices considered in this case which can be characterised as restrictions of competition are:
- (a) market and customer sharing by allocation of sales volumes;
  - (b) fixing of prices;

<sup>27</sup>

The list is not exhaustive.

- (c) exchanging of commercially sensitive information; and
  - (d) monitoring of the implementation of restrictive arrangements.
- (324) These agreements and concerted practices had as their **object** the restriction of competition within the meaning of Article 81 of the Treaty and Article 53 of the EEA Agreement. They are described in detail in the factual part of this Decision (see section 4). The characteristics of the horizontal arrangements under consideration in this case constitute essentially market sharing by allocation of sales volumes and price fixing, of which agreeing upon price increases or maintaining a certain price level are typical examples. By planning common action on price initiatives, the objective of the undertakings was to eliminate the risks involved in any unilateral attempt to increase prices, notably the risk of losing market share, since the cartel members were able to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors was going to be<sup>28</sup>. Prices being the main instrument of competition, the various collusive arrangements and mechanisms adopted by the producers were all ultimately aimed at inflating prices for their benefit and above the level which would be determined by conditions of free competition. Ceasing to determine independently their policy in the market, the cartel members thus undermined the concept inherent in the provisions of the Treaty relating to competition<sup>29</sup>.
- (325) It is settled case-law that for the purpose of application of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement there is no need to take into account the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proven<sup>30</sup>.
- (326) Even if it is not necessary to show any anti-competitive effects where the anti-competitive object of a conduct is proven, the Commission considers that the facts as established in section 4 demonstrate the **existence of anti-competitive effects** of the cartel arrangements as a whole, comprising agreements and concerted practices. It is, in fact, proven in this case, that the undertakings involved, whose sales amounted to over 90% of the EEA market for SC, allocated sales volumes, both with respect to concrete markets/countries and specific customers (see recitals (...)); agreed to increase and/or to maintain prices at a certain level, and actually attempted, and at various times succeeded, in raising their prices (see recitals (...)); exchanged commercially sensitive information (see recitals (...)); and monitored the implementation of those agreements (see recitals (...)).
- (327) According to the case-law, the Commission is not required to show systematically that the agreement on prices allowed the cartel participants to obtain higher prices than they would have done in the absence of such agreements. It is sufficient that agreed prices serve as the basis for individual negotiations as they limit the clients' margin of negotiation.<sup>31</sup> The fact that an agreement having an anti-competitive object is implemented, even if only in part, is sufficient to preclude the possibility that the

<sup>28</sup> Case 8/72 *Vereeniging van Cementhandelaren v Commission* [1972] ECR 977, paragraph 21.

<sup>29</sup> Case T-311/94 *BPB de Eendracht v Commission* [1998] ECR II-1129, paragraph 192.

<sup>30</sup> Case T-62/98 *Volkswagen AG vs Commission* [2000] ECR II-2707, paragraph 178.

<sup>31</sup> Joined Cases T-259/02 to T-264/02 and T-271/02. *Raiffeisen Zentralbank Österreich and Others v Commission* [2006] ECR II-5169, paragraphs 285–286.

agreement had no effect on the market<sup>32</sup>. Also, even when the cartel sets only price objectives and not fixed prices, it cannot be inferred from the fact that the undertakings sold below the reference prices that the cartel had no effects.<sup>33</sup>

- (328) Whilst the competition-restricting object of the arrangements is sufficient to support the conclusion that Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement apply, it has also been established that those arrangements were likely to restrict competition, which leads to the same conclusion.

#### 4.6.4. *Effect upon trade between Member States and between EEA Contracting Parties*

- (329) The continuing agreement between the producers had an appreciable effect upon trade between Member States and/or Contracting Parties to the EEA Agreement.
- (330) Article 81(1) 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. Similarly, Article 53(1) of the EEA Agreement is directed at agreements that undermine the achievement of a homogeneous European Economic Area.
- (331) The Court of Justice and Court of First Instance have consistently held that, *"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"*.<sup>34</sup> In any event, whilst Article 81 of the Treaty *"does not require that agreements referred to in that provision have actually affected trade between Member States, it does require that it be established that the agreements are capable of having that effect"*<sup>35</sup>.
- (332) As demonstrated in section 2.4, the SC sector is characterised by a substantial volume of trade between Member States and there is also trade between the Community and EFTA States belonging to the EEA.
- (333) The application of Article 81 of the Treaty and Article 53 of the EEA Agreement to a cartel is not, however, limited to that part of the participants' sales that 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<sup>36</sup>.
- (334) In this case, the cartel arrangements covered a substantial part of the territory of the EEA. The existence of arrangements to increase and maintain prices for SC in a substantial part of the territory of the EEA and to maintain agreed sales volumes for specific countries (and/or customers) must have resulted, or was likely to result, in the

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<sup>32</sup> Case T-38/02 *Groupe Danone v Commission*, [2005] ECR II-4407, paragraph 148.

<sup>33</sup> Case T-64/02 *Heubach v Commission* [2005] ECR, paragraph 117.

<sup>34</sup> Case 56/65 *Société Technique Minière* [1966] ECR 282, paragraph 7; Case 42/84 *Remia and Others v Commission* [1985] ECR 2545, paragraph 22; and Joined Cases T-25/95 etc., *Cimenteries CBR and Others v Commission* [2002] ECR II-491, paragraph 3930.

<sup>35</sup> Case C-219/95P *Ferriere Nord v Commission*, [1997] ECR I-4411, paragraph 19

<sup>36</sup> See Case T-13/89 *Imperial Chemical Industries v Commission* [1992] ECR II-1021, paragraph 304.

automatic diversion of trade patterns from the course they would otherwise have followed in the EEA<sup>37</sup>.

- (335) Insofar as the activities of the cartel related to sales in countries that are not Member States or Contracting Parties to the EEA Agreement, they lie outside the scope of this Decision.

*4.6.5. Provisions of competition rules applicable to Austria, Finland, Iceland, Liechtenstein, Norway and Sweden*

- (336) The EEA Agreement entered into force on 1 January 1994.
- (337) In the period from 21 September to 31 December 1994, the provisions of the EEA Agreement applied to the EFTA Member States which had joined the EEA; the cartel thus constituted a violation of Article 53 of the EEA Agreement as well as of Article 81 of the Treaty, and the Commission is competent to apply both provisions. The restriction of competition in those EFTA states during this period falls under Article 53 of the EEA Agreement.
- (338) After the accession of Austria, Finland and Sweden to the Community on 1 January 1995, Article 81 of the Treaty became applicable to the cartel insofar as it affected those markets. The operation of the cartel in Norway remained in violation of Article 53(1) of the EEA Agreement.
- (339) It follows from recitals (337) and (338) that insofar as the cartel operated in Austria, Finland, Norway and Sweden, it constituted a violation of the EEA and/or Community competition rules.

**4.7. The parties' arguments in response to the Statement of Objections as regards the facts and the Commission's assessment**

- (340) EKA, Finnish Chemicals, ELSA, Atochem and Elf Aquitaine did not contest the facts in this case. In the following recitals (341) to (362), the arguments raised by Aragonesas and Uralita are discussed.

*4.7.1. Arguments raised by Aragonesas*

- (341) In its reply to the Statement of Objections, Aragonesas puts forward a number of arguments concerning the facts of the case. Aragonesas' main arguments are summarised in recitals (342) to (346).
- (342) Aragonesas did not participate in agreements covering the whole of the common market and the EEA/EFTA States and any involvement of Aragonesas was limited to Spain, France and Portugal, where it mainly sold its SC production.
- (343) Statements by the immunity/leniency applicants EKA, Finnish Chemicals and Atochem suggest that EKA, Finnish Chemicals and Atochem constituted the driving forces behind the cartel. There is no evidence that Aragonesas systematically cooperated with the other players or directly participated in the arrangements but,

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<sup>37</sup> See Joined Cases 209 to 215 and 218/78 *Van Landewyck and others v Commission* [1980] ECR 3125, paragraph 170.

rather, the three leading companies often perceived Aragonesas as a threat. Moreover, Aragonesas was trying to increase and extend its business during the period of the infringement, thereby competing with other producers.

- (344) The evidence presented by the Commission is based primarily on the immunity/leniency applications made by EKA, Finnish Chemicals and Atochem. Aragonesas argues that information contained in an immunity/leniency application evidence alone is insufficient to establish an infringement of Article 81 of the Treaty. Aragonesas further argues that when such applications cover events which took place a long time ago, facts may become hazy or be forgotten. Also, immunity/leniency applications are inherently self-serving, since their objective is to secure immunity from or a reduction of a fine.
- (345) Aragonesas' behaviour on the market was not consistent with the allegations in the Statement of Objections and with information contained in (...) notes. In particular, Aragonesas contends that on a number of occasions (...) notes, when referring to discussions about supplies and prices, report figures deviating from Aragonesas' real supplies and prices deviated from the figures indicated in those discussions. The inaccuracy of the information exchanged by competitors with regard to Aragonesas suggests that it may have been gathered from sources other than Aragonesas.
- (346) Aragonesas' market position is similar to (...). The level of information which was exchanged on (...) was similar to that exchanged on Aragonesas but (...) is not accused of an infringement.

#### 4.7.1.1. The Commission's assessment and conclusion

- (347) The Commission does not dispute the fact that Aragonesas is a relatively small producer with sales of SC in a limited number of countries (see recital (43)). However, Aragonesas was part of a wider cartel scheme covering a substantial part of the territory of the EEA. Therefore, it is irrelevant where exactly in the EEA the actual sales of Aragonesas took place at the time of the infringement as Aragonesas' participation must be seen in the context of the overall circumstances and as part of the whole set of arrangements which constituted a single, complex and continuous infringement. It is established case-law that *"the mere fact that each undertaking takes part in the infringement in ways particular to it does not suffice to exclude its responsibility for the entire infringement, including conduct put into effect by other participating undertakings but sharing the same anti-competitive object or effect"*<sup>38</sup>. Aragonesas' behaviour in the cartel cannot be limited only to a specific number of countries and seen in isolation from the arrangements covering other parts of the territory of the EEA. While Aragonesas' main interest was concentrated on specific geographic areas, Aragonesas was involved in the wider cartel arrangements. This is demonstrated by the contemporaneous documentary evidence referred to in section 4.3. (...) Therefore, Aragonesas' argument that its participation was geographically limited to only a few countries cannot be followed, once the cartel arrangements are seen in their wider context.
- (348) It is also to be noted that even if Aragonesas participated in the illicit contacts with a different objective than that of its competitors, this would be irrelevant for qualifying

<sup>38</sup>

*Commission v Anic Partecipazioni SpA*, cited above, paragraph 80.

its actions as participation in the collusive agreement and/or concerted practice, as long as Aragonesas did not manifest this attitude by declaring it openly towards its competitors. According to settled case-law, it is sufficient for the Commission to show that the undertaking concerned participated in meetings and contacts at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel.<sup>39</sup> It is not sufficient for a participant in anti-competitive meetings and contacts to keep inner reservations against collusive arrangements to itself.

- (349) On three occasions, (...) notes refer to a telephone conversation with Aragonesas. First, (...). At the same time, (...) Finally, (...)
- (350) These references clearly indicate that direct telephone contacts with Aragonesas took place and that thereby Aragonesas contributed directly to the overall arrangements on prices. Moreover, Aragonesas confirmed that it participated in a meeting following the CEFIC assembly on 28 January 1998, where illegal discussions among competitors took place ((...)). The Commission therefore concludes, on the basis of the oral statements received in this case and contemporaneous evidence clearly suggesting anti-competitive behaviour on its side, that Aragonesas participated in the overall infringement. In such circumstances, it is for Aragonesas to produce evidence that explains its conduct in a way that is consistent with competitive behaviour.<sup>40</sup>
- (351) In the Commission's view, no such proof has been provided. Aragonesas has not produced a different, coherent explanation of the circumstances or indications upon which the Commission relies<sup>41</sup>. In particular, Aragonesas has not given any convincing explanation or justification of the telephone conversations mentioned in recital (349). (...) The Commission observes that it is not surprising that a person may not recall a specific phone call that took place many years before. However, in these circumstances, the Commission relies on contemporaneous evidence (...)
- (352) As regards the other instances in this Decision where reference is made to Aragonesas, the Commission accepts Aragonesas' argument that the information may have come from third parties and not from Aragonesas itself. The Commission does not have sufficient evidence in its file to show conclusively that, in these instances, the information came directly from Aragonesas. That will be reflected in the duration of the infringement for which Aragonesas is held liable.
- (353) In the same vein, even if Aragonesas had in fact actively competed on the market in an attempt to increase its market share during the period of the infringement, which Aragonesas now argues, such behaviour would not contradict a finding that it participated in the infringement. The fact that an undertaking may act in a manner which is not consistent with the cartel arrangements does not prove that it did not participate in the cartel. As noted in recital (348), it is sufficient for the Commission to

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<sup>39</sup> 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 and Others v Commission* [2007] ECR II-947, paragraphs 188–189; *Aalborg Portland and Others v Commission*, cited above, paragraph 81; Case C-199/92 *P Hüls v Commission* [1999] ECR I-4287, paragraph 155; *Commission v Anic Partecipazioni SpA*, cited above, paragraph 96.

<sup>40</sup> 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 and Others v Commission* [2004] ECR I-123, paragraph 132.

<sup>41</sup> Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P and C-219/00 P *Aalborg Portland and others v Commission*, [2004] ECR I-123, paragraph 132.

show that the undertaking concerned participated in meetings and contacts at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel<sup>42</sup>. Also, full compliance with cartel agreements is not a constitutive element for the proof of an agreement within the meaning of Article 81(1) of the Treaty. If, for instance, an undertaking is represented at meetings in which the parties agree on certain behaviour on the market, it may be held liable for an infringement even when its own conduct on the market is not in conformity with the conduct agreed.<sup>43</sup> The fact that a cartel agreement is not honoured does not mean that it does not exist; the infringement committed is therefore not cancelled out merely because one of the undertakings succeeded in using the cartel to its own advantage by not complying in full with the arrangements.<sup>44</sup>

- (354) As to Aragonesas' arguments concerning the use of leniency applications as evidence in this case, it is true that the immunity and leniency applicants in this case made their submissions for the purpose of application of the 2002 Leniency Notice. There is, however, no provision or any general principle of Community law that prohibits the Commission from relying, as against an undertaking, on statements made by other incriminated undertakings. If that were not possible, the burden of proving conduct contrary to Article 81 of the Treaty, which is borne by the Commission, would be unsustainable<sup>45</sup>. The Commission may rely on such statements for establishing an infringement as long as it applies circumspection in assessing their evidentiary value.
- (355) Moreover, statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence.<sup>46</sup> As regards the possibility to benefit from the application of the 2002 Leniency Notice in order to obtain a reduction in the fine, this should not, as such, create an incentive to submit distorted evidence. Indeed, any attempt to mislead the Commission could call into question the sincerity and completeness of such cooperation, thereby jeopardising the chances of benefiting from the 2002 Leniency Notice.<sup>47</sup>
- (356) In any event, the statements made by the immunity/leniency applicants are corroborated by other evidence contemporaneous with the facts at issue, (...). Furthermore, evidence of the infringement is also found in the parties' replies to the requests for information. The assessment of Aragonesas' involvement in the illegal arrangements is not based solely on the immunity/leniency applications and contemporaneous evidence of telephone conversations between Aragonesas and other cartel participants, but also on Aragonesas' own admission that it participated in an illegal meeting (see recitals (...)).
- (357) The Commission considers that certain discrepancies between the (...) notes and the market behaviour of Aragonesas do not disqualify the notes as a source of credible

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<sup>42</sup> *Bolloré and Others v Commission*, cited above, paragraphs 188–189.

<sup>43</sup> Case T–334/94 *Sarrió v Commission* [1998] ECR II–1439, paragraph 118.

<sup>44</sup> Judgment of 15 June 2005 in Joined Cases T–71/03, T–74/03, T–87/03 and T–91/03 *Tokai Carbon Co. Ltd and Others v Commission* not published in the ECR, at paragraph 74.

<sup>45</sup> Joined Cases T–67/00, T–68/00, T–71/00 and T–78/00 *JFE Engineering Corp a.o v Commission* [2004] ECR II–2501, paragraph 192.

<sup>46</sup> Joined Cases T–67/00, T 68/00, T–71/00 and T–78/00 *JFE Engineering a.o. v Commission* [2004] ECR II–2501, paragraph 211.

<sup>47</sup> Case T–120/04 *Peróxidos Orgánicos, SA v Commission* [2006] ECR II–4441, paragraph 70.

evidence of the nature of the discussions that took place. The notes are detailed and structured, with a relatively high level of precision. More particularly, the Commission observes that the conversations described in (...) notes normally took place at the time of the year when the actual supplies were not yet known, while Aragonesas in its reply to the Statement of Objections refers to figures which were known *ex-post*, at the beginning of the respective following year. Therefore, it is perfectly natural that the discussions described in (...) notes did not necessarily reflect the actual supplies that eventually took place. Furthermore, on a number of occasions there were discussions of Aragonesas' future prices and price offers. Contrary to Aragonesas' arguments, in this context it is not decisive what Aragonesas finally charged, since the prices were decided later on in negotiations with individual customers. Consequently, Aragonesas' argument that its competitive behaviour on the market is demonstrated by the fact that the effective prices charged to its final customers differed from the figures indicated in (...) notes cannot be accepted. It is also clear from the case-law that the implementation of an agreement on price objectives, rather than on fixed prices, does not mean that prices corresponding to the agreed price objective are to be applied, but rather that the parties endeavour to get close to their price objectives.<sup>48</sup>

- (358) As to Aragonesas' argument that there is no evidence of it systematically cooperating with the other market players, it is a common feature of cartel behaviour that documentation associated with illegal arrangements will be, as a rule, fragmentary and sparse. Facts must often be inferred from a number of coincidences and indicia which, taken together, in the absence of another plausible explanation, may be used as evidence.<sup>49</sup> It is sufficient if the body of evidence relied on by the institution, viewed as a whole, supports the firm conviction that the alleged infringement took place and an individual undertaking participated therein.<sup>50</sup> As is demonstrated by the contemporaneous documentary evidence (referred to in section 4.3), as well as by statements given by other SC producers, Aragonesas participated in the cartel according to its market position and business interests (see in this respect also recital (347)). Therefore, the fact that Aragonesas was involved only in certain contacts or partial arrangements, but not in others, cannot be interpreted as proof of its merely sporadic cooperation with the other competitors.
- (359) As to Aragonesas' argument that its position on the SC market was similar to that of (...) and that also the level of information exchanged on Aragonesas and (...) was approximately equal, the Commission considers that Aragonesas errs in making a comparison between its own position and that of (...) in this case. As demonstrated in recitals (349) to (350), the Commission has evidence of Aragonesas' participation in the cartel arrangements. In addition, Aragonesas itself admits having attended one meeting subject to illegal discussions. Furthermore, there are several references to Aragonesas' involvement in the cartel in the statements made by EKA and Finnish Chemicals. No such corresponding evidence could be established against (...).

<sup>48</sup> Case T-64/02 *Dr. Hans Heubach GmbH & Co. KG v Commission* [2005] ECR II-5137, paragraph 111.  
<sup>49</sup> 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 and others v Commission* [2004] ECR I-123, paragraphs 53-57 and Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP, *Dresdner Bank AG and Others v Commission*, judgement of 27 September 2006 (not yet published) paragraphs 59-67

<sup>50</sup> Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschaap and others v Commission* [2002] ECR I-8375, paragraphs 513 to 523; see also Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering Corp. a.o.*, cited above, paragraphs 179 and 180.

- (360) It is therefore concluded that the body of the evidence as a whole allows the Commission to find that Aragonesas has committed an infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement.

#### *4.7.2. Arguments raised by Uralita*

- (361) In its reply to the Statement of Objections, Uralita raises similar arguments as Aragonesas. First, Uralita contends that Aragonesas' involvement was only marginal and that Aragonesas is mentioned in connection with only one illicit meeting. Second, Uralita claims that Aragonesas was mentioned indirectly by the immunity/leniency applicants EKA, Finnish Chemicals and Atochem and there is no evidence of its involvement. Finally, Uralita argues that Aragonesas' activities were limited only to Spain, France and Portugal.

- (362) As demonstrated in recitals (347), (354)-(357), Uralita's arguments are unfounded.

#### **4.8. Non-application of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement**

- (363) 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 on the undertakings concerned restrictions which 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.
- (364) Restriction of competition being the sole object of the price arrangements which are the subject of this Decision, there is no indication that the agreements and concerted practices between the SC manufacturers entailed any efficiency benefits or otherwise promoted technical or economic progress. Hardcore cartels, like the one which is the subject of this Decision, constitute the most detrimental restrictions of competition, as they benefit only the participating suppliers but not consumers.
- (365) The parties do not present any argument suggesting that the conditions of Article 81(3) of the Treaty or Article 53(3) of the EEA Agreement are satisfied and it is concluded that they are not.

## **5. ADDRESSEES**

### **5.1. General principles**

- (366) In order to identify the addressees of this Decision, it is necessary to determine the legal entities to which responsibility for the infringement should be attributed.
- (367) As a general consideration, the subject of the Community competition rules is the “undertaking”, a concept that has an economic scope and that is not identical with the notion of corporate legal personality in national commercial or fiscal law. The “undertaking” that participated in the infringement is therefore not necessarily the same as the legal entity within a group of companies whose representatives actually

took part in the cartel meetings. The term “undertaking” is not defined in the Treaty. However, in *Shell International Chemical Company v. Commission*, the Court of First Instance held that “*in prohibiting undertakings inter alia from entering into agreements or participating in concerted practices which may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the common market, Article 85(1) [now Article 81(1)] of the EEC Treaty is aimed at economic units which consist of a unitary organization of personal, 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 kind referred to in that provision*”<sup>51</sup>.

- (368) Despite the fact that Article 81 of the Treaty is applicable to undertakings and that the concept of undertaking has an economic scope, only entities with legal personality can be held liable for infringements. This Decision must therefore be addressed to legal entities<sup>52</sup>. For each undertaking that is to be held accountable for infringing Article 81 of the Treaty in this case it is therefore necessary to identify one or more legal entities which should bear legal liability for the infringement. 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*”<sup>53</sup>. If a subsidiary does not determine its own conduct on the market independently, the company which directed its market strategy forms a single economic entity with that subsidiary and may be held liable for an infringement on the ground that it forms part of the same undertaking.
- (369) According to settled case-law of the Court of Justice and the Court of First Instance, 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. In the case of a 100% subsidiary, the Commission is not required to show additional elements to prove control by the parent company.<sup>54</sup>

<sup>51</sup> See Case T-11/89 [1992] ECR II-757, paragraph 311. See also Case T-352/94 *Mo Och Domsjö AB v Commission* [1998] ECR II-1989, paragraphs 87–96, Case T-43/02 *Jungbunzlauer v. Commission* [2006] ECR II-3435, paragraph 125; Case T-314/01 *Avebe v Commission*, ECR II-3085, paragraph 136; case T-330/01 *Akzo Nobel v Commission* [2006] II-3389, paragraph 83.

<sup>52</sup> Although an “undertaking” within the meaning of Article 81(1) 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 Case T-305/94 *PVC*, [1999] ECR, II-0931, paragraph 978.

<sup>53</sup> Case 170/83 *Hydrotherm* [1984] ECR 2999, paragraph 11, and 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* [2003] ECR II-4071, paragraph 290; Case T-112/05 *Akzo Nobel et al v. Commission*, paragraph 57.

<sup>54</sup> Joined Cases T-71/03 etc. *Tokai Carbon and others v Commission*, paragraph 60; Case T-354/94 *Stora Kopparbergs Bergslags v Commission* [1998] ECR II-2111, paragraph 80, upheld by the Court of Justice on appeal in Case C-286/98P *Stora Kopparbergs Bergslags v Commission*, [2000] ECR I-9925, paragraphs 27–29; and Case 107/82 *AEG v Commission*, [1983] ECR 3151, paragraph 50; judgment of 12 December 2007 in Case T-112/05 *Akzo Nobel and Others v Commission* not yet published in the ECR, paragraphs 60–62; judgment of 12 September 2007 in Case T-30/05 *William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG v Commission* [2007] not yet published in the ECR, paragraph 146

- (370) The question of decisive influence relates to the level of autonomy of the subsidiary with regard to its overall commercial policy and not to the awareness of the parent company with respect to the infringing behaviour of the subsidiary. Attribution of liability to a parent company flows from the fact that the two entities constitute a single undertaking for the purposes of the Community rules on competition<sup>55</sup> and not from proof of the parent's participation in or awareness of the infringement, both as regards its organisation or implementation.
- (371) When the Commission, in the Statement of Objections, relies on the presumption and declares its intention to hold a parent company liable for an infringement committed by its wholly-owned subsidiary, it is for that parent company, when it considers that - despite the shareholding - the subsidiary determines its conduct independently on the market, to rebut the presumption by adducing sufficient evidence in this regard during the administrative procedure.<sup>56</sup>
- (372) It falls, in principle, to the legal or natural 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 has assumed responsibility for operating the undertaking. Thus, where the legal entities which participated in the infringement continue their activities as subsidiaries under a new parent company, the latter cannot be held responsible for their unlawful activity prior to their acquisition.<sup>57</sup> As concerns the former parent company, it can be held liable for the infringement if it is part of the same undertaking as the legal entity that directly participated in the infringement (see recitals (367) to (371)-). If it would thus be answerable for the infringement but loses its legal personality and ceases to exist, being absorbed by another legal entity which is its legal and economic successor, the latter entity must assume the liability of the entity that was absorbed<sup>58</sup>. Liability for a fine may thus pass to a successor where the corporate entity which committed the infringement has ceased to exist in law.
- (373) Similar conclusions may be reached when a business is transferred from one company to another, in cases where there are economic links between the transferor and transferee, that is to say, when they belong to the same undertaking. In such cases, liability for past behaviour of the transferor may transfer to the transferee, notwithstanding the fact that the transferor remains in existence<sup>59</sup>.
- (374) The same principles hold true, *mutatis mutandis*, for the purposes of the application of Article 53 of the EEA Agreement.

<sup>55</sup> Joined Cases T-71/03, T-74/03, T-87/03, and T-91/03 *Tokai Carbon v Commission*, paragraph 54.

<sup>56</sup> Case T-330/01 *Akzo Nobel NV v. Commission* [2006] II-3389, paragraph 83.

<sup>57</sup> C-279/98 P *Cascades SA v. Commission*, paragraphs 78, 79; C-49/92 P *Commission v. Anic Partecipazioni SpA*, paragraph 145. This is different from a situation where the legal entity directly involved in the infringement ceases to exist in which case it has to be established which person has become responsible for the operation of the physical and human elements which contributed to the infringement. Cf. T-305/94 PVC II, paragraph 953.

<sup>58</sup> See Joined Cases 29/83 and 30/83 *CRAM and Rheinzink v. Commission* [1984] ECR 1679, paragraph 9; Case T-38/92 *All Weather Sports Benelux v. Commission* [1994] ECR II-211, paragraph 30. See also Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie* [1975] ECR 1663, paragraphs 84, 87.

<sup>59</sup> See *Aalborg Portland A/S a.o. v Commission*, cited above, paragraphs 354-360, and Case T-43-02 *Jungbunzlauer AG v Commission*, cited above, paragraphs 132-133.

- (375) During the period identified in section 4.3, the following undertakings were involved in the infringement:
- EKA / Akzo Nobel NV
  - Atochem / Elf Aquitaine
  - Finnish Chemicals / ELSA
  - Aragonesas / Uralita

## **5.2. Application to this case**

### *5.2.1. EKA Chemicals AB and Akzo Nobel NV*

- (376) It is established by the facts described in section 4 that EKA Chemicals AB (formerly EKA Nobel AB) participated in the anti-competitive behaviour which is the subject of this Decision.
- (377) EKA participated in the collusive behaviour from 21 September 1994. Since 25 February 1994, EKA has been part of the Akzo Nobel group. For the entire period of the infringement, Akzo Nobel NV controlled EKA through an intermediary, Akzo Nobel AB, which held 100% of EKA's shares. Since 30 September 2004, EKA has been indirectly controlled by Akzo Nobel NV through another intermediary, Akzo Nobel Chemicals International BV. Consequently, there is a presumption that Akzo Nobel NV has exercised decisive influence over EKA throughout the period of the infringement.
- (378) In addition, there are other elements which confirm that Akzo Nobel NV exercised decisive influence over EKA's commercial policy. As explained in section 2.2.1, the Akzo Nobel group is organised on the basis of a two-layer structure: a "corporate centre" within Akzo Nobel NV and directly underneath approximately 20 Business Units ("BUs"). The corporate centre co-ordinates the most important tasks and is responsible for the general strategy of the group. Each BU has its own General Manager, management team and supporting services but the BU management operates within the limits of the financial and strategic targets set out by the corporate centre and is bound by the "Business Principles" and "Corporate Directives" applicable to the entire Akzo Nobel group. The person in charge of each organisational unit at a specific level has a duty to report on the unit's activities to a higher level. The business unit "Pulp & Paper Chemicals" is responsible for the production and sales of SC in the EEA. EKA is part of this business unit.
- (379) Moreover, the persons set out in Table 2 were, in the relevant period, members of the Board of Directors of EKA and Akzo Nobel AB and/or Akzo Nobel NV:

***Table 2. – Members of the Boards of Directors***

(...)

- (380) The personnel overlaps in the management structure of EKA and its parent companies shown in Table 2 represent a further element which supports the Commission's view that Akzo Nobel NV exercised decisive influence over its subsidiary EKA.

- (381) Consequently, given the presumption following from the chain of 100% shareholding(s) that existed at the time of the infringement between EKA and Akzo Nobel NV (see recital (377)) and further given the facts mentioned in recitals (378) to (379), the Commission considers that Akzo Nobel NV exercised decisive influence over the conduct of its subsidiary EKA.
- (382) EKA and Akzo Nobel NV did not contest this finding in their reply to the Statement of Objections.
- (383) On the basis of the above, EKA Chemicals AB and Akzo Nobel NV should be held jointly and severally liable for the infringement committed by EKA Chemicals AB during the period from 21 September 1994 until 9 February 2000.

#### 5.2.2. *Arkema France SA and Elf Aquitaine SA*

##### 5.2.2.1. Commission's findings

- (384) The facts described in section 4 show that Atochem (now Arkema France SA) directly participated in the anti-competitive behaviour which is the subject of this Decision.
- (385) As mentioned in section 2.2.2, Atochem was created in 1983 under the name Atochem SA from the merger of Chloé Chimie, Atochimie and a part of the chemical activity of the group Pechiney Ugine Kuhlmann. In 1992, its name changed to Elf Atochem SA and in April 2000 to Atofina SA, after a takeover of Atochem's parent company Elf Aquitaine SA by the TotalFina group. On 4 October 2004, Atochem was renamed Arkema SA and, subsequently, Arkema France SA. It is, however, the same legal entity that directly participated in the infringement throughout its duration. Arkema France SA is therefore an addressee of this Decision.
- (386) Throughout the period of the infringement, Elf Aquitaine held more than 97% of the shares in Atochem<sup>60</sup>. Given that, under these circumstances, there are reasonable grounds for considering that the subsidiary will have to follow the policy laid down by its parent company (and thus not act autonomously) and that the parent company will encounter no obstacles in setting such policy for its subsidiary, it can be presumed that Elf Aquitaine exercised decisive influence over Atochem<sup>61</sup>. In addition, there are other elements which confirm the presumption that Elf Aquitaine did in fact exercise decisive influence. To begin with, the members of the *Conseil d'Administration* (Board of Directors) of Atochem were all appointed by Elf Aquitaine. Furthermore, (...) Given these various overlaps of personnel both directing and overseeing Atochem's business, and which (as regards the directors) had been appointed and - it must be assumed - could have been removed by Elf Aquitaine, the latter was clearly informed of all decisions to be taken by Atochem and could influence them at any time. There was also no other significant shareholder which could have exerted an influence on the commercial policy to be followed by the subsidiary.
- (387) Given the presumption following from Elf Aquitaine's shareholding in Atochem throughout the infringement (more than 97%) and further taking into account the

<sup>60</sup> As of April 2000, Elf Aquitaine's shareholding was decreased to 96,48%, see page 839 of the file.

<sup>61</sup> See for instance Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, paragraph 290. See also the Opinion of AG Warner of 22 January 1974 in Joined Cases 6 and 7/73 *ICI and Commercial Solvents Corp v. Commission* [1974] ECR 223.

organisational links, the Commission considers that Elf Aquitaine exercised decisive influence over the conduct of its subsidiary Atochem.

#### 5.2.2.2. Arguments of Atochem and Elf Aquitaine

- (388) In their responses to the Statement of Objections, both Atochem and Elf Aquitaine submit that Elf Aquitaine should not be held liable for the anti-competitive conduct of Atochem. In this respect, Atochem and Elf Aquitaine raise the following arguments.
- (389) First, the Commission incorrectly presupposes that in the situation of a 100% shareholding the liability of the parent company may be presumed. It is for the Commission to show that the parent company actually exercised decisive influence over the conduct of its subsidiary, the more so since in this case Elf Aquitaine held only some 97% of Atochem's shares.<sup>62</sup> With reference to the case-law, Atochem and Elf Aquitaine also argue that, although the 100% shareholding in the subsidiary provides a strong indication that the parent is able to exercise a decisive influence over the subsidiary's conduct on the market, this is not in itself sufficient to attribute liability to the parent for the conduct of its subsidiary. Something more than the extent of the shareholding must be shown, but this may be in the form of indicia.<sup>63</sup>
- (390) In this respect, the additional elements put forward by the Commission to support the presumption based on Elf Aquitaine's shareholding are, according to Atochem and Elf Aquitaine, insufficient to meet the standard set by the case-law or even erroneous.<sup>64</sup> The appointment of Atochem's Board members by Elf Aquitaine was only an automatic consequence of the shareholding structure under French commercial law and it should be borne in mind that the members of Atochem's Board were formally not appointed as Elf Aquitaine's representatives but as representatives of the totality of Atochem's shareholders. Furthermore, the Commission errs in stating that the business plan and the budget concerning Atochem's SC-related activities were approved by the management bodies of Elf Aquitaine. Moreover, concerning individuals in the management bodies of both companies, Atochem and Elf Aquitaine submit that personal management overlaps do not suffice to demonstrate Elf Aquitaine's exercise of decisive influence over Atochem's commercial policy. Finally, the Commission is also partly mistaken in the description of the functions held by certain individuals within Atochem and Elf Aquitaine: (...)
- (391) In line with the arguments above, Elf Aquitaine submits that (...) occupied only a relatively low position within the hierarchy of Atochem. He reported to (...)
- (392) Second, Atochem and Elf Aquitaine did not form a single economic unit but Atochem enjoyed full autonomy in determining its commercial policy for SC. Atochem's autonomy is demonstrated by the fact that Elf Aquitaine was solely a holding company, its powers being limited to the preservation of its financial interests and to general or horizontal issues such as human resources, fiscal policy of the group, industrial security and environmental matters. Elf Aquitaine solely approved major

<sup>62</sup> In this respect, the companies refer to the Opinion of Advocate General Mischo in Case C-286/98 P *Stora Kopparbergs Bergslags v Commission* [2000] ECR I-9925, paragraph 20.

<sup>63</sup> Case T-325/01 *Daimler Chrysler v. Commission* [2005] ECR II-3319, paragraph 218 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 and Others v Commission* [2007] ECR II-947, paragraph 132.

<sup>64</sup> Elf Aquitaine refers to the case *Bolloré v. Commission*, cited above.

investments or substantial changes in the scope of activities of companies within the group. Accordingly, Elf Aquitaine did not interfere with the commercial activities of its numerous subsidiaries. Throughout the period of the infringement, Atochem's reporting to Elf Aquitaine was limited to the extent required by law and no systematic information flow was established. In fact, Atochem reported to Elf Aquitaine only information on its commercial results and general policy. Atochem always acted in its own name and on its own behalf on the SC market. In any event, Elf Aquitaine was not directing the commercial policy of Atochem and was not in a position to do so.

- (393) Third, Atochem was only a relatively small market player (with a market share of approximately 9% in 1999) and Elf Aquitaine was not present on the SC market at all. More precisely, Elf Aquitaine was not directly involved in the infringement nor was it aware of any anti-competitive arrangements. It did not instruct Atochem about SC prices, output, sales targets etc. In this connection, Atochem submits that no evidence in the Commission's file shows such direct or indirect instructions which would have been given to Atochem by Elf Aquitaine. Moreover, given that the turnover generated by SC in 1999 did not represent more than 0,3% and 0,15% of Atochem's and Elf Aquitaine's turnovers, respectively, any potential financial impact of the SC business could not have been significant enough to require Elf Aquitaine's intervention or authorisation.
- (394) Finally, Atochem and Elf Aquitaine argue that the Commission should follow its Decision in *Organic Peroxides*<sup>65</sup> in which it was concluded that Atochem enjoyed autonomy in determining its commercial policy. Elf Aquitaine contends in this context that the *MCAA*<sup>66</sup> Decision, in which the Commission held Elf Aquitaine liable for Atochem's anti-competitive conduct, marks a radical change in the Commission's assessment of the liability of parent companies which runs counter to previous Commission decision practice. Elf Aquitaine further submits that, even though it was held liable for Atochem's conduct also in Decision 2006/903/EC of 3 May 2006 relating to a proceeding under Article 81 of the Treaty establishing the European Community and Article 53 of the EEA Agreement (Case COMP/F/C.38.620 — Hydrogen Peroxide and perborate)<sup>67</sup> ("*the Hydrogen Peroxide decision*"), the Commission did not, unlike in this case, attempt to demonstrate Elf Aquitaine's interference with Atochem's commercial policy.
- (395) In addition, Elf Aquitaine puts forward some more general remarks:
- fining a company other than that which committed the infringement would undermine the principle of the autonomy of a legal entity, and in particular its economic autonomy;
  - the fact that Elf Aquitaine was not involved in the Commission's investigatory procedure as it received no requests for information, was not subject to the on-site inspections and was not contacted by the Commission prior to receiving the Statement of Objections constitutes a violation of its rights of defence and of the presumption of innocence;

<sup>65</sup> Commission decision of 10 December 2003, *Organic peroxides*, OJ L 110, 30.04.2005, p. 44-47

<sup>66</sup> Commission decision of 19 January 2005, *MCAA*, case COMP/37.773, not yet published.

<sup>67</sup> OJ L 353, 13.12.2006, p. 54.

- the attribution of liability to Elf Aquitaine would violate several principles of European law (personal liability, personality of sanctions, principle of legality, equality of arms);
- the principle of legal certainty has been breached since, unlike in Case COMP/F/C.38.620 — Hydrogen Peroxide and perborate, "the *Hydrogen Peroxide* case", the Commission seeks in this case to demonstrate Elf Aquitaine's interference in Atochem's commercial policy, thereby making its decisional practice unpredictable; and
- for the sake of good administration, the Commission should wait for the judgment of the Court of First Instance in the *MCAA*<sup>68</sup>, *Hydrogen Peroxide*<sup>69</sup> and *Methacrylates*<sup>70</sup> cases where the issue of the liability of a parent company in cartel cases was raised by Elf Aquitaine.

### 5.2.2.3. The Commission's assessment and conclusion

- (396) As explained in recitals ((366)-(375)) and as recently confirmed by the Community Courts<sup>71</sup>, it is established case-law that a parent company can be presumed to exercise decisive influence over its wholly-owned subsidiaries. The presumption in the case of 100% ownership stems from the fact that a parent company in this position will almost always, and save for truly exceptional circumstances, exercise decisive influence over its subsidiary. Nothing different can be assumed in cases of almost-100% ownership given that the remaining shareholders will typically have no special minority rights but only a financial interest in the business of the subsidiary. Thus, although Elf Aquitaine's shareholding was below 100%, amounting to approximately 97%, there are no reasons as a matter of principle and no factual circumstances of this case which would exclude the application of the presumption. Hence, it is for Elf Aquitaine as the parent company to rebut the presumption by adducing evidence demonstrating that its subsidiary decided independently on its conduct on the market. Failure to provide sufficient evidence on the part of the parent company amounts to a confirmation of the presumption and provides a sufficient basis for the attribution of liability<sup>72</sup>. The presumption was not rebutted in this case.
- (397) Atochem's and Elf Aquitaine's arguments disputing the cogency of the additional elements put forward by the Commission are addressed in recitals (398) to (415).
- (398) While noting the companies' claim that the budget and business plan of Atochem with regard to its SC-related activities was not specifically approved by Elf Aquitaine, the submissions of the parties are not capable of putting in question the Commission's conclusions regarding the management overlaps between Atochem and Elf Aquitaine.
- (399) First, (...)

<sup>68</sup> Pending case T-175/05, *MCAA v Commission*.

<sup>69</sup> Pending cases T-185/06, T-186/06, T-189/06, T-190/06, T-191/06, T-192/06, T-194/06, T-196/06, T-197/06, T-199/06.

<sup>70</sup> Pending cases T-206/06, T-214/06, T-216/06, T-208/06, T-217/06.

<sup>71</sup> Judgment of 12 December 2007 in Case T-112/05 *Akzo Nobel et al v. Commission*, not yet published, paragraphs 60, 61 and 85; judgment of 12 September 2007 in Case T-30/05 *Prym Consumer v Commission*, not yet published, paragraphs 146–148.

<sup>72</sup> Cf. Case T-325/01 *DaimlerChrysler v. Commission* [2005] ECR II-3319, paragraph 219.

- (400) Second, at least according to the current articles of association ("Statuts") of Atochem<sup>73</sup>, its *Conseil d'Administration* determines the general strategy of the company's activities and supervises the strategy's implementation. Notwithstanding the rights reserved to the General Meetings of Shareholders ("Assemblées Générales"), it is authorised to take actions which are indispensable for the sound functioning of the company. To this end, each member of the *Conseil d'Administration* has the right to obtain any information and/or documents necessary to carry out the tasks conferred upon him.
- (401) Bearing this in mind, the contentions of the companies that the overlapping functions of certain individuals, such as (...), cannot be considered an element to support Elf Aquitaine's influence over Atochem's commercial policy, are not convincing. The same applies to the argument brought by Elf Aquitaine that (...) occupied only a middle-management position within the management structure of Atochem, as well as to the contentions of the companies that SC was never subject to discussion in the statutory or management bodies of Atochem and/or Elf Aquitaine (which appears unlikely at least for Atochem given that SC constituted one of its business activities) and that Elf Aquitaine, in any event, was not aware of any anti-competitive conduct of Atochem. The lack of diligence of the higher management of Atochem and Elf Aquitaine in exercising their duties, resulting in the alleged lack of awareness of the statutory and management bodies of Atochem and Elf Aquitaine of the actions taken by employees, cannot serve as an argument for the two companies to escape the liability for such actions.<sup>74</sup>
- (402) As for the claims that Elf Aquitaine has always limited itself to the function of a "holding company" with respect to SC, that it never interfered with Atochem's commercial activities, that Atochem enjoyed full autonomy and that, consequently, Atochem and Elf Aquitaine did not form a single economic unit, the following observations should be made.
- (403) The qualification of the role of a parent company in terms of "holding company" is not a conclusive argument with respect to the effective autonomy of a subsidiary. The fact that the parent company itself is not immediately involved in the operational business is not decisive as regards the question whether it should be considered to constitute a single economic unit with the operational units of the group. The division of tasks is a normal phenomenon within a group of companies. An economic unit by definition performs all of the main functions of an economic operator within the legal entities of which it is composed. Group companies and business units that are dependent on a corporate centre for the basic orientation of the commercial strategy and operations, for their investments and finances, for their legal affairs and for their leadership form a single economic unit and hence cannot be considered to constitute economic units in their own right.
- (404) The facts of this case are in line with that description. Given that Atochem reported to Elf Aquitaine information on its commercial results and general policy, it may safely be assumed that the latter used that information in order to influence the strategic policies of the group, as is the typical role of the ultimate parent company. This is also confirmed by the fact that Elf Aquitaine decided, among other things, on major

<sup>73</sup> As adopted on 10 March 2004.

<sup>74</sup> See also recital (370).

investments and significant changes in the scope of the business, and provided its subsidiaries with assistance in horizontal issues such as industrial security or environmental matters, as submitted by Elf Aquitaine in its reply to the Statement of Objections. As Elf Aquitaine put it, this influence was exerted in the interest of a “*circumspect governance over its assets for the benefit of the company*”. It should also be noted that the attribution of an infringement by a subsidiary to the parent company does not require proof that the parent company influences its subsidiary's policy in the specific area in which the infringement occurred<sup>75</sup>. Thus, Atochem's repeated contention that Elf Aquitaine would not have had a decisive influence “*over the commercial policy of Arkema [Atochem] in relation to Sodium Chlorate*” is irrelevant. More relevant appears Elf Aquitaine's implicit admission that it is responsible, in general, for formulating a “*coherent and stable group policy towards its subsidiaries*”. Moreover, Atochem did not in fact deny that its reporting also concerned SC as it acknowledged that it had provided “*to the majority shareholder tentative figures concerning the company without necessarily reporting about Sodium Chlorate and without enabling Elf Aquitaine to be informed in detail about Arkema's [Atochem's] commercial policy regarding Sodium Chlorate*”.

- (405) It is therefore concluded that the arguments raised by Atochem and Elf Aquitaine (see recitals (388) to (394)), which in any event have not been supported by evidence, are not sufficient to rebut the presumption that Elf Aquitaine exercised decisive influence over the commercial policy of Atochem.
- (406) In reply to the general arguments raised by Elf Aquitaine (see recital (395)), it is noted that the fact that in a previous case the Commission addressed its decision solely to Atochem does not prevent the Commission in this case from addressing its decision to both Atochem and Elf Aquitaine. The Commission has discretion to attribute liability to a parent company in such circumstances.<sup>76</sup>
- (407) As for the principle of personal liability, Article 81 of the Treaty is addressed to “undertakings” which may comprise several legal entities. In this context, the principle of personal liability is not violated as long as different legal entities are held liable on the basis of circumstances which pertain to their own role and their conduct within the same undertaking. In the case of parent companies, liability is established on the basis of their exercise of effective control on the commercial policy of the subsidiaries which are materially implicated by the facts. References to different areas of law where the principle of autonomy of a subsidiary is construed differently (such as in corporate law) are not relevant in this case.
- (408) Elf Aquitaine's rights of defence have not been breached in the present case. Elf Aquitaine received the Statement of Objections and was duly given an opportunity to make its views known. Its rights of defence have therefore been fully respected. The fact that the company was not subject to on-site inspections and did not receive any requests for information does not constitute a violation of its rights of defence. Inspections and requests for information are purely investigatory steps which the Commission is not obliged to address to undertakings before issuing a Statement of Objections.

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<sup>75</sup> Case T-112/05 *Akzo Nobel et al v. Commission*, not yet published, paragraph 83.

<sup>76</sup> See case T-203/01, *Michelin v Commission*, [2003] ECR, II-4071, paragraph 290.

- (409) As for Elf Aquitaine's claims concerning the alleged violation by the Commission of the presumption of innocence, the *Sumimoto* judgment<sup>77</sup> invoked by the company is not relevant in this case since it only refers to allusions to the liability of a person for a particular infringement in a final decision (and not, like in the present case, in the investigation stage preceding the Statement of Objections).
- (410) Similarly, Elf Aquitaine's claim that the Commission holds it *a priori* "guilty" must be rejected. Atochem, which belongs to a single undertaking with Elf Aquitaine, has explicitly admitted to participating in the infringement in its application for immunity and alternatively for a reduction of fines under the Leniency Notice. The attribution of liability to Elf Aquitaine follows from a presumption of decisive influence established by settled case-law and which has not been rebutted in this case.
- (411) Given all the reasons set out in recitals (409) - (410), it is also concluded that the presumption of innocence has not been violated in the present case.
- (412) Elf Aquitaine's argument that the Commission violates the principle of equality of arms by attributing liability to it solely on the basis of its shareholding in Atochem and by failing to take into account Elf Aquitaine's plausible alternative explanation of the relation between the two companies is ill-founded. As the presumption relating to the exercise of decisive influence builds on the fact that what is presumed is true in almost all cases, it is for the parent company to demonstrate any exceptional circumstances, not just a "plausible" alternative. However, most of the arguments put forward merely point to a distribution of functions which is typical for a hierarchically organised group of companies. These and other arguments have been addressed in detail in recitals (400) – (407). Moreover, no evidence was put forward in this case as is required under settled case-law if a parent company is to rebut the presumption. Therefore, the principle of equality of arms has not been violated in this case.
- (413) Elf Aquitaine's argument that the principle of legal certainty has been violated in this case must also be rejected. As in the *Hydrogen Peroxide* case, Elf Aquitaine's liability for the anti-competitive conduct of Atochem is based on the presumption which results from its shareholding in Atochem being in excess of 97%. Based on this presumption, which follows from settled case-law, it can be assumed that Elf Aquitaine exercised decisive influence over Atochem's commercial policy, which means that it bears responsibility for the conduct of its subsidiary which it should have prevented by using its influence. The same applies with regard to all other subsidiaries over which Elf Aquitaine exercises decisive influence. Nothing prevents Elf Aquitaine from adopting a coherent control and compliance policy with regard all of its subsidiaries in order to prevent anti-competitive behaviour, and thus any threat of parental liability.
- (414) Furthermore, the fact that several cases are currently pending before the Court of First Instance does not prevent the Commission from taking other decisions on similar matters.
- (415) On the basis of the above, Atochem (now Arkema France SA) and Elf Aquitaine SA should be held jointly and severally liable for the infringement committed by Atochem during the period from 17 May 1995 until 9 February 2000.

<sup>77</sup>

See Joined Cases T-22/02 and T-23/02 *Sumimoto v Commission* [2005] ECR II-4065, paragraph 106.

### 5.2.3. *Aragonesas SA (now Aragonesas Industrias y Energia SAU) and Uralita SA*

#### 5.2.3.1. Commission's findings

- (416) The facts described in section 4 show that Aragonesas Industrias y Energia SA directly participated in the anti-competitive behaviour which is the subject of this Decision.
- (417) As mentioned in section 2.2.4, Aragonesas belonged to the Chemical Division of Uralita SA. Until December 1994 when Uralita decided to regroup its chemical business, Aragonesas was a 100% subsidiary of Uralita. In December 1994, Uralita created EIA to which the entire chemical business was transferred. As a result, Aragonesas became a 100% subsidiary of EIA and EIA kept its 100% shareholding in Aragonesas throughout the relevant period. In 2003, Uralita and EIA merged. Consequently, Aragonesas became again a wholly owned (100%) subsidiary of Uralita and Uralita, as the legal and economic successor of EIA, assumed EIA's position vis-à-vis Aragonesas as its sole shareholder.
- (418) Moreover, Uralita was over the whole period of existence of EIA (i.e. between 1994 and 2003) its major shareholder. Initially, Uralita held 98,84% of shares of EIA. In the period 1995 – 1996, the shareholding of Uralita SA in EIA was reduced to between 50,52% and 51,72%. Between 1997 and 2000 Uralita held between 49,44% and 50,66% of EIA's shares. From 31 December 2000, Uralita held again more than 50% of EIA and, by December 2001, it increased its share up to approximately 84%. According to Uralita, none of the remaining shareholders of EIA held a significant percentage of shares during the period of the infringement.
- (419) It follows that, at least effectively given the size of the remaining shareholdings, Uralita had a controlling interest in EIA, which in turn was the sole shareholder of Aragonesas. In addition, there is other evidence which allows the conclusion that Uralita exercised decisive influence over Aragonesas' commercial policy, via EIA, throughout the period of the infringement. This evidence concerns overlapping directorships between Uralita, EIA and Aragonesas throughout the period taken into consideration for the purposes of this Decision.
- (420) (...).
- (421) (...)
- (422) (...)
- (423) It is thus established that during the period of the infringement, the Board of Directors of Aragonesas included several persons who at the same time sat on the Boards of Directors of Uralita (and EIA). Among these directors was at least one person, (...), who was an executive member (in fact the Chairman) of the Board of Aragonesas and thus clearly had management functions. In the Commission's view, these strong organisational links indicate that Uralita had established a control structure in order to exert decisive influence over its subsidiary's commercial conduct. This is confirmed by the participation of executive directors of Uralita (and EIA) as non-executive members of Aragonesas' Board of Directors, which made it possible *“to safeguard Uralita's financial interests with respect to the executive decisions taken in these*

*Board meetings*” and in any event allowed Uralita's management to be kept informed of all decisions taken on the level of the subsidiary.

- (424) It is considered that the facts mentioned in recitals (419) to (423) and (458) to (463) constitute sufficient evidence that Uralita exercised direct influence over Aragonesas' commercial policy. The evidence indicates *at least indirect control via the intermediary EIA*. As shown, there were overlapping directorships both between Uralita/EIA on the one hand, and EIA/Aragonesas on the other hand. Concerning *Uralita's relationship to EIA*, Uralita itself submits that it made investments in EIA's chemical division from 1994 in aiming at ensuring the value of the company and preparing EIA for divestment. Given this (at least financial) interest Uralita had in Aragonesas, it is inconceivable that EIA could have taken decisions independently that would have adversely affected the interests of Uralita.
- (425) Concerning *EIA's relationship to Aragonesas*, it is clear that EIA was not a mere financial holding but rather a company with strategic and operational responsibilities, with its own management team, commercial department and Chief Production Officer, as well as its own legal, human resources, finance and controlling departments. Moreover, it was Aragonesas' sole shareholder during the period of the infringement from which follows a presumption that EIA exercised decisive influence over its wholly-owned subsidiary. This presumption is confirmed by Uralita's own statements as regards the role of EIA's Board of Directors according to which the Board would “*discuss commercial and industrial issues when dealing with the management report and strategic plan*”; these documents required EIA's final approval “*based on the general policy of EIA*”. Likewise, Aragonesas stated in its reply to the Statement of Objections that EIA was “*concerned with broad strategic issues which mattered for the general policy of the group as a whole, such as the management report and the strategic plan*” and that it “*decided on strategic decisions which might affect the whole group, such as new investments or the financial results*”.
- (426) It is therefore considered that Uralita exercised, directly but also indirectly via EIA, decisive influence over Aragonesas' business orientation and overall commercial policy. Moreover, given the presumption of the exercise of decisive influence by EIA over Aragonesas following from the 100% shareholding that existed at the time of the infringement, as well as the additional factors mentioned above, it is also concluded that at the very least EIA exercised decisive influence over the conduct of its wholly-owned subsidiary Aragonesas. Taking further into consideration that EIA later merged with Uralita and that Uralita became its legal and economic successor, the Commission considers that EIA's liability for the conduct of Aragonesas (as part of the undertaking that committed the infringement) transferred to Uralita after its absorption of EIA in 2003.

#### 5.2.3.2. Arguments of Aragonesas

- (427) In response to the Statement of Objections, Aragonesas submits that EIA and Uralita should not be held liable for the infringement. Aragonesas' main arguments are presented in recitals (428) to (432).

- (428) The Commission attributed liability to EIA mainly on the basis of the 100% shareholding in Aragonesas. However, according to the case-law<sup>78</sup>, this is not justified. A 100% shareholding gives rise only to a presumption and must be supplemented by further indications pointing to the parent's material involvement in its subsidiary's conduct.
- (429) EIA was a holding company for three subsidiaries: Aiscondel, Delsa and Aragonesas. None of the subsidiaries shared clients, facilities or logistics costs. They were all based in different locations and had their own commercial platforms (sales teams, distribution channels, client base). Each of them decided internally their own commercial strategies without interference from EIA. EIA's Board of Directors was only concerned with broad strategic issues affecting the whole group, such as the management report, the strategic plan, new investments and the financial results. SC played no role in other management bodies of EIA as it was not relevant from either a strategic or economic point of view. By imputing liability to EIA, the Commission would also hold Aiscondel and Delsa liable for the infringement.
- (430) The commercial policy and the day-to-day management for SC were decided almost exclusively by (...), who enjoyed a wide discretion as evidenced by his job description. (...) was free to determine Aragonesas' SC sales policy independently without having to report back to senior management on specific initiatives he had undertaken. It is therefore not correct to suppose that EIA could have been aware of any infringements. EIA should not be held responsible for the conduct of Aragonesas which in reality concerned the actions of a single employee(...)
- (431) Referring to the Commission decision in the *Hydrogen Peroxide* case, Aragonesas argues that it would be inconsistent with the Commission practice to attribute liability to EIA.
- (432) Finally, Aragonesas contends that Uralita was only an indirect shareholder of Aragonesas with no interference in the commercial activities of Aragonesas. In fact, Uralita lacked the expertise and interest to become so involved. Moreover, the individuals from Uralita sitting on the Boards of EIA and Aragonesas were not involved in any decisions regarding SC.

#### 5.2.3.3. The Commission's assessment and conclusion

- (433) The arguments put forward by Aragonesas do not prove that EIA did not exercise decisive influence over Aragonesas. Nor is Aragonesas able to show that Uralita should not be held liable for the conduct of Aragonesas.
- (434) Throughout the infringement period, participation in the collusion took place via an employee of Aragonesas and that company should thus be held liable for its direct involvement in the cartel. During the infringement period, EIA owned 100% of Aragonesas' shares. In line with the case-law, there is therefore a presumption that EIA exercised decisive influence over Aragonesas (see recitals (369) to (371)). Consequently, EIA and Aragonesas together form part of the undertaking that committed the infringement (see recitals (367) - (368)).

<sup>78</sup> 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 and Others v Commission* [2007] ECR II-947, paragraph 132.

- (435) In addition, as already indicated (see recital (425)), there are further indicia which confirm the presumption in recital (369) that EIA in fact exercised decisive influence over the market conduct of Aragonesas. These indicia show that Aragonesas did not enjoy complete autonomy on the market.
- (436) The fact that Aragonesas had its own commercial platform does not in itself prove that Aragonesas defined its conduct on the market entirely independently from its parent<sup>79</sup>. That the parent company itself is not involved in the production and sale of SC is not decisive as regards the question whether it should be considered to constitute a single economic unit with the operational units of the group. The division of tasks is a normal phenomenon within a group of companies. An economic unit by definition performs all of the main functions of an economic operator within the legal entities of which it is composed. Recourse to local expertise and the empowerment of local management for day-to-day operations in case of a wholly-owned subsidiary are practically universal features of a 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.
- (437) The existence of a single economic entity does not presuppose the exercise of decisive influence over the day-to-day management of the subsidiary's operation, nor the commercial policy in the strict sense (e.g., distribution and pricing strategy), but rather over the general strategy which defines its business orientation<sup>80</sup>. Consequently, a parent company may be held liable as part of the undertaking committing an infringement even if it has not influenced its subsidiary's policy in the specific area in which the infringement occurred<sup>81</sup>. The subsidiary's management may well be entrusted with responsibility for the day-to-day business; but this does not rule out the possibility for the parent company to impose objectives and policies which affect the performance of the group and its coherence and to discipline any behaviour which may depart from those objectives and policies.
- (438) In the case of Aragonesas, EIA decided on broad strategic issues, such as the management report, the strategic plan, new investments and the financial results. More particularly, EIA's Board of Directors decided on the profit and loss account of Aragonesas, the appointment and removal of the members of the Board of Aragonesas and other executive appointments and removals, the increase or reduction of the Aragonesas' share capital and major investments. It approved the budget, the management report and the strategic plan for its sector. When dealing with the management report and the strategic plan, the Board discussed commercial and industrial issues<sup>82</sup>.

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<sup>79</sup> See 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 and Others v Commission* [2007] ECR II-947, paragraph 142.

<sup>80</sup> See the judgment of 12 December 2007 in Case T-112/05 *Akzo Nobel NV and others v Commission*, not yet published in the ECR, paragraphs 63-65, 82, 83.

<sup>81</sup> *Id.*, paragraph 83.

<sup>82</sup> See Uralita's reply to the Statement of Objections, paragraph 54.

- (439) As discussed in recitals (420), (421) and (422), during the whole of the infringement period, two managers of Uralita (...) were members of the Boards of Directors at both Aragonesas and EIA. (...) sat in both Boards until 1998. Therefore, even accepting the fact that those individuals were materially not involved in the SC business and taking into account that the day-to-day management functions of Aragonesas were delegated to the subsidiary itself, this does not show that the Board of Directors of EIA did not exercise decisive influence on Aragonesas' commercial policy.
- (440) Aragonesas' contention that SC was not relevant for EIA from either a strategic or economic point of view, and that it did not interfere with the day-to-day decision making process for SC, does not prove that EIA granted Aragonesas complete autonomy in defining its overall conduct on the market<sup>83</sup>. Moreover, while Aragonesas claims that the commercial policy and day-to-day management for SC were decided “almost exclusively” by (...), and that he enjoyed “wide discretion” in this area, (...) job description states that such autonomy (in the selection of markets, clients and the negotiation of prices and volumes) would only be granted “[s]ave for specific instructions from the Commercial Director”<sup>84</sup>.
- (441) For those reasons, Aragonesas has not shown that it decided independently on its own conduct on the market and, consequently, has not rebutted the presumption that EIA exercised control over it.
- (442) As has been already set out in recital (370), the argument that there is no indication of direct involvement of the parent company in the anti-competitive conduct and its alleged lack of awareness is irrelevant.
- (443) As regards Aragonesas' further claims that by imputing liability to EIA the Commission would be inconsistent with the *Hydrogen Peroxide* case, the Commission enjoys a margin of discretion in deciding which entities of an undertaking it holds liable for an infringement and its assessment is done on a case-by-case basis. The fact that, in previous decisions, based on the facts in those particular cases, the Commission chose not to hold the parent companies liable does not mean that the Commission is prevented from holding the parent company liable in this case.
- (444) As for Aragonesas' contention that by imputing liability to EIA the Commission would also hold Aiscondel and Delsa liable for the infringement, it is noted that EIA was the parent company of Aiscondel and Delsa and neither of the two had any ownership in Aragonesas but, instead, all three companies were 100% subsidiaries of EIA. Therefore, the liability rests solely on the parent company EIA and, following its merger with Uralita, on its legal and economic successor Uralita. Further reasons for holding Uralita liable for the conduct of Aragonesas are discussed in recitals (455)-(469).

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<sup>83</sup> See 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 and Others v Commission* [2007] ECR II-947, paragraph 144.

<sup>84</sup> See Aragonesas' reply to the Statement of Objections, paragraphs 56, 58. At the same time, Uralita stated in its reply to the Statement of Objections, paragraph 32, that Boards of Directors within its group “do not normally interfere in day-to-day management”.

#### 5.2.3.4.Arguments of Uralita

- (445) Uralita's main arguments in response to the Statement of Objections and in their later submissions are summarised in recitals (446) to (454).
- (446) The Commission presumes that a parent company holding a majority of the issued shares in a subsidiary can be considered to be in a position to exercise decisive influence over that subsidiary. However, such a presumption applies only if a company holds 100% of the subsidiary and, even then, such a presumption is rebuttable. On the basis of case-law<sup>85</sup>, the Commission bears the burden of proving that such a decisive influence actually existed. In the case *Copper Plumbing Tubes*<sup>86</sup>, the Commission took the view that a parent company's 98,6% shareholding in a subsidiary was not enough to establish liability because the parent did not have 100% control over the subsidiary; the parent had no direct involvement in and awareness of the cartel and the parent did not exercise any management of commercial policies of its subsidiaries.
- (447) On the basis of the case-law<sup>87</sup>, exercise of control must be shown in the two step test according to which the parent company must first be able to exercise decisive influence on the subsidiary and, second, has effectively exercised this power. A number of additional elements may be considered in order to adduce or refute a parent company's responsibility. In cases<sup>88</sup> where a subsidiary existed as an independent undertaking and where there was no indication that a parent company was involved in or knew about the infringement, liability was attributed only to the subsidiary.
- (448) At the time of the infringement, Uralita held an indirect shareholding of between 49,44 and 51,72% in Aragonesas through EIA. EIA was created in 1994 as a holding company in order to put the chemical business on the stock market. Due to potential obligations resulting from stock market regulation, Uralita only maintained limited control. In this respect, Uralita explains that Spanish stock market regulations require a company to make a compulsory take-over bid if the company owns the majority of the voting rights and that, for this reason, Uralita did not own the majority of the voting rights<sup>89</sup>. Therefore, Uralita's shareholding cannot be considered as sufficiently significant to justify the presumption that it had a decisive influence over Aragonesas' commercial policy. The Commission also fails to take into consideration that there existed an intermediary company – EIA – between Uralita and Aragonesas.

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<sup>85</sup> Case C–286/98P *Stora Kopparbergs Bergslags v Commission*, [2000] ECR I–9925, paragraph 28; case T–325/01, *DaimlerChrysler v Commission*, ECR [2005] I–3319, paragraph 218; case T–330/01, *Akzo Nobel v Commission*, [2006] II–3389, paragraph 83;

<sup>86</sup> Case COMP/E-1/38.069 - *Copper Plumbing Tubes*, Commission decision of 3 September 2004, not yet published.

<sup>87</sup> Case 107/82 *AEG v Commission* [1983] ECR 3151, paragraph 50; case T–314/01 *Avebe v Commission* [2006] ECR II–3085, paragraph 136; also Case C–294/98 P *Metsä-Serla Oy v Commission* [2000] ECR I–10065, paragraph 27; 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 Rorindustri and others v Commission* ECR [2005] I–5425 paragraph 117.

<sup>88</sup> Commission decision of 21 November 2001 *Vitamins*, OJ [2003] L 6/1, paragraph 643; Commission decision of 20 December 2001, *Carbonless Paper*, OJ [2004] L115/1, paragraph 364; Commission decision of 11 June 2002, *Austrian Banks*, OJ [2004] L 56/1, paragraph 479; Commission decision of 20 October 2004, *Spanish Raw Tobacco*, not yet published, paragraph 376.

<sup>89</sup> See the chart of management structure 1992-2000 submitted by Uralita on 14 March 2008.

- (449) Neither Uralita nor EIA were in a position to control Aragonesas to such an extent as to prevent any of the alleged infringements. Uralita had no effective control over Aragonesas' commercial policy because its participation in Aragonesas did not constitute a strategic investment but was driven by financial objectives. Uralita had no specific knowledge of the chemical sector and, hence, did not take over Aragonesas' day-to-day management. Uralita only made sure that the key positions in Aragonesas were covered by competent individuals, mostly from Aragonesas' own staff.
- (450) There were no business links between EIA and Uralita and EIA was not integrated into the Uralita group. A number of examples illustrate the absence of any business links between the two companies: EIA was listed independently on the stock market and had its own annual report; EIA had its own legal, human resources, finance and controlling departments; EIA had its own independent headquarters; EIA never used Uralita's research and development resources; Uralita was not responsible for EIA's debts; EIA and Uralita had no clients in common and EIA had its own commercial department; EIA used different utilities; EIA and Uralita did not share logistics costs; EIA never used Uralita's know-how, intellectual property rights, software licences or information technology systems; EIA had its own corporate image, logo and website; EIA sold PVC to Uralita at market price; and salaries at EIA were higher than at Uralita.
- (451) There are no indications that Uralita knew about the infringement or was otherwise involved in it. The Commission's allegations relate to the actions of a single Aragonesas employee who enjoyed considerable autonomy and whose obligations to report back to senior management were limited. (...) never reported back to the management of either EIA or of Uralita. None of the individuals mentioned in recitals (420), (421) and (422) (the Board members) was in a position to control Aragonesas' commercial policy or to be aware of the infringement.
- (452) The Board of Directors of EIA met 5-6 times a year and the Board of Aragonesas 4-5 times a year. Neither Board was involved in the commercial decision making process for individual product lines. Messrs (...) were non-executive members of the Boards of EIA and Aragonesas. Their function was to represent Uralita in these Boards and safeguard Uralita's financial interests with respect to the executive decisions taken in the Board meetings. The number of directors who represented Uralita on EIA's Board never exceeded 50% of the members of the Board during the infringement period. There were both internal or executive members and also external members in the Board. The difference between the two is that the internal or executive members were also employed by the company in question while the external members were not linked to the management of the company. Moreover, with respect to external members, a further distinction into so called "domanial" and independent members can be made. "Domanial" members represent significant shareholders in the company, whereas independent members represent the interests of the floating capital. In principle, independent members should not be linked to the company's management or significant shareholders.
- (453) The official minutes of Uralita's Board of Directors meetings as well as Uralita's annual reports show that Uralita did not exercise any material control over the commercial activities of EIA and Aragonesas. The minutes of meetings of EIA's Board of Directors show that the Board only discussed commercial and industrial issues when dealing with the management report and the strategic plan. Its only role

regarding both documents was to give its final approval based on the general policy of EIA. Aragonesas' Board of Directors had an executive function and was typically concerned with high-profile executive decisions in relation to the financial performance and the overall organisation of the company, including the approval of the annual budget and following the compliance with it. It was not involved in the day-to-day management of the individual product lines. Therefore, neither Uralita's, EIA's nor Aragonesas' senior management controlled Aragonesas' commercial policy in relation to SC, for which Mr. (...) enjoyed wide discretion.

- (454) It is incorrect to attribute liability to Uralita for EIA's liability as Aragonesas still exists as legal entity. Uralita only assumed EIA's legal position vis-à-vis Aragonesas after the alleged infringements took place. When an undertaking has allegedly participated in an infringement in its own right and the company is not simply absorbed by another undertaking and therefore still exists as a separate legal entity, it must answer itself for its unlawful activity.

#### 5.2.3.5. The Commission's assessment and conclusion

- (455) The arguments put forward by Uralita do not convincingly show that it did not exercise decisive influence over Aragonesas. On the contrary, the following shows that Uralita had *de facto* control over Aragonesas.
- (456) The case-law referred to in recitals (370) and (371) does not exclude the possibility that parent companies with lower shareholdings than 100% can be held liable for an antitrust infringement committed by the subsidiary. As set out in recital (368), according to the case-law, different companies belonging to the same group form an economic unit, and therefore an undertaking within the meaning of Article 81 of the Treaty, if the companies concerned do not determine independently their own conduct on the market. In the case of a subsidiary, which is not wholly-owned by its parent, it is possible to find that the subsidiary and the parent together form an economic unit for the purposes of the application of Article 81 of the Treaty if the subsidiary has not decided independently upon its own conduct on the market, understood as the general strategy defining its business orientation.
- (457) The factual situation in each case may be different because the precise circumstances pertain to the structure that the parent company has decided to establish in each case. What counts is whether, on the basis of the facts particular to the case in question, it is demonstrated that the parent company has exercised decisive influence over the subsidiary's business, rather than to compare the particular facts of one case against those of another.
- (458) On the basis of Uralita's submissions, it is clear that, even though Uralita reduced its shareholding in EIA to 50,52% in 1995 and to 49,44% in 1997, the decision-making structures concerning EIA – and Aragonesas – did not materially change but, in practice, remained the same as when EIA was a wholly-owned (100%) subsidiary of Uralita. Indeed, Uralita has submitted that the other shareholders had no significant shareholding in EIA (recital (418)). Uralita has neither shown nor even argued that any of the other shareholders of EIA exercised decisive influence over that intermediate company. On the contrary, Uralita has submitted that the Board Members of the Spanish Stock market listed companies are generally appointed on the basis of the proposal made by the company's Board of Directors which is then approved by the

General Assembly. This was the procedure used to appoint the members of EIA's Board of Directors during the infringement period. Several members of EIA's Board of Directors were connected to Uralita through membership in Uralita's Board of Directors and, therefore, were considered to represent Uralita. Based on Uralita's own submission, Uralita had either a majority or at least an equal number of members in EIA's Board who represented Uralita (see recital (459)). Therefore, given the composition of EIA's Board of Directors in the relevant period, Uralita exercised direct influence over the decision-making process of that Board.

- (459) During the infringement period, two members of the Aragonesas Board of Directors – (...) - simultaneously held positions on the Boards of Directors in Uralita and EIA. In addition, (...) Therefore, Uralita exercised decisive influence over Aragonesas through EIA's Board. (...)
- (460) The involvement of Uralita's management personnel on the Boards of Aragonesas and EIA thus secured a direct influence by the parent company over the policy of its subsidiaries. Even if the day-to-day management functions of Aragonesas were delegated to the subsidiary, this does not mean that the Boards of Directors of Uralita and EIA did not exercise decisive influence on the subsidiary's commercial policy. The delegation of management functions is optional and lies entirely in the hands of the parent company. It is practically a universal feature of a business needing specialised knowledge that operational powers are granted to the local management of a subsidiary.
- (461) In addition, Uralita stresses that it itself "*made sure that the key positions in Aragonesas were covered by competent individuals*" (see recital (449)). Uralita gives the following appointments as examples of this practice: (...) Entrusting individuals with such consecutive positions constitutes a classic mechanism to keep information flow and coherence within the members of the group - in this case between Aragonesas, EIA and Uralita - and guarantees predictability of management and of policy aspects. In addition, directors of Uralita had a direct influence on the appointment and removal of the senior executives in EIA and Aragonesas through EIA's so called "standing and compensation Committee". This Committee assumed the delegated powers between the Board meetings and set the group's general compensation policy. This included appointing and removing senior executives, determining the pay of senior executives and proposing directors' pay to the Board.
- (462) Thus, by being represented in EIA's management bodies, Uralita had a direct influence on the composition of the management of both EIA and Aragonesas. (...)
- (463) Not only did Uralita decide on the key people in Aragonesas but it also steered and monitored the financial performance of the company in order to ensure that the financial results were satisfactory and the budget was met by Aragonesas, as any financial investor would do. Uralita had directors sitting in the audit Committee of the Board of EIA, the main functions of which were accounting, reporting and control, appointment and removal of external auditors and review of their conclusions. (...)
- (464) Uralita also submits that it made investments in EIA's chemical division from 1994 aimed at ensuring the value of the company and preparing EIA for divestment. Given the interest Uralita had in EIA and the chemical sector, including Aragonesas, under

its umbrella, it is therefore inconceivable that EIA or Aragonesas could have taken decisions independently that would have adversely affected the interests of Uralita.

- (465) Moreover, the reporting lines between managers in the SC business lead directly to EIA's Board of Directors, where Uralita was represented by some of its own directors (see recitals (419) to (422)). (...) The General Manager of Aragonesas reported to the Board of Directors of EIA. As discussed above (see recital (459)), given that Uralita was strongly represented in EIA's Board of Directors, Uralita had direct access to information concerning Aragonesas' business.
- (466) Such a reporting line 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 financial objectives and strategies set by the parent. In the light of these facts, a blanket denial of the existence of an information flow from the subsidiary to the parent is not credible. The argument that (...) did not receive instructions directly from Uralita does not change that conclusion, nor does it prove that Aragonesas was autonomous in determining its own conduct on the market. In any event, it is hardly credible that, as Uralita claims, neither Uralita's nor EIA's nor Aragonesas' senior management controlled Aragonesas' commercial policy with regard to SC, even though control over the subsidiary's policy in the specific area in which the infringement occurred is not decisive to establish control over the subsidiary's commercial policy.
- (467) Uralita's arguments relating to the absence of any business links do not prove that it did not exercise decisive influence over Aragonesas. As has been analysed in detail in recital (436), the fact that the parent company has decentralised decision-making functions is not decisive as regards the question whether it should be considered to constitute a single economic unit with the operational units in the group. Therefore, the argument of Uralita cannot be accepted.
- (468) Finally, as concerns the absorption of EIA, through the merger Uralita assumed EIA's position vis-à-vis Aragonesas as its legal and economic successor. In this context, the question whether or not Aragonesas itself continues to exist as a legal entity is not relevant. EIA was purely and simply absorbed by Uralita and, consequently, Uralita assumes the liability incurred by the absorbed entity as part of the undertaking that committed the infringement. Therefore, it is considered that the liability for the infringement resting on EIA as Aragonesas' sole owner was transferred to Uralita.
- (469) On the basis of the above, Aragonesas SA (now Aragonesas Industrias y Energia SAU) and Uralita SA should be held jointly and severally liable for the infringement committed by Aragonesas SA during the period from 16 December 1996 until 9 December 1999.

#### *5.2.4. Finnish Chemicals Oy and Erikem Luxembourg SA (in liquidation)*

##### *5.2.4.1. Commission's findings*

- (470) The facts as described in section 4 show that Finnish Chemicals directly participated in the anti-competitive behaviour which is the subject of this Decision.
- (471) ELSA was the 100% owner of Finnish Chemicals in the period at least from 13 February 1997, that is to say, the time when the acquisition of 100% Finnish

Chemicals' shares by Erikem Oy, a wholly owned subsidiary of ELSA, was cleared by the Commission (recital (20)), to 30 January 2003. Consequently, there is a presumption that ELSA has exercised decisive influence over Finnish Chemicals since 13 February 1997.

- (472) In addition, there are other elements which show that ELSA can be held liable for the infringement committed, given that it exercised a decisive influence over the business policy of its subsidiary. (...), one of the minority shareholders and members of the Board of Directors of ELSA (from 19 December 1996 until the end of the infringement), as of August 1998 simultaneously held the position of Managing Director of Finnish Chemicals. Moreover, (...) Similarly, (...) It is further worth noting that the person who held the position of Finnish Chemicals' Managing Director was, in this capacity, also a member of ELSA's Board.
- (473) Taking into account the full ownership of Finnish Chemicals by ELSA since 13 February 1997, as well as the managerial overlap, the Commission considers that ELSA exercised decisive influence over the commercial policy of its subsidiary Finnish Chemicals. The subsequent transfer of the shares in Finnish Chemicals to Kemira did not relieve ELSA of its liability, as it continued to exist as a legal entity<sup>90</sup>.

#### 5.2.4.2.Arguments of ELSA

- (474) While Finnish Chemicals does not contest the Commission's reasoning concerning the attribution of liability to ELSA in its reply to the Statement of Objections, ELSA itself submits that it should not be held liable for the infringement and raises the following arguments.
- (475) ELSA argues that, first, Finnish Chemicals operated as an autonomous entity at all times during the period of the infringement and decided independently on its own conduct on the market. Second, ELSA's articles of incorporation expressly prevented it from exercising decisive influence over Finnish Chemicals. Third, there is no evidence in the Commission's file concerning ELSA's involvement in, or knowledge about, the cartel and, more particularly, ELSA is not mentioned in any submission of the cartel participants (...). Furthermore, the conduct in which Finnish Chemicals engaged had begun before ELSA acquired it and continued in the same manner after Finnish Chemicals' acquisition by ELSA. The fact that Finnish Chemicals' conduct after its acquisition by ELSA continued in the same vein as previously (with identical topics discussed and the same individuals involved) shows that Finnish Chemicals acted independently of its parents.
- (476) Furthermore, ELSA submits that it is inequitable to hold ELSA liable for the infringement but not the previous owners of Finnish Chemicals, (...) whose position was no different from that of ELSA and which exercised joint control over Finnish Chemicals. Consequently, either all, or none, of the owners of Finnish Chemicals should have been addressees of the Statement of Objections. The disparity in the treatment between ELSA and (...) is all the more disturbing given that one of (...) senior managers participated in a cartel meeting in September 1994 while no individuals from ELSA were ever directly involved in any illicit contacts with competitors.

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See judgment of Court of Justice C-279/98 *Cascades v Commission* [2000], paragraph 78.

#### 5.2.4.3. The Commission's assessment and conclusion

- (477) The arguments of ELSA cannot be accepted. As explained in recitals ((369) - (370)) and as recently confirmed by the Community Courts,<sup>91</sup> it is established case-law that the Commission can presume that a parent company exercises decisive influence on its wholly-owned subsidiaries.
- (478) As to the arguments put forward by ELSA, in order to rebut that presumption, the following is observed.
- (479) ELSA's reference to Article 3 of its own articles of incorporation which states, *inter alia*, that ELSA shall neither directly nor indirectly interfere in the management of companies belonging to its investment portfolio, notwithstanding the rights which ELSA may exercise as a shareholder, cannot suffice to rebut the presumption.
- (480) The exercise of decisive influence on the commercial policy of a subsidiary does not require interference with the day-to-day management of the subsidiary's operation. The subsidiary's operational management may well be entrusted with the subsidiary itself (and typically will be, as a matter of the efficient distribution of functions), but this does not exclude the exercise of decisive influence by the parent company on the subsidiary's overall business policy.
- (481) In the case of Finnish Chemicals, the decisive influence of ELSA in policy matters is demonstrated by the fact that, as of the date Finnish Chemicals was acquired by Erikem Oy/ELSA, certain decisions affecting Finnish Chemicals could be taken only with the consent of ELSA's Board of Directors, and that some strategic decisions could be made only if first proposed by (...). These strategic decisions encompassed any material change in the nature of Finnish Chemicals' business, the appointment or removal of directors of the company, the incurring by Finnish Chemicals of any borrowing or indebtedness, the disposal of any significant asset and the creation of mortgage, charge or similar encumbrance over any asset, the entering into contracts outside the ordinary scope of trading, and the incorporation of a new subsidiary of Finnish Chemicals.
- (482) Furthermore, the business plan and budget of Finnish Chemicals were prepared by (...).
- (483) ELSA's argument that (...) notes ((...)) do not mention ELSA at all, is irrelevant, because as discussed above in recital (370)) in order to hold a parent company liable for an infringement committed by its subsidiaries, it is not necessary to establish that it was directly involved in its organisation and implementation. It should, however, be noted, that (...) directly or indirectly reported to (...) . Therefore, (...) ELSA knew or at least should have known of the illegal arrangements.
- (484) As for ELSA's claim that there is no indication of its direct involvement in the anti-competitive conduct and that it was not aware of such conduct, this argument is irrelevant for the reasons set out in recital (370). Concerning ELSA's contention that Finnish Chemicals, after it had been acquired by ELSA, continued its participation in the infringement in exactly the same manner despite the change of ownership, the

<sup>91</sup> See Case T-30/05 *Prym Consumer v Commission*, not yet published, paragraphs 146–148; Case T-112/05 *Akzo Nobel NV and others v Commission*, not yet published, paragraph 57 et seq.

Commission notes that ELSA itself claims it only "*stepped into the shoes*" of the previous owners of Finnish Chemicals which, according to ELSA, exercised joint control over the company. Since the concept of economic entity relates to the overall commercial policy of an undertaking, the fact that the infringing behaviour of Finnish Chemicals continued uninterrupted/unchanged is irrelevant in the context of assessing ELSA's liability for the conduct of Finnish Chemicals.

- (485) As for ELSA's argument that the Statement of Objections should have been addressed either to all, or to none of the owners of Finnish Chemicals, this is addressed in section 6.2 below (see recitals (493) and (494)).
- (486) Finnish Chemicals Oy should therefore be held liable for the infringement it committed in the period from 21 September 1994 until 9 February 2000 and Erikem Luxembourg SA should be held jointly and severally liable for the infringement committed by Finnish Chemicals Oy for the period from 13 February 1997 until 9 February 2000.

## **6. DURATION OF THE INFRINGEMENT**

### **6.1. Starting and end dates**

- (487) EKA and Finnish Chemicals participated in the anti-competitive arrangements at least as of 21 September 1994 (see recitals (...)), Atochem at least as of 17 May 1995 (see recitals (...)) and Aragonesas at least as of 16 December 1996 (see recital (...)). For ELSA, the starting date is 13 February 1997 (see recital (20)).
- (488) As to the end of the infringement, to the Commission's knowledge the last anti-competitive meeting (...) was held on 9 February 2000. (...) the Commission considers 9 February 2000 to be the end date of the cartel for all undertakings involved, that is to say, for EKA, Finnish Chemicals, Atochem and Aragonesas.
- (489) It follows that the total duration of the infringement, as described in this Decision, is 5 years and 4 months for EKA, Akzo Nobel NV and Finnish Chemicals, 2 years and 11 months for ELSA, 4 years and 8 months for Atochem and Elf Aquitaine and 3 years and 1 month for Aragonesas and Uralita.

### **6.2. Application of limitation periods**

- (490) Pursuant to Article 25(1)(b) of Regulation (EC) No 1/2003, the power of the Commission to impose fines for infringements of the substantive rules relating to competition is subject to a limitation period of five years. For continuing or repeated infringements, the limitation period only begins to run on the day the infringement ceases<sup>92</sup>. Any action taken by the Commission for the purpose of the preliminary investigation or proceedings in respect of an infringement interrupts the limitation period and with each interruption time starts running afresh.<sup>93</sup> Any such interruption applies for all the undertakings which have participated in the infringement<sup>94</sup>.

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<sup>92</sup> Article 25(2) of Regulation (EC) No 1/2003.

<sup>93</sup> Article 25(3) to (5) of Regulation (EC) No 1/2003.

<sup>94</sup> Article 25(4) of Regulation (EC) No 1/2003.

- (491) As set forth in section 3 of this Decision, representatives of EKA informed the Commission by a faxed letter dated 28 March 2003 about the existence of anti-competitive behaviour constituting an infringement of Article 81 of the Treaty. On 10 September 2004, the Commission then sent requests for information to Finnish Chemicals, Atochem and Aragonesas pursuant to Article 18(2) of Regulation (EC) No 1/2003.
- (492) Given that the infringement under investigation did not cease before 9 February 2000, and that the applicable limitation period was interrupted for all undertakings at the latest by the sending of written requests on 10 September 2004, it follows that the Commission's power to impose fines on any of the addressees of this Decision is not time-barred pursuant to Article 25(1)(b) of Regulation (EC) No 1/2003.
- (493) As for ELSA's argument that the Statement of Objections should have been addressed either to all, or to none of the previous owners of Finnish Chemicals (...), it is noted that the Commission became aware of a cartel in the SC sector following EKA's immunity application lodged on 28 March 2003 and the limitation period was interrupted on 10 September 2004 (see recital (492)).
- (494) (...) exited the SC business on 19 December 1996, that is to say, on the date when both companies transferred all of their respective shares in Finnish Chemicals to Erikem Oy, a wholly owned subsidiary of ELSA (see recital (20)). Therefore, for (...), the infringement ceased on 19 December 1996, that is to say, more than five years before 10 September 2004, when the running of the limitation period was interrupted by an investigatory step taken by the Commission (the sending of the requests for information). It follows that the imposition of fines on both companies is time-barred.

## **7. REMEDIES**

### **7.1. Article 7 of Regulation (EC) No 1/2003**

- (495) 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.
- (496) 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.

### **7.2. Article 23(2) of Regulation (EC) No 1/2003**

- (497) 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 and/or Article 53 of the EEA Agreement. Under Article 15(2) of Council Regulation No 17 of 16 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty<sup>95</sup>, which was applicable at the time of the

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<sup>95</sup> OJ L3, 21.2.1962, p. 204/62. Regulation repealed by Regulation (EC) No 1/2003.

infringement, the fine for each undertaking participating in the infringement must not exceed 10 % of its total turnover in the last business year preceding the adoption of a fining decision. The same limitation results from Article 23(2) of Regulation (EC) No 1/2003.<sup>96</sup>

- (498) In fixing the amount of any fine, pursuant to Article 23(3) of Regulation (EC) No 1/2003, regard must be had both to the gravity and to the duration of the infringement. In setting the fines to be imposed, the Commission will refer to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003<sup>97</sup> (hereinafter “the 2006 Guidelines”).
- (499) In their responses to the Statement of Objections, Atochem and Elf Aquitaine claim that any fine imposed on them should be determined according to 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<sup>98</sup> (hereinafter “the 1998 Guidelines”) and not the 2006 Guidelines, as, at the time when Atochem was contemplating making the decision to apply for reduction of fines and eventually did so, the 2006 Guidelines had not yet been published. Atochem and Elf Aquitaine argue that applying the 2006 Guidelines to them, which in their view would certainly increase the amount of the fines imposed, would violate the Community law principles of non-retroactivity, legal certainty and legitimate expectations as well as the principle of equal treatment.
- (500) The companies argue that Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>99</sup> prohibits the imposition of heavier penalties than those applicable when the offence in question was committed and state that both legal rules and the consequences for violations thereof must be clear, precise and reasonably foreseeable at that time. In their view, this is not the case with the change from the 1998 Guidelines to the 2006 Guidelines as the latter profoundly modified the method of calculating the fines (value of sales, entry fee, duration, recidivism). As regards legitimate expectations, Atochem and Elf Aquitaine refer to the fact that when applying for immunity/leniency, Atochem acquired a legitimate expectation that any fine would be calculated under the set of rules applicable at the time, namely the 1998 Guidelines, which were binding on the Commission. They argue that the case-law rejecting the undertakings' legitimate expectation as regards a specific level of the fines or a particular method of calculating such fines was developed in a situation where there were no prior guidelines on fines. However, with the adoption of the 1998 Guidelines the Commission would have limited its own discretion in that respect, thereby creating legitimate expectations.
- (501) Atochem and Elf Aquitaine further submit in their responses to the Statement of Objections that an application of the 2006 Guidelines would constitute a violation of the principle of equal treatment. In addition, Atochem claims that by applying the 2006 Guidelines the Commission would violate the principle of good administration.

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<sup>96</sup> Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area (OJ L 305, 30.11.1994, p.6) “the Community rules giving effect to the principles set out in Articles 85 and 86 [now Articles 81 and 82] of the EC Treaty [...] shall apply *mutatis mutandis*”. (OJ L 305, 30.11.1994, p.6)

<sup>97</sup> OJ C 210, 1.9.2006, p. 2

<sup>98</sup> OJ C 9, 14.1.1998, p. 3.

<sup>99</sup> Signed in Rome on 4 November 1950..

In support of this argument, Atochem argues that, taking into account a number of similarities between this investigation and the investigation in the *Hydrogen Peroxide* case (such as the similar nature and purpose of both products, overlaps concerning the undertakings involved in the two infringements, identical periods of time in which both infringements occurred, similar nature and identical geographic scope of both infringements, the fact that immunity applications in both cases were triggered by the unannounced inspection carried out by the Commission in the *Hydrogen Peroxide* case on 25 and 26 March 2003), both infringements should have been subject to one single investigation or should have been at least investigated simultaneously and within the same timeframe, while instead the Statement of Objections in this case was seriously delayed. According to Atochem, the excessive length of the administrative procedure in this case, as compared to the *Hydrogen Peroxide* case, demonstrates a lack of due diligence on the Commission's part which leads to a manifestly inequitable result of the proceedings for Atochem and has potential adverse affects on its rights of defence.

- (502) Atochem's and Elf Aquitaine's arguments cannot be accepted. It is settled case-law that in determining the amount of the fines, the Commission has a wide discretion. It is also settled case-law that the fact that the Commission imposed fines of a certain level for certain types of infringement in the past does not mean that it cannot increase that level within the applicable limits if that is necessary to ensure the implementation of Community competition policy.<sup>100</sup>
- (503) The Court of Justice has previously established<sup>101</sup> that undertakings involved in an administrative procedure in which fines may be imposed cannot claim a legitimate expectation that the Commission will not exceed the level of fines previously imposed or that it will apply the same methodology of calculating fines as in previous cases. This was also found to be the case for undertakings which had decided to cooperate with the Commission in order to seek a reduction of any fines under the Leniency Notice before the Commission decided on a revised method of calculating the fines, a method which was subsequently applied to calculate the fines imposed on the said undertakings. In particular, the legitimate expectations that undertakings are able to derive from the Leniency Notice are limited to an assurance that their fines will be reduced by a certain percentage, whereas they do not extend to the method of calculating the fines or to a specific level of the fine capable of being calculated at the time when the undertaking decides to cooperate with the Commission.<sup>102</sup> Nothing in the Court's reasoning indicates that the outcome of the legal assessment would be different where the previous Commission practice follows from a set of rules, as in the case of fining guidelines. The Court also held in the same circumstances that by changing its enforcement policy from the previous fining practice to the practice set out in the 1998 Guidelines the Commission had not violated the principle of non-retroactivity.<sup>103</sup>

<sup>100</sup> Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others v Commission* [1983] ECR 1825, paragraph 109, and 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 and others v Commission* [2005] ECR I-5428, paragraphs 169 to 173, 227.

<sup>101</sup> 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 and others v Commission*, cited above, in particular paragraphs 159, 162, 163 and 182-188.

<sup>102</sup> Id., paragraph 188.

<sup>103</sup> Id., paragraphs 213 to 232.

- (504) The argument that the case-law referred to in recital (503) does not apply in this matter because prior guidelines already existed cannot be accepted. The fact that the Commission cannot depart from its own guidelines in cases where they apply without providing any justification<sup>104</sup> does not mean that it cannot use its discretion and apply new guidelines, within the limits of Regulation (EC) No 1/2003. Moreover, it follows from the Court's reasoning that what matters is not the character of the previous administrative practice (for example, the existence or non-existence of a set of published rules governing that practice), but rather whether the change in enforcement policy was reasonably foreseeable at the time when the infringement was committed.<sup>105</sup> In this context, it must again be stressed that undertakings cannot acquire a legitimate expectation in the fact that the Commission will not exceed the level of fines previously imposed, or in a particular method of calculating the fines, and therefore must take account of the possibility that the Commission may increase the level of fines by the application of (new) guidelines.<sup>106</sup> In addition, contrary to what Atochem argues the Commission considers that the 2006 Guidelines do not constitute a fundamental change in methodology from previous fining practice, for which reason also the change in enforcement policy was reasonably foreseeable. In particular, while the importance of certain factors for the ultimate level of the fine may have shifted, the same factors already featured in previous Commission practice.
- (505) As for the principles of equal treatment and good administration, Atochem's and Elf Aquitaine's arguments cannot be accepted, either<sup>107</sup>. SC and hydrogen peroxide are two distinct products. Furthermore, the pattern of illicit contacts followed in the hydrogen peroxide cartel was different compared to this case, with mostly different undertakings and different individuals within these undertakings involved. There were thus objective grounds for the Commission to assume two separate infringements and to initiate separate procedures in respect of each of them.<sup>108</sup> The fact that in previous cases<sup>109</sup> several products have been subject to one investigation does not deprive the Commission of its discretion, on a case-by-case basis, to prosecute infringements related to different products either individually or within the framework of one investigation. Moreover, the Commission considers that a *decision in a procedure concerning both infringements* could not have been rendered earlier than the *current decision*, or that the Statement of Objections in such a single procedure could have

<sup>104</sup> See for instance T-224/00 *Archer Daniels Midland v Commission* [2003] ECR II-02597, paragraph 182, and Case C-3/06 P *Groupe Danone v Commission* [2007] ECR I-1331, paragraph 80. See also Case T-329/01 *Archer Daniels Midland v Commission* [2006] ECR II-3255, paragraph 380.

<sup>105</sup> 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 and others v Commission*, cited above, paragraphs 222-224, 230. See also for a later "clarification" of certain elements of the 1998 Guidelines, which the Court analysed as a new interpretation of a legal rule, Case C-3/06 P, *Groupe Danone v Commission*, [2007] ECR I-1331, paragraphs 87-93. Here, the Court applied the same principles as in the *Dansk Rørindustri* case. See further Joined Cases T-101/05 and T-111/05 *BASF and UCB v Commission*, paragraphs 233-4.

<sup>106</sup> *Id.*, paragraphs 226-230.

<sup>107</sup> See Case T-329/01, *Archer Daniels Midland v Commission*, [2006] ECR II-3255, paragraph 53 ("*It is settled case-law that the application of the method set out in the [1998] Guidelines in calculating the fine imposed does not constitute discriminatory treatment by comparison with undertakings which infringed the Community competition rules at the same time but, for reasons pertaining to the time when the infringement was discovered or to the conduct of the administrative procedure initiated against them, were sanctioned before the adoption and publication of the Guidelines*").

<sup>108</sup> See Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others v Commission*, paragraphs 118-124.

<sup>109</sup> Atochem refers to the Commission decision of 31 May 2006, case COMP/F/38.645 – Methacrylates.

been notified to the parties earlier than September 2006, the date of publication of the 2006 Guidelines (see point 38 of the 2006 Guidelines).

- (506) Atochem's arguments concerning the excessive length of the Commission investigation with potential adverse effects on Atochem's rights of defence are also ill-founded. First, Atochem disregards the fact that the investigation of a possible infringement of Article 81 of the Treaty in the SC sector was triggered by the initial immunity application of EKA only in March 2003 (see section 3.1). Second, it was only the whole set of information obtained in the course of the investigation from 2003 to 2007, as systematically referred to throughout this Decision, which allowed the Commission to initiate the proceedings by adopting the Statement of Objections. Moreover, the Court of Justice has established that in order to demonstrate that there has been a breach of rights of defence, including on account of the excessive duration of the investigation phase, it is for the undertaking that claims a violation of its rights to establish that its opportunities to refute the Commission's objections were affected for reasons arising from the fact that the first phase of the administrative procedure had taken an unreasonably long time. The arguments relating to the breach of the rights of defence must be supported by convincing evidence capable of demonstrating that such a breach may have resulted from the excessive duration of the phase of the administrative procedure preceding notification of the Statement of Objections and that on the date of notification the opportunities of the undertaking concerned to defend itself were already thereby compromised.<sup>110</sup>
- (507) Atochem does not bring forward any concrete examples of a violation of its rights of defence but only states that, due to the excessive length of the proceedings, more severe provisions on fines will be applied by the Commission than would otherwise have been the case. This argument has been already addressed in the context of Atochem's submissions concerning the principle of non-retroactivity and legitimate expectations (see recital (503)). It is noted that the limits of Regulation (EC) No 1/2003 have been respected in both the *Hydrogen Peroxide* case and in this case and, consequently, Atochem's claims concerning the excessive length of the proceedings must be rejected.<sup>111</sup>
- (508) Lastly, it should be noted that at recital (346) of the Statement of Objections, the Commission already anticipated the application of the 2006 Guidelines on fines to the case concerned by this Decision.

### **7.3. The basic amount of the fines**

#### *7.3.1. Calculation of the value of sales*

- (509) In determining the basic amount of the fine to be imposed, the Commission normally takes as a starting point the value of each undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA. In this case, the sales of SC made by each undertaking in the EEA

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<sup>110</sup> Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] ECR I-8725, paragraphs 56, 60.

<sup>111</sup> Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others v Commission* [1983] ECR 1825, paragraph 109 and 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 and others v Commission* [2005] ECR I-5428, paragraphs 169 and 172.

during the business year which ended on 31 December 1999 (the last full business year of the infringement) will be taken into account.

#### 7.3.2. *Determination of the basic amount of the fines*

- (510) The basic amount of the fine should be determined as a proportion of the value of the sales, depending on the degree of the gravity of the infringement, multiplied by the number of years of the infringement.

##### 7.3.2.1. Gravity

- (511) As a general rule, the proportion of the value of the sales taken into account will be set at a level of up to 30% of the value of the sales. In order to decide whether the proportion of the value of the sales to be considered in a given case should be at the lower or at the higher end of that scale, the Commission has regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.
- (512) In this case, the competitors shared markets by allocating sales volumes, coordinating price increases and/or maintaining prices in a coordinated manner and exchanging competitively sensitive information. Market sharing and price fixing arrangements are by their very nature among the most harmful restrictions of competition. Therefore, the proportion of the value of sales taken into account for this infringement should be set at the higher end of the scale.
- (513) The estimated combined market share of the four undertakings participating in this infringement (having regard to the last full business year of the infringement) was more than 90% (see Table 1, recital (46)) in the EEA.
- (514) As concerns the geographic scope of the infringement, a substantial part of the territory of the EEA was affected (see section 2.4).
- (515) As regards the implementation of the arrangements, although not always completely successful, the arrangements were generally implemented and the monitoring of the implementation was a common feature of the cartel.
- (516) In their replies to the Statement of Objections, Finnish Chemicals, Atochem, Elf Aquitaine, Aragonesas and Uralita raise various arguments aimed at attenuating the gravity of the infringement.
- (517) Finnish Chemicals argues that, in determining gravity, consideration should be given to the relatively small size of its SC business. It also argues that, as regards continental Europe, EKA – together with Atochem – was the driving force and instigator of the arrangements.
- (518) Atochem submits that the Commission should take into account the fact that no individuals from the top management of the company were involved in, nor did they conceive or encourage the anti-competitive arrangements. Furthermore, due to its modest position on the SC market, Atochem only played a minor role in the arrangements addressed by this Decision which in particular did not allow it to play a mediating role between the two large producers, EKA and Finnish Chemicals. Even in

the period from 1997 until 1999, when it became more active, it was only concerned about a limited number of customers. The argument regarding Atochem's modest position on the SC market is also raised by Elf Aquitaine.

- (519) Aragonesas claims that the top management of the company was never involved in any illicit conduct since the commercial policy in relation to SC was directed at a relatively low management level; that if contacts with competitors occurred at all, they were neither frequent nor regular; that Aragonesas' involvement would have been limited to arrangements concerning countries in which its customers are based; that the role Aragonesas as a small player in the market for SC may have played was passive and minor compared to the other SC producers which were the driving forces; and that Aragonesas' conduct on the market shows that it did not implement the arrangements but rather competed, which is why it was often perceived as a threat by the other producers. The arguments concerning Aragonesas' marginal and passive role in the arrangements as well as the lack of involvement of its high management are also raised by Uralita.
- (520) Those arguments are not capable of undermining the conclusions reached in recitals (511) - (515) on the factors which have to be considered when establishing the gravity of an infringement. The allegedly minor role of Finnish Chemicals, Atochem and Aragonesas on the SC market is already reflected in the value of the affected sales, which is used as a basis for the determination of the basic amount of the fine to be imposed. The fact that Atochem and Aragonesas were represented in the illicit contacts with competitors mainly by individuals from the middle management level cannot in itself have an impact on the gravity of the infringement. As far as further arguments raised by the parties are specific to their individual position and behaviour, they will be considered when examining the applicability of mitigating circumstances.
- (521) In conclusion, taking into account the factors discussed in recitals (511) to (520), the Commission considers that the proportion of the value of the sales of each undertaking involved to be used to establish the basic amount should be 19%.

#### 7.3.2.2.Duration

- (522) The infringement lasted for at least 5 years and 4 months for EKA and Finnish Chemicals, for at least 4 years and 8 months for Atochem and for at least 3 years and 1 month for Aragonesas. In accordance with point 24 of the 2006 Guidelines, the amount determined in accordance with recitals (509), (511) to (521) should therefore be multiplied by the factor 5.5 for EKA/Akzo Nobel NV and Finnish Chemicals, by the factor 5 for Atochem/Elf Aquitaine and by the factor 3.5 for Aragonesas/Uralita. As regards ELSA, which is held jointly and severally liable for the actions of Finnish Chemicals, the amount determined in accordance with recital (509), (511) to (521) should be multiplied by the factor 3 given that it acquired control over Finnish Chemicals only in February 1997.

#### 7.3.2.3.Additional amount

- (523) In order to deter undertakings from entering into horizontal price-fixing agreements such as the agreements dealt with in this Decision, the basic amount of the fine to be imposed should be increased by an additional amount, as indicated in point 25 of the 2006 Guidelines. For this purpose, having considered the factors discussed in recitals

(512) to (515), in particular the nature and geographic scope of the infringement and the combined market share of the cartel participants, it is considered appropriate that an additional amount of 19% of the value of the sales should be added.

#### 7.3.2.4. Conclusion on the basic amount

- (524) The basic amounts of the fines to be imposed on each undertaking should therefore be as follows:

Undertaking	EUR
EKA/Akzo Nobel NV	116 000 000
Finnish Chemicals	68 000 000
ELSA	42 000 000
Atochem/Elf Aquitaine	22 700 000
Aragonesas/Uralita	9 900 000

### 7.4. Adjustments to the basic amount

#### 7.4.1. Aggravating circumstances

##### 7.4.1.1. Repetition of infringements of a similar kind

- (525) At the time the infringement took place, Atochem had already been the addressee of previous Commission decisions holding it liable for earlier cartel activities<sup>112</sup>. The fact that Atochem has repeated the same type of conduct in its business activities (either in the same industry or in different sectors), shows that the first penalties did not prompt it to change its conduct. This constitutes an aggravating circumstance which justifies an increase of 90% in the basic amount of the fine to be imposed on it.
- (526) The argument raised by Atochem in its reply to the Statement of Objections that the previous cartel behaviour occurred more than 12 years before the beginning of the SC infringement, and therefore could not be relied on for a finding of repeated infringements is not accepted. It is not the previous infringement but the date of the decision finding such an infringement that matters. Commission Decision 94/599/EC in Case COMP IV/31.865 – *PVC* was taken in 1994 and thus during the same year in which Atochem started participating in the cartel which is the object of this Decision. As for Decision 86/398/EEC in Case COMP IV/31.149 – *Polypropylene* and Decision 85/74/EEC in Case COMP IV/30.907 - *Peroxygen products*, they were only rendered some eight and ten years, respectively, before the start of the current infringement and before the *PVC* Decision in 1994. In *Danone v. Commission*, the Court of First

<sup>112</sup> See Commission Decision of 23 November 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.907 - Peroxygen products) (OJ L 035, 7.2.1985 p.1), Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 – Polypropylene) (OJ L 230, 18.8.1986, p. 1) and Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/31.865 – PVC) (OJ L 239, 14.9.1994, p. 14).

Instance held that Article 15 of Regulation No 17 does not specify a maximum period in relation to the finding that an undertaking has committed repeated infringements<sup>113</sup>, which is also valid for Article 23 of Regulation (EC) No 1/2003. As confirmed by the Court of Justice on appeal, where a relatively short time of less than 10 years has elapsed between the finding of an infringement and a repeated infringement, the Commission may rightfully conclude that the repetition of unlawful conduct shows a tendency not to draw the appropriate conclusions from that previous finding, thereby justifying an increase of the fine for such repetition<sup>114</sup>.

- (527) As concerns the additional argument that since 2004 Atochem has ceased to be active in the sector of polypropylene, it suffices to point out that this alleged change occurred years after the infringement which is the focus of this Decision had ended. In any event, the repetition of similar infringements justifies an increase in the fine because it proves that the earlier fine was not sufficiently deterrent. Deterrence, however, cannot be limited only to the market concerned by a particular infringement but must apply to all of an undertaking's activities. Thus, the fact that Atochem may not be able to “re-offend” in a particular business sector is irrelevant for its increase in the fine on account of repeated infringements<sup>115</sup>.

#### 7.4.2. *Mitigating circumstances*

##### 7.4.2.1. Limited involvement in the infringement

- (528) In their replies to the Statement of Objections, Finnish Chemicals, Atochem and Aragonesas argue that their involvement in the infringement was limited.
- (529) Finnish Chemicals submits that, compared to EKA and Atochem, it was throughout the period of the infringement a smaller company in the position of a follower; that once its negotiations with the customer (...) had started, which destabilised the arrangements, it was involved in the infringement only to a limited extent; that as of mid-1999, it did not respect the collusive agreements and in fact broke up the coordination with competitors and, finally, that after mid-1999 the nature of the contacts among SC producers changed and they were driven only by Atochem's willingness to restore the understanding among competitors.
- (530) Similarly, Aragonesas contends that its involvement was limited to arrangements concerning countries in which its customers were based; the role Aragonesas played was passive and minor compared to the other SC producers; and Aragonesas' conduct on the market shows that it did not implement the arrangements.
- (531) As stated in recital (393), Atochem raises the argument that due to its modest position it played only a minor role in the arrangements on the SC market and that, even in the time period 1997 – 1999 when it became more active, its participation only involved a limited number of customers.

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<sup>113</sup> Case T-38/02 *Groupe Danone v Commission*, paragraphs 353 to 355. Upheld on appeal in Case C-3/06 *P Groupe Danone v Commission*, paragraphs 38 to 40.

<sup>114</sup> Case T-38/02 *Groupe Danone v Commission*, paragraphs 354 and 355, upheld on appeal in Case C-3/06 *P Groupe Danone v Commission*, paragraph 40.

<sup>115</sup> See Case T-203/01 *Michelin v Commission*[2003] ECR II-4071, paragraph 293; *Bolloré and Others v Commission*, paragraph 527.

- (532) In reply to the arguments of Finnish Chemicals and Aragonesas concerning non-implementation of the collusive arrangements and their alleged independent and/or pro-competitive conduct, it should be recalled that 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<sup>116</sup>. In these cases, the mere fact of cheating at the expense of the other cartel members cannot be admitted as a mitigating circumstance.
- (533) In order for the Commission to be able to assess whether there is a mitigating circumstance, each undertaking must demonstrate that, during the period in which it was a party to the offending arrangements, its involvement was substantially limited and that 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.<sup>117</sup>
- (534) In this case, Aragonesas has not shown that it avoided implementing the unlawful arrangements by adopting competitive conduct on the market or by breaching its obligations relating to the implementation of the cartel. Therefore, Aragonesas retained responsibility for participation in the cartel. It would otherwise be too easy for undertakings to reduce their exposure to a 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 harmful to competition.<sup>118</sup> In these circumstances, fines would risk to lose their deterrent effect.
- (535) Finnish Chemicals' arguments do not suffice to show the existence of a mitigating circumstance, either. It was demonstrated in section 4 that Finnish Chemicals had frequent contacts with its competitors throughout the period from January 1998 (that is to say, from the time when its negotiations with the customer (...) had been launched) to February 2000. In the period after mid-1999, there were no less than fifteen phone calls and three meetings between Finnish Chemicals and other SC producers, at least five of which were initiated by Finnish Chemicals. Such conduct is in clear contradiction to Finnish Chemicals' contention that it broke up the coordination with competitors in 1999 and, consequently, cannot qualify as a mitigating circumstance. Moreover, this conduct contradicts Finnish Chemicals' argument related to its alleged role as a follower in the cartel. Furthermore, Finnish Chemicals' argument that the contacts after mid-1999 were only driven by Atochem's attempts to restore the understandings is both irrelevant, since the contacts were in any event unlawful by

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<sup>116</sup> See Case T-308/94 *Cascades v Commission*, [1998] ECR II-925, at paragraph 230; judgment in Joined Cases T-71/03 etc., *Tokai Carbon and others v Commission*, cited above, at paragraph 297; judgment in Case T-44/00 *Mannesmannröhren-Werke AG v Commission* [2004] ECR II-729, at paragraphs 277-278, and Case T-327/94 *SCA Holding v Commission* [1998] ECR II-1373, at paragraph 142.

<sup>117</sup> T-26/02 *Daichii v Commission* [2006] ECR II-713, paragraph 113. See also point 29 of the 2006 Guidelines.

<sup>118</sup> Case T-44/00 *Mannesmannröhren-Werke AG v Commission*, at paragraphs 277-279 and Joined Cases T-259/02 to T-264/02 and T-271/02, *Raiffeisen Zentralbank Österreich and Others. v Commission*, paragraph 491.

nature, and ill-founded, since Finnish Chemicals initiated several contacts after mid-1999.

- (536) Atochem's arguments related to its allegedly minor role in the cartel must be rejected on similar grounds as those raised by Finnish Chemicals. Atochem maintained frequent contacts with its competitors throughout the period of its involvement in the cartel (as referred to in section 4). Atochem's contention that during the first year of its participation the number of its contacts with other SC producers remained limited cannot affect the Commission's assessment of mitigating factors. Atochem's initial contacts with competitors already show its active participation in the anti-competitive arrangements. Such contacts became gradually more frequent up to the situation towards the end of the cartel when the majority of contacts were initiated by Atochem. As to its attempts to mediate between EKA and Finnish Chemicals, Atochem's argument that it could not have played a mediating role due to its limited market share is clearly rebutted by the documentary evidence referred to in section 4.3. The accuracy of this evidence is not contested by Atochem. Atochem's argument concerning its modest position on the SC market is further undermined by the fact that Atochem's market share in certain Member States (such as France, Belgium or Portugal) significantly exceeded its overall share of approximately 9% and that Atochem supplied SC to some of the key customers (throughout the period of the infringement, it delivered SC to the customers Soporcel, Portucel or International Paper, and the customer (...) was supplied by Atochem until 1998).
- (537) As for Aragonesas' contention that its involvement was limited to arrangements concerning countries in which its customers were based, this fact is already reflected in the calculation of the value of sales (see recital (509)) and, consequently, cannot be accepted as a mitigating circumstance.
- (538) In view of the foregoing, the existence of mitigating circumstances based on the alleged limited involvement in, and/or the limited implementation of the infringement by, Finnish Chemicals, Atochem and Aragonesas cannot be accepted.

#### 7.4.2.2. Procedural irregularities

- (539) Elf Aquitaine argues that any fine that might be imposed on it should be reduced because of procedural irregularities.
- (540) It should be noted that the Court of First Instance has established that only procedural irregularities capable of seriously harming the interests of the party invoking them can justify a reduction of the fine. That may in particular be the case where irregularities involve an infringement of the fundamental rights.<sup>119</sup>
- (541) However, apart from generally invoking the principles of non-retroactivity and the presumption of innocence (these arguments have been addressed in recitals (502) to (504)), Elf Aquitaine does not bring any concrete example of a violation of its fundamental rights. The same applies to the alleged violation of Elf Aquitaine's rights

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<sup>119</sup> Joined Cases T-259/02 to T-264/02 and T-271/02, *Raiffeisen Zentralbank Österreich and Others v Commission*, paragraph 569.

of defence by not being the addressee of investigatory measures prior to the Statement of Objections.

- (542) Consequently, no mitigating circumstances based on alleged procedural irregularities can be accepted.

#### 7.4.2.3. Effective co-operation outside the 2002 Leniency Notice

- (543) Atochem has argued that its effective and ongoing co-operation during the administrative proceedings should (at least) be regarded as an attenuating circumstance, as should be the fact that, following the receipt of the Statement of Objections, Atochem has not contested the facts of the case.

- (544) However, taking into account all the facts of this case, there are no exceptional circumstances present in this case that could justify granting Atochem a reduction for effective cooperation falling outside the 2002 Leniency Notice<sup>120</sup>. In this respect, the Commission notes that, unlike the 1996 Leniency Notice, the 2002 Leniency Notice does not foresee a reduction of the fine for non-contestation of the facts any longer, and the Commission has not created any expectations in this case that a reduction "outside" the 2002 Leniency Notice would be granted.

#### 7.4.3. *Specific increase for deterrence*

- (545) In determining the amount of the fine, the Commission pays particular attention to the need to ensure that fines have a sufficiently deterrent effect. To that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates.

- (546) In their replies to the Statement of Objections, several parties submit that there is no need to increase their fine and put forward various arguments in support of this view. Finnish Chemicals argues that at the time of the infringement it was a much smaller player than EKA and had never before been the subject of infringement proceedings of the kind at issue in this case and that, consequently, any fine eventually imposed on it would have a deterrent effect. Atochem and Elf Aquitaine contend that increasing the fine to ensure sufficient deterrence would be inappropriate since Atochem and Elf Aquitaine received significant fines by way of four recent Commission decisions all of which already took into account the need to ensure a deterrent effect. They also argue that, in any event, an increase for deterrence would only be applicable to groups of companies whereas in this case only Atochem should be fined. Atochem further argues that no increase for deterrence of the fine should be applied given that Atochem has introduced a compliance programme in January 2001. In any event, given that the 2006 Guidelines would lead to a significant increase of fines, no further deterrence by the application of a multiplier is necessary. Finally, Aragonesas contends that there would be no need for an increase for deterrence in this case since Aragonesas does not have a particularly large turnover beyond the sales of SC. Similarly, Uralita puts forward the argument of its (both in absolute and relative terms) low turnover which would not justify an increase for deterrence. It further submits that an increase for

<sup>120</sup> See Commission decision of 20 October 2005 in case C-38281 *Raw Tobacco Italy*, recital 385. See also 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 and Others v Commission* [2005] ECR I-5425, paragraphs 380-382 and Case T-15/02 *BASF v Commission* [2006] ECR II-497, paragraphs 585-586.

deterrence would be inappropriate as Uralita did not participate in the infringement and that such an increase is usually applied only in situations of a 100% parent-subsidiary relation.

- (547) In relation to the arguments raised by the parties, it should be recalled that in cartel cases there may be a need to apply a specific increase for deterrence in consideration of the size of the undertaking's turnover beyond the sales of goods or services to which the infringement relates (point 30 of the 2006 Guidelines). Furthermore, according to point 31 of the 2006 Guidelines, the Commission will also take into account the need to increase the fine in order to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount. As for Atochem's and Elf Aquitaine's contentions that any potential fines should only be imposed on Atochem, this argument cannot be accepted. It is noted that both companies are being held liable for the infringement since they formed part of the same undertaking (the notion of "undertaking" as the relevant subject of the Community competition rules was explained in detail in recital (367)). Concerning the other arguments raised by Atochem, it is noted that the introduction of a compliance program may indicate Atochem's efforts to comply with the competition law; it does not, however, in itself constitute a sufficient guarantee that no anti-competitive conduct will occur in the future.<sup>121</sup> This is confirmed by the fact that the infringement in the *Methacrylates* case<sup>122</sup> continued until 12 September 2002 despite the introduction of the compliance program in January 2001. Furthermore, the fact that Atochem has been subject to several recent Commission decisions imposing fines does not rule out another increase of the fine for deterrence in the present case<sup>123</sup>. Rather, its participation in a series of cartels confirms the need to ensure appropriate deterrence in each decision which establishes an infringement with regard to similar behaviour in the future.
- (548) In the financial year ending on 31 December 2007, the total turnovers of the companies in the present case were as follows: EKA, EUR (...); Akzo Nobel NV, EUR 10 217 million; Finnish Chemicals, EUR (...); ELSA, EUR 509 000; Atochem, EUR (...); Elf Aquitaine, EUR 139 389 million; Aragonesas, EUR (...) and Uralita EUR 1 095 million. It is observed that Elf Aquitaine has a particularly large turnover beyond the sales of goods or services to which the infringement relates, and that such turnover is, in absolute terms, much larger than the turnover of the other undertakings involved.
- (549) Accordingly, and in order to ensure that fines have a sufficient deterrent effect in this case, it is decided to increase the fine to be imposed on Elf Aquitaine by 70%.

## **7.5. Application of the 10 % turnover limit**

- (550) Article 23(2) of Regulation (EC) No 1/2003 provides that "*For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year*".
- (551) In this case, the fines to be imposed on Finnish Chemicals and ELSA amount to more than 10% of their respective total turnovers in 2007. The fines will therefore be

<sup>121</sup> See Joined Cases T-101/05 and, T-111/05 *BASF and UCB v Commission*, cited above, paragraph 52.

<sup>122</sup> See Commission decision of 31 May 2006 in case COMP/F/ 38.645 *Methacrylates*.

<sup>123</sup> See Joined Cases T-101/05 and, T-111/05 *BASF and UCB v Commission*, cited above, paragraphs 39, 52.

adjusted in line with Article 23(2) of Regulation (EC) No 1/2003. The 10% ceiling is not reached in respect to the fines to be imposed on the remaining undertakings which were involved in the infringement that is the subject of this decision.

- (552) The amounts of the fines to be imposed on each undertaking before application of the 2002 Leniency Notice should therefore be the following:

<b>Company</b>	<b>EUR</b>
EKA/ Akzo Nobel NV	116 000 000
Finnish Chemicals	(...)
ELSA	50 900
Atochem	43 130 000
Elf Aquitaine	38 590 000
Aragonesas	9 900 000
Uralita	9 900 000

## **7.6. Application of the 2002 Leniency Notice**

- (553) As indicated in section 3, this investigation was initiated following information being brought to the attention of the Commission on 28 March 2003 by EKA, which expressed its willingness to cooperate with the Commission and applied for immunity under the terms of the 2002 Leniency Notice.
- (554) Subsequent to the requests for information pursuant to Article 18(2) of Regulation (EC) No 1/2003, Atochem submitted an application for immunity from fines or alternatively for reduction of fines under the 2002 Leniency Notice. Following Atochem's application, Finnish Chemicals applied for reduction of fines under the 2002 Leniency Notice.
- (555) The Commission examines in recitals (556) - (595), in chronological order, whether the parties concerned satisfied the conditions set out in the 2002 Leniency Notice.

### **7.6.1. EKA**

- (556) EKA was the first undertaking to inform the Commission about a secret cartel concerning sales of SC in the EEA. On 28 March 2003, EKA applied for immunity from fines or, alternatively, a reduction of fines and expressed its willingness to cooperate with the Commission under the terms of the 2002 Leniency Notice. (...)
- (557) On 30 September 2003, the Commission granted EKA conditional immunity from fines in accordance with point 15 of the 2002 Leniency Notice.
- (558) EKA fulfils the conditions of point 8(a) of the 2002 Leniency Notice since it was the first undertaking to submit evidence which would have enabled the Commission to adopt a decision to carry out an investigation. In order to qualify for immunity from a fine, the 2002 Leniency Notice requires applicants for immunity pursuant to point 8(a)

to meet, in addition to the conditions which entitled them to benefit from conditional immunity under this provision, the cumulative conditions set out in point 11 of the Notice. Point 11(a) of the Notice lays down the obligation for the immunity applicant to cooperate fully, on a continuous basis and expeditiously throughout the administrative procedure, and to provide all evidence that comes into its possession or is available to it. Point 11(b) and (c) requires the immunity applicant to end its involvement in the suspected infringement no later than the time at which it submits evidence under point 8 and not to take steps to coerce other undertakings to participate in the infringement.

- (559) EKA fulfils the requirements as set out in point 11(a) of the 2002 Leniency Notice. With regard to point 11(b) of the Notice, according to the evidence in the Commission's possession EKA terminated its involvement in the infringement at the latest at the time at which it first submitted evidence to the Commission. Finally, as concerns point 11(c) of the Notice, the Commission has no evidence to suggest that EKA took steps to coerce other undertakings to participate in the infringement.
- (560) In view of the foregoing, EKA has fulfilled all the conditions of point 11 of the 2002 Leniency Notice and thus qualifies for immunity from any fines that would have otherwise been imposed on it.

#### 7.6.2. *Atochem*

- (561) Atochem was the second undertaking to approach the Commission under the 2002 Leniency Notice. Atochem's reply of 18 October 2004 to a request for information pursuant to Article 18(2) of Regulation (EC) No 1/2003 also included an application for immunity from fines or, alternatively, for reduction of fines under the 2002 Leniency Notice.
- (562) Following its initial assessment of Atochem's application, the Commission came to the preliminary conclusion that the evidence provided by Atochem cannot be regarded as constituting significant added value within the meaning of point 21 of the 2002 Leniency Notice and that, therefore, the application should be rejected.
- (563) By letter of 11 July 2007 and pursuant to point 26 of the 2002 Leniency Notice, the Commission informed Atochem of its intention to reject its application for immunity from fines or reduction of fines.
- (564) (...)
- (565) (...)
- (566) (...)
- (567) (...)
- (568) (...)
- (569) (...)
- (570) (...)

(571) (...)

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(575) (...)

(576) (...)

(577) Therefore, Atochem's argument that its submission represents significant added value in that it expanded on certain facts which appear in EKA's oral statement and brought to light new evidence thereby strengthening the Commission's ability to prove the infringement must be rejected. For the same reasons, Atochem's arguments that the Commission has taken a contradictory approach in this case as compared to the *Hydrogen Peroxide* case and that it has seriously underestimated the value of Atochem's submission must be rejected.

(578) (...)

(579) (...)

(580) For all the foregoing reasons, Atochem's application cannot be regarded as constituting significant added value within the meaning of point 21 of the 2002 Leniency Notice and, therefore, must be rejected.

#### 7.6.3. *Finnish Chemicals*

(581) Finnish Chemicals was the second company to apply for a reduction of fines after Atochem. In assessing the added value of Finnish Chemicals' application, the Commission will also take into account, as a point of comparison, the information it received from Finnish Chemicals in its reply to the request for information dated 10 September 2004.

(582) Finnish Chemicals replied to the Commission's request for information pursuant to Article 18(2) of Regulation (EC) No 1/2003 on 8 October 2004 (...)

(583) By letter of 11 July 2007 and pursuant to point 26 of the 2002 Leniency Notice, the Commission informed Finnish Chemicals 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 2002 Leniency Notice.

(584) (...)

(585) (...)

(586) (...)

(587) (...)

- (588) The evidence submitted by Finnish Chemicals therefore represents significant added value for the purposes of points 21 and 22 of the 2002 Leniency Notice.
- (589) In determining, pursuant to point 23 of the 2002 Leniency Notice, the percentage of reduction of the fine for which Finnish Chemicals qualifies within the band of 30% to 50%, the Commission takes into account the extent to which the evidence submitted by Finnish Chemicals represents added value, as well as the time at which Finnish Chemicals submitted this evidence. In assessing the value of the evidence provided by Finnish Chemicals, it should be pointed out that at the time Finnish Chemicals approached the Commission, the Commission already possessed evidence submitted by EKA, Finnish Chemicals (in its reply to the information request dated 10 September 2004, as far as Finnish Chemicals did not go beyond the scope of that requests)) and Atochem. However, the information supplied by Finnish Chemicals allowed the Commission to establish facts which the Commission could not have otherwise established. Finnish Chemicals submitted its leniency application shortly after it had learned about the Commission's investigation by way of the request for information. Its submission provided the Commission with a clear understanding of the case and enhanced the Commission's ability to pursue its investigation. (...)
- (590) In addition, according to the evidence in the Commission's possession, Finnish Chemicals terminated its involvement in the infringement at the latest at the time at which it first submitted the evidence.
- (591) Finnish Chemicals should therefore be granted a reduction of 50% of the fine that would otherwise have been imposed on it.
- (592) (...)
- (593) (...)
- (594) (...)
- (595) (...) the Commission cannot agree that Finnish Chemicals provided the Commission with facts previously unknown to the Commission which enabled the Commission to extend the duration of the cartel. For these reasons, Finnish Chemicals' arguments relating to partial immunity are unfounded and must be rejected.

#### **7.7. The amounts of the fines to be imposed in this proceeding**

- (596) The fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 should therefore be as follows:
- |     |  |                              |
|-----|--|------------------------------|
| (a) | Akzo Nobel NV and EKA Chemicals AB,<br>jointly and severally:  | EUR 0                        |
| (b) | Finnish Chemicals Oy:<br>of which jointly and severally with<br>Erikem Luxembourg SA (in liquidation): | EUR 10 150 000<br>EUR 50 900 |
| (c) | Arkema France SA and Elf Aquitaine SA,<br>jointly and severally:                                       | EUR 22 700 000               |

(d)	Arkema France SA:	EUR 20 430 000
(e)	Elf Aquitaine SA:	EUR 15 890 000
	Uralita SA and Aragonesas Industrias y Energia SAU, jointly and severally:	EUR 9 900 000

HAS ADOPTED THIS DECISION:

*Article 1*

The following undertakings infringed Article 81 of the Treaty and Article 53 of the EEA Agreement by participating, for the periods indicated, in a complex of agreements and concerted practices with a view to allocating sales volumes, fixing prices, exchanging commercially sensitive information on prices and sales volumes and monitoring the execution of the anti-competitive arrangements for sodium chlorate in the EEA market:

- (a) EKA Chemicals AB, from 21 September 1994 until 9 February 2000;
- (b) Akzo Nobel NV, from 21 September 1994 until 9 February 2000;
- (c) Finnish Chemicals Oy, from 21 September 1994 until 9 February 2000;
- (d) Erikem Luxembourg SA, from 13 February 1997 until 9 February 2000;
- (e) Arkema France SA, from 17 May 1995 until 9 February 2000;
- (f) Elf Aquitaine SA, from 17 May 1995 until 9 February 2000;
- (g) Aragonesas Industrias y Energia SAU, from 16 December 1996 until 9 February 2000;
- (h) Uralita SA, from 16 December 1996 until 9 February 2000.

*Article 2*

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

- |     |   |                |
|-----|---|----------------|
| (a) | EKA Chemicals AB and Akzo Nobel NV,<br>jointly and severally:                 | EUR 0          |
| (b) | Finnish Chemicals Oy:   | EUR 10 150 000 |
|     | of which jointly and severally with<br>Erikem Luxembourg SA (in liquidation): | EUR 50 900     |
| (c) | Arkema France SA and Elf Aquitaine SA,<br>jointly and severally:              | EUR 22 700 000 |
| (d) | Arkema France SA:   | EUR 20 430 000 |
| (e) | Elf Aquitaine SA:   | EUR 15 890 000 |
| (f) | Aragonesas Industrias y Energia SAU and Uralita SA,<br>jointly and severally: | EUR 9 900 000  |

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. 642-0029000-95 of the European Commission with:

Banco Bilbao Vizcaya Argentaria S.A.  
Avenue des Arts, 43  
B-1040 BRUXELLES

Code IBAN: BE76 6420 0290 0095  
Code SWIFT: BBVABEBB

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:

EKA Chemicals AB  
445 80 Bohus  
Sweden

Akzo Nobel NV  
Strawinskylaan 2555  
1077 ZZ Amsterdam  
The Netherlands

Finnish Chemicals Oy  
Harmajantie 3  
32740 Äetsä  
Finland

Erikem Luxembourg SA  
5 rue Guillaume Kroll  
1882 Luxembourg  
Luxembourg

Arkema France SA  
420 rue d'Estienne d'Orves  
92705 Colombes Cedex  
France

Elf Aquitaine SA  
2, place de La Coupole  
La Défense 6  
92400 Courbevoie  
France

Aragonesas Industrias y Energia SAU  
Avenida Diagonal 595  
08014 Barcelona  
Spain

Uralita SA  
Paseo de Recoletos 3  
28004 Madrid  
Spain

This Decision shall be enforceable pursuant to Article 256 of the Treaty and Article 110 of the EEA Agreement.

Done at Brussels,

*For the Commission*

*Member of the Commission*