COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 31.05.2006
C(2006) 2098 final

COMMISSION DECISION

of

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

(Case COMP/F/38.645 - Methacrylates)

(Only the English and French texts are authentic)

Version to be notified to:

Degussa AG
Röhm GmbH & Co. KG
Para-Chemie GmbH
ICI PLC
Quinn Barlo Ltd
Quinn Plastics NV
Quinn Plastics GmbH
Lucite International Ltd
Lucite International UK Ltd

(Text with EEA relevance)

EN

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(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 of competition laid down in Articles 81 and 82 of the EC Treaty[1] and, in particular, Articles 7(1) and 23(2) thereof,

Having regard to the Commission decision of 17 August 2005 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation EC No 1/2003 and Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty,[2]

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

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

WHEREAS:

1. SUMMARY OF THE INFRINGEMENT

[1] OJ L 1, 4.1.2003, p.1. Regulation as amended by Regulation (EC) No 411/2004 (L 68, 6.3.2004, p.1).
[2] OJ L 354, 30.12.1998, p. 18.
[3] OJ C 285, 22.11.2006, p.4.
[4] OJ C 285, 22.11.2006, p.2.

(1) This Decision is addressed to the following legal entities:

- Degussa AG
- Röhm GmbH & Co. KG
- Para-Chemie GmbH
- Total SA
- Elf Aquitaine SA
- Arkema SA
- Altuglas International SA
- Altumax Europe SAS
- ICI PLC
- Lucite International Ltd
- Lucite International UK Ltd
- Quinn Barlo Ltd
- Quinn Plastics NV
- Quinn Plastics GmbH

(2) The addressees of this Decision participated in a single and continuous infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement in the Methacrylates industry involving three products:

– **Polymethyl-methacrylate (PMMA)-moulding compounds;**

– **Polymethyl-methacrylate (PMMA)-solid sheet and;**

– **Polymethyl-methacrylate (PMMA)-sanitary ware.**

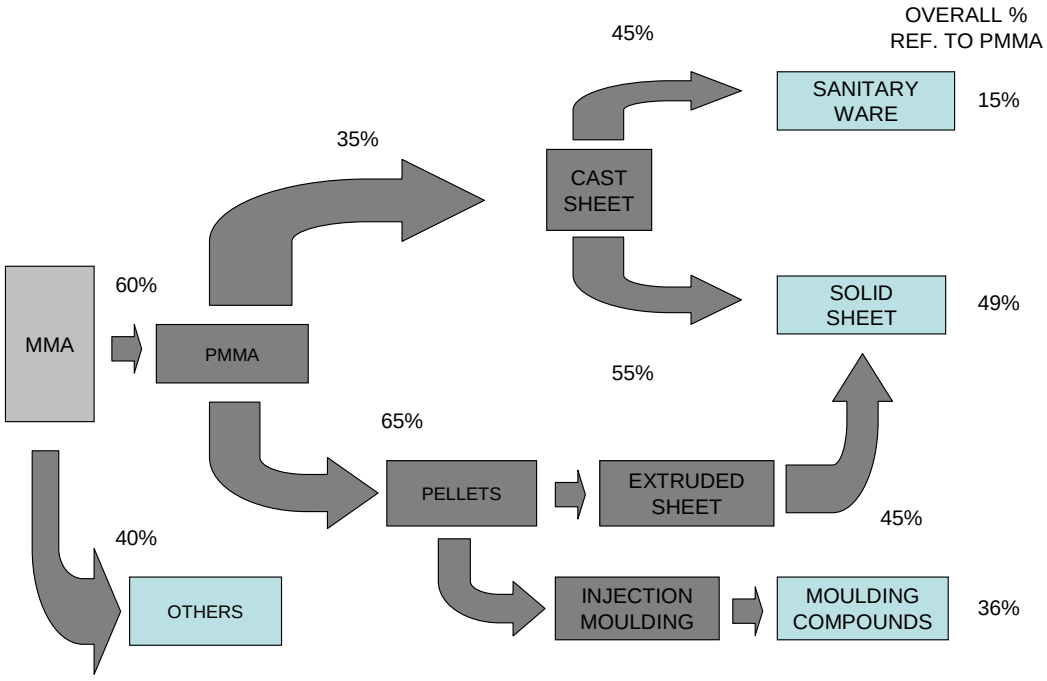
(3) The infringement started on 23 January 1997 at the latest and lasted until 12 September 2002. It covered the whole territory of the EEA. The infringement's main features included competitors discussing prices, agreeing, implementing and monitoring price agreements either in the form of price increases, or at least stabilisation of the existing price level; discussing the passing on of additional service costs to customers; exchanging commercially important and confidential market and / or company relevant information and participating in regular meetings and having other contacts which facilitated the infringement.

2. THE INDUSTRY SUBJECT TO THE PROCEEDINGS

2.1. The products under investigation

(4) PMMA-moulding compounds, PMMA-solid sheet and PMMA-sanitary ware are part of a production chain with Methacrylate-Monomers (MMA) being the starting point and main raw material of the three PMMA-products. Although these three PMMA-products are all both physically and chemically distinct, they can be considered as one homogenous product group due to a common raw-material input.

(5) PMMA is an acrylic polymer available as a resin or sheet with high UV-resistance. It is obtained by the polymerisation (a chemical process that combines several monomers to form a polymer or polymeric compound) of MMA. This can happen either a) directly, by a casting process which makes cast solid sheets, or b) via the form of pellets, which are then injection moulded to make PMMA-moulding compounds or extruded to make extruded solid sheets. PMMA pellets account for 65% of the total PMMA produced in Europe. The remaining 35% is made through the casting process, the applications of which are sanitary ware (45%) and cast solid sheets (55%). The approximate distribution of MMA between the three downstream PMMA-products is as follows: solid sheet (49%), moulding compounds (36%) and sanitary ware (15%).



(6) PMMA-moulding compounds are mainly used in the car industry for the production of headlamps, tail-lights and glass for dashboards. Other major end uses include household appliances, optical media (DVDs, lenses), electronics, mobile phone displays, cosmetics packaging, toys, pens and furniture.

(7) PMMA-solid sheet is either cast or extruded sheet and is mainly used for illuminated advertising applications, for shop interior displays and in the construction industry for the building of tunnel vaults and lighting globes.

(8) PMMA-sanitary ware is a special application of PMMA-solid sheet and is mainly used in the production of bath tubs and shower trays.

2.2. The addressees of this Decision

2.2.1. "Atofina" (Total SA, Elf Aquitaine SA, Arkema SA, Altuglas International SA and AltumaxEurope SAS)

(9) Arkema SA (hereafter: Arkema), based in La Defense, Puteaux, France, was created under the name Atochem SA in 1983 from the merger of Cloè Chimie (a joint venture company then owned by Elf Aquitaine, CFP and Rhone-Poulenc), Atochimie and the biggest part of the chemical activity of the group Pechiney Ugine Kuhlmann. For the period of the infringement until April 2000 Elf Aquitaine was the main shareholder (97,6%) of Atochem SA which changed its name to Elf Atochem in 1992, then Atofina SA in April 2000 after a 1999 takeover of the Elf group by the TotalFina Group. Finally, Atofina was renamed Arkema on 4 October 2004. For the period of the infringement after April 2000, Arkema has been controlled (96,48%) by Elf Aquitaine, which is in turn almost wholly owned (99,43%) by Total SA (the former TotalFinaElf SA), a company listed on the Paris stock exchange.

(10) The main subsidiaries of Arkema involved in the PMMA business are Altuglas International SA and Altumax Europe SAS, and their respective subsidiaries.

(11) Altuglas International SA (hereafter: Altuglas) produces the three PMMA-products within the Arkema group. In 1992, Elf Atochem and Rohm and Haas Inc., Philadelphia, USA created the Atohaas SA joint venture for the production and marketing of PMMA. Both companies holding about 50% of Atohaas, Elf Atochem was responsible for the day-to-day management of the European joint venture, whereas Rohm and Haas was responsible for the day-to-day management of the US joint venture. The joint venture ended in 1998 when Elf Atochem acquired the Atohaas shares from Rohm and Haas.[5] In 1998, this joint venture was renamed Atoglas. In January 2005 Atoglas was renamed Altuglas International SA.

(12) From 1998 onwards, the PMMA business was under the control of both Altuglas and Altumax Europe SAS (a sister company of Altuglas), which are both wholly owned subsidiaries of Arkema, which was responsible for the marketing of PMMA-solid sheet.

(13) The name used hereafter in this Decision to refer to any undertaking in the current Total group involved in the infringement is "Atofina".

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[5] See Commission decisions of 28.7.92, Case IV/M.160, *Elf Atochem/Rohm and Haas*, at paragraph 7 and 25.5.98, Case IV/M.1158: *Elf Atochem/Atohaas* [***Deleted***].

(14) In 2005, the world-wide turnover of the Total Group was EUR 143,168 million, whereas, Elf Aquitaine´s turnover was EUR 120,795 million world-wide, and Arkema's world-wide turnover was EUR 5,710 million. In 2000 EEA-wide turnover in the three PMMA-products was EUR 188 million.

2.2.2. "Degussa" (Degussa AG, Röhm GmbH & Co. KG and Para-Chemie GmbH)

(15) Degussa AG (hereafter: Degussa), based in Düsseldorf, Germany, was founded in 1873 and is one of the world's biggest producers of specialty chemicals. It currently has three divisions including "Technology "Specialties, Consumer Solutions" and "Specialty Materials". The division "Construction Chemicals" was sold to BASF in early 2006 subject to the approval of the competent competition authorities.

(16) Until 1997, the major shareholder in Degussa was the German Gesellschaft für Chemiewerte mbH (GFC) with a 36,4% shareholding. The purpose of GFC was only to hold investments, whereas business strategy used to be decided at Degussa's management level. In December 1997, Veba AG took over 100% of GFC and thus held 36,4% of Degussa's share capital. From September 1998 until January 1999 Veba AG held, via its 100% subsidiary Hüls AG, this 36,4% share in Degussa. On 1 Februray 1999, Degussa was merged with Hüls AG , the result being the company Degussa-Hüls AG. On 16 June 2000, Viag AG was merged into Veba AG which was then renamed E.ON AG (E.ON). From 16 June 2000 until 31 January 2001, EON held 64,7% in Degussa-Hüls AG. On 1 February 2001, Degussa-Hüls AG and SKW Trostberg AG merged and Degussa AG was created. From 1 February 2001 until February 2003, E.ON held 64,5% of Degussa. Following a public offering in January 2003, RAG and the E.ON Group of companies each held 46.5% of Degussa until 30 June 2004. From 1 July 2004 until January 2006, RAG held 50.1% and E.ON held 42.86%, with 7.04% being floated.

(17) RAG intends to acquire 100% of Degussa's shares. On 19 December 2005 RAG agreed with E.ON to purchase E.ON's 42,86% share. On 25 January 2006 RAG made an acquisition offer to the remaining shareholders of Degussa AG. At present, RAG AG holds more than 95% of Degussa's shares via its wholly owned (indirect) subsidiary RAG Projektgesellschaft mbH.

(18) The main subsidiaries of Degussa involved in the PMMA business are Agomer GmbH, Röhm GmbH & Co. KG and Para-Chemie GmbH discussed in recitals (19), (20) and (21).

(19) Agomer GmbH (hereafter: Agomer), created on 16 April 1997, is the company to which Degussa transferred its entire specialty plastics business (including PMMA). Until 25 March 1999, the date when the business activities of Agomer were merged into those of the then Röhm GmbH, Agomer was a 100% subsidiary of the then Degussa AG.

(20) Röhm GmbH & Co. KG (hereafter: Röhm) is a 100% subsidiary of Degussa since January 2001. The present Röhm was, until the merger of Degussa and

Hüls AG in 1999, a 100% subsidiary of Hüls AG and existed, until December 2000, as Röhm GmbH.

(21) Para-Chemie GmbH (hereafter: Para-Chemie) is a 100% subsidiary of Röhm and active in the production of PMMA-sanitary ware.

(22) PMMA-moulding compounds, and PMMA-solid sheet were produced in the Degussa group from 1980 until 2003 by the section specialty plastics (later: Agomer) and Röhm.

(23) PMMA-sanitary ware was produced in the Degussa group from 1980 until 2003 by the section specialty plastics (later: Agomer), Röhm and Para-Chemie.

(24) Today, the division 'Speciality Polymers' is responsible for the Methacrylates business within the Degussa group. This division comprises the business units Methacrylates (comprising MMA and PMMA-moulding compounds) and Plexiglas (comprising PMMA-solid sheet and PMMA-sanitary ware).

(25) The name used hereafter in this Decision to refer to any undertaking in the current Degussa group involved in the infringement is "Degussa".

(26) The world-wide turnover of Degussa AG (including its subsidiaries) was approximately EUR 11,750 million in 2005. Degussa´s EEA-wide turnover amounted to EUR 6,400 million in 2003. In 2000 the EEA-wide turnover in the three PMMA-products was EUR 216 million.

2.2.3. "ICI" (ICI PLC)

(27) **Imperial Chemicals Industries PLC** (hereafter: ICI) is a United Kingdom-based world-wide manufacturer of specialty chemicals and the parent company of the ICI group.

(28) Until the mid 1980's the acrylics business was part of ICI Mond and Plastics divisions. In 1987, ICI Acrylics was organised as a separate business unit. In 1990, it acquired a sheet polymer plant in Clairvaux, France and, in 1994, an extruded sheet plant in Nischwitz, Germany.

(29) After 1990, responsibility for the production and/or sale of PMMA within the ICI group lay with ICI Acrylics. ICI Acrylics was a non incorporated business unit within the ICI group.

(30) By a Sale & Purchase Agreement dated 3 October 1999, the business and assets of ICI Acrylics was sold by ICI to Ineos Acrylics UK Parent Co 2 Limited (now Lucite International Holdings Limited) and Ineos Acrylics UK Trader Limited (now Lucite International UK Limited). Completion of the transaction and thus the transfer of the legal ownership took place on 2 November 1999. Shortly prior to the sale of ICI Acrylics to Ineos Acrylics, certain affiliates of ICI agreed to sell ICI Acrylics' European extruded sheet business to the Barlo group and to buy Barlo's polymer business. These

transfers were completed shortly after the sale of ICI Acrylics to Ineos Acrylics.

(31) The world-wide turnover of ICI (including its subsidiaries) was GBP 5,810 million (EUR 8,490 million) in 2005. The world-wide turnover of ICI Acrylics amounted to GBP 539 million in 1998. ICI PLC has been unable to provide EEA-wide turnover figures for ICI Acrylics as regards the three PMMA-products.

2.2.4. "Lucite" (Lucite International Limited and Lucite International UK Limited)

(32) The main producer of methacrylates and related (upstream) products within the Lucite group (hereafter: Lucite) is Lucite International UK Limited, a wholly-owned subsidiary of Lucite International Limited.

(33) **Lucite International Limited** is the holding and ultimate parent company of a group of about 30 acrylics producers around the world. It was established in May 2002 and is based in Southampton, United Kingdom.

(34) By a Sale & Purchase Agreement dated 3 October 1999, the business and assets of ICI Acrylics was sold by ICI to Ineos Acrylics UK Parent Co 2 Limited (now Lucite International Holdings Limited) and Ineos Acrylics UK Trader Limited (now Lucite International UK Limited). Completion of the transaction and thus the transfer of the legal ownership took place on 2 November 1999. On 12 April 2002, Ineos Acrylics Limited was renamed Lucite International Limited and shortly thereafter the purchasing companies were also renamed after the acrylics brand "Lucite". The changes of name as of end 1999 did not involve any changes to the underlying legal entities.

(35) The name used hereafter in this Decision to refer to any undertaking in the current Lucite group involved in the infringement is "Lucite".

(36) The world-wide turnover of Lucite was GBP 780 million in 2005 (around EUR 1,140 million). In 2000 the EEA-wide turnover in the three PMMA-products was EUR 105.980 million.

2.2.5. "Barlo" (Quinn Barlo Ltd, Quinn Plastics NV and Quinn Plastics GmbH)

(37) On 7 May 2004, Quinn Group Ltd, Gortmullen, Northern Ireland - an Irish company conglomerate - took over the entire share capital of Barlo Group plc which up to that date had been the ultimate parent company of the Barlo group of companies with a 100% shareholding. This acquisition included Barlo Plastics, in which the PMMA-business was grouped. Following the acquisition, Barlo Group plc was delisted and changed into Barlo Group Limited. In January 2005, Quinn Group integrated all of the former Barlo businesses in the Quinn organisation and renamed Barlo Group Limited as Quinn Barlo Ltd and Barlo Plastics as Quinn Plastics.

(38) The main subsidiary of the former Barlo Group involved in the Methacrylates business was the former Barlo Plastics NV, as of 1 January 2005, renamed as

Quinn Plastics NV. Barlo Plastics NV with HQ in Geel, Belgium was the parent company for the subsidiaries mentioned in recital (43).

(39) In 1992, the Barlo Group acquired IRG Plastics NV, a producer of PMMA solid sheet based in Geel, Belgium, and renamed it Barlo Plastics Europe NV. Until 2001, the company produced and sold PMMA-solid sheet in Geel. In 2001, the production site of PMMA-solid sheet was moved to Barlo Plastics GmbH (on 1 January 2005, this company was renamed Quinn Plastics GmbH), in Mainz, Germany. In October 2003, Barlo Plastics Europe NV was merged into Barlo Plastics NV.

(40) On 28 November 1997, the Barlo Group acquired Resart GmbH (hereafter: Resart), a producer of PMMA-moulding compounds and PMMA-solid sheet, with headquarters in Mainz, Germany from BASF, and renamed it Barlo Plastics GmbH. In the same year the Barlo Group acquired the Spanish producer of PMMA-cast sheet Critesa SA from BASF and renamed it Barlo Plastics SA.

(41) In 1999, shortly after the sale of ICI Acrylics to Ineos Acrylics, the Barlo group acquired ICI Acrylics GmbH (a producer of PMMA-solid sheet) in Thallwitz, Germany and renamed it Barlo Plastics Nischwitz GmbH. After the acquisition the entire production of PMMA-solid sheet was moved to Barlo Plastics GmbH in Mainz.

(42) In 2000, the Barlo Group acquired Barlo Plastics Slovakia sro, a producer of PMMA-moulding compounds and PMMA-solid sheet in Zilina, Slovak Republic.

(43) Barlo Plastics SA, Barlo Plastics Slovakia sro and Barlo Plastics Europe NV were directly and wholly owned subsidiaries of Barlo Plastics NV. Barlo Plastics GmbH was an indirect, wholly owned subsidiary of Barlo Plastics NV.

(44) As regards Resart, on 28 November 1997, the day Barlo purchased Resart from BASF, Barlo and BASF signed an agency agreement for PMMA-moulding compounds under which BASF acted solely as agent and sold on the account of Resart. This agency agreement was terminated in December 1999 when the merchant market operations were assumed by Ineos Acrylics (Lucite).

(45) The name used hereafter in this Decision to refer to any undertaking in the current Quinn group involved in the infringement is “Barlo”.

(46) The world-wide turnover of Barlo amounted to EUR 310.850 million for 2005. In 2000 the EEA-wide turnover in PMMA-solid sheet was EUR 66.370 million.

2.3. Description of the industry

2.3.1. General remarks

(47) The European PMMA industry can be further divided according to its processing into PMMA-moulding compounds, PMMA-solid sheet and PMMA-sanitary ware with MMA being the common chemical basis connecting the different products.

2.3.2. The supply

(48) In the EEA there were only a limited number of suppliers of PMMA-products during the period of the infringement as described in this Decision. The three largest players for all products were Atofina, Degussa and ICI (later Lucite). In addition to these three players, there were a number of smaller players such as Barlo, Repsol and BASF.

(49) As regards PMMA-moulding compounds, the biggest supplier was Degussa, followed by Atofina, ICI (and from 1999, following the sale of its business unit, ICI Acrylics, Lucite[6]) and, far behind, Barlo. As regards PMMA-solid sheet the biggest suppliers were Degussa and Atofina followed by ICI (later Lucite) and Barlo. As regards PMMA- sanitary ware, the main suppliers were ICI (later Lucite) and Atofina, followed by Degussa.

2.3.3. The demand

(50) The vertically integrated producers such as Degussa, Atofina and ICI (later Lucite) whose portfolio ranges from MMA to PMMA, use around two thirds of their MMA for their own production of PMMA. The remainder is sold to producers of PMMA-products who do not produce MMA or who have a shortfall in supply of MMA.

2.3.4. The geographic scope of the industry

(51) The PMMA industry is to be considered as at least EEA-wide as all competitors supply their products to customers in the entire EEA. The competition parameters within the EEA are sufficiently homogeneous to ensure unlimited trade flows within all levels of the PMMA industry.

2.3.5. EEA sales value

(52) The 2000 EEA market value for all three PMMA-products together was approximately EUR 665 million for approximately 255.000 tons. Figures for 2002 are similar.

2.3.6. Inter-state trade

(53) European PMMA production is concentrated in a certain number of sites in various European countries. During the cartel producers sold their products within the EEA to end users either directly through a network of subsidiaries

[6] Throughout this Decision, the Commission refers to "ICI (later Lucite)" to reflect the respective involvement of both companies.

or indirectly through independent distributors in the different European countries.

(54) During the cartel, there were important trade flows between Member States and the Contracting Parties to the EEA Agreement as regards the three PMMA-products.

3. PROCEDURE

3.1. The Commission's investigation

(55) **[*Recitals (55) – (84) are deleted, including any cross references to these Recitals and relevant footnotes. The Recitals are summarised as follows*:** Following Degussa's application for immunity pursuant to the Notice on immunity from fines and reduction of fines in cartel cases ("the Leniency Notice")[7] on 20 December 2002 the Commission carried out inspections at the premises of Atofina, Barlo, Degussa and Lucite on 25 and 26 March 2003, addressed various requests for information under Article 11 of Regulation No 17[8] and Article 18 of Regulation (EC) No 1/2003 to the companies involved throughout the entire administrative procedure and received leniency applications from Atofina, Lucite and ICI.**]**

(85) On 17 August 2005, the Commission initiated proceedings in this case and adopted a Statement of Objections against Degussa AG, Röhm GmbH & Co. KG, Para-Chemie GmbH, Total SA, Elf Aquitaine SA, Arkema SA, Altuglas International SA, Altumax Europe SAS, ICI PLC, Lucite International Ltd, Lucite International UK Ltd, BASF AG, Quinn Barlo Ltd, Quinn Plastics NV, Quinn Plastics GmbH, Quinn Plastics SA, Repsol YPF SA, Repsol Quimica SA, Repsol Brønderslev A/S and Repsol Polivar SpA concerning a single and continuous infringement relating to MMA, PMMA-moulding compounds, PMMA-solid sheet and PMMA-sanitary ware. The Oral Hearing on the case was held on 15 and 16 December 2005 and was attended by all undertakings to which the Statement of Objections had been addressed.

(86) **[*Recitals (86) - (92) have been deleted, including any cross references to these Recitals and relevant footnotes*]**.

(93) In view of the elements brought forward by the undertakings in their replies to the Statement of Objections and at the Oral Hearing, the Commission has decided, firstly, to drop objections against all undertakings in relation to the part of the infringement relating to MMA, secondly, to also drop objections against BASF AG, Repsol YPF SA, Repsol Quimica SA, Repsol Brønderslev A/S and Repsol Polivar SpA in relation to PMMA-moulding compounds, PMMA-solid sheet and PMMA-sanitary ware, thirdly, to drop objections against Quinn Barlo Ltd, Quinn Plastics NV, Quinn Plastics GmbH, Quinn Plastics SA in relation to PMMA-moulding compounds and, lastly, to drop objections against Quinn Plastics SA in relation to PMMA-solid sheet.

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7 OJ C 45, 19.2.2002, p. 3.

8 OJ 63: 17/62, 21.2.1962, p. 204; Regulation repealed by Regulation (EC) No 1/2003.

4. DESCRIPTION OF EVENTS

4.1. General remarks

(94) The overall structure of the anti-competitive arrangements for the three PMMA-products shows that they can be considered as one single infringement. The three major European producers Atofina, ICI (later Lucite) and Degussa are fully integrated producers.

(95) The description of the events as regards PMMA-moulding compounds, PMMA-solid sheet and PMMA-sanitary ware is based on the application for immunity and the additional company statements of Degussa. This evidence submitted by Degussa has been corroborated by evidence gathered through the inspections, replies to requests for information, information submitted by Atofina and Lucite in the framework of their applications for leniency and the replies of the parties to the Statement of Objections.

(96) The anti-competitive behaviour relating to the three PMMA-products shows a number of common features:

– a core group of the same undertakings, namely Atofina, Degussa and ICI (later Lucite), were involved;

– there is a link between the different products, MMA being the common chemical basis connecting them;

– the venue for the meetings was often the same;

– certain meetings involved anti-competitive arrangements for more than one of the three PMMA-products;

– a number of representatives of the undertakings involved in the anti-competitive arrangements had responsibility for more than one of the three PMMA-products;

– the same mechanisms as mentioned in detail in sections 4.2.2 - 4.2.4 applied to all three PMMA-products.

(97) For ease of understanding, the factual part of this Decision contains different sections for each of the three PMMA-products.

4.2. Overview of the infringement as regards all three products

4.2.1. Dates and locations of meetings

(98) The competitors to whom this Decision is addressed engaged in anticompetitive meetings and contacts from at least January 1997 until September 2002. Multilateral meetings were both arranged and held close to production sites of the companies involved or at airport conference centres. Sometimes anti-competitive meetings were also held on the occasion of official meetings of the European Chemical Industry

Council (CEFIC)[9]. These meetings on the occasion of CEFIC meetings had not been formally arranged beforehand and took place as so-called "Breakfast meetings" in the morning of the official CEFIC-meeting in a café or restaurant near the meeting venue, in private hotel rooms, at the hotel bar or during dinners. There were also numerous bilateral contacts between competitors either in person or via phone calls to discuss details of the anti-competitive arrangements, and, in particular as regards national markets, to maintain or intensify the co-operation between competitors and analyse the implementation of concluded agreements.

(99) As PMMA-sanitary ware is a special application of PMMA-solid sheet, no separate CEFIC sector group[10] for PMMA-sanitary ware existed. Discussions and agreements on this product therefore occurred in the context of meetings and contacts relating to PMMA-solid sheet. Due to different customer and distribution channels, Atofina, Degussa and ICI decided to hold separate meetings for PMMA-sanitary ware from the end of 1996. After 1996 the meetings on PMMA-sanitary ware usually took place independently from CEFIC meeting dates and were usually located near one of the production sites. ***[Deleted, including any cross references to this part and/or relevant footnotes]***, the meetings were referred to as "Rugby Club, Rugby or XV (symbolising the 15 players in a rugby team)" meetings and were conducted in a secretive manner and organised in rotation between these participants.

4.2.2. Influencing the price level via price agreements

(100) The main topic of the meetings was the development of the European price level for the three PMMA-products. The talks were mainly aimed at influencing the price level, i.e. stabilisation or increase of the existing price level.

(101) This influence on the price level was achieved by agreeing on target-prices. The meetings between competitors always followed similar patterns. At first, relevant market information was exchanged. It was discussed how far the market would allow the implementation of price increases. The development of the price level within the various European currency regions was discussed. Estimations on the different price levels were exchanged and compared. Reasons for different price levels on different markets (e.g. changing currency rates) were analysed.

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9 CEFIC is the association of the European chemical industry.

10 As an umbrella organisation, CEFIC has recognised about 120 sector groups and affiliated associations. A sector group is a CEFIC Board recognised organisation, allowing the European Producers of a chemical substance (group of chemical substances) to work together on their related issues under the management of a CEFIC staff member, see for details www.cefic.org.

(102) The participants would also reject demands from customers for further price reductions as they knew that their competitors would not give in to such demands, largely removing the threat of losing customers to a competitor. Sometimes agreements on prices for individual major customers were also made.

(103) Apart from target-price agreements, the competitors discussed the passing on of additional service costs to the customers e.g. for cutting and colouring in relation to PMMA-moulding compounds and PMMA-solid sheet. Furthermore, the implementation of protection prices to safeguard the few exclusive customers of some producers was discussed by competitors.

4.2.3. Implementation and monitoring of the price agreements

(104) The implementation of the agreements on target prices and price increases was intended to occur as follows: first, after an agreement had been reached between the competitors, the planned increase was announced in customer letters. Second, these customer letters were sometimes forwarded to competitors by way of assurance for their own implementation of the price increase one or two weeks later. The national market leader was normally responsible for the implementation of this first step i.e. the other competitors could first observe the market reaction before implementing the price increases themselves one or two weeks later. As for the implementation of price increases Atofina as market leader in France, Italy and Benelux took the first step on those markets, ICI (later Lucite) in the United Kingdom and Scandinavia, and Degussa in Germany and Spain. However, in some cases the implementation of price increases failed due to a lack of discipline of the competitors, delays in the announcement of price increases and the market power of some major customers who could negotiate rebates for large-scale orders.

(105) ***[Deleted, including any cross references to this part and/or relevant footnotes]***, up to three different levels within the business organisation of some of the competitors were involved in anti-competitive activities which covered all three PMMA-products within the Methacrylates industry. The members of the board level of most competitors held a superior responsibility at **"summit" level** for the three PMMA-products under investigation (this level was not directly involved in operational business decisions, but concluded the basic understanding for collaboration between competitors). Furthermore, this summit level also fixed the framework for the agreements on target prices which were to be concluded on the operational level and was also involved in settling disputes in order to maintain contacts between competitors. The business unit level was responsible for the concrete contents of any

agreements and served as a link between the board and sales management levels. The main quantitative focus as regards direct contacts between competitors was on the management of the **business unit,** and below that, the **sales level**. The heads of the business units were responsible for a part of the Methacrylates industry and took all relevant operative decisions for this business. The subordinated sales managers had the operative responsibility for certain regional markets and implemented the decisions of the management of the business units. Both business unit and sales level personnel participated in the official CEFIC meetings and the cartel meetings that were held between competitors on the occasion of such meetings. The sales level also used telephone contacts to secure the implementation of the agreements. The qualitative focus of the anti-competitive agreements was split between the board and the business unit level. From the details laid out in this Decision the Commission concludes that no clear distinction can be drawn between the business unit and sales level and that these two allegedly separate levels should therefore be considered as constituting one level.

(106) Until 2000 competitors contacted each other by telephone up to four times a day, and exchanged prices for certain customers. At the end of the 1990's contact by telephone was partly replaced by contact via email. In these contacts, specific prices for specific customers were discussed with the aim of soliciting support for price increases that one of the competitors was trying to push through. An example given by Lucite is that where it was trying to implement a price increase with a particular customer, Lucite would inform Atofina and Degussa so that they would not offer a lower price if they were approached by the same customer. In addition, telephone contact was used as a means to check progress in relation to previously agreed price increases.

(107) These contacts and meetings between competitors were also used to monitor the implementation of agreements which had been concluded between the competitors on target prices and where implementation problems had occurred. The competitors exchanged experiences with customers following the previous price negotiations where certain others had offered a lower price to increase their market share. As the implementation of the agreed target price had been affected by such behaviour these anti-competitive meetings were aimed at identifying any deviation from the agreements and agreeing on more effective cooperation on prices in the future.

4.2.4. Exchange of other confidential market information

(108) At their multilateral meetings the competitors also exchanged confidential market information which was capable of influencing independent commercial decisions taken by the competitors, such as information relating to the volume and price developments on the

market, changes in production capacities and capacity utilisation and market behaviour of the competitors and customers including supplies to particular customers, new market entries and exits, product innovations and related issues. Furthermore, new business structures of competitors, the organisation of the industry, the exchange of capacities and deliveries were important issues.

4.3. PMMA-moulding compounds

4.3.1. Initial collusive contacts

(109) ***[Recital (109) is deleted, including any cross references to this Recital and relevant footnotes. Recital 109 is summarised at [4.2.1 et seq.]]***.

4.3.2. Meetings and contacts between competitors

(110) ***[Recitals (110) – (134) are deleted, including any cross references to these Recitals and relevant footnotes. Recitals (110) - (134) are summarised at [4.2.1 et seq.]]***.

4.4. PMMA-solid sheet

4.4.1. Initial collusive contacts

(135) ***[Recital (135) is deleted, including any cross references to this Recital and relevant footnotes. Recital 135 is summarised at [4.2.1 et seq.]].***

4.4.2. Meetings and contacts between competitors

(136) ***[Recitals (136) - (174) are deleted, including any cross references to these Recitals and relevant footnotes. Recitals (136) - (174) are summarised at [4.2.1 et seq]].***

4.5. PMMA-sanitary ware

4.5.1. Initial collusive contacts

(175) ***[Recital (175) is deleted, including any cross references to this Recital and relevant footnotes. Recital (175) is summarised at [4.2.1 et seq.]].***

4.5.2. Meetings and contacts between competitors

(176) ***[Recitals (176) – (196) are deleted, including any cross references to these Recitals and relevant footnotes. Recitals (176) - (196) are summarised at [4.2.1 et seq.]].***

5. THE Treaty and the EEA Agreement

5.1. Relationship between the Treaty and the EEA Agreement

(197) The arrangements described in section 4 applied to the whole of the territory of the EEA in which demand for PMMA-moulding compounds, PMMA-solid sheet and PMMA-sanitary ware existed, and the cartel members had sales throughout the Member States and EFTA States, which were party to the EEA Agreement (see section 2.3.6 above).

(198) The EEA Agreement, which contains provisions on competition analogous to those of the Treaty, entered into force on 1 January 1994.

(199) Insofar as the arrangements affected competition in the common market and trade between Member States, Article 81 of the Treaty is applicable. As regards the operation of the cartel in EFTA States which are part of the EEA and its effect upon trade between the Community and Contracting Parties to the EEA Agreement or between Contracting Parties to the EEA Agreement, this falls under Article 53 of the EEA Agreement.

5.2. Jurisdiction

(200) 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 competition in the common market as well as on trade between Member States.

6. Application of Article 81 of the Treaty and Article 53 of the EEA Agreement

6.1. Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement

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

(202) 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) of the Treaty to "*trade between Member States"* is replaced in Article 53(1) of the EEA Agreement 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*".

6.2. The nature of the infringement in the present case

(203) Articles 81 of the Treaty and 53 of the EEA Agreement prohibit agreements between undertakings, decisions by associations of undertakings and concerted practices.[11]

6.2.1. Agreements and concerted practices

6.2.1.1. Principles

(204) An agreement for the purpose of Article 81 of the Treaty can be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The fact of 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 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.[12]

(205) In its judgment in *Limburgse Vinyl Maatschappij N.V. and others v. Commission* (*PVC II*)[13], 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"*.

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[11] The case law of the Court of Justice and the Court of First Instance in relation to the interpretation of Article 81 of the EC 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 in the judgment of the EFTA Court Case E-1/94, *Restamark*, [1994/1195] EFTA Court Reports 17, paragraphs 32-35.

[12] See judgment of the Court of First Instance, *HFB and others v. Commission*, [2002] ECR II - 1487, at paragraph 207.

[13] See judgment of the Court of First Instance, joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94,, *Limburgse Vinyl Maatschappij NV, Elf Atochem SA, BASF AG, Shell International Chemical Company Ltd, DSM NV and DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst AG, Société artésienne de vinyle, Montedison SpA, Imperial Chemical Industries plc, Hüls AG and Enichem SpA v Commission of the European Communities*, at paragraph 715.

(206) Although Article 81 of the Treaty and Article 53 of the EEA Agreement draw a distinction between the concept of "*concerted practice*" and that of "*agreements between undertakings*", the object is to bring within the prohibition of these Articles a form of co-ordination between undertakings by which, without having reached the stage where an agreement properly so-called has been concluded, they knowingly substitute practical co-operation between them for the risks of competition.[14]

(207) The criteria of co-ordination and co-operation 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 it intends to adopt in the common market. Although that requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.[15]

(208) Thus, conduct may fall under Article 81 of the Treaty as a concerted practice even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopted or adhered to collusive devices which facilitate the co-ordination of their commercial behaviour.[16] 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.

(209) Although in terms of Article 81 of the Treaty the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active on 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

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14 See judgment of the Court of Justice, Case 48/69, *Imperial Chemical Industries v Commission*, [1972] ECR I-619, at paragraph 64.

15 See judgment of the Court of Justice, joined Cases 40-48/73, *Suiker Unie and others v Commission*, [1975] ECR II-1663.

16 See also the judgment of the Court of First Instance,, Case T-7/89, *Hercules v Commission*, [1991] ECR II-1711, at paragraph 242.

concerted practice is caught by Article 81 of the E Treaty even in the absence of anti-competitive effects on the market.[17]

(210) Moreover, it is established case law that the exchange, between undertakings, in pursuance of a cartel falling under Article 81 of the Treaty, of information concerning their respective deliveries, which not only covers deliveries already made but is intended to facilitate "constant monitoring of current deliveries in order to ensure that the cartel is sufficiently effective", constitutes a concerted practice within the meaning of that article.[18]

(211) In the case of a complex infringement of long duration, it is not necessary for the Commission to characterise the conduct as exclusively one or other of these forms of illegal behaviour. 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 purpose into several different forms of infringement.

(212) In *PVC II*,[19] the Court of First Instance confirmed that *"[i]n the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [81] of the Treaty"*.

(213) An agreement for the purposes of Article 81(1) of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract at 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

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17 See also the judgment of the Court of Justice, Case C-199/92, *Hüls v Commission*, , [1999] ECR I-4287, at paragraphs 158-166.

18 See, in this sense, judgments of the Court of First Instance, Case T-147/89, *Société Métallurgique de Normandie v Commission,* Case T-148/89, *Trefilunion v Commission* and T-151/89, *Société des treillis et panneaux soudés v Commission*, [1995] ECR II-1057 at paragraph 72.

19 See judgment of the Court of First Instance, *Limburgse Vinyl Maatschappij NV and others,* cited above, (*PVC II*), at paragraph 696.

mechanisms and in pursuance of the same common purpose. As the Court of Justice, upholding the judgment of the Court of First Instance, has pointed out in *Anic*[20] it follows from the express terms of Article 81(1) of the Treaty that an agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.

(214) It is also well-settled 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*".[21] Such distancing should take the form of an announcement by the company, for instance, that it would take no further part in the meetings (and therefore did not wish to be invited to them).

6.2.1.2. Application to the case

(215) As described in section 4 the undertakings mainly discussed prices including those charged to individual customers, they agreed on price increases and monitored the implementation of the agreed price agreements, they discussed the passing on of additional service costs, and exchanged commercially important and confidential company and/or market relevant information.

(216) The Commission concludes that in line with the case law in recitals (204)-(214), the behaviour of the undertakings concerned can be characterised, for the three PMMA-products within the Methacrylates industry, as a complex infringement consisting of various actions which can either be classified as agreements or concerted practices, within which the competitors knowingly substituted practical co-operation between them for the risks of competition. Furthermore, the Commission considers, on the basis of the same case-law, that the participating undertakings in such concertation must have taken account of the information exchanged with competitors in determining their own conduct on the market, all the more so because the concertation occurred on a regular basis and over a long period. According to the case law, such a concerted practice is caught by Article 81(1) of the Treaty even in the absence of anti-competitive effects on the market.

(217) On the basis of the above considerations, the Commission considers that the complex of behaviour in this case, as described in section 4, presents

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[20] See judgment of the Court of Justice, Case C-49/92, *Anic Partecipazioni v Commission*, [1999] ECR I- 4125, at paragraph 81.

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

all the characteristics of an agreement and/or a concerted practice in the sense of Article 81 of the Treaty and Article 53 of the EEA Agreement.

6.2.2. Single and continuous infringement

6.2.2.1. Principles

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

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

(220) 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 or 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. This is certainly the case where it is established that the undertaking in question was aware of the unlawful behaviour of the other participants or could have reasonably foreseen or been aware and prepared to take the risk.[22]

(221) In fact, as the Court of Justice stated in its judgment in *Anic*, the agreements and concerted practices referred to in Article 81(1) of the Treaty necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged. It follows that infringement of that article may result not only from an isolated act but also from a series of acts or from a continuous

[22] See judgment of the Court of Justice, *Commission v Anic Partecipazioni*, cited above, at paragraph 83.

conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves an infringement of Article 81 of the Treaty.[23]

6.2.2.2. Application to the case

(222) The Commission considers that the complex of arrangements in this case present the characteristics of a single and continuous infringement. The infringement consisted of a series of actions that can be qualified as agreements or concerted practices covering the three products concerned, which demonstrated a continuous course of action with a common object of restricting competition. The Commission considers, therefore, that the information supplied by Degussa, seen in conjunction with the corroborating material from the investigation, constitutes credible evidence of an infringement of the scope and duration as established in this Decision.

(223) As described above in section 4, the anti-competitive arrangements for the three PMMA-products within the Methacrylates industry show a number of common features:

– a core group of the same undertakings were involved in the anti-competitive arrangements. The three major European producers Atofina, ICI (later Lucite) and Degussa participated in the arrangements as regards all three PMMA-products under investigation (see recital (94));

– there is a direct link between the three PMMA-products with MMA being the common chemical basis connecting the different products. The three major European producers Atofina, ICI (later Lucite) and Degussa are fully integrated producers. Their product portfolio covers all three PMMA-products. These companies paid great attention to the spill-over effects of the anti-competitive arrangements concluded for each of the products. Hence the cartelisation on one product automatically influenced the cost structure and/or prices of the other products.

– meetings and contacts were occasionally dedicated to more than one of the three PMMA-products with the venue for the meetings often being the same. The link is shown in numerous meetings which were dedicated both to PMMA-moulding compounds and PMMA-solid sheet. As of October 1996, PMMA-sanitary ware issues were discussed in separate meetings, but even after that date competitors met and

[23] See judgment of the Court of Justice, *Commission v Anic Partecipazioni*, cited above, at paragraphs 78-81, 83-85 and 203.

discussed pricing and market issues relating both to PMMA-sanitary ware and PMMA-solid sheet.

– a number of representatives of the undertakings involved in the anti-competitive arrangements had responsibility for more than one product under investigation and were therefore aware or should have been aware of the existence of anti-competitive arrangements covering several products. An example is [***Deleted, including any cross references to this part and/or relevant footnotes***], who is the Chief Executive Officer of Degussa's subsidiary Röhm and who participated in meetings relating to PMMA-moulding compounds and PMMA-solid sheet. This also applies to [***Deleted, including any cross references to this part and/or relevant footnotes***], the Vice President Global Monomers and EAME at ICI Acrylics, who also attended meetings relating to PMMA-moulding compounds and PMMA-solid sheet. [***Deleted, including any cross references to this part and/or relevant footnotes***], the (then) responsible manager for the PMMA-business at Atofina's subsidiary Atohaas also participated in several meetings dedicated to both PMMA-moulding compounds and PMMA-solid sheet just like [***Deleted, including any cross references to this part and/or relevant footnotes***] who took over the function of [***Deleted, including any cross references to this part and/or relevant footnotes***] at Atofina's subsidiary Atoglas as well as [***Deleted, including any cross references to this part and/or relevant footnotes***] and [***Deleted, including any cross references to this part and/or relevant footnotes***] who had sales responsibility for PMMA-solid sheet and PMMA-sanitary ware at Atoglas and participated in meetings related to these products). Equally, Lucite's PMMA manager [***Deleted, including any cross references to this part and/or relevant footnotes***] participated in meetings related to all three PMMA-products.

– the same mechanisms as mentioned in detail in sections 4.2.2 - 4.2.4 applied to all three PMMA-products in that the undertakings mainly discussed prices including those charged to individual customers, agreed on price increases and monitored the implementation of the agreed price agreements, they discussed the passing on of additional service costs, and exchanged commercially important and confidential company and/or market relevant information.

(224) In the light of the above, it is the Commission's conclusion that although the three PMMA-products represent different characteristics and may be considered to belong to different product markets, there are sufficient links to conclude that the producers of PMMA-moulding compounds, PMMA-solid sheet and PMMA-sanitary ware adhered to a common scheme which laid down the lines of their action in the market and restricted their individual commercial conduct. The infringement consisted of a complex of behaviour having a common plan and single economic aim, namely to avoid the normal movement of prices in the EEA for all three PMMA-products, by agreeing on price increases and other practices described above.

(225) Given these elements, it would indeed be artificial to split up such continuous conduct, characterised by a single aim, by treating it as consisting of several separate infringements, when what was involved was a single and common plan which manifested itself in the various agreements and concerted practices.

(226) The fact that an undertaking concerned did not participate in all the constituent elements of the overall cartel cannot relieve it of responsibility for the infringement of Article 81 of the Treaty. In this case the fact that one company, namely Barlo, does not produce all three PMMA-products like the other participants of the anti-competitive arrangements does not change the nature and the object of the infringement which was to distort the normal movement of prices with regard to the three PMMA-products. From the facts described above in section 3 it is clear that all participants in the anticompetitive arrangements adhered and contributed, to the extent they could (i.e. to the extent they were active in one or more of the products concerned by the arrangements) to the common anti-competitive plan.

(227) Moreover, the fact that Barlo may not have participated in all of the meetings as regards the product where it was active (i.e. PMMA-solid sheet) in no way detracts from the assessment of its participation in the cartel, since it participated in meetings before or after the meetings it missed and it was in a position to be informed and take account of the information exchanged with its competitors when determining its commercial conduct on the market.[24]

6.3. Restriction of competition

(228) 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:[25]

(a) directly or indirectly fix selling prices or any other trading conditions;

(b) limit or control production, markets or technical development;

(c) share markets or sources of supply.

(229) Specifically, the fixing of a price, even one which merely constitutes a target, affects competition because it enables all the participants in a cartel to predict with a reasonable degree of certainty what the pricing

[24] See judgment of the Court of Justice, joined Cases C-204, 205, 211, 213 ,217 and 219/00, *Aalborg Portland A/S and Others v. Commission*, [2004] ECR I-00123, at paragraphs 55-57, 86, 230 and 249.

[25] The list is not exhaustive.

policy pursued by their competitors will be.[26] More generally, such cartels involve direct interference with the essential parameters of competition on the market in question.[27] By expressing a common intention to apply a given price level for their products, the producers concerned cease to determine independently their policy in the market and thus undermine the concept inherent in the provisions of the Treaty and the EEA Agreement relating to competition.[28]

(230) The characteristics of the horizontal arrangements under consideration in this case constitute essentially discussing prices, agreeing, implementing and monitoring price agreements in the form of price increases or at least stabilisation of the existing price level, of which agreeing upon percentage price increases is a typical example. By planning common action on price initiatives with price increases, the undertakings aimed at eliminating the risks involved in any unilateral attempt to increase prices, notably the risk of losing market share. 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.

(231) Price fixing by its very nature restricts competition within the meaning of both Article 81 of the Treaty and Article 53 of the EEA Agreement.

(232) More particularly, in this case, the principal aspects of the complex of agreements and concerted practices which can be characterised as restrictions of competition in order to find a breach of Article 81 of the Treaty and Article 53 of the EEA Agreement are:

(a) discussing prices, agreeing, implementing and monitoring price agreements in form of price increases or at least stabilisation of the existing price level;

(b) discussing the passing on of additional service costs to customers;

(c) exchange of commercially important and confidential market and/or company relevant information; and

(d) participating in regular meetings and having other contacts to agree to the above restrictions (a) – (c) and monitor their implementation.

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[26] See judgment of the Court of Justice,, Case 8/72, *Vereniging van Cementhandelaren* v *Commission*, [1972] ECR II-977, at paragraph 21.

[27] See judgment of the Court of First Instance, Case T-141/94, *Thyssen Stahl* v *Commission*, [1999] ECR II-347, at paragraph 675.

[28] See judgment of the Court of First Instance, Case T-311/94,, *BPB de Eendracht* v *Commission*, [1998] ECR II-1129, at paragraph 192.

(233) This complex of agreements and concerted practices has as its object the restriction of competition within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement and has been described in detail in the factual part of this Decision.

(234) It is settled case-law that for the purpose of application of Article 81 of the Treaty and Article 53 of the EEA Agreement there is no need to take into account the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved.[29]

(235) In this case the parties showed a consistent pattern of collusive contacts which were aimed at restricting competition between them. Regarding the anti-competitive object of the exchanges of commercially important and confidential market- and/or company relevant information and the other contacts with an anticompetitive purpose identified above in sections 4.3.1, the arrangements have to be seen in context and in the light of all the circumstances. These exchanges served to attain the single objective of restricting price competition and further enabled the undertakings to adapt their pricing strategy to the information received from competitors.

(236) The evidence establishes that the parties operated a restriction of the market from 23 January 1997 until 12 September 2002 at least. On several occasions the parties agreed on price increases which were implemented by the participants in the infringement and regular contacts between competitors took place to ensure the implementation of the agreed strategy.

(237) Despite the fact that the participants may sometimes not have respected the arrangements and that price increases were not successfully implemented, this does not imply that they did not implement the cartel agreement or that the arrangements produced no effects on the market. As the Court of First Instance stated in *Cascades*, *"an undertaking which, despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit"*.[30]

(238) By its very nature, the implementation of a cartel agreement of the type described above leads automatically to a significant distortion of

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29 See judgment of the Court of First Instance in *Volkswagen AG v. Commission*; Case T-62/98 [2000] ECR II-2707, paragraph 178.

30 See judgment of the Court of First Instance, Case T-308/94, *Cascades v. Commission*, [1998] ECR II-925, at paragraph 230.

competition, which is of exclusive benefit to producers participating in the cartel and is highly detrimental to customers and, ultimately, to the general public.

(239) Furthermore, even if the parties perceived the final outcome of some of the price increases as a failure, this does not necessarily imply that they produced no effect on the market. It is quite normal that a leader of a price increase loses some market share, which is a risk that the undertaking in question voluntarily assumes in collusive situations like those in question in these proceedings. In this case, often by taking turns in leading the price increases implemented during this cartel, Degussa, Atofina and ICI (later Lucite) could level out some of these risks and losses. Moreover, a partially implemented or a short-term price increase also affects prices and harms consumers, even when such effect is felt for a shorter period of time than planned and desired by the participants. If the precise price increase targets were not always entirely achieved, it is reasonable to conclude that they still had some effect on the way in which the cartel members approached negotiations with customers and thus at least some effect on prices was achieved.

6.4. Application of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement

(240) The parties have not raised any arguments to suggest that the conditions of Article 81(3) of the Treaty and Article 53(3) of the EEA-Agreement are fulfilled in this case and the Commission considers that that is not the case.

6.5. Effect upon trade between Member States and between EEA Contracting Parties

(241) According to the case law of the Court of Justice "*in order that an agreement between undertakings may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States*".[31] In any event, whilst Article 81(1) of the Treaty "*does not require that provisions have actually affected trade between Member States, it does require that it be established that the agreements are capable of having that effect*".[32]

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[31] See judgment of Court of Justice, Case 42/84, *Remia and others v. Commission*, [1985] ECR 2545, at paragraph 22.

[32] In addition see judgments of the Court of Justice in *Société Technique Minière*; Case 56/65; [1966] ECR I-282, paragraph 7; *Remia* and Others, Case 42/84, [1985] ECR 2545, paragraph 22 and judgment of the Court of First Instance in *Cimenteries CBR* , Joined Cases T-25/95 and others, [2002] ECR II-491. See also judgments of the Court of Justice *in Javico*, Case

(242) Furthermore, the application of Article 81 of the Treaty and Article 53 of the EEA Agreement to a cartel is not restricted to the part of sales by participants in the cartel which actually involve a physical transfer of goods from one Member State or EEA Contracting Party to another, nor is it necessary to demonstrate that the individual participation of each of the cartel members, as opposed to the cartel as a whole, affected trade between Member States or EEA Contracting Parties.[33]

(243) As explained in the "Inter-State trade" section 2.3.6, there was a substantial volume of trade as regards the three PMMA-products between Member States and between EEA Contracting Parties. Hence, the complex of agreements and concerted practices between the cartel members had an appreciable effect on this trade.

(244) In this case, the cartel arrangements covered virtually all trade throughout the Community and EEA. The existence of a price-fixing mechanism must have resulted, or was likely to result, in the automatic diversion of trade patterns from the course they would otherwise have followed.[34]

6.6. Addressees of the Decision

6.6.1. Principles

(245) In order to identify the addressees of this Decision, it is necessary to determine to which legal entities responsibility for the infringement should be imputed.

(246) The subject of Article 81 of the Treaty and Article 53 of the EEA Agreement 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 company or fiscal law. In order to determine liability for an infringement of Article 81 of the Treaty, it is necessary to identify the undertaking which can be held liable. The term "undertaking" is not defined in either the Treaty or the EEA Agreement, but it may refer to any entity engaged in a commercial activity. A decision concerning an infringement of Article 81 of the Treaty and/or Article 53 of the EEA Agreement may therefore be addressed to one or several entities having their own legal personality and forming part of the undertaking, and thus to a group as a whole, or to sub-groups, or to subsidiaries.

C-306/96, [1998] ECR I-1983, at paragraphs 16 and 17 and *European Night Services*, Case T-374/94, [1998] ECR II-3141, at paragraph 136.

[33] See judgment of the Court of first Instance in *Imperial Chemical Industries* v *Commission*, Case T-13/89, [1992] ECR II-1021, paragraph 304.

[34] See judgment of the Court of Justice, joined Cases 209 to 215 and 218/78, *Van Landewyck and others v Commission*, [1980] ECR 3125, at paragraph 170.

(247) For the purpose of applying and enforcing competition law decisions, it is accordingly necessary to define the undertaking that is to be held accountable for the infringement of Article 81 of the Treaty by identifying one or more legal persons to represent the undertaking. According to the case law, "*Community competition law recognises that different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Articles 81 and 82 of the EC Treaty if the companies concerned do not determine independently their own conduct on the market*".[35] If a subsidiary does not determine its own conduct on the market independently, its parent forms a single economic entity with the subsidiary, and may be held liable for an infringement on the ground that it forms part of the same undertaking.

(248) A parent company may be held responsible for the unlawful conduct of a subsidiary, if the subsidiary "*does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company*".[36] According to established case-law, when a parent company owns the totality (or almost the totality) of the shares of the subsidiary it can be presumed that the subsidiary follows the policy laid down by the parent company and thus does not enjoy such an autonomous position. [37] The parent company can reverse the presumption of decisive influence by producing convincing evidence to the contrary.

(249) It is also established case-law that the fact that the subsidiary has separate legal personality is not sufficient to exclude the possibility that its conduct may be attributed to the parent company.[38]

(250) When an infringement of Article 81 of the Treaty and/or Article 53 EEA is found to have been committed, it is necessary to identify the natural or legal person who was responsible for the operation of the undertaking at the time when the infringement was committed, so that it can answer for it. Liability for illegal behaviour may thus pass to a successor where the

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35 See judgment of the Court of Justice, Case 170/83, *Hydrotherm*, [1984] ECR 2999, at paragraph 11, and Court of First Instance, *Viho* v *Commission*, Case T-102/92, [1995] ECR II-17, at paragraph 50, cited in judgment of the Court of First Instance, Case T-203/01, *Michelin* v *Commission*, [2003] ECR II-4071.

36 See judgment of the Court of Justice,*Imperial Chemical Industries* v *Commission*, cited above, p. 619, paragraph 132-133 (p.666).

37 See judgment of the Court of First Instance, Case T-71/03 and others, *Tokai Carbon v Commission*, not yet reported, at paragraph 60; Court of First Instance, Case T-354/94,, *Stora Kopparbergs Bergslags* v *Commission*, [1998] ECR II-2111, at paragraph 80, upheld by Court of Justice, Case C-286/98P, *Stora Kopparbergs Bergslags* v *Commission*, [2000] ECR I-9925, at paragraphs 27-29; and Court of Justice, Case 107/82, *AEG* v *Commission*, [1983] ECR 3151, at paragraph 50.

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

corporate entity, which committed the violation, has ceased to exist in law.

(251) When an undertaking has been found to have committed an infringement of Article 81 of the Treaty and/or Article 53 of the EEA Agreement and later disposes of the assets that were the vehicle of the infringement and withdrew from the market concerned, the undertaking in question will still be held responsible for the infringement if it is still in existence.[39]

(252) If the undertaking, which has acquired the assets of the undertaking that participated in the infringement, carries on with the violation of Article 81 of the Treaty and/or Article 53 of the EEA Agreement, liability for the infringement may be apportioned between the seller and the acquirer of the infringing assets.[40]

6.6.2. Addressees of this Decision

(253) The approach outlined in section 6.6.1 is applied to each of the undertakings concerned in accordance with the specific facts and characteristics of this case.

6.6.3. "Degussa" (Degussa AG, Röhm GmbH & Co. KG and Para-Chemie GmbH)

(254) It is established by the facts as described in section 4 that Degussa AG, Röhm GmbH & Co. KG (the former Agomer GmbH and then Röhm GmbH) and Para-Chemie GmbH have participated in the described collusive behaviour.

(255) Röhm GmbH & Co. KG (a 100% subsidiary of Degussa) and Para-Chemie GmbH (a 100% subsidiary of Röhm) are independent legal entities. Due to the fact that both companies were directly or indirectly wholly owned by Degussa (the liability of the former Hüls AG has been

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[39] See judgment of the Court of Justice in *Enichem Anic SpA v. Commission (Polypropylene)*, Case T-95/89, ECR II-1623, See also judgment of the Court of Justice in *Commission v. Anic Partecipazioni SpA*, cited above.

[40] See Commission Decision of 27.7.94, Case IV/31.865, PVC II, OJ L 1994 L 239, pp. 14 -35, paragraph 41: "*It is (…) irrelevant that an undertaking may have sold its PVC business to another: the purchaser does not thereby become liable for the participation of the seller in the cartel. If the undertaking which committed the infringement continues in existence it remains responsible in spite of the transfer. On the other hand, where the infringing undertaking itself is absorbed by another producer, its responsibility may follow it and attach to the new or merged entity. It is not necessary that the acquirer be shown to have carried on or adopted the unlawful conduct as its own. The determining factor is whether there is a functional and economic continuity between the original infringer and the undertaking into which it was merged*."

absorbed by Degussa AG), and that the supervisory board of Röhm is partly composed by members of the management of Degussa AG, the Commission holds Degussa liable for the infringing behaviour of Röhm GmbH & Co. KG and Para-Chemie GmbH.

(256) Until the transfer of its PMMA-business on 16 April 1997 to Agomer GmbH, Degussa participated in the collusive behaviour. From 16 April 1997 Agomer was a 100% subsidiary of Degussa, centralising Degussa's PMMA business. On 25 March 1999 Agomer's business was merged into that of the then Röhm GmbH which was a 100% subsidiary of Hüls AG until the Degussa-Hüls merger in 1999. Röhm GmbH existed until December 2000. Since January 2001 Röhm GmbH & Co. KG (hereafter: Röhm) has been a 100% subsidiary of Degussa. The liability of Agomer GmbH from 1997 until 25 March 1999 has been absorbed by Röhm GmbH whose liability has been absorbed by Röhm GmbH & Co. KG and the liability of Hüls AG, then Degussa-Hüls AG has been absorbed by Degussa AG following the merger between Degussa-Hüls AG and SKW Trostberg AG in February 2001.

(257) Throughout the entire period of the infringement the now Röhm GmbH & Co. KG wholly owned and controlled Para-Chemie GmbH, which was only active in the production of PMMA-sanitary ware. That fact, as well as the fact that PMMA-sanitary ware is a special application of PMMA-solid sheet led the Commission to presume the exercise of decisive influence in its Statement of Objections. The parties have not put forward any arguments to rebut this presumption. The Commission therefore holds Röhm GmbH & Co. KG liable for the infringing behaviour of Para-Chemie GmbH.

(258) To conclude, the Commission finds that Degussa AG participated in the infringing behaviour during the period from 23 January 1997 until the transfer of its entire speciality plastics business to Agomer on 16 April 1997. The Commission also holds Degussa, together with Röhm GmbH & Co. KG and Para-Chemie GmbH, jointly and severally liable for the infringement committed by Röhm GmbH & Co. KG (the former Agomer GmbH and Röhm GmbH) and Para-Chemie GmbH during the period from 23 January 1997 until 12 September 2002.

6.6.4. "Atofina" (Total SA, Elf Aquitaine SA, Arkema SA, Altuglas International SA and Altumax Europe SAS)

(259) It is established by the facts as described in section 4 that Altuglas International SA (the former Atohaas and Atoglas SA), and Altumax Europe SAS have participated in the described collusive behaviour.

(260) Arkema SA was created under the name Atochem SA in 1983 from the merger of Cloè Chimie (a joint venture company then owned by Elf

Aquitaine, CFP and Rhone-Poulenc), Atochimie and the biggest part of the chemical activity of the group Pechiney Ugine Kuhlmann. In 1992 Atochem SA changed its name into Elf Atochem. The company once more changed its name to Atofina SA in April 2000, after a 1999 takeover of the Elf group by the TotalFina Group. Finally, Atofina was renamed Arkema on 4 October 2004.

(261) The main subsidiaries of Arkema that were involved in the PMMA business were Altuglas International SA and Altumax Europe SAS with their respective subsidiaries.

(262) In 1992, Elf Atochem and Rohm and Haas Inc., Philadelphia, USA created the Atohaas SA joint venture for the production and marketing of PMMA. In 1998, this JV was renamed Atoglas. In January 2005 Atoglas was renamed Altuglas International SA. Currently Altuglas International SA is wholly-owned by Arkema SA (the former Atofina). Altumax Europe SAS is a wholly-owned subsidiary of Arkema SA. Despite the renaming of Altuglas International SA it is the same legal person who has participated in the infringement throughout the entire period.

(263) Throughout the whole period of the infringement Altumax Europe SAS was directly wholly owned by Arkema SA. . As regards Altuglas International SA, for the period from 1992-1998, Elf Atochem (now Arkema) and Rohm and Haas held 50% respectively of that company (at that time named Atohaas JV). However, Elf Atochem was responsible for the day-to-day management of the European Atohaas joint venture. As from 1998 Elf Atochem/Arkema controls 100% of the shares of Altuglas.

(264) Taking all this into account, the Commission presumes the exercise of decisive influence and therefore considers Arkema SA as liable for the infringing behaviour of Altuglas International SA and Altumax Europe SAS.

(265) During the infringement, the members of the board of Arkema SA were appointed by Elf Aquitaine SA. Taking into account this fact, as well as Elf Aquitaine SA's 97,6% shareholding in Atofina SA held until April 2000 of the infringement period (and becoming 96,48% after this date, see recital (266)) , the Commission presumes that Elf Aquitaine SA exercised decisive influence and effective control over the conduct of its subsidiary Arkema SA. The Commission therefore holds Elf Aquitaine SA liable for the infringements committed by Arkema's 100% subsidiaries Altuglas International SA and Altumax Europe SAS.

(266) In April 2000 TotalFina SA acquired control of the company Elf Aquitaine SA by means of a public offer, becoming TotalFinaElf SA. TotalFinaElf SA subsequently changed its name into Total SA. Since that date, Arkema has been controlled (96,48%) by Elf Aquitaine, which has, in turn, been almost wholly owned (99,43%) by Total SA since its acquisition during the infringement period.

(267) From April 2000 until the end of the infringement,, Total SA controlled directly or indirectly the capital of all operating companies of the group, including the companies that fulfilled a direct role in the infringing behaviour described in this Decision. Given these facts, the Commission presumed that Total SA exercised decisive influence over the conduct of its subsidiaries Elf Aquitaine SA, Arkema SA Altuglas International SA and Altumax Europe SAS and sent a Statement of Objections to all these entities.

(268) Responses to the Statement of Objections were sent separately by Atofina, on the one hand, and by Total and Elf Aquitaine, on the other. Total and Elf Aquitaine firstly observed that for the sake of good administration the Commission should wait for the judgment of the Court of First Instance in *MCAA* [41] where the issue of the liability of a parent company in cartel cases has been raised by Elf Aquitaine. According to the companies, *MCAA* represented an audacious change in the Commission assessment of parent companies' liability. In contrast, *Organic peroxides*[42] was addressed to Atofina alone.

(269) Subsequently Atofina, Total and Elf Aquitaine mainly argued that the Decision should be addressed solely to Atofina on the following grounds:

(a) fining a different company from that which committed the infringement would disregard the principle of autonomy of a legal entity and, in particular, economic autonomy;

(b) attribution of liability to Total and Elf Aquitaine would infringe several principles which are at the basis of Community law (personal liability, punishment should be applied only to offender, presumption of innocence, principle of equality of arms and principle of non-discrimination between multinational companies and others);

(c) although Elf Aquitaine and Total nominate members of the board of Atofina this does not prove that they have the possibility to exercise decisive influence. Atofina enjoys complete autonomy in its

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41 See Commission Decision of 19.1.05, Case COMP/37.773, *MCAA*, not yet published. [Court reference number T- 161/05].

42 See Commission Decision of 10.12.03, Case COMP/37.857, *Organic peroxides* not yet published.

commercial policy and conduct on the market. It is not subordinated to the instructions originating from Total and/or Elf Aquitaine (the reporting duty being limited to general information given within the framework of normal functioning in a group of companies, focussed mainly on accounting, financing and auditing matters);

(d) Total and Elf Aquitaine were not involved in the Commission's investigatory procedure, received no requests for information, were not subject to on the spot investigations and were not contacted by the Commission prior to receiving the Statement of Objections; and

(e) if the Commission considered Total, Elf Aquitaine, Atofina and its subsidiaries as a single economic entity, it should also apply the Leniency Notice to Total and Elf Aquitaine thus also allowing these two companies to enjoy a possible reduction of any fines, for which their subsidiary Atofina applied on 3 April 2003.

(270) The Commission has analysed the above arguments. The fact that a case is currently pending before the Court of First Instance does not prevent the Commission from adopting other Decisions on the same or similar matters.

(271) Furthermore, the fact that in a previous case the Commission addressed its decision to Atofina alone does not, as such, prevent the Commission from addressing its decision in this case to both Atofina and Total/Elf Aquitaine. The Commission has discretion to impute liability to a parent company in circumstances such as those in the present case[43] and the fact that it has not done so in a previous decision does not prevent it from doing so in this case.

(272) The Commission does not accept the argument that any of the principles of law mentioned by the companies are infringed in this Decision. For instance, neither the principle of autonomy of a legal entity, nor the principle of punishment of offender only are disregarded by the fact that more than one company within the same economic group is held liable for an infringement. The other arguments are assertions which are not supported by evidence to a sufficient degree to rebut the presumption that Total and Elf Aquitaine are responsible for the acts of their subsidiary Atofina.

(273) As regards the principle of personal liability according to which punishment should be applied only to the offender, the jurisprudence of the Court of Justice recognises the principle of personal liability[44]. In

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[43] See judgment of the Court of Justice, T-203/01, *Michelin* [2003] ECR -4071, at paragraph 290.

[44] See judgment of the Court of Justice, *Anic Partecipazioni v Commission*, cited above, at paragraph 78.

line with the principles of parental liability set out in section 6.6.2, Total/Elf Aquitaine are liable for the infringement by virtue of the fact that they formed a single undertaking with their subsidiary Atofina, that was involved in the infringement. The principle of autonomy of a legal entity and economic autonomy are company law principles that are not relevant once a group of companies is held to form a single undertaking for the purposes of applying Article 81 of the Treaty and Article 53 of the EEA Agreement.

(274) On the principles of presumption of innocence and of equality of arms, Atofina, Total and Elf Aquitaine are confusing the notions of liability and imputation. Atofina, which belongs to a single undertaking together with Total/Elf Aquitaine, has explicitly admitted to its involvement in the infringement in its application for immunity and, alternatively, for a reduction of fines under the Leniency Notice. Therefore, the presumption of innocence has not been violated. The imputation of responsibility to Total/Elf Aquitaine follows from a presumption of decisive influence deriving from established jurisprudence and which has not been rebutted in this case. Therefore, no separate set of evidence needs to be submitted to establish Total's and Elf Aquitaine's responsibility than that which is used to demonstrate Atofina's responsibility for the same infringement. Consequently, the principle of equality of arms has not been breached.

(275) The fact that Total and Elf Aquitaine were not subject to on-site inspections and did not receive any requests for information does not affect the issue of the liability of parent companies for the acts of their subsidiaries. Inspections and requests for information are purely investigatory steps which the Commission is not obliged to carry out/send to all undertakings receiving a Statement of Objections.

(276) The Commission, finally, will take account of the reduction accorded to Atofina in the framework of the leniency programme for determining the fine to be imposed on Total and Elf Aquitaine.

(277) The Commission therefore confirms its findings that Altuglas International SA, Altumax Europe SAS, Arkema SA, Elf Aquitaine SA are jointly and severally liable for the infringement committed by Altuglas International SA and Altumax Europe SAS during the period from 23 January 1997 until 12 September 2002. Total SA is held jointly and severally liable for the infringement committed by Altuglas International SA and Altumax Europe SAS from 1 May 2000 until 12 September 2002.

6.6.5. ICI PLC

(278) It is established by the facts as described in section 4 of this decision that ICI PLC participated in this cartel.

(279) ICI claims it should not be an addressee for any part of infringement committed by ICI Acrylics, irrespective of the latter's lack of legal personality. ICI submits that responsibility for the entire duration of the infringement lies with the collection of personnel, tangible and intangible assets that was known, up until its sale, as ICI Acrylics, and is now Lucite.

(280) As this Decision sets out, ICI Acrylics was set up as a separate business unit (i.e. unincorporated) with management, assets, personnel, facilities and business strategy functions and was the sole entity within the ICI Group responsible for PMMA manufacture and sale.

(281) ICI's claims that the extent of its involvement in ICI Acrylics consisted of "reserved powers" which related to significant capital investment, acquisition and disposals of significant value. ICI claims these reserved powers did not however interfere with management autonomy or day to day operations, nor formulation of business strategy. ICI claims that ICI Acrylics prepared its own budget, which after approval was incorporated into ICI Group budget, and furthermore, no ICI director or executive participated in the alleged infringement.

(282) According to ICI, this "relevant undertaking" was autonomous prior to its seamless transfer where after it carried on the same specific economic aim within Lucite. ICI remarks that ICI Acrylics' change of name, form and ownership is irrelevant: it alone was the "relevant undertaking" solely liable for the infringement prior to and after these changes.

(283) ICI concludes that the doctrine of economic succession should apply, which ensures that undertakings (and the people that manage them) do not escape responsibility for past conduct merely by virtue of a change of ownership, name or form. ICI claims that the Court of Justice has previously made clear that a change in legal form and name of undertaking does not create a "new undertaking" free of liability for the anticompetitive behaviour of its predecessor when, from an economic point of view, the two are identical: the determining factor is whether there is economic continuity between original infringer and the undertaking into which it has merged.

(284) ICI submits that the doctrine applies because the "relevant undertaking", ICI Acrylics, no longer exists in its earlier autonomous legal form but continues operating as part of Lucite. ICI claims that this change in legal form should not result in the responsibility for the infringement being

passed onto another undertaking, ICI PLC, whose personnel and assets, ICI claim, were not involved in the infringement.

(285) In determining the addressee, ICI urges the Commission to consider whether there is functional and economic continuity between the original infringer, ICI Acrylics, and the undertaking into which it is merged, Lucite.

(286) ICI relies on *Compagnie Royale*[45] and *Aalborg*[46] by way of examples of the application of the doctrine and distinguish *Enichem Anic*[47] on the basis that there was no argument in that case that the entity engaged in the infringement was autonomous prior to the sale. ICI claims that in *Aalborg* and *NMH Stahlwerke GmbH*[48], the doctrine of economic succession has been applied to find the buyer alone responsible, where ownership had changed and the relevant undertakings were unincorporated.

(287) The Commission considers that, as ICI itself acknowledges, ICI Acrylics was a business unit of ICI PLC.

(288) For the purposes of imposing a fine, as noted at recital (247) above and by ICI itself, the Commission identifies an entity with legal personality. Between January 1997 and November 1999, ICI Acrylics was a business unit within ICI PLC, as the latter being the "only" entity having the right to exercise the reserved powers described in recital (281). The Commission views ICI PLC, as an undertaking for the purposes of Article 81, as the appropriate entity within ICI group to be an addressee of this Decision.

(289) In this case, the Commission has no need to consider applying the doctrine of economic succession, as argued by ICI, as it has identified the entity with legal personality of which the business unit committing the infringement incontestably formed part at the time of the infringement. In such circumstances, application of the doctrine would be inappropriate and legally incorrect.

(290) It is established by the facts described in section 4 that ICI PLC participated in the collusive behaviour. From 1990 the responsibility for the products under investigation within the ICI group lay with ICI

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45 See judgment of the Court of Justice, joined Cases 29 and 30/83, *CRAM and Rheinzink v. Commission*, [1984] ECR II-1679, at paragraphs 8-9.

46 See judgment of the Court of Justice, joined Cases C-204, 205, 211, 213, 217 and 219/00, *Aalborg Portland A/S and Others v. Commission*, , [2004] ECR I-00123, at paragraph 352.

47 Case T-6/89 [1991] ECR II-1623.

48 Case T-134/94 [1999] ECR II-0241.

Acrylics, which was a business unit not incorporated within the ICI group.

(291) In the Statement of Objections, the Commission stated that 1 October 1999 was the date when ICI Acrylics was sold to Ineos (later Lucite). However, in its reply to the Statement of Objections and in its letter of 10 February 2006, Lucite stated that the completion date of 2 November 1999, being the date when legal ownership was transferred, should be taken as the starting date of any infringement committed by Lucite. The Commission, therefore, rejects ICI's argument that the effective date of the purchase of ICI's business unit was 1 October 1999 and that it should be taken as the date for determining liability between ICI and Lucite. The Commission uses the date of 2 November 1999 to attribute liability between ICI and Lucite.

(292) ICI PLC therefore participated in the infringement from 23 January 1997 until 1 November 1999. 2 November 1999 was the completion date of the sale of its business unit to Ineos (later Lucite) when the transfer of legal ownership took place. This change of end date has no impact on the amount of the fine.

6.6.6. "Lucite" (Lucite International Ltd and Lucite International UK Ltd)

(293) It is established by the facts as described in section 4 that Lucite International UK Ltd participated in the infringement described in this Decision.

(294) Lucite International Ltd. is the holding and ultimate parent company of the Lucite group and wholly owns Lucite International UK Ltd. Furthermore, the directors of Lucite International Ltd were also directors of Lucite International UK Ltd during the period of the infringement. The Commission therefore presumes that Lucite International Ltd exercised decisive influence and effective control over Lucite International UK Ltd and therefore holds Lucite International Ltd liable for the infringement committed by Lucite International UK Ltd

(295) The change of name in 1999 into Ineos Acrylics Ltd and in 2002 into Lucite International Ltd did not involve any changes as to the responsibility of the underlying legal entities.

(296) Therefore, Lucite International Ltd and Lucite International UK Ltd are jointly and severally liable for the infringement committed by Lucite International UK Ltd during the period from the date of transfer of the legal ownership of the business from ICI PLC on 2 November 1999 until 12 September 2002.

6.6.7. "Barlo" (Quinn Barlo Ltd, Quinn Plastics NV and Quinn Plastics GmbH)

(297) It is established by the facts, as described in section 4, that Barlo Plastics GmbH (now renamed Quinn Plastics GmbH) participated in the collusive behaviour.

(298) In 1992, the Barlo Group acquired IRG Plastics NV and renamed it Barlo Plastics Europe NV. On 28 November 1997, the Barlo Group acquired Resart GmbH (renamed Barlo Plastics GmbH) and Critesa SA (renamed Barlo Plastics SA) from BASF. Barlo Plastics GmbH and Barlo Plastics SA were held by Barlo Plastics NV. In October 2003, Barlo Plastics Europe NV was merged into Barlo Plastics NV.

(299) On 7 May 2004, Quinn Group Ltd, Gortmullen, Northern Ireland - an Irish company conglomerate - took over the entire share capital of Barlo Group plc which up to that date had been the ultimate parent company of the Barlo group of companies with a percentage of ownership of 100%. This acquisition also included Barlo Plastics in which the PMMA-activities had been grouped. Following the acquisition, Barlo Group plc was delisted and changed into Barlo Group Ltd. In January 2005, Quinn Group integrated all of the former Barlo businesses into the Quinn organisation and renamed Barlo Group Ltd as Quinn Barlo Ltd, Barlo Plastics as Quinn Plastics, Barlo Plastics NV as Quinn Plastics NV, Barlo Plastics GmbH as Quinn Plastics GmbH and Barlo Plastics SA as Quinn Plastics SA.

(300) Quinn Barlo Ltd is now the legal successor of Barlo Group Ltd (formerly Barlo Group plc). The changes in the legal personality of the Barlo Group plc to Quinn Barlo Ltd do not have any impact on its liability which was transferred to the legal successor. Quinn Barlo Ltd is now the parent company of the former Barlo group holding, directly or indirectly, 100% of the shares of the former Barlo companies.

(301) Barlo Plastics GmbH (now Quinn Plastics GmbH) was directly owned by Barlo Plastics Europe NV, which in turn was wholly owned by Barlo Plastics NV. Barlo Plastics Europe NV was merged into Barlo Plastics NV. Barlo Plastics NV was in turn wholly owned by Barlo Group plc. The Commission therefore holds Quinn Barlo Ltd (formerly Barlo Group plc) and Quinn Plastics NV (formerly Barlo Plastics Europe NV and Barlo Plastics NV) liable for the conduct of Quinn Plastics GmbH (formerly Barlo Plastics GmbH) during the infringement.

(302) In its reply to the Statement of Objections Quinn stated that the Quinn Group had not participated in any infringement and had inherited this case unknowingly through the hostile acquisition of the Barlo Group some years after the alleged infringement by the Barlo Group ended.

(303) The Commission acknowledges that Quinn Group Ltd only purchased Barlo after the alleged end of the infringement and Quinn Group Ltd is not an addressee of this decision. However, the Commission holds Quinn Barlo Ltd, as the legal and economic successor of Barlo Group plc, responsible for the infringement prior to the purchase, as at the time of the infringement the then Barlo Group plc was the ultimate parent company with a 100% ownership of the company participating in the infringement

(304) The Commission, therefore, confirms its findings that Quinn Barlo Ltd as the legal successor of Barlo Group plc, should be held jointly and severally liable together with Quinn Plastics NV and Quinn Plastics GmbH for the infringement committed by Quinn Plastics GmbH (formerly Barlo Plastics GmbH) during the period April 1998 until 21 August 2000

6.6.8. Conclusions

(305) On the basis of the above considerations, the Commission considers that the following legal entities should bear responsibility for their respective infringements and be addressees of this Decision:

- Degussa AG
- Röhm GmbH & Co. KG
- Para-Chemie GmbH
- Total SA
- Elf Aquitaine SA
- Arkema SA
- Altuglas International SA
- Altumax Europe SAS
- ICI PLC
- Lucite International Ltd
- Lucite International UK Ltd
- Quinn Barlo Ltd:
- Quinn Plastics NV
- Quinn Plastics GmbH

6.7. Duration of the infringement

6.7.1. Beginning of the infringement

(306) [***Deleted, including any cross references to this part and/or relevant footnotes***] the Commission will for the purposes of this Decision limit its assessment under Article 81 -Treaty and Article 53 of the EEA Agreement and the application of any fines to the period beginning on 23 January 1997, as this is the first anti-competitive meeting of which the Commission has confirmation from more than one of the participants.[***Deleted, including any cross references to this part and/or relevant footnotes***].

(307) The Commission will thus take 23 January 1997 as the relevant starting date as regards **Degussa, Atofina**[49] and **ICI**.

(308) As regards **Lucite,** 2 November 1999 was the completion date of the sale of ICI's business unit to Lucite and that was the date when the transfer of the legal ownership took place. The Commission will thus take 2 November 1999 as the relevant starting date as regards Lucite.

(309) As regards **Barlo,** its first participation is confirmed at the meeting in April 1998. ***[Deleted, including any cross references to this part and/or relevant footnotes]*** the Commission will thus take 30 April 1998 as the relevant starting date as regards Barlo.

6.7.2. End of the infringement

(310) ***[Recital (310) is deleted, including any cross references to this part and/or relevant footnotes]***.

(311) As the Commission considers that it does not have sufficient evidence that the cartel lasted beyond this meeting, it will take 12 September 2002 as the relevant end date as regards **Degussa, Atofina**[50] and **Lucite.**

(312) As regards **ICI,** 2 November 1999 was the completion date of the sale of ICI's business unit to Lucite and that was the date when the transfer of the legal ownership took place. The Commission will therefore take 1 November 1999 as the relevant end date as regards ICI.

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[49] The same starting date applies to Elf Aquitaine. Total acquired control of Elf Aquitaine in April 2000. Since then Total controls directly or indirectly the capital of all operating companies of the group for the remainder of the duration of the infringement. Hence, the Commission will take **1 May 2000** as the relevant starting date for determining duration in the case of **Total**.

[50] The same end date as defined for Atofina applies to Elf Aquitaine and Total.

(313) As regards **Barlo,** its last participation is confirmed at the meeting of 21 August 2000 [***Deleted, including any cross references to this part and/or relevant footnotes***]. As the Commission considers that it does not have sufficient evidence that Barlo participated in the cartel after this meeting, it will take 21 August 2000 as the relevant end date as regards Barlo.

7. REMEDIES

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

(314) In accordance with Article 7 of Regulation (EC) No 1/2003, when the Commission finds that there is an infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement, it may require the undertakings concerned to bring such infringement to an end.

(315) While it appears from the facts that in all likelihood the infringement effectively ended in September 2002, it is necessary to ensure with absolute certainty that it has ceased. The undertakings to which this Decision is addressed should therefore be required to terminate the infringement (if they have not already done so) and to refrain henceforth from any agreement, concerted practice or decision by an association of undertakings which might have a similar object or effect.

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

(316) 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 Article 53 of the EEA Agreement. Under Article 15(2) of Regulation No 17 [51] which was applicable at the time of the infringement, the fine for each undertaking participating in the infringement could not exceed 10% of its total turnover in the preceding business year. The same limitation results from Article 23(2) of Regulation (EC) No 1/2003.

(317) Pursuant to Article 15(2) of Regulation No 17 and Article 23(3) of Regulation (EC) No 1/2003, the Commission must, in setting the amount of the fine, have regard to all relevant circumstances and, in particular, the gravity and duration of the infringement, these being the two criteria expressly mentioned in those Regulations. In doing so, the Commission will set the fines at a level sufficient to ensure that they have a deterrent effect. In addition, the role played by each undertaking participating in the infringement will be assessed on an individual basis.

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[51] Under Article 5 of Council Regulation (EC) No 2894/94 of 28.11.94 concerning arrangements for implementing the Agreement on the European Economic Area "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)

The Commission will in particular take account, in determining the amount of the fines, of any aggravating or mitigating circumstances for each undertaking. Lastly, it will apply, where appropriate, the Leniency Notice.

8. THE BASIC AMOUNT OF THE FINES

(318) The basic amount is determined according to the gravity and the duration of the infringement.

8.1. Gravity

(319) In assessing the gravity of the infringement, the Commission takes account of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

8.1.1. Nature of the infringement

(320) It is clear from section 4.2 that the main features of the infringement included competitors discussing prices, agreeing, implementing and monitoring price agreements either in the form of price increases or at least stabilisation of existing price levels; discussing the passing on of additional service costs to customers; exchange of commercially important and confidential market and / or company relevant information and participating in regular meetings and other contacts to facilitate the infringement, including monitoring implementation. The infringement started, at the latest, on 23 January 1997 and lasted until 12 September 2002. It covered the whole territory of the EEA. By their very nature, horizontal agreements and practices of this type are "very serious" infringements of Article 81 of the Treaty and Article 53 of the EEA Agreement within the meaning of 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[52] (hereinafter "the Guidelines") as they are executed for the sole benefit of the undertakings and to the detriment of consumers. The case law has confirmed that agreements or concerted practices involving in particular, as in this case, horizontal price agreements, may warrant classification as "very serious" solely on the basis of their nature, without it being necessary for such conduct to cover a particular geographical area or have a particular impact.[53]

8.1.2. The actual impact of the infringement

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52 OJ C9, 14.1.1998, at page 3.

53 *Brasserie nationale a.o. v Commission*, Case T-49/02 to T-51/02, 27.7.05, paragraphs 178 and 179; T-38/02, *Groupe Danone v Commission*, 25 October 2005, in particular paragraphs 147, 148 and 152 and *SAS v Commission*, 18 July 2005, in particular paragraphs 84, 85, 130 and 131;

(321) In this proceeding, it is not possible to measure the actual impact on the EEA market of the complex of arrangements of which the infringement consists and therefore the Commission does not rely specifically on a particular impact, in line with the Guidelines according to which the actual impact should be taken into account when it can be measured. The Court of First Instance found that the Commission is not required precisely to demonstrate the actual impact of the cartel on the market and to quantify it, but could confine itself to estimates of the probability of such an effect. What can be said, in this case, is that with regard to the EEA, the price agreements and practices were implemented (see section 4.2.3) and were monitored by the European producers and that such implementation did have an impact on the market, even if its actual effect is *ex hypothesi* difficult to measure.[54]

(322) In its response to the Statement of Objections ICI details instances during the infringement when participating undertakings did not appear to implement an agreed course of conduct. Whilst ICI acknowledges that a reduced or limited impact of an infringement is not a defence to liability, ICI highlights that it is an important factor when determining the basic amount of the fine and the gravity of the infringement. ICI submits that the cartel was largely ineffective and without any enforcement mechanism which allowed vigorous pricing competition throughout the entire duration of the cartel. ICI claims that the Commission has provided no evidence or assertion that the cartel had any impact.

(323) ICI cites a number of Commission decisions to demonstrate where there is a link between gravity and harm on the market and in which the Commission has reclassified gravity to "serious" rather than "very serious" in price fixing cases of limited geographical scope.[55]

(324) Atofina refers to Commission decisions such as *Vegetable Parchment*,[56] where the impact did not seem to have serious repercussions on consumers, and *Zinc Producer Group*,[57] where production reductions did not achieve a sufficient scale to eliminate totally all competition, to

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54 See judgments of the Court of First instance, Case T-241/01, of 18.7.05 and *SAS v Commission*, at paragraph 122 and in Case T-38/02 ,*Danone v Commission*, at paragraph 148.

55 Commission Decision of 9.12.1998, Case IV/34466, *Greek ferries*, OJ L 109 of 27.4.1999, page 24 and Commission Decision of 24.7.2002, Case COMP/E-3/36.700, *Industrial and Medical Gases*, OJ L 84 of 1.4.2003, pages 1 and following, at paragraph 424.

56 Free translation of : "ne semble pas avoir eu de serieuses repercussions sur les consommateurs", Commission Decision of 23.12.1977, Case IV/29176: *Vegetable Parchment*, OJ 171, 856, 172, 117, 28.173 of 23.12.77, JOCE 1978, L 70 of 13.3.1978, page 54, at paragraph 82.

57 Free translation of : "« les differentes reductions de production n'ont pas atteint un ordre de grandeur suffisant pour eliminer totalement la concurrence", Commission Decision of 6.8.JOCE 1984, Case IV/30350, *Zinc Producer Group*, OJ L 220 of 17.8.1984, page 43, at paragraph 100.

argue that the gravity of this infringement should be "serious" rather than "very serious".

(325) Atofina also cites various instances where the cartel failed to implement agreed price rises. [***Deleted, including any cross references to this part and/or relevant footnotes***] Atofina makes further references to the Statement of Objections, which for the period after 2000 refers to an aggressive pricing policy by Lucite which resulted in client losses for Degussa and Atofina.

(326) Atofina argues that market share data supports its argument that agreed cartel prices were not implemented and market share fluctuated: in PMMA-solid sheet, Barlo increased market share from 2000 to 2002 and in PMMA-sanitary ware, Atofina increased its market share from 1995 to 2002 whilst Degussa's market share fell.

(327) In response to the above arguments, the Commission makes the following observations. The mere fact that at certain times certain undertakings deviated from an agreed course of conduct to gain market share at the cost of other undertakings does not merit reconsideration of the gravity of this type of infringement as anything other than "very serious". Given the geographic scope set out at recital (330) below, the Commission dismisses ICI's suggestion that the gravity should reflect a more limited geographic scope than argued in the Statement of Objections.

(328) Whilst it is clear from recital (321) that monitoring did occur in this case, the Commission in any event considers that the absence of measures to monitor the implementation of the cartel cannot, in itself, limit the gravity of the infringement. From section 4.2.3, it is clear that undertakings were able to find out through various means whether other undertakings were implementing or cheating on agreed prices and practices. As ICI observes, deviation by an undertaking was regularly raised by other undertakings at meetings. As noted at recitals (106) and (107) however, regular contacts by phone occurred, later being replaced by email, to co-ordinate and ensure implementation and compliance and customer letters were forwarded amongst participants with the same aims. Also exchange of information between the participants enabled more effective monitoring and implementation in the market. Also meetings regularly verified the compliance and implementation of the status quo agreement in the PMMA-sanitary ware market. A deviating undertaking's decision to cheat on the cartel to gain market share should also not be equated with an explicit decision not to participate in the cartel. The deviating undertaking could benefit from the cartel in another way, profiting from knowledge of others' commercial decisions. The deviating undertaking may not be acting independently in making commercial decisions or pricing competitively, but may be pricing e.g. below that agreed by the cartel: the undertaking may therefore continue

to exacerbate, albeit in a different way, the cartel's impact on the market where that impact is measurable. Changes in market shares of participating undertakings, which are in any event minor, do not alone indicate that cartelised prices were not being applied nor that exchanged information was not being relied upon.

(329) In the light of the foregoing, the Commission will not reclassify the gravity of the infringement due to the periods of deviation which allegedly limited the impact of the cartel on the market. The Commission concludes that the collusive price agreements were implemented and had an impact on the market in the territory covered by the cartel for the products concerned, but that the impact cannot be measured with precision. The Commission therefore rejects ICI and Atofina's arguments (and similar arguments of the other undertakings) on this issue.

8.1.3. The size of the relevant geographic market

(330) In assessing gravity, it should be borne in mind that the infringement covered the territory of the EEA.

8.1.4. The Commission's conclusion on the gravity of the infringement

(331) In view of the nature of the infringement and the fact that it covered the entire territory of the EEA, the Commission takes the view that it must be regarded as "very serious" within the meaning of the Guidelines.

8.2. Differential treatment

(332) Within the category of very serious infringements, the proposed scale of likely fines makes it possible to apply differential treatment to undertakings in order to take account of the effective economic capacity of the offenders to cause significant damage to competition. This is appropriate where, as in this case, there is considerable disparity as regards the turnover in the cartelized products of the undertakings participating in the infringement.[58]

(333) To that end, the undertakings can be subdivided into several categories according to their relative weight in turnover achieved with the PMMA products for which they participated in the cartel. The Commission considers it appropriate to use EEA-wide turnover generated in 2000. For Degussa, Atofina, and ICI (later Lucite), this concerns all three PMMA-products. For Barlo, this concerns PMMA-solid sheet only. The Commission has chosen 2000 because it is the most recent year of the

[58] The Court of First Instance has accepted this approach where the categories are justified: see judgment in *Tokai Carbon Co. Ltd and others* v *Commission*, cited above, at paragraph 217.

infringement in which most undertakings to which this decision is addressed were active in the cartel. Turnover figures for 2002, which are not disclosed for confidentiality reasons, do not change the Commission's categories. According to the parties' estimates, the total size of the EEA market for all three PMMA-products in 2000 amounted to approximately, by volume, 250.000 tonnes, and by value, EUR 665 million. Figures for 2002 are similar.

(334) Degussa and Atofina, with EEA turnover in 2000 of EUR 216 and 188 millions respectively for all three PMMA-products, are placed in the first category. Lucite, with EEA turnover in 2000 of EUR 105.98 million, is the third largest producer in total for all three PMMA-products and is placed in the second category. ICI, which has been unable to provide turnover figures for its business unit ICI Acrylics, is placed in the second category with Lucite given that the sale of the former to the latter permits an equitable comparison with Lucite's figures in terms of ICI Acrylics' relative size and economic power on the relevant market. Barlo, with EEA turnover in 2000 of EUR 66.37 million in PMMA-solid sheet, is placed in the third category.

(335) In the case of Barlo, in the light of the facts set out in section 4, the Commission takes into account that it is not clear whether Barlo took part in any collusive contacts concerning PMMA-moulding compounds or PMMA-sanitary ware. Therefore it seems that Barlo was not aware or could not necessarily have had knowledge of the overall scheme of the anti-competitive arrangements. Consequently, given the facts of this case, a reduction of 25% is applied to the basic amount of the fine calculated for Barlo.

(336) On that basis, the appropriate starting amounts for the undertakings on which a fine is to be imposed in this proceeding are as follows:

First Category (Degussa, Atofina (the same starting amount applies to Total, Elf Aquitaine, Arkema, Altuglas and Altumax))	EUR 65 million
Second Category (Lucite, ICI)	EUR 32.5 million
Third category (Barlo)	EUR 15 million

8.3. Sufficient deterrence

(337) In the category of very serious infringements, the scale of fines that can be imposed also makes it possible to set the amount of the fines at a level which ensures that they have sufficient deterrent effect, having regard to the size and economic power of each undertaking.

(338) Total/Elf Aquitaine submitted that the Commission should not take into account the world-wide turnover of Total/Elf Aquitaine for the purpose of increasing the fine on Atofina in order to ensure sufficient deterrence, unless the Commission demonstrated the direct involvement of Total/Elf Aquitaine as parent company in the cartel.

(339) Atofina further supports this approach by reference to the Commission's decisions in *Pre-insulated Pipes*[59] and *Carbonless Paper*[60] which, they allege, demonstrate that where the responsibility for the infringement lies with the subsidiary alone and not with the group, no multiplier is justified.

(340) Atofina argues that any multiplier applied on the basis of Total/Elf Aquitaine's turnover would be both discriminatory and disproportionate as the multiplier should relate to the market in which the undertaking committed the infringement.

(341) Atofina also argues that the Commission is not legally empowered to apply a multiplier on the basis of the group (i.e. Total/Elf Aquitaine) turnover. Citing *British Sugar*[61] inter alia, Atofina remarks that whilst the Commission can incorporate into the basic amount a deterrent effect in order to take into account the profit that participating undertakings draw from the infringement, the profit drawn from the infringement must be proportional to their market position on the relevant market where the infringement has occurred. Atofina argues that the principle of proportionality requires that a multiplier should therefore be based on Atofina's market position on the affected markets and should not include the entire group. Atofina submits that the Court of Justice has previously reduced the fine where it was the result of a simple calculation based on global turnover, particularly where the goods concerned only represented a small amount of global turnover.[62]

(342) Atofina also argues that if the Commission imposes a fine on integrated companies forming part of a larger group, this essentially comprises a bonus for those companies which are not integrated and part of a group, which is unjustly discriminatory for integrated companies. Finally, Atofina submits that the Commission cannot take into account twice the market position held by Atofina when deciding on the multiplier. Atofina's reasoning is that this has already been taken into account as

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59 Commission Decision of 21.10.1998, Case IV/35.691, *Preinsulated Pipes*, OJ L 24 of 30.1.1999, page 1 and following, paragraph 169.

60 Commission Decision of 20.12.2001, Case COMP/36.212. *Carbonless Paper*, OJ L 115 of 21.4.2004, page 1 and following , paragraph 364.

61 See judgment of the Court of First Instance, Cases T-202/98, T-204/98 and T-207/98, *British Sugar and others v Commission*, [2001] ECR II-2035, paragraph 134.

62 See judgment of the Court of Justice, joined Cases 100 to 103/80, *SA Musique Diffusion Francaise and others v Commission*, [1983] ECR II-1825, paragraph 121.

part of the assessment of gravity, namely the differential capacity of each undertaking set out in section 8.2.

(343) ICI argues that a multiplier should not be applied as it sold the infringing assets 6 years ago and its financial capacity does not warrant it. ICI cites *MCAA*,[63] in which, with several undertakings of different sizes, the Commission applied a multiplier to the largest undertakings in proportion to their respective economic capacities. ICI claims that economic capacity may not just be measured by worldwide turnover but, perhaps; also market capitalisation, resources and profit margins. Whilst turnover would not make ICI one of the largest of the participating undertakings in this cartel, ICI claims this turnover measure overstates its financial capacity due to its commitments to its pension fund, costs associated with divestments and recent poor cash flow.

(344) ICI highlights that the Commission has previously stated that a multiplier is required only where "there is considerable disparity in size of the undertakings participating in the infringement".[64] Furthermore, ICI claims that in cases such as *Seamless Steel Tubes*[65], where all the undertakings were of similar size, no such multiplier was applied. If any such multiplier were to be imposed, ICI claims that it should be proportional to ICI's size, thus the same multiplier should not be imposed on two undertakings which have a different size.

(345) The Commission's position on Total/Elf Aquitaine's parental liability for involvement in this cartel has been dealt with in section 6.6.1. If the Commission were to decide, on the basis of Total/Elf Aquitaine's argument, that a lower fine should be imposed on Atofina than is justified by the size of the undertaking of which it is part, a very large undertaking involved in one or several cartels could escape from high fines by creating small subsidiaries with little turnover to engage them in illegal behaviour. Imposing a sufficiently high fine on a large undertaking for each infringement committed by any entity of such undertaking is likely to deter such behaviour. Regarding the claim concerning the principle of non-discrimination between multinational companies and others, it must be recalled that effective deterrence is an essential objective of the Commission's policy on fines. In that respect, it is sufficient to point out, first, that when an undertaking for the purpose of Article 81 has committed an infringement, the Commission is entitled to take account of its overall size. Second, large multinational

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63 *MCAA*, cited above.

64 Commission Decision of 20.10.01, *Carbonless Paper*, cited above, at paragraph 405. ICI also refers to previous Commission decisions of *Organic Peroxides*, Commission decision of 10.12.2003, not published yet, at paragraph 462; *Raw Tobacco Spain*, Commission decision of 20.10.04, not yet published, at paragraph 423; *Organic Peroxides* and *MCAA*, both cited above, which it claims demonstrate that this is the Commission's practice.

65 See Commission Decision of 8.12.99, Case IV/E-1/35.860-B: *Seamless steel tubes*, OJ L 140/1 of 6.6.03.

undertakings are, in regard of their size, in a different situation from smaller undertakings, in that a difference of treatment is objectively justified.

(346) The Commission also considers Atofina's argument that the Commission could not rely twice on Atofina's position in the market both to apply a multiplier and to establish differential treatment for a grouping (see recital (335)) as without foundation or application in this case. In fact, while differential treatment is based on the turnover of each participant in the cartelised market, which gives a proper indication of their respective weight during the infringement, the multiplier is based on the total turnover of the undertaking, which reflects the need to increase the level of the fine for deterrence purposes. The Commission considers its approach on multipliers both non discriminatory and proportional.[66]

(347) As regards ICI's arguments regarding the Commission's use of turnover to measure economic capacity, turnover is applied as the Commission's proxy in this case against all undertakings equally.[67] As a proxy, the Commission believes turnover serves as a sensible and useful *indication* of economic capacity and strength.[68] As is clear from the Guidelines, a multiplier should only be applied where there is considerable disparity in size of the undertakings participating in the infringement and the same multiplier should not be imposed on two undertakings which have a different size.

(348) In summary, the Commission rejects Total/Elf Aquitaine, Atofina and ICI's arguments on this issue (including any similar arguments of other parties).

(349) The Commission therefore considers it appropriate in order to set the amount of the fine at a level which ensures that it has sufficient deterrent effect to apply a multiplication factor to the fines imposed. The Commission notes that in 2005, the most recent financial year preceding this Decision, the total turnovers of the undertakings were as follows: Degussa AG: EUR 11,750 million; Total SA: EUR 143,168 million and ICI PLC: EUR 8,490 million. Accordingly, the Commission considers it

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66 In *Preinsulated Pipes*, the European Court of Justice approved the Commission's approach in *Dansk Rørindustri and Others* v *Commission and Others*, Joined Cases C-189/02P, C-202/02P, C-205/02P to C-208/02P and C-213/02P, [2005] ECR I-5425. The Court of First Instance in *Danone v Commission*, Case T-38/02, not yet published, at paragraphs 167-183 also supported the Commission approach on multipliers.

67 See judgment of the Court of First Instance, T-15/02, , *BASF / Commission* (not yet reported) at paragraph 244, which supports the European Commission's approach in using turnover.

68 In *Danone v Commission*, cited above, the Court of First Instance noted at paragraph 171 that the Commission has not defined the methodology to be applied, leaving itself the discretion to select an appropriate proxy on a case by case basis.

appropriate to multiply the fine for Degussa by 1.75, ICI by 1.5 and Atofina by 3.[69]

(350) In the light of the foregoing, the starting amounts become as follows:

Degussa	EUR 113.75 million
Atofina (the same starting amount applies to Total, Elf Aquitaine, Arkema, Altuglas and Altumax)	EUR 195 million
ICI	EUR 48.75 million

8.4. Duration of the infringement

(351) As set out in section 6.6 above, the undertakings were involved in the infringement at least during the following periods:

(a) Degussa: from 23 January 1997 until 12 September 2002, namely a period of 5 years and 7 months;

(b) Atofina: from 23 January 1997 until 12 September 2002, namely a period of 5 years and 7 months (of which Total from 1 May 2000 until 12 September 2002)[70];

(c) ICI: from 23 January 1997 until 1 November 1999, namely a period of 2 years and 9 months;

(d) Lucite: from 2 November 1999 until 12 September 2002, namely a period of 2 years and 10 months.

(e) Barlo: from 30 April 1998 until 21 August 2000, namely a period of 2 years and 3 months.

(352) The starting amounts of the fines will consequently be increased by 10% per full year's duration and increased by 5% for any additional period of six months or more but less than one year.

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69 As regards Arkema, Altuglas and Altumax, which form part of Atofina, a separate multiplier of 1.25 will be applied to their own starting amount of EUR 65 million against which their duration uplift of 55% is applied before the recidivist uplift of 50% can be calculated. See further paragraph (369).

70 See paragraph (277) above.

(353) The percentage increases to be applied to the starting amount for each undertaking are therefore as follows:

Degussa	55%
Atofina (Total, due to its shorter ownership period[71]: 20%. Elf Aquitaine, Arkema, Altuglas and Altumax: 55%)	55%
Lucite	10%[72]
ICI	25%
Barlo	20%

8.5. Conclusion on the basic amounts

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

Degussa	EUR 176.3125 million;
Atofina (Total, due to its shorter ownership period, is jointly and severally liable for EUR 234 million of this amount). Elf Aquitaine, Arkema, Altuglas and Altumax are jointly and severally liable for the whole amount.	EUR 302.25 million;
Lucite	EUR 35.75 million;
ICI	EUR 60.9375 million;
Barlo	EUR 18 million;

9. Aggravating and mitigating circumstances

[71] See paragraph (277) above.

[72] As Lucite's evidence enabled the Commission to find an infringement of longer duration than prior to the submission of the evidence until 12 September 2002, in accordance with point 23 of the Leniency Notice, these elements will not be taken into account when setting the fine, resulting in an increase for duration of 10% instead of 25% for Lucite, see section 10.3.1.

9.1. Aggravating circumstances

9.1.1. Repeated infringement

(355) The Commission considers that a repeated infringement of the same type occurs when an undertaking to which a Commission decision has been addressed in the past as a party to an infringement is later found responsible for another infringement of the same type, even if it is committed in a different sector or in respect of a different product.

(356) In the Statement of Objections, the Commission cited a number of previous decisions which it intended to take into account when considering whether the undertakings had committed a repeated infringement. Following further consideration, and assessment of the parties' responses to the Statement of Objections, the previous decisions which the Commission intends to rely on as regards each undertaking are set out below, followed by the parties' arguments as to why they should not be taken into account as repeated infringements and thus not regarded as an aggravating circumstance for the setting of the basic amount in this case.

Degussa

(357) The decisions of relevance to the Degussa are: *Peroxygen products*[73] and *Polypropylene*.[74]

Atofina

(358) The decisions of relevance to Atofina are: *Peroxygen products*,[75] *Polypropylene*[76] and *PVC II.*[77]

ICI

(359) The decisions of relevance to ICI are: *Polypropylene*[78]*and PVC II.*[79]

Atofina

(360) Atofina submits that the Commission's taking into account of previous decisions which relate to facts occurring 20 or 30 years ago for the purposes of establishing a repeated infringement is manifestly excessive. Atofina also argues that one of the decisions relied upon, *Peroxygen*

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73 Commission decision of 23.11.84,,Case IV/30.907, *Peroxygen products*, OJ L 35 7.2.1985, p.1

74 Commission decision of 23.4.86, Case IV/31.149, *Polypropylene*, OJ L 230 18.8.1986, p.1.

75 Cited above.

76 Cited above.

77 Commission decision of 27.7.94, Case IV/31865, *PVC II*, OJ L 239 14.9.94, p. 14.

78 Cited above.

79 Cited above.

products,[80] does not comprise an infringement *of the same type* which can be taken into account to establish a repeated infringement. Citing *Michelin*[81], Atofina stated that the Commission's ability to consider previous decisions is conditioned on the previous decision and the current infringement being of the same type.

(361) Atofina also claimed that previous decisions could only be taken into account where they are imputable to the same entity, decisions being, in Atofina's view, "personal" to the infringing entity/legal person at the time and not simply attributable to the group and cites *Thyssen Stahl*[82] in support.

(362) Whilst Atofina highlights that one of the previous decisions relates to facts over 30 years old, the proven duration of the infringements in subsequent previous decisions accounts almost entirely for the time period between the oldest previous decision and the current infringement; the latest decision was adopted only 2 and half years before Atofina engaged in this infringement. Furthermore, to establish a repeated infringement, the Commission need only find one previous decision of the same type; as regards Atofina, it has three such examples.[83] Relying on previous decisions does not constitute in the Commission's view a violation of the principles of proportionality or legal certainty.

(363) The Commission rejects Atofina's argument that the previous decisions referred to in recital (358) cannot be taken into account as they were not committed by the same entity. In each of those decisions Atochem SA was an addressee for the specific reasons set out in those decisions. Atochem SA, as set out at recital (9), later changed its name to Elf Atochem in 1992 then Atofina SA in April 2000 and finally Arkema SA in October 2004, remaining the same entity throughout.

(364) Relying on *Interbrew/Alken-Maes*,[84] Atofina also suggested that for the previous decisions to be taken into account, there should be some link in the personnel involved between the previous decisions and the current

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80 Commission Decision of 23.11.1984, Case IV/30.907, *Peroxygen Products*, OJ L 35 of 7.2.1985, page 1.

81 See judgment of the Court of First Instance, T-203/01, *Manufacture francaise des pneumatiques Michelin v. Commission*, at paragraph 284-288.

82 See judgment of the Court of First Instance in *Thyssen Stahl AG v Commission*, cited above, at paragraph 617: *"the notion of recidivism, such as it exists in certain number of national legal orders, implies that a "person" has committed new infringements after having been punished for similar infringements"*.

83 See *Danone v.Commission*, cited above, at paragraphs 353-355.

84 Commission Decision of 5.12.2001, Case COMP/37.614/F3 – PO. *Interbrew and Alken-Maes*, OJ L 200 of 7.8.2003, at paragraph 313. Danone had the same President Directeur General for the previous decisions and for the infringement in question. Two staff also worked in the division to which previous decisions related, as well as later in the division to which the infringement in question occurred.

infringement. However, such employee links are clearly not a prerequisite to the finding of a repeated infringement.[85]

(365) Finally, as regards Atofina's argument that only previous decisions of a similar type can be taken into account for a repeated infringement, the Commission rejects the attempt to differentiate types of agreements/practices which all constituted horizontal infringements of Article 81. In any event, in *Peroxygen products*, the Commission found a horizontal infringement of Article 81, of the same type as the infringement to which the Commission objects in this case.

ICI

(366) ICI also submitted that the Commission's taking into account of decisions relating to conduct back in the late 1970's is excessive. Since this conduct, ICI argues that it has undergone a radical restructuring, which makes it a very different undertaking to that found guilty of infringements of a similar type in the past, which ICI argues, renders an increase for repeated infringement inappropriate and unwarranted. Furthermore, ICI claims to have significantly improved its competition compliance with a range of innovative and effective measures.

(367) As regards ICI's argument that the Commission's approach is excessive in taking into account facts which occurred over 20 years ago, the Commission refers to the response given to Atofina's argument above.

(368) Whilst the Commission welcomes efforts at the highest level within ICI to improve its competition law compliance, even this in addition to the passage of time since previous infringing conduct, does not devolve ICI of the consequences of committing a repeated infringement. It is appropriate that the Commission ensures that this decision has sufficient deterrent effect to prevent any risk of recurrence. Finally, as set out at section 6.6.5, the sale of the "infringing assets" to a third party does not absolve ICI from liability for the period in which it participated in the infringement.

(369) As a result of the repeated infringements listed at recitals (357), (358), (359) of the same type, which constitute an aggravating circumstance, the Commission intends to increase the basic amount of the fine to be imposed on each of the following undertakings as follows:

Degussa: 50%,

Atofina (Total and Elf Aquitaine are not recidivists): 50%[86], and;

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[85] An approach confirmed by the Court of First Instance in *Danone v. Commission*, cited above.

[86] Arkema, Altuglas and Altumax will be solely liable for this recidivist penalty of EUR 62.96875 million. This amount is calculated as follows: a 1.25 multiplier is applied to a EUR

ICI : 50%.

9.1.2. Role of leader or instigator of the infringement

(370) Atofina claims that Degussa acted as the leader or instigator of the cartel. Barlo argues that Degussa and Atofina jointly led or instigated the cartel. Other parties have similar claims. Lucite alleges that Degussa was the ringleader and also suggests that Atofina played a coercer type role in, for example, admonishing Lucite for aggressive pricing in PMMA-sanitary ware.

(371) The Commission takes the view that whilst Degussa and Atofina played an important role in the cartel, it could not be proven that they acted as leader or instigator. As set out at recital (223), there was a core group of Degussa, Atofina and ICI (later Lucite) which were responsible for collusive initiatives and it is not possible to identify one undertaking as the leader or instigator.

9.2. Mitigating circumstances

9.2.1. Passive and/or minor role in the infringement

(372) In general, the Commission accepts that an exclusively passive or "follow-my-leader" role played by an undertaking in the infringement may, if established, constitute a mitigating circumstance. A passive role implies that the undertaking will adopt a low profile, that is to say not actively participate in the creation of any anti-competitive agreements[87] The factors capable of revealing such a role within a cartel include the significantly more sporadic nature of the undertaking's participation in the meetings by comparison with the other members of the cartel,[88] and also the existence of express declarations to that effect made by representatives of other undertakings which participated in the infringement.[89] In any event, it is necessary to take account of all the relevant circumstances in each particular case.

(373) In its response to the Statement of Objections, Barlo claimed that it had only a passive or minor role in the infringement. It is clear from the facts described that Barlo's involvement in the cartel was not comparable to that of most other undertakings. There appears not to be much evidence that Barlo actively participated in the creation of any anticompetitive agreements or practices. Rather, proven anticompetitive contacts

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65 million starting amount (which equals EUR 81.25 million), then a further 55% uplift is applied for duration (which equals EUR 125.9375 million) and finally, 50% of this sum comprises the recidivism uplift.

87 See judgment of the Court of First Instance, Case T-220/00, *Cheil Jedang v. Commission*, [2003] ECR II-02473, at paragraph 167.

88 See judgment of the Court of First Instance, *BPB de Eendracht NV v Commission*, cited above, at paragraph 343.

89 See judgment of the Court of First Instance, *Weig v Commission*, cited above, at paragraph 264.

comprised sporadic attendance of meetings which were mainly limited to Barlo being informed about the anticompetitive agreements or practices for PMMA-solid sheet. It also seems that Barlo did not participate in many of the significant multilateral meetings in which key aspects of the price agreements and anticompetitive practices were agreed.

(374) Due to Barlo's passive and minor role, the Commission therefore grants a reduction of the amount of the fine that would otherwise have been imposed by 50%.

9.2.2. Non-implementation in practice of the offending agreements or practices

(375) Most of the undertakings claim that the infringement or elements thereof were not, not fully or not effectively implemented, in particular because of the lack of an effective system of penalties.

(376) Atofina, as set out in section 8.1.2 on gravity of the infringement, argues that the price agreements were only partially implemented, at times due to its conduct. On the basis of this, Atofina claims that it merits a reduction relying on *Welded Steel Mesh*[90] and *Cement*[91] to demonstrate that reductions were granted where certain undertakings either withdrew from the infringement, limiting its effectiveness, or never implemented the infringement, respectively, and on *Graphite Electrodes*[92] where an agreement was only partially implemented. ICI makes similar arguments.

(377) Barlo claims it did not act on the price agreements or on the information exchanged relating to PMMA-solid sheet. Barlo further claims its role essentially destabilised the cartel as, from 1998 to 2000, it was seeking to overcome previous product quality issues and low profitability in PMMA-solid sheet and drive its market share which it claims to have done, its market share having risen from 1998 to 2000.

(378) In the Commission's view, the fact that an undertaking which participated in an infringement or elements thereof with its competitors did not always behave on the market in the manner agreed between them is not necessarily 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

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90 Commission Decision of 2.8.1989, Case IV/31.553, *Welded Steel Mesh*, OJ L 260 of 6.9.1989, page 1 and following., at paragraph 204.

91 Commission Decision of 30.11.1994, Cases IV/33.126 and 33.322: *Cement*, OJ L 343 of 30.12.1994, page 1 and following., at paragraph 65.9b.

92 Commission Decision of 18.7.2001, Case COMP/36.490, *Graphite Electrodes*, OJ L 100 of 16.4.2002 p.1, at paragraph 235.

trying to exploit the cartel for its own benefit.[93] The mere fact of cheating at the expense of the other cartel members cannot therefore be admitted as a mitigating circumstance.

(379) Each undertaking would have to demonstrate that it systematically and explicitly refrained from applying the restrictive agreements.[94] Even if certain decisions were not fully carried out, this did not affect the implementation of the cartel as a whole. In this case, none of the undertakings explicitly announced that they would refrain, or provided any conclusive evidence that they refrained, from applying the agreements and thus adopted really competitive behaviour.

(380) As regards Atofina's and ICI's arguments, the Commission's position on implementation of the price agreements is set out at section 8.1.2. However, neither ICI nor Atofina argue that they did not make use of the exchange of commercially important and confidential market and / or company relevant information. The Commission rejects Atofina's and ICI's claims that such partial implementation should be treated as a mitigating circumstance: the Commission will not reward undertakings trying to exploit the cartel for their own benefit. Furthermore, the Commission views Atofina's reliance on *Welded Mesh Steel*, *Cement* and *Graphite Electrodes* to argue for a reduction for its involvement as inappropriate. In *Welded Mesh Steel*, evidence clearly revealed that the undertaking had withdrawn from the anticompetitive practices, which merited some reduction. Such evidence is not present in this case.[95] In *Cement*, evidence revealed that undertakings either never participated in, tried to avoid implementing, or did not implement at all, certain aspects of the cartel, which merited some reduction: none of these elements apply to Atofina (or any other participating undertaking) in this case.[96] In *Graphite Electrodes*, partial non implementation of a *basic principle* of the cartel over 3 years merited a reduction. However, no such equivalent scenario applies in this case.[97]

(381) Whilst it remains unproven that Barlo systematically refrained from applying the prices agreements or service costs to customers, it was able to benefit from the market related information exchanged and alter its commercial conduct accordingly (perhaps facilitating market share increases). Furthermore, Barlo did not explicitly refrain as regards the other undertakings from following the proposed common objectives

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93 See judgment of the Court of First Instance in *Cascades SA* v *Commission*, cited above, at paragraph 230. See also the judgment of the Court of First Instance in *Tokai Carbon Co. Ltd and others* v *Commission*, cited above, at paragraph 297, and judgment of the Court of First Instance, Case T-44/00, in *Mannesmannröhren-Werke AG* v *Commission* [2004] ECR II-02223 at paragraphs 277-278.

94 See judgment of the Court of First Instance, *Mannesmannröhren-Werke AG* v *Commission*, cited above, at paragraph 278.

95 *Welded Mesh Steel*, cited above, at paragraph 204.

96 *Ciment*, cited above, at paragraph 65 (9).

97 *Graphite Electrodes*, cited above, at paragraph 235.

agreed by all the undertakings (irrespective of whether these objectives were occasionally only unexpectedly revealed during the meeting). The Commission therefore rejects Barlo's claim that its non-implementation in practice of the offending agreements or practices comprises a mitigating circumstance.

9.2.3. Early termination of the infringement

(382) Several undertakings argue that the Commission should take account of the fact that they stopped taking part in the cartel either before the inspections took place or immediately after the inspections were carried out by the Commission. Atofina relies on *Nathan Bricolux*[98] and *Amino Acids*,[99] to illustrate that the Commission granted a reduction of 50% due to willingness to end the infringement after receipt of the Statement of Objections and 10% for lack of evidence of continuation after the inspections respectively. Atofina claims that it ended its infringement at the latest on the date of the inspections and that it should receive a reduction accordingly under this heading. Barlo and Lucite made similar claims.

(383) The Commission takes the view that the immediate termination of unlawful behaviour cannot normally be regarded as a mitigating circumstance in secret cartel cases where the infringements were committed deliberately. According to the Court of First Instance, *"An undertaking's reaction to the opening of an investigation into its activities can be assessed only by taking account of the particular context of the case"* and "*the Commission cannot therefore be required, as a general rule, either to regard a continuation of the infringement as an aggravating circumstance or to regard the termination of an infringement as a mitigating circumstance"*.[100]

(384) In the Commission's view, in cases of very serious infringements, the fact that an undertaking terminates the offending behaviour before any intervention by the Commission does not merit any particular reward. When exercising its power of assessment, the Commission has no obligation to award a reduction of a fine for the termination of a clear infringement, whether this termination occurred before or after the Commission's intervention.[101] The Court of First Instance has confirmed that the fact that an undertaking voluntarily puts an end to the infringement before the Commission has opened its investigation is sufficiently taken into account in the calculation of the duration of the

98 Commission Decision of 5.7.2000, Case COMP/36.516, *Nathan Bricolux*, OJ L 54 of 23.2.2001, page 1, paragraph 134.

99 Commission Decision of 7.6.2000, Case COMP/36.545, *Amino Acids*, OJ L 152 of 7.6.2001, page 24, at paragraphs 383-384.

100 See judgment of the Court of First Instance, Case T-31/99, *ABB Asea Brown Boveri Ltd* v *Commission*, [2002] ECR II-1881, at paragraph 213.

101 See judgment of the Court of First Instance in *Tokai Carbon Co. Ltd and others v Commission*, not yet reported, at paragraphs 292-294.

infringement period and does not constitute a mitigating circumstance.[102]

(385) In this regard, the Commission rejects the claims of the undertakings that termination of the infringement on or shortly after the carrying out of inspections should be a mitigating circumstance.

9.2.4. Introduction of a compliance programme

(386) Several undertakings claim that account should be taken of the fact that they have set up a compliance programme. While the Commission welcomes such measures to avoid cartel infringements in the future, such measures cannot change the reality and significance of the infringement and the need to sanction it in this decision, the more so since the infringement concerned is very serious.[103]

(387) In this regard, the Commission rejects the parties' claims that the introduction of a compliance programme should be a mitigating circumstance.

9.2.5. Absence of benefit

(388) To the extent that the parties submit that their fines should be reduced because they did not gain any benefit from the anticompetitive agreements and practices, it suffices to note that for an undertaking to be classified as a perpetrator of an infringement it is not necessary for it to have derived any economic advantage from its participation in the cartel in question.[104] The fact that an undertaking has derived no profit from the infringement cannot prevent it from being fined, as otherwise the fine would lose its deterrent effect. It follows that the Commission is not required, for the purpose of fixing the amount of fines, to establish that the infringement secured an improper advantage for the undertakings concerned, or to take into consideration, where it applies, the fact that no profit was derived from the infringement in question.[105] Therefore, the gravity of the parties' anti-competitive behaviour is in no way mitigated by the fact that the profits derived may have been negligible.

9.2.6. Crisis in the Methacrylates sector

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102 See judgment of the Court of First Instance in *Tokai Carbon Co. Ltd and others* v *Commission*, cited above, at paragraph 341.

103 See judgment of the Court of First Instance of 14.5.1998, Case T-304/94: *Europa Carton* v *Commission*, [1998] ECR 1998 II-869, at paragraph 141. See also judgment of the Court of First Instance, Case T-65/99, *Strintzis Lines Shipping SA* v *Commission*, [2003] ECR 2003 II-5433, at paragraph 201 and judgment of the Court of First Instance, Case T-224/00, *Archer Daniels Midland* v *Commission*, [2003] ECR II-2597, at paragraphs 280 and following.

104 See judgment of the Court of First Instance, Case T-304/94, *Europa Carton* v *Commission*, [1998] ECR II-869, at paragraph 141.

105 See judgment of the Court of First Instance, Case T-241/01, *Scandinavian Airlines System AB v. Commission*, at paragraph 146.

(389) Several parties have argued that a reduction should be granted on the ground that the raw material input for PMMA, mono-methacrylates (MMA), was being produced by an industry which was in crisis, impacting in turn on the PMMA industry. The Commission observes that in a free market economy, entrepreneurial risk includes the risk of occasional losses or even bankruptcy. The fact that an undertaking may not happen to make profits on a certain commercial activity is no licence for it to enter into secret collusion with competitors to cheat customers and other competitors.

(390) As a general rule, cartels risk coming into play not when undertakings make large profits but precisely when a sector encounters problems. Therefore, if the parties' reasoning were followed, fines in cartel cases would automatically have to be reduced in virtually all cases. In *Graphite Electrodes*,[106] the Court of First Instance confirmed that the Commission is not required to regard as a mitigating circumstance the poor financial state of the sector in question.

9.2.7. Cooperation outside the Leniency Notice

(391) Certain undertakings requested that insofar as their co-operation was not taken into account under the Leniency Notice, their co-operation be considered outside the Leniency Notice. According to the Guidelines, the Commission may reduce the basic amount of the fines on the basis of mitigating circumstances, amongst which effective cooperation of the undertakings outside the scope of the Leniency Notice.

(392) In this case the Commission has assessed if a reduction of fines was justified, in line with the case-law, with regard to the question whether the co-operation of any of the undertakings concerned enabled the Commission to establish the infringement more easily.[107] That assessment has in fact been carried out in application of the Leniency Notice (see section 10 below).

(393) The Commission considers, taking into account the arguments of the parties, the very limited scope and value of their cooperation and the contestation of facts they have made beyond this limited cooperation, that no other circumstances are present that would lead to a reduction of fines outside the Leniency Notice, which, in secret cartel cases, could in any event only be of an exceptional nature (see *Raw Tobacco Italy*[108]).

9.2.8. Other factors

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106 See judgment of the Court of First Instance in *Tokai Carbon Co. Ltd and others* v *Commission*, cited above, at paragraph 345.

107 See judgment of the Court of First Instance of 6.12.2005, Case T-48/02 *Brouwerij Haacht v Commission*, , not yet reported, at paragraph 104 and the case law cited therein.

108 See Commission Decision of 20.10.2005, Case COMP/38.281: *Italian Raw Tobacco*, not yet published, at paragraphs 385 and following.

(394) Atofina submits it should obtain a reduction in line with previous Commission decisions, in particular, *Specialty Graphite*[109] where the Commission granted a reduction of 33% to SGL Carbon AG (SGL) on the basis that the company was in serious adverse financial situation and had recently been fined by the Commission. Atofina also cites *Electrical and Mechanical Carbon and Graphite Products* where SGL obtained a similar reduction on the same basis. In Atofina's view, the reductions were due not to the serious adverse financial situation of the undertakings *and* the recent fines imposed on it, but solely on the basis of the recent fines imposed. Atofina bases its argument on the Commission's reasoning in both cases,[110] namely that a reduction on the grounds of a serious adverse financial situation would constitute an unjustified competitive advantage. Atofina believes that the recent fines imposed on it of around EUR 180 million should be taken into account for a reduction.

(395) In *Copper Plumbing Tubes*,[111] the Commission applied both *Specialty Graphite* and *Electrical and Mechanical Carbon and Graphite Products* with reference to KM Europa Metal AG Group's (KME Group) request for a reduction of fine on the basis of the recent fines imposed on it combined with its alleged serious adverse financial situation. Contrary to Atofina's suggestion, in assessing KME Group's requests, the Commission evaluated *both* the impact of the fines imposed on KME Group (in terms of percentage of total turnover) and KME Group's alleged serious adverse financial situation.

(396) The Commission observes, however, that Atofina has not submitted any argument that it finds itself in a serious adverse financial situation of any sort and the Commission consequently rejects Atofina's argument for a reduction under "Other factors".

9.3. Conclusion on aggravating and mitigating circumstances

(397) As a result of the aggravating and mitigating circumstances taken into account, the basic amount of the fine to be imposed on Degussa should be increased by 50% to EUR 264.46875 million. The basic amount of the fine to be imposed on Atofina should be increased by 50% for Arkema, Altuglas and Altumax to EUR 365.21875 million[112]. For Total the basic amount remains EUR 234 million. For Elf Aquitaine the basic amount remains EUR 302.25 million. The basic amount of the fine to be imposed on ICI should be increased by 50% to EUR 91.40625 million.

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109 See Commission Decision of 17.12.2002, Case COMP/37.667: *Speciality Graphite*, at paragraphs 556- 559.

110 See *Speciality Graphite*, cited above, at paragraph 555 and see Commission Decision of 3.12.2003, Case COMP/38.359: *Electrical and Mechanical Carbon and Graphite Products*, at paragraphs 349- 356.

111 See Commission Decision of 3.9.2004, Case COMP/38.069: *PO/Copper Plumbing Tubes*, at paragraphs 835- 841.

112 See footnote 85 to see how this is calculated.

The basic amount of the fine to be imposed on Barlo should be decreased by 50% to EUR 9 million.

9.4. Application of the 10% turnover limit

(398) Article 23(2) of Regulation (EC) No 1/2003 provides that the fine imposed on each undertaking is not to exceed 10% of its turnover.

(399) As regards the 10% ceiling, if "*several addressees constitute the 'undertaking', that is the economic entity responsible for the infringement penalised, again at the date when the decision is adopted, (…) the ceiling can be calculated on the basis of the overall turnover of that undertaking, that is to say of all its constituent parts taken together. By contrast, if that economic unit has subsequently broken up, each addressee of the decision is entitled to have the ceiling in question applied individually to it.*"[113]

10. APPLICATION OF THE LENIENCY NOTICE

(400) Degussa, Atofina and Lucite co-operated with the Commission at different stages of the investigation with a view to receiving the favourable treatment provided for in the Leniency Notice. ICI applied for leniency but this was rejected.

10.1. Degussa

(401) Degussa was the first to submit evidence which enabled the Commission to adopt a decision to carry out an investigation in the sense of Article 14(3) of Regulation No 17. Prior to Degussa's application, the Commission did not have sufficient evidence to adopt a decision to conduct such an investigation. Accordingly, Degussa's application satisfied the conditions set out in points 8 (a) and 9 of the Leniency Notice and Degussa was granted conditional immunity from fines.

(402) No undertaking has produced any evidence why Degussa should not benefit from immunity and based on the evidence in the Commission's possession, Degussa has co-operated fully, on a continuous basis and expeditiously throughout the Commission's administrative procedure and provided the Commission with all evidence available to it relating to the suspected infringement. It seems that Degussa ended its involvement in the suspected infringement no later than the time at which it submitted evidence under point 8(a) of the Leniency Notice, i.e. 20 December 2002 and did not take steps to coerce other undertakings to participate in the infringement. Hence, Degussa qualifies for full immunity from fines.

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[113] See judgment of the Court of First Instance in *Tokai Carbon and Co Ltd and others v Commission*, paragraph 390, cited above.

10.2. Atofina

(403) Atofina was the first undertaking to meet the requirements of point 21 of the Leniency Notice, as it provided the Commission with evidence which represents significant added value with respect to the evidence already in the Commission's possession at the time of its submission. It seems that Atofina terminated its involvement in the infringement no later than the time at which it submitted the evidence and its involvement has remained terminated. It qualifies, therefore, under point 23 (b), first indent of the Leniency Notice, for a reduction of 30% - 50% of the fine that would otherwise have been imposed.

(404) In the assessment of the level of reduction within the band of 30%- 50%, the Commission takes into account the time at which the evidence of significant added value was submitted and the extent to which it represents such value. It may also take into account the extent and continuity of any cooperation after the submission.

(405) Although the timing of Atofina's leniency application on 3 April 2003 was relatively early in the proceedings, in the month following the inspections, it was only after receipt of Atofina's subsequent submissions ***[Deleted, including any cross references to this part and/or relevant footnotes]*** that the Commission concluded Atofina qualified for leniency in view of the nature and level of detail of these submissions, which strengthened the Commission's ability to prove the facts in question. More importantly, even if Atofina had provided significant added value with its first submission and the time factor had been more in its favour, the extent to which Atofina has added value to the Commission's case has remained limited throughout the proceedings. ***[Deleted, including any cross references to this part and/or relevant footnotes].***

(406) ***[Recitals 406 – 408 are deleted, including any cross references to this part and/or relevant footnotes.]***

(409) Whilst Atofina responded to all information requests of the Commission, Atofina failed to outline the nature and duration of its involvement in relation to PMMA-sanitary ware and was more vague in its submissions on more recent contacts in relation to all three PMMA-products; this confirms that the extent to which Atofina's cooperation represents added value has remained limited.

(410) Based on the foregoing, the Commission considers that Atofina is entitled to a 40% reduction of the fine that would otherwise have been imposed.

10.3. Lucite

(411) Lucite was the second undertaking to meet the requirements of point 21 of the Leniency Notice, as it provided the Commission with evidence which represents significant added value with respect to the evidence already in the Commission's possession at the time of its submission. Furthermore it seems that it terminated its involvement in the infringement no later than the time at which it submitted the evidence. Lucite qualifies, therefore, under point 23 (b), second indent of the Leniency Notice, for a reduction of up to 30 % of the fine. In its assessment of the level of reduction within the said band, the Commission takes into account the time at which the evidence of significant added value was submitted and the extent to which it represents such value. It may also take into account the extent and continuity of any cooperation after the submission.

(412) Lucite fulfilled the condition of significant added value relatively early in the proceedings, just over three months after the Commission's inspections, on 11 July 2003. Lucite's application was clear, well structured and detailed. Although the Commission had evidence from its own inspections at Lucite, of the infringement lasting until at least 28 February 2001, Lucite's evidence enabled the Commission to extend the cartel until 12 September 2002***[Deleted, including any cross references to this part and/or relevant footnotes]***. ***[Deleted, including any cross references to this part and/or relevant footnotes]*** Following inspections at its premises, its leniency application, subsequent responses to information requests, and offers of assistance, the Commission believes Lucite has provided full, continuous and effective co-operation.

(413) Based on the foregoing, the Commission considers that Lucite is entitled to a 30% reduction of the fine that would otherwise have been imposed.

10.3.1. Immunity under point 23 of the Leniency Notice

(414) As noted at recital (412) above, although the Commission had evidence from the inspection at Lucite of the infringement lasting until at least 28 February 2001, Lucite's evidence (subsequently confirmed by Degussa and Atofina) enabled the Commission to extend the cartel until 12 September 2002.

(415) Lucite's evidence for the period of the infringement after 28 February 2001 related to facts previously unknown to the Commission which had a direct bearing on the duration of the suspected cartel and, in accordance with point 23 of the Leniency Notice, the Commission will not take the period 1 March 2001 until 12 September 2002 into account for the purpose of the fine.

10.4. ICI

(416) ICI applied for leniency on 18 October 2004, after the Commission had received leniency submissions from Degussa (20 December 2002), Atofina (3 April 2003) and Lucite (11 July 2003).

(417) Pursuant to the Leniency Notice, the Commission has examined ICI's submission in the chronological order in which submissions have been made to evaluate whether it constitutes significant added value within the meaning of point 21 of the Leniency Notice. Based on these criteria the Commission informed ICI that the evidence submitted by ICI does not represent significant added value within the meaning of the Leniency Notice.

(418) As regards ICI's arguments that their submission comprised significant added value, the number of times the Commission cites ICI's documents in a Statement of Objections or a Decision clearly does not indicate significant added value in itself. Indeed, even the total number of documents relied upon is not in itself critical but, rather, how the content of the documents provided, by its very nature and/or its level of detail, enabled the Commission to strengthen its ability to prove the facts in question. As ICI correctly observes, contemporaneous documents are more probative than non contemporaneous documents.

(419) Of the references to ICI documents in this Decision (out of a total of 168 documents provided to the Commission), some are of use in terms of background information only, for example, on some aspects of implementation. However, the documents did not enable the Commission to prove the facts of the case. At the time of ICI's application, the Commission had already received sufficient decisive evidence from other undertakings to prove the facts. The Commission also does not consider that ICI qualifies for any reduction for co-operation outside the Leniency Notice.

10.4.1. Timing of ICI's leniency application

(420) In its reply to the SO, ICI suggested that it was prevented from making a leniency application as it had sold its ICI Acrylics business unit to Lucite before the start of this case and was in some way discriminated against. The Commission rejects this argument. The purpose of the Leniency Notice is to encourage undertakings involved in cartel activities to come forward on a voluntary basis and cooperate with the Commission. This objective would be undermined if the Commission were to allow undertakings who have not voluntarily come forward and cooperated with the Commission to escape responsibility for their actions by claiming they were no longer able to make an application. In any case ICI was involved in the cartel for a period of almost three years before it sold its ICI Acrylics business unit to Lucite on 2 November 1999. The 1996 Leniency Notice[114] applied from July 1996 and ICI

[114] OJ 1996 C 207/4.

therefore had the opportunity to make a leniency application when it still owned the ICI Acrylics business unit.

(421) As regards ICI's claims that the Commission in some way disadvantaged ICI vis-a-vis other parties by excluding it from the investigation and discouraging Lucite from informing ICI of the investigation, the Commission rejects these claims in entirety. Part of ICI's interpretation of the Commission's letter of 8 May 2003 to Lucite, in which the Commission responded to questions from Lucite about whether to approach ICI is correct, namely that the Commission declined to take a position on whether Lucite should contact ICI. The Commission's view was, and remains, that this was a matter for Lucite to decide. The Commission letter simply confirmed to Lucite how the Leniency Notice operated, namely that conditional immunity was no longer available and that leniency cannot be applied for or granted jointly, but only by or to an individual company. The interpretation of this letter and subsequently action by Lucite was for Lucite to decide. Finally, contrary to ICI's indications, the Commission is not under an obligation of any kind to inform participating undertakings in the cartel of its investigation.

10.5. Conclusion on the application of the Leniency Notice

(422) In conclusion, the following reductions of the fines that would otherwise have been imposed will be granted:

(a) Degussa - immunity from fines;

(b) Atofina - reduction of 40%; and

(c) Lucite - reduction of 30% and immunity under point 23 of the Leniency Notice for the period 1 March 2001 until 12 September 2002.

11. FINAL AMOUNTS OF THE FINES TO BE IMPOSED IN THIS PROCEEDING

(423) In conclusion, the fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 are as follows:

(a) Degussa AG, Röhm GmbH & Co. KG and Para-Chemie GmbH, jointly and severally liable: EUR 0

(b) Arkema SA, Altuglas International SA and Altumax Europe SAS, jointly and severally liable: EUR 219.13125 million. Of this amount Total SA is held jointly and severally liable for EUR 140.4 million and Elf Aquitaine SA is held jointly and severally liable for EUR 181.35 million;

(c) ICI PLC : EUR 91.40625 million;

(d) Lucite International Ltd and Lucite International UK Ltd, jointly and severally liable: EUR 25.025 million; and

(e) Quinn Barlo Ltd, Quinn Plastics NV and Quinn Plastics GmbH, jointly and severally liable: EUR 9 million.

HAS ADOPTED THIS DECISION:

Article 1

The following undertakings have infringed Article 81 of the Treaty and Article 53 of the EEA Agreement by participating, during the periods indicated, in a complex of agreements and concerted practices in the Methacrylates industry which covered the whole EEA territory and which consisted of discussing prices, agreeing, implementing and monitoring price agreements either in the form of price increases, or at least stabilisation of existing price levels; discussing the passing on of additional service costs to customers; exchange of commercially important and confidential market and / or company relevant information and participating in regular meetings and other contacts to facilitate the infringement..

(a) Degussa AG, from 23 January 1997 until 12 September 2002;

(b) Röhm GmbH & Co. KG, from 23 January 1997 until 12 September 2002;

(c) Para-Chemie GmbH, from 23 January 1997 until 12 September 2002;

(d) Total SA from Total, from 1 May 2000 until 12 September 2002;

(e) Elf Aquitaine SA, from 23 January 1997 until 12 September 2002;

(f) Arkema SA, from 23 January 1997 until 12 September 2002;

(g) Altuglas International SA, from 23 January 1997 until 12 September 2002;

(h) Altumax Europe SAS, from 23 January 1997 until 12 September 2002;

(i) ICI PLC, from 23 January 1997 until 1 November 1999;

(j) Lucite International Ltd, from 2 November 1999 until 12 September 2002;

(k) Lucite International UK Ltd, from 2 November 1999 until 12 September 2002;

(l) Quinn Barlo Ltd, from 30 April 1998 until 21 August 2000;

(m) Quinn Plastics NV, from 30 April 1998 until 21 August 2000; and

(n) Quinn Plastics GmbH, from 30 April 1998 until 21 August 2000.

Article 2

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

(a) Degussa AG, Röhm GmbH & Co. KG and Para-Chemie GmbH : EUR 0;

(b) Arkema SA, Altuglas International SA and Altumax Europe SAS, jointly and severally liable: EUR 219.13125 million; of this amount Total SA is jointly and severally liable for EUR 140.4 million and Elf Aquitaine SA is jointly and severally liable for EUR 181.35 million;

(c) ICI PLC : EUR 91.40625 million;

(d) Lucite International Ltd and Lucite International UK Ltd, jointly and severally liable : EUR 25.025 million; and

(e) Quinn Barlo Ltd, Quinn Plastics NV and Quinn Plastics GmbH, jointly and severally liable: EUR 9 million.

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: 375-1017300-43 of the European Commission with

ING, Agence Bruxelles-Européenne, Rond Point Schuman 5, B-1040 Brussels

(SWIFT code BBRUBEBB – IBAN code BE66 3751 0173 0043)

After 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, namely 6,09%.

Article 3

The undertakings listed in Article 1 shall immediately bring to an end the infringements referred to in that Article, in so far 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 an identical or similar object or effect.

Article 4

This Decision is addressed to:

Degussa AG
Corporate Centre
Bennigsenplatz 1
DE - 40474 Düsseldorf

Röhm GmbH & Co. KG
Kirschenallee
DE - 64293 Darmstadt

Para-Chemie GmbH
Hauptstraße 53
AT - 2440 Gramatneusiedl

Total SA
2, place de la Coupole
La Défense 6
FR – 92400 Courbevoie

Elf Aquitaine SA
2, place de la Coupole
La Défense 6
FR – 92400 Courbevoie

Arkema SA
4-8, Cours Michelet
La Défense 10
FR - 92800 Puteaux

Altuglas International SA
6, Cours Michelet
Cedex 52
FR - 92063 Paris La Défense

Altumax Europe SAS
6, Cours Michelet
Cedex 52
FR - 92063 Paris La Défense

ICI PLC
20 Manchester Square
UK - London, W1U 3AN

Lucite International Ltd
Queens Gate
15-17 Queens Terrace
Southampton
UK - Hampshire SO14 3 BP

Lucite International UK Ltd
POB 34
Orchard Mill
Duckworth Street
Darwen
UK - Lacashire BB3 1QB

Quinn Barlo Ltd
c/f Quinn Hotel Limited,

Dublin Hotel
IE - Cavan, County Cavan

Quinn Plastics NV
Leukaard 1
BE - 2440 Geel

Quinn Plastics GmbH
Gassnerallee 40
DE - 55120 Mainz

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,

Neelie KROES
Member of the Commission