COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 05/12/2007
C(2007) 5910 final

COMMISSION DECISION

of

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

Case COMP/38629 - Chloroprene Rubber

(ONLY THE ENGLISH, ITALIAN AND GERMAN TEXTS ARE AUTHENTIC)

TO BE NOTIFIED TO:
Bayer AG
E.I. DuPont de Nemours and Company
DuPont Performance Elastomers S.A.
DuPont Performance Elastomers L.L.C.
The Dow Chemical Company
Denki Kagaku Kogyo K.K.
Denka Chemicals GmbH
Tosoh Corporation
Tosoh Europe B.V.
ENI S.p.A.
Polimeri Europa S.p.A.

(Text with EEA relevance)

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

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COMMISSION DECISION

of 05/12/2007

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

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,
Having regard to the Agreement on the European Economic Area,
Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[1], and in particular Article 7 and Article 23(2) thereof,
Having regard to the Commission decision of 13 March 2007 to initiate proceedings in this case,
Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty[2],
After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,
Having regard to the final report of the Hearing Officer in this case[3],

Whereas:

1. INTRODUCTION

1.1. Addressees

(1) On 13 March 2007 the Commission initiated proceedings for infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement against the following undertakings:

– Bayer AG

– E.I. DuPont de Nemours and Company

– DuPont Performance Elastomers S.A.

[1] OJ L 1, 4.1.2003, p. 1. Regulation as last amended by Regulation (EC) No 1419/2006 (OJ L 269, 28.9.2006, p. 1).
[2] OJ L 123, 27.4.2004, p. 18. Regulation as amended by Regulation (EC) No 1792/2006 (OJ L 362, 20.12.2006, p. 1).
[3] OJ

– DuPont Performance Elastomers L.L.C.

– The Dow Chemical Company

– Denki Kagaku Kogyo K.K.

– Denka Chemicals GmbH

– ENI S.p.A.

– Polimeri Europa S.p.A.

– [a company within the ENI group] S.p.A.

– Tosoh Corporation

– Tosoh Europe B.V.

1.2. Summary of the infringement

(2) The addressees of this Decision participated in a single, complex and continuous infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement, covering the entire EEA territory, consisting of agreements and/or concerted practices aimed at agreeing upon the allocation and the stabilization of markets, market shares and sales quotas for chloroprene rubber, coordinating and implementing several price increases, agreeing upon minimum prices, allocating customers and exchanging competitively sensitive information.

1.3. Duration of participation in the infringement

(3) The addressees participated in the infringement, or bear liability for it, at least for the following periods:

– Bayer AG: from 13 May 1993 to 13 May 2002;

– E.I. DuPont de Nemours and Company, from 13 May 1993 to 13 May 2002;

– DuPont Performance Elastomers S.A. and DuPont Performance Elastomers L.L.C.: from 1 April 1996 to 13 May 2002;

– The Dow Chemical Company: from 1 April 1996 to 13 May 2002 ;

– Denki Kagaku Kogyo K.K. and Denka Chemicals GmbH: from 13 May 1993 to 13 May 2002;

– ENI S.p.A. and Polimeri Europa S.p.A. from 13 May 1993 to 13 May 2002;

– Tosoh Corporation and Tosoh Europe B.V.: from 13 May 1993 to 13 May 2002.

1.4. Relevant product

(4) The product concerned is Chloroprene Rubber.

1.5. Territory covered

(5) The scope of the cartel arrangements was world-wide.

1.6. EEA and world-wide market values

(6) The market for Chloroprene Rubber is estimated at approximately 70 000 metric tonnes and EUR 160 million in the EEA and approximately EUR 725 million world-wide in 2001.[4]

2. THE INDUSTRY SUBJECT TO THE PROCEEDINGS IN THIS CASE

2.1. The product

(7) Chloroprene rubber (hereinafter: CR; synonym: Polychloroprene or sometimes Neoprene) is a synthetic rubber which is an artificially-made polymere acting as an elastomer. An elastomer has the mechanical property that it can undergo much more elastic deformation under stress than most materials and still return to its previous size without permanent deformation. Synthetic rubber serves as a substitute for natural rubber in many cases, especially when improved material properties are needed.

(8) CR is characterised by its balance of properties which makes it unique among synthetic elastomers. It has good mechanical strength, high ozone and weather resistance, good aging resistance, low flammability, good resistance toward chemicals, moderate oil and fuel resistance and adhesion to many substrates.[5]

(9) However, due to its high chlorine content it is regarded as environmentally unfriendly. Moreover, for some applications CR is over-engineered, that is to say, it has more technical aspects than necessary, which makes it expensive in relation to its remote substitutes (ethylene-propylene rubber [EP(D)M], nitrile-butadiene rubber [NBR], Polyurethane, Etylen-Vinyl-Acetat [EVA]). Those substitutes are not the subject of this Decision.

(10) CR is produced in a variety of grades in both dry and latex forms. General-purpose grades may be modified, for example, to sulphur-modified grades. Sulphur modification improves the breakdown of the rubber during mastication (lowering of viscosity). Sulphur-modified grades are used in particular for parts exposed to dynamic stress, such as driving belts, timing belts or conveyor belts because of their excellent mechanical properties. But the polymers are less stable during storage and the vulcanizates less resistant to aging.[6] All forms and grades of CR are the subject of this Decision.

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4 [*] (all page numbers refer to the pages of the investigation file).

5 See p. 17465.

6 See p. 17468.

(11) CR is used in three different areas. First, it is used for technical rubber parts (cables, hoses etc.). The technical rubber industry accounts for approximately 61% of all applications and processes CR mainly for the automotive industry (hoses, v-belts, power transmission belts etc.). Second, approximately 33% of CR are used as raw material for adhesives, in particular for the shoe and furniture industry (soles, heels, coated fabrics etc.). Third, it is used as latex (approximately 6% of all applications[7]), for diving equipment, bitumen modifications and inner sole of shoes.

2.2. The market players

2.2.1. Undertakings subject to these proceedings

2.2.1.1. Bayer AG

(12) Bayer AG (hereinafter Bayer) is a company under German law with its headquarter in Leverkusen, Germany. It operates on a world-wide basis and is the ultimate parent company of a group of companies in 150 countries. It is a research-based enterprise with core competencies in the fields of health care, nutrition and high-tech materials. Its total turnover in 2006 was EUR 28 956 million.

(13) Bayer manufactures CR in Dormagen, Germany and manufactured, until July 1998, in Houston, Texas (USA). It sells the technical CR products under the trade name Baypren and the CR latex adhesives under the trade name Dispercoll.

(14) Before 2004 Bayer operated as a parent corporation with manufacturing and sales activities. Since October 2003 Bayer has been effectively functioning as a management holding company.[8] Until then it was the responsible economic entity for the marketing of technical CR products. The marketing decisions were centralised in the headquarters of Bayer in Leverkusen, Germany, and dealt with by the business unit "Rubber" (Geschäftsbereich Kautschuk), [*] of which had pricing authority, that is to say, the authority to set the price of the product for clients.

(15) Until the end of 1995 the CR latex adhesives were also dealt with by the business unit "Rubber". As of 1 January 1996 the marketing of CR latex adhesives was split between two categories: *"manufacturers using latex adhesives as a raw material"* – still dealt with by the business unit "Rubber" – and *"manufacturers using latex adhesives for technical rubber products"* – dealt with by a newly created Joint Venture[9], Polymer Latex GmbH & Co KG, via its business unit Coatings and Colorants[10].

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7 All percentage figures from fact sheet on polychloroprene, see p. 17465.

8 See pp. 4245, 17484.

9 Polymer Latex is a 50:50 joint venture of the dispersion divisions of Bayer AG and the former Hüls AG and Röhm GmbH companies (today Degussa AG); see history of the company p. 17615.

10 See p. 6501.

(16) Pricing authority for the CR latex adhesives lay with [*] of the respective business unit in Bayer dealing with the product at the time. However, [*] (that is to say, the unit responsible for marketing of technical rubber products as well as latex adhesives and raw material) had the authority to fix the internal transfer price within Bayer. In other words [*] determined the price that the unit responsible for "manufacturers using latex adhesives for technical rubber products" had to pay to the unit “Rubber”.

(17) Moreover, during the period from 1 April 1997 to December 2002 [*] suggested sale prices to the unit responsible for latex adhesives for technical rubber manufacturers which were usually followed.[11]

(18) Bayer's turnover data and market share for CR in 2001 can be found in the Annex.

(19) The representatives of Bayer in the meetings or contacts described below in the factual part 4 of this Decision were the following individuals:[12] [*]

2.2.1.2. Denki Kagaku Kogyo Kabushiki Kaisha

(20) Denki Kagaku Kogyo Kabushiki Kaisha (電気化学工業株式会社) is a publicly held Japanese corporation. Its headquarters are located in Tokyo, Japan. Denka was founded in 1915 and employs 4 739 people worldwide.[13] Denka is engaged in the production, marketing and promotion of organic and inorganic materials, electronic products as well as functional materials and processed products worldwide.[14] Denka has been manufacturing CR in its Aomi Plant,[15] Japan, and has been selling it under the trade name "Denka Chloroprene" since 1962.[16] Denka stopped its sales to the USA in 1973 after an antidumping duty order had been issued. That order is still in effect.[17] In 2006 Denka’s worldwide turnover was EUR 2 254 million.[18]

(21) Denka Chemicals GmbH (hereinafter Denka Europe) is Denka's regional trading company for Europe. It was established in Düsseldorf, Germany, in August 1990 and is a 100 % subsidiary of Denka.[19]

(22) From August 1990 to March 1994 Denka [*] reported to the [*] of Denka's [*], who reported to the [*] of Denka's [*]. At the end of 1993 Denka started its own CR stock and delivery operation in the European

11 See p. 6501.
12 [*]
13 See p. 17505.
14 See p. 17507.
15 See p. 4917.
16 See pp. 4910, 17508 ff.
17 [*]; see p. 17511.
18 For the financial year 2006 (1/04/2006 to 31/03/2007), Denka's total world-wide turnover was JPY 329 262 million. An average exchange rate of EUR 1 = JPY 146.02 for 2006 is applied.
19 See p. 4917.

market.[20] Since March 1994 domestic and export CR sales belong to Denka's Organic Chemicals Department. Since then, Denka [*] reports to [*] of Denka's [*] who reports to the [*] of Denka's [*].[21]

(23) [*] .[22]

(24) Denka's turnover data and market share for CR can be found in the Annex.

(25) The representatives of Denka in the meetings or contacts described below were the following individuals[23]: [*]

(26) "Denka" is the name used hereinafter to refer to any company owned by Denki Kagaku Kogyo Kabushiki Kaisha.

2.2.1.3. The Dow Chemical Company

(27) The Dow Chemical Company (hereinafter Dow) has its headquarter in Delaware, USA and it employs 42 000 people worldwide. The main activities of Dow are in base and speciality chemicals as well as hydrocarbons and energy. In 2006 Dow's worldwide turnover was EUR 39 124 million.[24]

(28) On 1 April 1996 it became active on the CR market via its participation in DuPont Dow Elastomers L.L.C. and DuPont Dow Elastomers S.A., a 50/50 joint venture with DuPont (see recital (31)). It remained active in the business via that joint venture until 30 June 2005 (see recital (36)).

2.2.1.4. DuPont Group

- *E.I. DuPont de Nemours and Company*

(29) E.I. DuPont de Nemours and Company (hereinafter DuPont) is a USA based company the total turnover of which was EUR 21 839 million in 2006.[25] DuPont is the original developer of CR. DuPont was directly active on the market for CR from 1931 until 1 April 1996, when it transferred its CR business to the 50/50 joint venture DuPont Dow Elastomers L.L.C. that it formed with Dow (see recitals (31)-(37) below). On 1 July 2005 DuPont again became directly active in the CR market when it took over the CR business from DuPont Dow Elastomers L.L.C. and DuPont Dow Elastomers S.A. and continued the business under its wholly owned subsidiary DuPont Performance Elastomers L.L.C. (see recital (36)). DuPont sells CR under the trade name Neoprene.

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20 See p. 17210.

21 See p. 17211.

22 See [*]

23 See p. 17227.

24 Dow's total world-wide turnover in 2006 was USD 49 124 million. An average exchange rate of EUR 1 = USD 1.2556 for 2006 is applied.

25 Dupont's total world-wide turnover in 2006 was USD 27 421 million. An average exchange rate of EUR 1 = USD 1.2556 for 2006 is applied.

(30) The representatives of DuPont in the meetings and contacts during the period from 13 May 1993 to the end of March 1996 described below were[26]: [*]

- DuPont Dow Elastomers

(31) DuPont Dow Elastomers (hereinafter DDE) was a joint venture company set up in 1996[27] in accordance with a Formation Agreement (signed on 16 January 1996) and a Limited Liability Company Agreement (hereinafter LLC Agreement) between Dow, DuPont and two of their subsidiaries, Wenben Inc. and DuPont Elastomers Inc. The latter two were the immediate parent companies of DDE and 100% subsidiaries of Dow and DuPont respectively.[28] Therefore Dow and DuPont each held 50% of the shares in DDE.

(32) DDE was a USA company with headquarters in Wilmington, Delaware. Regional responsibility for Europe was delegated to DuPont Dow Elastomers S.A. (hereinafter DDE S.A.), ultimately a 100% subsidiary of DuPont Dow Elastomers L.L.C. with headquarters in Geneva, Switzerland.[29]

(33) According to the Formation Agreement DDE represented Dow and DuPont's business interests within the "business purpose" of the joint venture, that is the discovery, development, design, manufacture, distribution, marketing and sale of high quality elastomers on a global basis and specifically provides for the elimination of product competition within the "business purpose".

(34) According to the LLC Agreement Dow transferred certain technology and other assets and DuPont transferred its entire elastomers business, including CR, as well as the ancillary business records. Therefore, DDE produced and sold CR under DuPont's trade name Neoprene. Net profits or losses of DDE were allocated in equal proportions to the two parents (Article XII of the LLC Agreement).

(35) The joint venture began to operate on 1 April 1996. It produced CR in two USA plants which were brought into the joint venture from DuPont (Pontchartrain and Louisville) and, until July 1998, also in Maydown, Ireland.[30]

(36) In 2004 DuPont and Dow entered into a series of agreements concerning the joint venture[31]. Those transactions closed on 30 June 2005 at which stage DDE ceased to be a joint venture and, instead,

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26 See pp. 1096, 4628, 4629.

27 The Joint Venture was approved by the Commission on 21 February 1996, Case IV/M.663.

28 See p. 4614 and p. 4624.

29 See 4614.

30 See p. 1041.

31 These were approved by the Commission in Cases COMP/M.3733 and COMP/M.3743.

became a wholly owned subsidiary within the DuPont Group under the name DuPont Performance Elastomers L.L.C.[32]

(37) The representatives of DDE in the meetings and contacts during the period from 1 April 1996 to 13 May 2002 described below were:[33][*]

(38) DDE's turnover data and market share for CR can be found in the Annex to this Decision.

(39) Throughout this Decision "DuPont" is the name referred to for the actions undertaken by any company belonging to the DuPont Group and "DDE" is the name referred to for the actions undertaken by the joint venture between DuPont and Dow or any company belonging to the joint venture.

- DuPont Performance Elastomers

(40) On 1 July 2005 DDE ceased to be a joint venture and, instead, became, and has subsequently continued to operate as, a wholly owned subsidiary within the DuPont Group changing its name to DuPont Performance Elastomers L.L.C. (hereinafter DPE).[34] DuPont thereby again became directly active on the CR market through its subsidiary. DPE's regional office for Europe is DuPont Performance Elastomers S.A., which is a 100% subsidiary of DPE.

2.2.1.5. The Eni Group

(41) ENI S.p.A. (hereinafter Eni) is a company under Italian law. It is active in the energy sector and is the ultimate parent company of the Eni Group. The total turnover of the Eni Group in 2006 was EUR 86 105 million.[35]

(42) The Eni Group acquired the CR business at the end of 1992 from the group Rhône-Poulenc whose CR-company was called Distugil. Following the acquisition the CR business was entrusted within the Eni Group to EniChem Elastomeri S.r.l. (hereinafter EE) a company which ENI S.p.A. indirectly fully controlled through EniChem S.p.A., EE's 100% parent company. Effective from 1 November 1997 EE merged into its parent company EniChem S.p.A.[36]

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32 [*]

33 [*]

34 [*]

35 Annual report of ENI 2006, see http://www.eni.it/bilancio-interattivo/eng/2006/index.html

36 See pp. 14845; Eni owned from 99,93 to 99,97% of EniChem:
- From 1994 until 13 April 1995 Eni owned 99,93% of EniChem with 0,31% indirectly through Sofid S.p.A. (the financial group of Eni) and 59,43% indirectly through Società Chimica Internazionale S.p.A. (owned by Eni 1% and Eni's subsidiaries Agip 49,5% and Snam 49,5%)
- from 13 April 1995 to 31 December 1997, Eni owned 99.97 % of EniChem, 59.74 % of this indirectly through its subsidiaries Agip S.p.A. and Snam S.p.A.
- As of 31 December 1997 and at least until March 2005 Eni also owned 99,97 % with the difference that Agip S.p.A. and Snam S.p.A. merged leading to a decrease of the share indirectly owned to 29.87 % (through its subsidiary Snam).

(43) On 1 January 2002, EniChem S.p.A. transferred the “Elastomeri e Stirenici" (Elastomers and Styrenes) business (including CR) together with other businesses to its 100 % subsidiary Polimeri Europa S.p.A. (hereinafter Polimeri). Since at least 30 April 2001 Polimeri has been 100% owned by EniChem S.p.A. and, on 21 October 2002, Eni acquired direct full ownership of Polimeri. On 30 April 2003 EniChem S.p.A. changed its name to [a company within the ENI group] S.p.A. (hereinafter [a company within the ENI group]).[37] Eni trades CR under the brand-name Butaclor.[38]

(44) On 31 December 2005 Eni exited the CR market and closed down its only CR production site in Champagnier, France.

(45) Eni Group's turnover data and market share for CR can be found in the Annex to this Decision.

(46) The representatives of Eni Group in the meetings or contacts described below were the following individuals[39]: [*]

(47) "Enichem" is the name used hereinafter to refer to any company in the Eni Group.

2.2.1.6. Tosoh Corporation

(48) Tosoh Corporation (東ソー株式会社) is a publicly held Japanese corporation. It was founded in 1935 under the name Toyo Soda Manufacturing Co., Ltd., which was changed to Tosoh Corporation in 1987.[40] Its headquarters are located in Tokyo, Japan. Tosoh employs 9 373 people worldwide[41] and comprises some 130 companies.[42] Tosoh is engaged in the production, marketing and promotion of basic chemicals, petrochemicals, specialty products and fine chemicals worldwide.[43] Tosoh is divided into business groups.[44] For 2006, Tosoh’s worldwide turnover was EUR 5 350 million.[45]

(49) Tosoh has been manufacturing CR since 1971 in its Nanyo Complex, Japan, and sells it under the trade name "Skyprene". CR was marketed by the business group "PVC and Rubber Division" from 1992, by "Specialty Material Division" from 1996 and by "Polymers Division" from 2000.[46] Tosoh started to sell CR on a larger scale into Western Europe as of 1981.[47] Due to the USA antidumping order which has

37 See pp. 14695-14697; regarding the structure of the Eni group see also p. 13832.
38 [*] p. 17619.
39 See pp. 4935-4940, 17007-17022, 4956-4961, 13827-13828.
40 See p. 4595, see also pp. 17620 ff.
41 See p. 17624.
42 See p. 17626.
43 See p. 17624.
44 [*] 17629 f.
45 For the financial year 2006 (1/04/2006 to 31/03/2007), Tosoh's total world-wide turnover was JPY 781 347 million. An average exchange rate of EUR 1 = JPY 146.02 for 2006 is applied.
46 [*]
47 [*]

been in place since 1973, Tosoh does not sell CR to the US. That order is still in effect.[48]

(50) Tosoh Europe BV (hereinafter Tosoh Europe) is Tosoh's regional trading company for Europe, the Middle East and Africa.[49] It was established in Amsterdam, The Netherlands, in 1976. In 1987 it changed its name from Amto International BV to Tosoh Europe BV.[50] It conducts marketing activities for Tosoh and its group companies, and serves as the company's business development centre for the European markets.[51] Tosoh Europe is a 100% subsidiary of Tosoh.[52]

(51) Tosoh's turnover data and market share for CR can be found in the Annex to this Decision.

(52) Tosoh [*] ordinarily takes and implements decisions with regard to sales, prices and customers. [*] directly reports to Tosoh's [*] on sales, prices and customers. Tosoh's [*] ultimately reports to Tosoh's [*] with regard to general CR sales issues and informs Tosoh's [*] about CR quantities requested by customers. Tosoh's [*] takes and implements decisions with regard to production.[53]

(53) The representatives of Tosoh in the meetings or contacts described below were the following individuals[54]: [*]

(54) "Tosoh" is the name used hereinafter to refer to any company owned by Tosoh Corporation.

2.2.2. Other market players

(55) To the Commission's knowledge no other CR producers than the addressees of this Decision are or were active on the EEA market.[55]

2.3. Description of the market

2.3.1. Supply

(56) The geographic scope of the CR business is world-wide. The major suppliers and customers are present in each of the principal economic regions of the world and operate on a global basis. Transport is not a relevant cost factor. Since 1973 an antidumping duty order for CR products originating in Japan has been in place in the US.

48 [*] see p. 17511.
49 See pp. 17627 f.
50 [*]
51 See pp. 17627 f.
52 [*]
53 [*]
54 [*]
55 [*]

(57) During the 1990s CR was mainly produced by the following companies: Bayer, DuPont, DDE, EniChem, Denka, and Tosoh. DuPont/DDE and Bayer have the largest production capacities.

(58) In relation to the supply of CR to various world-wide regional markets DuPont/DDE was the leader in the US, whereas Bayer was the leader in Europe. By 1997/1998 the world-wide CR market suffered from over-capacity (390 000 metric tonnes). This situation was alleviated by two important production facility closures in 1998: DDE closed its plant in Ireland (Maydown) with a capacity of approximately 33 000 metric tons and Bayer closed its plant in Texas, USA (Houston) with a capacity of approximately 27 000 metric tonnes. As of 2002 IISRP (International Institute of Synthetic Rubber Producers) showed a total world-wide capacity of CR of approximately 300 000 metric tonnes and demand in Europe for approximately 72 500 metric tons.[56]

2.3.2. Inter-state trade

(59) During the infringement period the participants used to sell CR produced in Germany, Ireland, France, USA and Japan to customers established in the different Member States and in Contracting Parties to the EEA Agreement. Therefore, during the infringement period, there were important trade flows of CR between Member States and between the Contracting Parties to the EEA Agreement.

3. PROCEDURE

3.1. The Commission's investigation

(60) On 18 December 2002, Bayer informed the Commission of the existence of a cartel in the chloroprene rubber sector[57] expressed its willingness to cooperate with the Commission under the terms of the Commission notice on immunity from fines and reduction of fines in cartel cases ([58] ("the Leniency Notice"). Bayer's initial submission was [*]. [59] By decision of 27 January 2003, Bayer was granted conditional immunity from fines by the Commission.[60]

(61) On 27 March 2003 the Commission carried out an unannounced inspection at the premises of Dow Deutschland Inc. in Schwalbach which concerned this case as well as cases COMP/38542-EPDM, COMP/38637-BR and COMP/38638-ESBR.[61]

(62) On 9 July 2003, an unannounced inspection was carried out at the premises of Denka in Düsseldorf.

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56 [*]
57 [*]
58 OJ C 45, 19.2.2002, p.3.
59 [*]
60 See p. 75 f.
61 See p. 220 ff.

(63) On 15 July 2003, Tosoh submitted a leniency application[62] which was followed [*] .[63]

(64) On 21 November 2003, DDE submitted a leniency application[64] which was followed [*] .[65]

(65) Since March 2005, the Commission has addressed several requests for information under Article 18 of Regulation (EC) No 1/2003 to Bayer, DDE, DuPont, Denka, Dow, Tosoh, Eni, [a company within the ENI group] and Polimeri.

(66) After having received the first request for information, Syndial and Polimeri submitted leniency applications on 15 April 2005.[66] Syndial submitted further statements in May 2005[67] and November 2006.[68]

(67) As mentioned above in recitals (63)-(66), Tosoh, Syndial and Polimeri applied for immunity from fines or - alternatively - for a reduction of the fine that would otherwise be imposed on them, under the terms of the Leniency Notice. DDE applied for a reduction of its fine. Prior to the notification of the Statement of Objections the Commission, came to the preliminary conclusion that the evidence submitted by Tosoh and DDE constituted significant added value within the meaning of point 22 of the Leniency Notice and informed Tosoh and DDE by letter of 7 March 2007 of its intention to apply a reduction of a fine within a specified band of 30-50% and 20-30% respectively, as provided in point 23(b) of the Leniency Notice. On the same day, Syndial and Polimeri were informed in writing that their applications did not meet the conditions set out in points 8(a) or 8(b) of the Leniency Notice and that, according to points 15 and 17 thereof, they would not be granted conditional immunity from fines.[69]

3.2. Statement of Objections and Oral Hearing

(68) On 13 March 2007, the Commission initiated proceedings and adopted a Statement of Objections (SO) concerning an infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement.

(69) The SO was addressed to 12 undertakings. The addressees were Bayer AG, E.I. DuPont de Nemours and Company and its subsidiaries DuPont Performance Elastomers S.A. and DuPont Performance Elastomers L.L.C., The Dow Chemical Company, Denki Kagaku Kogyo K.K. and its subsidiary Denka Chemicals GmbH, ENI S.p.A. and its subsidiaries

62 [*]
63 [*]
64 [*]
65 [*]
66 [*]
67 [*]
68 [*]
69 In the Italian version of the Statement of Objections a translation error occurred. In recital 67 of that language version it was stated that [a company within the ENI group] and Polimeri were informed that they would not be granted a *"conditional reduction"* instead of *"conditional immunity"* from fines.

Polimeri Europa S.p.A. and [a company within the ENI group] S.p.A. and Tosoh Corporation and its subsidiary Tosoh Europe B.V. The SO was notified to the addressees on 15 and 16 March 2007. The initial deadline for reply was 6 weeks after reception of the DVD containing the Commission's file except oral statements and documents relating thereto. After several requests for extension of the deadline to reply to the SO the Commission granted all of the addressees an extension of the deadline until 15 May 2007.

(70) All the parties to which the SO had been addressed submitted written comments in reply to the objections raised by the Commission.

(71) The undertakings had access to the Commission's investigation file in the form of a copy on DVD, except oral statements and documents relating thereto. With the DVD, the undertakings received a list specifying the documents contained in the investigation file (with consecutive page numbering) and indicating the degree of accessibility of each document. In addition, the undertakings were informed that the DVD gave the parties full access to all the documents obtained by the Commission during the investigation, except for business secrets and other confidential information. Access to oral statements and documents relating thereto was given at the Commission premises.

(72) An Oral Hearing on the case was held on 21 June 2007. All parties exercised their right to be heard.

(73) After the SO and the Oral Hearing, Denka provided one further written submission. That submission was made in reply to two questions from the Commission questions at the Oral Hearing which could not be answered on the spot.

3.3. Investigations and proceedings in other jurisdictions

(74) The US Department of Justice carried out an investigation in the chloroprene rubber market which, in the US, led to plea agreements with [a company within the ENI group][70] and with DDE, on 29 June 2005 and 29 March 2005[71], respectively.

(75) [a company within the ENI group] has agreed to plead guilty to participating in an international conspiracy to fix prices of chloroprene rubber. In a felony case filed in US District Court in San Francisco, [a company within the ENI group] was charged with conspiring with its competitors to fix the price of chloroprene rubber sold in the United States and elsewhere from September 1999 to April 2002.

(76) DDE has agreed to plead guilty to participating in an international conspiracy to fix prices of chloroprene rubber. In a felony case filed in US District Court in San Francisco, DDE was charged with conspiring

[70] See p. 17695.
[71] See p. 17698.

with its competitors to fix the price of chloroprene rubber sold in the United States and elsewhere from August 1999 to April 2002.

(77) A further investigation in the chloroprene rubber sector was carried out by the Canadian Competition Bureau. In July 2007 DuPont Performance Elastomers LLC pleaded guilty and was fined by the Superior Court of Justice in Ottawa for its role in an international conspiracy to fix prices of polychloroprene rubber.

(78) The Competition Bureau found that Du Pont and co-conspirators agreed to fix the prices of polychloroprene rubber (identical to CR) sold in the North American market between August 1999 and April 2002.

4. DESCRIPTION OF THE EVENTS

4.1. Basic principles and structure of the cartel

(79) The Commission has evidence that Bayer, Denka, DuPont/DDE, Enichem and Tosoh have participated in meetings and other contacts with the aim to discuss their respective CR businesses.

(80) Before describing in detail the chronology of the cartel events, the basic principles and structure of the cartel are first outlined in recitals (81)-(122).

4.1.1. Objectives

(81) The basic objectives of the cartel arrangements were to freeze the competitors' market shares on the CR market, to regionalize production and supply, to eliminate the European price differential between Northern and Southern Europe and to increase prices or prevent a decline in prices for CR products worldwide.

(82) In the past, most of the CR producers operated with just one production plant worldwide, while DDE and Bayer both had more than one plant. Historically this had lead to firms concentrating their efforts in the region where the manufacturing capacity was located. Therefore Tosoh and Denka held leading positions in Asia, Bayer in the northern part of Western Europe and Enichem in the Southern part of Western Europe. DDE's focus was on the US, Canada and the South American market and on certain key strategic accounts in Europe. The Japanese producers were, however, gradually acquiring more business in Europe. At the same time demand for CR was declining and the producers were faced with a structural over-capacity situation on a world-wide level; the CR business is mature and in a number of applications it has been increasingly replaced by other substitute rubber products.[72]

(83) [*] a characteristic of the CR industry is that there are high switching costs from one CR producer to another, as for many applications the producers have to go through a product qualification process at each

[72] [*]

customer. Consequently there is a high customer loyalty and, on the part of the producer, a focus on trying to increase revenue through sales to existing customers. Therefore, if a CR producer actively attacks the key account of another CR producer, this can lead to price erosion and a downward price spiral.[73]

(84) There was a feeling among competitors that with the over-capacity and declining markets, for producers to make inroads into the others' home markets would only lead to the home producers going outside the region to recapture share, thereby causing further erosion on prices.[74] To tackle this problem the competitors developed, in the first place, detailed quota agreements on sales quotas for each producer of CR for various regions of the world.[75] [*][76]

(85) To ensure the functioning of that system and compliance with the agreed market shares, the parties exchanged information on their shipment and/or sales figures, capacity and capacity utilization figures and on offers to individual customers. Concerning the shipment/sales figures, historically virtually all CR manufacturers reported their CR sales and production capacities on a monthly basis to the IISRP.[77] The data provided to the IISRP was broken down into seven defined IISRP regions, namely, Western Europe (WE), Central East Europe and the Confederation of Independent States (CEE/CIS), Socialist Asia (SCA), Middle East and Africa (MEA), Asia excluding Socialist Asia (APAC), North America/Canada (NAKA) and Latin America (LATAM). The IISRP then used these figures to calculate the monthly CR consumption per region and passed the result on to the competitors, approximately three weeks after the report. Each producer could then use this information to calculate its own market share per region for every month. [*][78]

(86) [*][79]

(87) The idea of *"regionalisation"* was to allocate certain geographical markets, mostly the respective *"home markets",* to certain CR producers and to minimize supplies from other competitors into these agreed home markets. As a part of the regionalisation strategy, the parties agreed upon the allocation of certain key customers. [*] [80] The

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73 [*]

74 [*]

75 See pp. 13912-13913.

76 [*]

77 IISRP is a worldwide association based in the US, with three sections – America, Europe and Asia. The sections have each twice a year a meeting on these continents and in addition each year there is a global annual meeting of all three sections on one of the continents (on rotating basis). The European section of the IISRP has its regional office in Richmond, England, where many of its meetings are held. Within each of the continental sections, there are sub-committees which meet more regularly. One of these committees is a statistical committee, [*]

78 [*]

79 [*]

80 [*]

aim of the regionalisation strategy was for DuPont/DDE to consolidate its market share in the USA [*] [81]

(88) In order to make the *"regionalisation"* strategy function, DDE and Bayer needed to have the other producers on board with this strategy. The main concern appeared to have been the Japanese producers. Tosoh submits that the basic purpose of the agreements among the CR producers was to limit the market share of the Japanese producers in Europe. [*] [82] [83]

(89) [*] [84] [*] [85] This lack of any automatic market discipline explains the pressure that was exercised on the Japanese producers – Denka and Tosoh – to get them to join the cartel arrangements. [*].[86]

(90) The principle of regionalisation further implied avoiding any aggressive price competition in the respective home markets of the other producers, that is to say, North America for DuPont/DDE, the Northern part of Western Europe for Bayer, the Southern part of Western Europe for Enichem and Asia for Denka and Tosoh.[87]

(91) Along with the objectives of the regionalisation strategy, Bayer and DDE also reduced their production capacities in a way that ensured better functioning of the regionalisation. In 1998, when the regionalisation strategy was already well established, DDE closed down its plant in Maydown, Northern Ireland and Bayer closed down its plant in Houston, Texas, USA. This meant that both companies concentrated on production in their respective home markets. Bayer announced its plant closure publicly on 2 October 1997 and the plant was closed down on 30 September 1998.[88] DDE announced its plant closure in the meeting of 4 February 1998 and closed down its plant in July 1998.[89] [*] [90]

(92) Another objective was to eliminate an existing price differential between Northern and Southern Europe. [*] The competitors first tried to raise the price level in Southern Europe considerably to level out the difference (see recitals (148), (202), (228), (235), (239) below). [*] [91]

(93) Regarding the price increases in general, the competitors mostly tried to increase prices per type of CR. [*] [92] [93]

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81 [*]
82 [*]
83 [*]
84 [*]
85 [*]
86 [*].
87 [*]
88 [*]
89 [*]
90 [*]
91 [*]see also recital (202).
92 [*]
93 [*]

4.1.2. Organisation

(94) The competitors met on a regular basis several times a year, but not at specific intervals. The meetings were held as multilateral, trilateral and bilateral meetings. Some of the meetings were held on the occasion of IISRP annual meetings.[94] The multilateral meetings were generally held as regional and global meetings.[95] [*] [96] [*][97]

(95) At the beginning the competitors held both multilateral and bilateral or trilateral meetings, but after September 1998 the pattern changed so that multilateral meetings were replaced by bilateral and trilateral meetings.

4.1.2.1. Regional meetings

(96) [*] Regional meetings took place two to three times a year at product manager level. Regional meetings were held, for example, as European or Asian meetings and often served as preparatory meetings for the global meetings. The regional meetings were usually attended by Enichem ([*] Bayer [*] DuPont/DDE ([*]) as well as Tosoh's and Denka's representatives in Europe, [*] for Tosoh and [*] for Denka.[98]

(97) At the beginning of European regional meetings the companies usually reported shipments to various European countries in order to determine what the consumption in each region was. The companies did not report their sales into a given country but rather their shipments from factories to individual countries. That reporting was aimed at verifying that market shares had remained unchanged with respect to the previous meeting. If there had been variations in the market shares, the companies would inquire about the reasons for such changes. Afterwards the companies discussed prices by country and by CR grade. The prices to be charged in Europe were, as a general rule, not agreed upon at the regional, but at the global meetings. At the end of the meetings, there were frequently complaints about volumes and/or prices. Complaints were possible if there had been serious undercutting but in general there were no sanctions.[99]

4.1.2.2. Global meetings

(98) [*] [100] During the global meetings the competitors discussed all IISRP regions. [*] submits that from 1994, those meetings were usually

94 [*]
95 [*].
96 [*] see also recital (137).
97 [*]
98 [*] See also the chronology of cartel events in Chapter 4.2.
99 [*] explains that the term "undercutting" concerns the undercutting of agreed prices and that undercutting the prices would have led the cheating undertaking to increase its volumes and, thus, its market share, see p. 13914 [*] See also the chronology of cartel events in Chapter 4.2
100 [*]

attended by Enichem ([*], Bayer [*], DuPont/DDE ([*]), Tosoh ([*] and [*]), Denka ([*]) and [*].[101]

(99) As in the regional meetings, the parties would report their shipment figures. The analysis of shipment figures was preliminary to any other discussion and was intended to identify shipments by geographic region for each competitor. Each company provided the figures of its actual sales by tonnes or kilo tonnes of products divided by IISRP regions. The parties also shared capacity figures by region, global capacity figures and capacity utilization figures.[102]

(100) According to [*] one participant usually wrote down the figures for each producer on a black board and each participant took notes of such figures. DDE states that in one meeting the participants used a black board to write out each supplier's numbers while in other meetings the parties read their numbers out and the other suppliers took notes.[103] [*] [104] [*].

(101) Subsequently, prices were discussed and an agreement was reached about prices for the following period. [*] [105] Price increases were agreed upon in the form of a given percentage. The producers usually did not implement the price increases before, but only after the meetings. Sometimes market realities forced companies to reduce prices compared to the price increases or price levels agreed upon during the global meetings. This would then be a topic for discussion at the following meeting.[106] [*] submits that the participants often agreed to implement the agreed price increase on a staggered basis in the course of the weeks following the global meeting.[107]

(102) [*][108]

4.1.2.3. Tri- and bilateral meetings and contacts

(103) The competitors used to discuss follow-up to the global and regional meetings during bilateral contacts. Those contacts occurred frequently and took place as telephone contacts, meetings and visits of competitors to the headquarters of the other producers. As the chronology of cartel events confirms, the meetings served different purposes, such as trust building, preparation of the multilateral meetings and the monitoring of the implementation of agreements reached in the multilateral meetings such as agreed price increases or the possibility to complain about aggressive behaviour on key accounts of one producer. [*][109]

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101 [*]
102 [*]
103 [*]
104 [*]
105 [*]
106 [*]
107 See p. 13914.
108 [*]
109 [*] See also the chronology of cartel events in Chapter 4.2.

(104) As mentioned above in recital (95), after September 1998 bilateral and trilateral contacts and meetings replaced the multilateral meetings. Meetings were held very frequently and [*] of DDE took a leading role in such contacts. [*][110]

(105) [*][111]

(106) Some of the bilateral meetings were held on the premises of one of the parties taking part in the meeting.[112] [*][113]

4.1.2.4. The course of the meetings and contacts

(107) [*][114] [*][115] [116]

(108) [*][117]

(109) [*][118]

(110) [*] [119] [120]

(111) The competitors consequently used a fixed market share as target market share for the following years. [*] [121] [122] [123]

(112) [*] [124] [*][125]

(113) [*] [126]

(114) [*].[127] In the first column, the relevant world regions in which market shares were compiled and compared are listed. The first column begins with WE (Western Europe), followed by CEE/CIS (Central East Europe and the Confederation of Independent States), SCA (Socialist Asia), MEA (Middle East and Africa), APAC (Asia excluding Socialist Asia), NAKA (North America/Canada) and LATAM (Latin America). Sometimes numbers were used to identify the individual regions, such as the number three for WE, four for CEE/CIS, five for SCA, six for

110 [*] See also the chronology of cartel events in section 4.2.
111 [*]
112 [*]
113 [*]
114 [*]
115 See recital (173).
116 [*]
117 [*]
118 [*]
119 [*]
120 [*]
121 [*]
122 [*]
123 [*]
124 [*]
125 [*]
126 [*]
127 [*]

MEA, seven for APAC, eight for NAKA and nine for LATAM.[128] In the second column, the years 1992 to 1998 are given in the table provided by [*]. The table provided by [*] lists the years 1993 until 1998. The next column shows the world wide market requirement. In the following columns the sales and market shares of the competitors in the respective years and regions are listed in kilo tonnes and percentages.[129] [*].[130]

(115) After this monitoring of adherence to the target market shares, the competitors exchanged information on prices in specific countries. On various occasions they used flipcharts for these discussions. The competitors then agreed on a certain target price or target price increase and on the time when the next price increase was to be announced or implemented.[131] It appears that competitors agreed on the target prices/target price increases either as minimum prices (see for instance the discussions on "rock-bottom-prices" in recitals (228), (229), (238)) or on price increases in percentages. [*][132]

(116) [*] [133]. [134]

4.1.3. Concealing of competitor contacts

(117) As the competitors were aware of the anticompetitive nature of their contacts, they used different tools and methods to conceal their respective contacts.

(118) Tosoh submits that [*] used code-names and abbreviations for certain persons and companies. For example, [*] stands for [*], ″[*]″ was the code-name used by [*] for DDE/DuPont. ″[*]″ stands for Bayer, and ″[*]″ for Enichem. The name ″[*]*″,* frequently used by [*] in his agendas, indicates meetings between all five competitors. Further, [*] used the code-name ″[*]″ for [*] of Distugil/Rhône-Poulenc.[135]

(119) [*][136] [137] [138] DDE also submits that competitors did not physically exchange any documents or data at the meetings.[139]

(120) [*] [140] [141] [142]

128 [*]
129 [*]
130 [*]
131 [*]
132 [*]
133 [*], see also recital (201).
134 [*] confirmed by [*]
135 [*]
136 [*]
137 [*]
138 [*]
139 [*]
140 [*]
141 [*]
142 [*]

(121) [*][143]

(122) [*][144] This is consistent with the fact that meetings were mostly held in hotels or restaurants.

4.2. The chronology of cartel events and evidence relating to specific meetings

4.2.1. Period before 1993

(123) [*]

(124) [*][145]

(125) [*][146]

(126) [*][147]

(127) [*][148] [149]

(128) [*][150]

(129) [*][151] [152] [153] [154] [155]

(130) [*][156]

(131) [*][157]

(132) [*][158]

4.2.2. Period from 1993 until 1996

(133) [*][159]

(134) [*][160]

(135) [*][161] [162] [163] [164] [165]

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143 [*]
144 [*]
145 [*]
146 [*]
147 [*]
148 [*]
149 [*]
150 [*]
151 [*]
152 [*]
153 [*]
154 [*]
155 See also recital (122).
156 [*]
157 [*]
158 [*]
159 [*] see also recital (137). This is confirmed by [*][*].
160 [*]

(136) [*][166] [167]

- Meetings in 1993

(137) On **12 or 13 May 1993** representatives of DuPont, Bayer, Enichem, Denka and Tosoh met **in Florence**.[168] The meeting was organised by DuPont, which booked the room and chaired the meeting.[169] It was held in the same week as an IISRP meeting, which was scheduled for 11 May until 14 May in Florence. [*][170] [*][171]

(138) [*][172]

(139) [*][173]

(140) [*][174] [175] [176]

(141) In its reply to the SO [a company within the ENI group] contests its participation at the meeting and states that [*]'s presence at the meeting can be ruled out, as [*] became [*]. [*]s presence at the meeting could not be confirmed by [a company within the ENI group].

(142) In its reply to the SO Denka confirms its presence at the official IISRP meeting and that DuPont set up a separate meeting, which Denka attended. According to Denka it did not disclose any figures at the side meeting but the European producers had calculated the total Japanese exports to Europe beforehand by subtracting their own sales data from the publicly available IISRP figures. Denka contests that it disclosed any figures or exchanged any information during the uncontested side meeting with competitors. Denka states that the European producers wanted the Japanese companies to exit the European market and that the Japanese suppliers were not interested in limiting their sales to Europe or in splitting sales or shares between Denka and Tosoh. Denka submits that the European producers threatened the Japanese producers with possible anti-dumping proceedings during the meeting.

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161 [*]

162 After being [*] until May 1993 [*]

163 [*], see also recital (144).

164 [*]; see also recitals (111) ff above.

165 [*]

166 [*]

167 [*]

168 [*]

169 [*]'s travel expense record (TER) includes a *"conf. room fee"* for the 13 and 14 May 1993, [*]

170 [*] DDE's TER show that also [*] was present in Florence from 10 to 14 May 1993 [*].

171 [*]

172 [*]

173 [*]

174 [*]

175 [*]

176 [*]– this is confirmed by [*], who states that *"Florence"* was a key word used by [*]in 1997 when [*] became [*]to refer to the target marked share concept, as the decision to implement this system had been taken in a meeting in Florence, [*]

(143) On **13 July 1993** a multilateral meeting was held at the Hilton Airport Hotel in **Zürich**. Attendees were [*] (DuPont), [*], [*]or [*] (Enichem), [*] and [*] (Denka) and [*] and [*] (Tosoh). [*][177] [*] submits in its reply to the SO that at that time the concept of forming DDE had not yet been discussed between DuPont and Dow. [*] contest in their replies to the SO that they participated in this meeting.

(144) [*][178]

(145) [*] [179] [180] [181]

(146) [*][182] [183] [184] [185]

(147) [*] [186]

(148) A meeting took place between Bayer, Enichem, Denka and Tosoh on **18 November 1993** at the Airport Centre in **Düsseldorf**.[187] That meeting was a follow up of the meeting in Florence in May 1993.[188] At the meeting individual companies' sales figures by region were exchanged. Further, a price increase scheme for Europe was discussed. The aim of such price increase scheme was to eliminate the existing price differences in Europe. At that time, prices in Northern and Western Europe were much higher than those in Southern and Eastern Europe.[189] [*] In their replies to the SO [*] contest that they participated in the meeting.

- Continuation of meetings in 1994 and 1995

(149) Following the meetings in May and November 1993 there is evidence of regular multilateral meetings between competitors. There is also evidence of bilateral and trilateral meetings that took place in between the multilateral meetings. Those meetings seem to have served to introduce new company representatives to the other cartel members (see for example recital (150)), debrief on a multilateral meeting that had just taken place (see recital (169)) or ensure that the others respected the cartel arrangements (see recital (176)). [*][190] [191]

177 [*]
178 [*]
179 [*]
180 [*]
181 [*]
182 [*]
183 See travel record, [*]
184 [*]
185 [*]
186 [*]
187 [*]
188 In its reply to the SO Denka tries to argue that it was not present during this meeting, as it was a follow up meeting of the meeting held in Frankfurt the week before – however the SO did not qualify this meeting as a follow up meeting for the one held in Frankfurt but for the one held in Florence in May 1993, a meeting at which Denka participated.
189 [*]
190 [*]

(150) **Between 6 and 9 February 1994** [*] and [*] (both Enichem) met with the Japanese producers Tosoh and Denka in **Tokyo**. The meeting with Tosoh took place on 7 February, the meeting with [*] (Denka) on one of the other days during [*] stay in Tokyo.[192] The purpose of the meetings was to introduce [*] to the Japanese producers. The agenda of [*], who organized the meeting on 7 February but did not personally attend the meeting, [*][193] As explained above in recital (118), "[*]" was the code-name used by [*] for [*] of Enichem (former Rhône-Poulenc/Distugil). [*] .[194] Denka describes the meeting in its reply to the SO as a pure courtesy visit.

(151) The next meeting between the five competitors took place on **11 April 1994** at the airport in **Zurich**. This appears to have been a regional meeting. Participants were [*] (Enichem), [*] (DuPont), [*] (Bayer), [*] (Tosoh) and [*] (Denka).[195] [*][196] [197]According to [*] the meeting served as a preparation meeting for the upcoming global meeting in April 1994 in Singapore.[198]

(152) Further topics of the meeting were price increases and individual prices.[199] [*][200]

(153) A handwritten document submitted by DuPont shows detailed discussions on price increases and customers. The context of the document suggests that it was drafted during or after a multilateral meeting held in 1994.[201] It has the same handwriting as the document written on 2 December 1994, probably by [*] (see recital (163)). The document first shows shipment figures in tonnes and market shares in percentages of D (DuPont), B (Bayer), E (Enichem) and D/T (Denka and Tosoh) in WE (Western Europe), ECE/CIS (Central East Europe and the Confederation of Independent States) and MEA (Middle East and Africa). Due to the geographic areas covered, that document could refer to the meeting on 11 April 1994 or the meeting on 15-16 September 1994. The context of the document suggests that the figures given show the shipments of the competitors in the first quarter or the first half of 1994. The document further reads as follows:

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191 According to [*] meetings took place on 25 September 1995 with [*] from Bayer in Leverkusen, with [*] from Enichem on 10 November 1995 in Milan, with [*]and possibly [*]of Denka in Düsseldorf on 24 November 1995 and with [*] of DuPont on 5 December 1995 in Geneva. [*]*] stands for Bayer, [*] stands for Enichem, [*] stands for Denka and [*] stands for DuPont); [*]; 6169-6179, 13201-13203 [*] (TER show a business lunch or dinner with [*]and [*] on 24 November 1995 with the purpose *"*[*]*"*; according to [*]s TER [*] returned to Düsseldorf on 23 November).

192 [*]

193 [*]

194 [*]

195 [*] 871-872, 12047-12049 [*] – probably the meeting was organized by DuPont as [*]'s TER includes a *"conf. room fee"* for the 11 April 1994, [*]

196 [*], see also recital (140).

197 [*]

198 [*]

199 [*]

200 [*] and recital (9).

201 [*]

[*]

(154) The document shows that the competitors mentioned in the document – DuPont, Enichem and Bayer – had agreed on a price increase for October/November and on its implementation: DDE was supposed to lead in Italy, Enichem in France and Bayer in other countries for which increases had been agreed *(*[*]). The document also indicates that the competitors agreed on timing of contracts with customers so that current contracts could be kept until the end of the year and that no contracts should be concluded beyond the three first months of 1995. Moreover, the document shows that the competitors exchanged information on their sales volumes and prices with individual customers.

(155) Denka admits, in its reply to the SO, that it participated at the meeting as it feared retaliation through anti dumping complaints. Denka further admits that it provided IISRP data per region. It contests however that it participated in any price discussions.

(156) A further meeting was organized **between 20 and 22 April 1994** in **Singapore**. Participants were [*] (Enichem), [*](DuPont), [*](Bayer), [*] (Denka), [*] Tosoh.[202] [*][203] According to [*], the meeting was led by DuPont and lasted one afternoon and the following morning. [*] submits that the representative of [*] acted as secretary of the meeting and wrote on a board the information exchanged among the participants. Further, [*] explains that a worldwide price increase was agreed upon at the meeting. The price increase was agreed in percentage terms, by IISRP region and product grade. It was also agreed which companies would lead the price increase.[204] Denka admits, in its reply to the SO, that it participated at the meeting as it feared retaliation through anti dumping complaints. It contests, however, that any price discussions took place.

(157) [*][205] [206]

(158) [*][207] Participants were [*](Enichem), [*] (DuPont), [*](Bayer)[*](Denka) and [*] (Tosoh). [*] submits that the meeting was organized by DuPont. [*] The meeting in Tokyo was intended to deal with any renegotiation of target market shares for the individual IISRP regions. Hence, it is likely that the meeting in Zurich was a regional meeting. [*][208] [209] [210] In its reply to the SO [*] clarifies that, according

202 [*]

203 [*]

204 See p. 13910.

205 [*] 12054-12056, 13172-13174 [*] *]'s TER show a business lunch or dinner on 28 June 1994 with a [*]in a Japanese restaurant in the Königsgallerie in Düsseldorf with [*]and [*] (both Denka); as purpose of this meeting the TER mentions *"*[*]*",* see also pp. 14571-14582 ([*]).

206 [*] and the travel expenses of [*]

207 [*], [*], [*]. agenda reads on 15 and 16 September 1994 as follows: *"*[*]*"* – W.W probably stands for a worldwide meeting in accordance to the calendar entry of 20 April 1994, [*]

208 [*]

to [*], two meetings took place on 15 and 16 September 1994. The first, the meeting on 15 September 1994, was a world-wide meeting, whereas the meeting on 16 September 1994 was a European regional meeting.[211]

(159) DuPont submitted a handwritten document showing discussions with competitors on price increases and on various CR customers. The context of the document suggests that it was drafted during or after a multilateral meeting held in the later part of 1994, possibly the regional meeting of September 1994 in Zurich.[212] It has the same handwriting as the document written on 2 December 1994, probably by [*] (see recital (163)). The document reads as follows:

[*]

(160) The document shows that the competitors exchanged information on their sales and prices with individual customers in various European countries. It also shows that the competitors exchanged information on the implementation of price increases for some customers or increases in various countries in general. The price increase of Bayer in Spain mentioned in the document could be the one announced by Bayer on 1 November 1994.[213]

(161) Denka admits, in its reply to the SO, that it participated at the meeting as it feared retaliation through anti dumping complaints. It contests, however, that any discussions on market shares took place.

(162) Another document submitted by DuPont shows a table dated **1 and 9 October 1994** with the shipment figures in kilo tonnes and actual market shares and target market shares in percentages of all competitors. The table only refers to numbers, not to competitors. The market shares presented for the various regions in the world suggest that number 1 stands for DuPont, 2 stands for Bayer, 3 stands for Enichem and 4 and 5 stand for the Japanese producers Denka and Tosoh. The target market shares for each competitor are printed on the document for the regions WEU (Western Europe), MEA (Middle East and Africa), AS/OZ (Asia excluding Socialist Asia), NA (North America/Canada) and LA (Latin America). The actual market shares and the shipment figures are inserted in handwriting for DuPont, Bayer, Enichem and Tosoh and Denka together.[214] The document shows that the competitors met and exchanged information on their individual market shares and shipment figures and that they compared those

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209 [*]

210 [*]

211 This is illustrated by [*]'s diary which provides ″[*].″ (worldwide) foe 15 September and ″[*]″ for 16 September, [*]

212 [*] The topics discussed, the prices, price increases and customers are nearly identical to the document drafted on 2 December 1994, [*] One of the few differences between these two documents is the statement that Eni would increase at [*] by Dec 1, which indicates that this document was drafted before December.

213 See footnote 208.

214 [*]

figures to the official aggregated IISRP numbers. Denka contests, in its reply to the SO, that the shipment figures stem from Denka.

(163) A "regional meeting" took place on **2 December 1994** at the Airport Center **Zurich**. The main purpose of the meeting was the preparation of the global meeting between 8 and 10 December.[215] Attendees were [*] and [*] (Enichem), [*] (DuPont), [*] (Bayer), [*] (Denka) and [*] (Tosoh). Enichem submits that the purpose of the meeting was to discuss the implementation of the price increase agreement reached in Singapore, the preparation of the next global meeting in Tokyo in December and the exchange of sales data on a country-by-country basis.[216] [217] [218]

(164) Denka admits, in its reply to the SO, that it participated at the meeting as it feared retaliation by the European producers. It states, however, that it refused to provide any country-by-country data to its competitors and that it provided only incorrect regional figures. Denka claims that disclosing actual sales data on a country-by-country basis would have revealed Denka's aggressive sales policy and would have caused retaliation.

(165) A handwritten document submitted by DuPont and dated 2 December 1994 appears to be DuPont's representative's notes relating to the meeting on 2 December 1994 in Zurich. The note refers to different regions, such as Italy, Spain, the United Kingdom, Belgium, Germany and Portugal. It reads as follows:

[*][219]

(166) That document is another example of the exchange of information between the competitors on their sales, prices and price increases with individual customers in various European countries. It also shows that the competitors exchanged information on the implementation of price increases for some customers or increases in various countries in general.

(167) [a company within the ENI group] contests, in its reply to the SO, that it implemented any agreed price increases. It claims that the quoted note only shows dates in the future and that all the prices for [a company within the ENI group] listed in the note are higher then its real prices at the time.

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215 [*] 12071-12076 [*] agenda reads „[*]– as explained in recital (118) [*] used "[*]" as a code-name for meetings between all five competitors).

216 [*]

217 [*]

218 [*]

219 [*] A further document submitted by [*] headed *"Neoprene Germany"* seems to relate to the same meeting or another meeting in the same period as it mentions the same price increases of Enichem for January 1995. It is written in another handwriting and gives detailed information on customers in Germany, in particular on [*] – regarding [*] the document reads: "[*].

(168) The global meeting referred to in recital (163) was held **between 8 and 10 December 1994** in **Tokyo.** Participants were [*] and possibly [*] (Enichem), [*] and [*] (DuPont), [*] (Bayer), [*] (Denka), Tosoh (possibly [*]) [*].[220] [*] [221] [222] [*].[223] [*] (see recital (153)).[224]

(169) On **10 or 11 January 1995** [*] (DuPont) met with [*] (Bayer) in **Zürich**.[225] [*]

(170) The following multilateral meeting took place on **8 February 1995** at the airport in **Düsseldorf**, probably in the airport centre. The meeting served as a preparatory meeting for the global meeting in Singapore on 18 February 1995. It started at about 10.00 a.m. and was attended by Bayer, Enichem, Denka, Tosoh and DuPont.[226] [*] [227] [228] [229]

(171) [*] (Bayer), [*] (DuPont), [*] (Enichem), Denka and Tosoh [*] [230]

(172) [*] contest, in their reply to the SO, that they participated in the meeting. [a company within the ENI group] claims that it did not have any interest in discussing the Asian market.

(173) [*] took place on **3 May 1995** in the Hilton Airport Hotel in **Amsterdam**.[231] As at the meeting in Zurich in December 1994, the competitors discussed *"*[*]*"* as well as its implementation.[232] [*]

(174) A global meeting took place in **London** on **8 or 9 May 1995**.[233] Participants were [*] (Bayer),[*] (Enichem), [*](Denka), [*] (Tosoh) and [*](DuPont). During the meeting the competitors discussed shipment figures and a price increase in Europe.[234] In the course of the

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220 [*] mentions between 9 and 10 December 1994 "[*]" – however [*] states that [*] did not attend this meeting.

221 [*]

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223 [*]

224 [*]

225 [*]

226 [*]14583-14599 ([*] TER mentions for this day an IISRP meeting) as well as [*] calendar mentions a "[*]" meeting for this day in Düsseldorf at 9:30 – JOHN meetings was, as explained above in recital (118), a code-name for meetings between all the competitors.

227 [*]

228 [*]

229 [*](An internal note from [*] shows that [*] planned a price increase for CR in the second quarter of 1995 to "[*]". A minute of an internal [*] meeting of 1 June 1995 shows, that prices in Italy, Spain and Portugal should be brought to "European level" and that differences in prices in different regions should be equalized).

230 [*]. [*]TER shows that [*] was in Singapore at least from 18 February until 21 February, [*] did not specify why the meeting took place on 18 February and not on 19 or 20 February, [*].

231 [*][*] mentions for this date a JOHN meeting at 9:30 in Amsterdam, [*] See also pp. 6148-6152 [*] 14600-14608 ([*]) and [*].

232 [*]

233 [*] agenda mentions: [*], which indicates that [*]met with Denka before the W.W = worldwide meeting took place). See also pp. 6154-6161, 13184-13189 [*] , 14609-14625 (TER [*]).

234 [*] e-mail shows that the price increase which had been agreed upon in May 1995 and which was to be implemented on 1 September or 1 November 1995 was suspended in several countries. Instead [*] decided to implement minimum "floor prices" in order to avoid a further drifting apart of CR prices throughout the different European countries).

meeting the non-Japanese companies raised complaints about high utilisation rates by Japanese companies. Denka, in particular, was criticised for its high utilisation rate according to IISRP figures. Denka therefore revealed its actual capacity which was higher than indicated in the IISRP's statistics. Hence, Denka was criticised by the non-Japanese for having too much capacity. Further, it was suggested by DuPont, Bayer and Enichem that all producers should aim at having a similar capacity utilisation rate.[*][235]

(175) Denka admits, in its reply to the SO, that it participated at the meeting and that the European producers complained about Denka's utilization rates. It claims, however, that the meeting did not have any anticompetitive scope, that no information exchange took place and that no price increases were discussed.

(176) [*] [236] [237]

(177) On **29 August 1995** the five competitors met in the Hotel Forte Crest in **Milan**.[238] The meeting was attended by [*] (Bayer), probably [*] (DuPont), [*] and [*](Enichem), [*] and [*] (Denka) and [*] (Tosoh). [*]

(178) Denka admits, in its reply to the SO, that it participated at the meeting as it feared that the European producers would file an anti-dumping complaint. It claims, however, that the meeting did not have any anticompetitive scope.

4.2.3. Period from 1996 until 1998

(179) [*] submits that the exchange of information became more formalised during the period between 1996 and 1998. According to [*] charts were prepared which could be completed by the respective producer.[239] [*] [240] [241]

(180) During the second half of 1996 and at the beginning of 1997 there was also some tension in the cartel, but the evidence shows that the cartel continued uninterrupted over that period. The evidence on the cartel contacts indicates that the cartel members appear to have resorted to bilateral meetings to work out the problems. [*] (see recital (193)). [*][242] However, the evidence on the meetings shows that DDE/DuPont was already present well before that, in the meeting of 5 or 6 November 1996 in Singapore (see recital (194)).

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235 [*] (Bayer) does not recall the meeting but [*] states that [*] probably met on 9 May with the competitors, [*]

236 [*]

237 [*]

238 [*] clarifies in its submission that no IISRP meeting ever took place in San Donato), [*] agenda reads: *"*[*]*").* See also pp. 6163-6167, 12111-12113 [*]

239 See for example the table provided by [*]

240 [*]

241 [*]

242 [*] see also recital (189).

(181) During the same period between May 1996 and July 1997 [*] and, just before, [*]. In such a situation it is understandable that competitors needed to work to ensure continuity of the agreements with new contact persons and to build trust between them. [*] They had a series of bilateral meetings with the other cartel members with the purpose of introducing [*]and building trust between the competitors[243] [244]

(182) [*] [245]

(183) [*] In late September 1996, Enichem announced that its CR (Butaclor) activities were no longer for sale.[246]

(184) [*] [247]

(185) A further aim of the cartel during the period from 1996 to 1998 was to increase prices. Consequently, at the meetings between all the competitors, several price rises were agreed upon.[248]

- Five party meetings in Milan and Tokyo in early 1996 and bi-/trilateral meetings pursuing the contacts

(186) The next meeting between the five competitors took place in **Milan** on **23 January 1996**.[249] Participants were [*] (Bayer), DuPont, [*] (Enichem), [*] and [*] (Denka) and [*] (Tosoh). As in the meeting on 29 August 1995 the competitors exchanged shipment figures by regions in Europe and drew up *"*[*]*"*by region, discussing announcement dates and effective dates of price increases. According to [*] the meeting was most likely a regional meeting, as a global meeting had just been held in August 1995. [*] submits that the meeting was organized by Enichem and that it served as a preparatory meeting for the next global meeting in February 1996, at least as regards the IISRP regions in Europe.[250] This is supported by a fax submitted by DuPont. The fax which was sent on 2 February 1996 (hence between the regional meeting on 23 January 1996 and the global meeting in February 1996) shows a table headed ″[*]″ with the shipment figures in kilo tonnes and market shares in percentages of all the competitors and in all seven IISRP regions. The table only refers to numbers, not to competitors. The market shares presented for the various regions in the world

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246 [*]

247 [*], see also recitals (116) and (200).

248 [*]

249 [*] agenda for 22 – 25 January reads: „[*]– The entry Sandonoto probably refers to Enichem's headquarters in San Donato). See also pp. 6181-6187, 12121-12126, 13237-13238 [*] [*] was in Milan between 23 and 24 January 1996. [*] does not recall a meeting with competitors but [*] does not want to rule out the possibility that [*] met with Enichem on 23 January at the offices of Enichem, [*] including [*]'s TER and a receipt of the Hotel Forte Crest of 23 January 1996)

250 [*]- In [*] expense claims [*] mentions the meeting in San Donato on 23 January 1996 as an *"*[*]*"*. However [*] clarifies in its submission that no IISRP meeting ever took place in San Donato. Therefore [*] submits that the meeting must have been a regional meeting between the competitors, where IISRP shipment figures were exchanged and discussed.

suggest that number 1 stands for DuPont, 2 stands for Bayer, 3 stands for Enichem and 4 and 5 stand for the Japanese producers Denka and Tosoh.[251] The table reflects the market shares and target market shares agreed upon during the meeting of 9 – 10 December 1994 in Tokyo (see recital (168)). In contrast to the document drafted on 1 October 1994 the fax shows separate shipment figures for Denka and Tosoh. It is consequently highly probable that the purpose of sending the fax was preparation for the discussions to be held in Tokyo between 8 and 10 February 1996.

(187) Denka admits, in its reply to the SO, that it participated at the meeting. It claims, however, that the meeting did not have an anticompetitive scope and that no confidential information was exchanged.

(188) **Between 8 and 10 February 1996** [*] (Bayer), [*] and [*] (DuPont), [*] (Enichem), [*] (Denka), Tosoh (Tosoh's representatives from the head offices) and [*]met for a global meeting in **Tokyo**.[252] [*][253] [254] [255]

(189) A trilateral meeting between Tosoh, DDE ([*]) and Denka ([*]) was held in **Bath** between **5 and 8 May 1996**.[256] Tosoh's representatives at the meeting were [*], the successor of [*] at Tosoh in Europe, and [*]. During the meeting DDE claimed that, according to the Japanese export statistics, Denka had increased its market share globally in 1995. [*] of DDE was very angry about that fact, left the meeting and declared that DDE would fight back in order to regain market shares.[257]

(190) In its reply to the SO, Denka admits that it participated in the ad hoc meeting but claims that the only reason for the meeting was DDE's complaint about Denka's market behaviour.

(191) On **23 May 1996** a meeting took place in the Lindner-Hotel in **Düsseldorf**. Participants were [*] (Enichem) and [*] (Bayer).[258] [*] [259]

(192) On **24 July 1996** [*] and [*] (DDE) and [*] (Bayer) met **in Düsseldorf or in Leverkusen**, probably in [*]'s (Bayer) conference room. [260] The

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251 [*]

252 [*]– A restaurant receipt of [*] mentions [*], [*] and [*] from Bayer Japan – according to [*], these are indeed names of Bayer employees, but all of them are fake names in this context). Denka admits in its reply to the SO that it participated at this meeting. It claims however that the meeting did not have an anticompetitive scope, that no confidential information was exchanged and that no price increase was agreed upon.

253 This is confirmed by [*].

254 [*]

255 [*]

256 [*] TER mentions for the 8 May 1996 "[*]″

257 [*]

258 [*] The expense claim of [*] mentions a meeting with [*]and the subject *"*[*]*"* - Bayer explains that the person and the subject mentioned on the expense claim are falsely indicated by [*], in order to conceal the true identity of the person with whom discussions were held and the subject matter of the discussions. In fact [*] (Bayer) met [*] of Polimeri, see also [*]]'s TER mentions for this day a visit of customers in Düsseldorf).

259 [*]

260 [*]

meeting focused on the possible joint purchase of the CR business of Enichem (see recital (183)). CR was only addressed very briefly at the meeting. Bayer was trying to know more about the reality of any intention on the part of DDE to participate in the goodwill purchase where Bayer would play the leading role vis-à-vis Enichem and [*] viewed DDE's participation in the purchase as an indirect participation to be settled through purchasing contracts with Bayer. After the meeting, [*] reported the content of the meeting to [*] (DDE).

(193) A bilateral meeting was held between [*] (Bayer) and [*] and [*] (Tosoh) on **23 October 1996** in **Düsseldorf**.[261] [*] There was a suspicion that the price increases had not been implemented by the Japanese producers. [*][262]

- Five party meeting in Singapore, November 1996 and bilateral meetings pursuing the contacts in late 1996 and early 1997

(194) On **5 or 6 November 1996** a global meeting was held in **Singapore**.[263] Participants were [*] (Enichem), [*],[*]and possibly [*](DDE), [*] (Bayer), [*] (Denka) and [*] (Tosoh). [*] thinks that this was rather a regional Asian meeting and that it had nothing to do with Europe. [*](DDE) met the evening before the meeting with Enichem.[264] The meeting with Enichem took place very soon after Enichem had decided no longer to try to find a purchaser for its CR business (see recital (183)). During the meeting Enichem's representative explained that Enichem had determined that it made more economic sense to continue operating the plant and [*] communicated to DDE that it was, *"*[*]*"*[265] According to DDE, at the November 1996 meeting with all participants, discussion focused on "*more general topics"*, and basically everyone commiserated as to how bad a shape the industry was in. [*][266]

(195) On **7 February 1997** [*] and [*](both DDE) met with [*], [*] and [*] (all Enichem) in **Milan**.[267] [*] the meeting was one in a series of bilateral meetings between [*] (DDE) and Bayer and Enichem in the period 1997-1998. While DDE could not clarify the content of the meetings it submits that [*] had a mainly [*] function for the European region and was normally not directly involved in commercial issues. However, the evidence submitted by DDE shows that, in 1996, before this series of meetings, [*] was already involved in another series of meetings between the same parties which concerned possible joint

261 [*] agenda reads: 11:30 Betty Germany 12:00 in DUS – as mentioned in recital (118) "Betty" is a code-name and stands for Bayer). See also pp. [*]

262 [*]

263 [*]

264 DDE states that Enichem was represented by [*] during this meeting. [*] submits however that it was [*] who was present at the pre-meeting on 5 November, [*].

265 [*]

266 [*]

267 [*] confirmed by [*]

purchase of Enichem's CR business by Bayer and DDE and related purchasing contracts between them.[268]

(196) [*] **12 February 1997** in **Milan**.[269] [*][270]

- Multilateral meetings continue in 1997 with meetings in Vancouver and London

(197) Following the November 1996 meeting in Singapore, multilateral meetings between the competitors resumed fully in 1997 and 1998. According to DDE the decision to resume multilateral contacts was taken at a meeting on **5 May 1997** in **Vancouver**, where there was an IISRP meeting.[271] [*] during the IISRP meeting [*] and [*](both DDE) met their counterparts from Bayer ([*]) and Enichem ([*]) and had a brief impromptu meeting in the lobby of the hotel where the IISRP conference was being held. [*][272] However, the travel expenses receipts of [*](Bayer) demonstrate that [*] was in Vancouver from 4 to 8 May 1997. [*][273]

(198) According to DDE at that meeting on the occasion of the IISRP meeting the competitors decided to set up producers' meetings. Taking into account the evidence on the cartel meetings presented above in this section, it is more likely that DDE is referring to the continuation of the multilateral meetings after the tension during the second half of 1996. According to DDE the purpose was to discuss CR production volumes because the competitors had the feeling at the time that the aggregate production data that was being reported by the IISRP was not accurate. In particular the reporting of the off-grid volumes, which means second quality, in Europe and the USA was incorrect. [*][274]

(199) The first of a series of multilateral meetings, which were resumed after a short interval following the meeting in Vancouver in May 1997, took place on **18 July 1997** in the Sheraton Airport Hotel in **London**.[275] The meeting was attended by [*] (Bayer), [*](DDE), [*]and [*](Enichem), [*]and [*] (Denka) and [*] and [*] (Tosoh) and lasted between three and four hours. [*][276] The competitors exchanged data on capacity in and shipments to the various IISRP regions using a flipchart to assess every producer's production capacity and their share of each regional market. At that time, a distinction was drawn between the IISRP regions and between different product types and grades. According to [*] Enichem had prepared charts like the one presented in this recital for the competitors, in which the respective figures of Enichem were already filled in. [*]

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268 [*]

269 [*]

270 [*]

271 [*] see also TER [*], pp. 14639-14649 ([*]).

272 [*]

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274 [*]

275 [*] 845-854, 6230-6234, 12200-12209 [*] TER mention as purpose for a trip to London ″[*]″.

276 [*]'s TER includes a ″[*]″ for the 17 July 1997 and mentions ″[*]″ in the Sheraton Skyline on 18 July 1997, [*] this is confirmed by [*].

(200) During the same London meeting the competitors discussed several other topics such as the development of a *"regionalisation strategy",* the freezing of market shares and an agreement on a *"moratorium"* under which there would be no aggressive price competition targeted at the customers of the other competitors.[277]

(201) To comply with the *"*[*]*",* it was agreed that competitors should refrain from competitive activities in those regions in which they did not have any production capacity. Japanese producers in particular should be satisfied with what they had in Asia and stop taking business in Europe. This strategy included setting target market shares for the seven IISRP regions. The *"moratorium"* was thought to be a more flexible system than the target market share plan, as it allowed the producers to compete with one another on sales volumes where new applications had been developed or where overall demand had increased. It was, however, decided that there would no longer be any price competition, as this behaviour had previously set a downward price spiral in motion. In other words the moratorium was thought to ensure that none of the competitors would be able to use favourable pricing to create volume. [*][278]

(202) Furthermore the competitors decided to align the differences in pricing level in individual regions as they experienced a wide delta between Northern and Southern European prices of approximately 15 %. Consequently they held detailed discussions on prices and agreed on common price increases. The competitors discussed the rough currency equivalent prices between the North and South and how much the Southern prices would need to escalate to be on a par with the Northern prices. [*].[279] [*] the producers were concerned that if all country prices were to increase around the same time, the customers might get suspicious. Thus, they discussed having one supplier announce the increase first and having the others wait and see how that went before taking action in other countries. According to DDE, Enichem was to lead the price increases in Italy and Greece, Bayer would lead in Spain, France and Portugal and DDE would lead in the United Kingdom.[280] Further, Enichem volunteered to be the first supplier to lead an increase. The price increase discussed and agreed upon was about 5 - 7% and the participants agreed to implement the price increase through staggered price announcements to avoid suspicion.[281]

(203) [*][282] [*].[283] [*].[284]

277 Regarding the regionalization strategy and the moratorium, see also recitals (87) and (116).
278 [*], confirmed by [*].
279 [*]
280 [*]
281 [*]
282 [*]
283 [*]
284 [*]

(204) In preparation for the meeting in London on 18 July 1997, [*] Bayer had asked [*], [*], [*], [*] and [*] (all Bayer) for information in preparation for a worldwide price increase in [a chloroprene rubber product].[285] [*] thinks that [*] agreed during a phone call with [*] prior to the meeting, that they would make internal enquiries into specific market data, in order to be able to discuss those topics in London.

(205) According to [*] another main topic of the first London meeting in July 1997 was the plant closures by DDE and Bayer. [*].[286] [*][*] of DDE and [*] of Bayer left the meeting together in the same car. [*] [287]

(206) [*][288] [*]

(207) According to DDE the Japanese producers complained during the meeting about [*] .[289] The complaint was that [*] was selling outside of Japan into Asia and perhaps Eastern Europe, at highly discounted prices.

(208) Denka admits, in its reply to the SO, that it participated at the meeting as it feared retaliation through anti dumping complaints. It claims, however, that no anticompetitive issues were discussed during the meeting and that no confidential information was exchanged between the competitors.

(209) On 2 October 1997 Bayer publicly announced the closure of its CR plant in Houston.[290]

- *Five party meeting in Singapore, 7 November 1997*

(210) On **7 November 1997** the competitors met at 13.00 p.m. in the Oriental Hotel in **Singapore**.[291] Participants were [*] (Bayer), [*] and possibly [*] (DDE), [*] (Denka) and [*] (Tosoh).[292] [*] states that [*] chaired the meeting. [*] (Enichem) cancelled [*] participation at the last minute for cost reasons. According to [*]'s handwritten notes prepared at the meeting, the discussion was focussed on increasing prices in Asia. [*] confirms that the competitors discussed the Asia Pacific price floor, which turned out not be sustainable. [*] Therefore, the meeting in Singapore had, above all, been concerned with ensuring that the competitors agreed to continue on the same line and abide by the

285 [*]

286 [*] confirms that Bayer announced its plant closure during the meeting, [*] however [*] states that it announced its own plant closure of the plant in Maydown only in the third meeting in London in 1998.

287 See also recital (91) and footnote 88.

288 [*]

289 [*]

290 [*] see also recital (205), (241) and footnote 287.

291 [*] 6236-6240 [*] TER mention as purpose for a Singapore trip from 5 November until 8 November *"In regard to AB, DSPL meeting"*).

292 [*] notes mention the presence of B (Bayer), Dp (DuPont), DK (Denka) and TS [*] TER do not mention any trip to Singapore on 7 November 1997, however they mention a trip to Paris from 25 until 28 November 1997; [*] states that the price for the airline ticket to Paris simply could not explain a trip to Paris and [*] remembered the meeting in Singapore in November 1997. [*] cannot explain why the TER mentions Paris in this case and not Singapore [*].

moratorium. [*] The competitors agreed that the effort should continue and that they would check back with one another in spring 1998. Further discussions were held on the price increase scheduled for the last quarter of 1997 and market shares were shown on a flipchart.[293] At the meeting and in contrast to the meeting held in London in July 1997, Tosoh and Denka presented individual data for their shipment figures. Concerning Europe, [*] the parties did not talk about the Eastern European price floor. According to [*], this stemmed from the fact that the parties did not think a floor (a minimum price) really had a chance to succeed and that the region was fairly small in the big picture. According to [*]'s notes there was a proposal for the next meeting of the five producers to take place on 19 or 26 January 1998.[294]

(211) In its reply to the SO Denka admits that it participated in the meeting. It contests, however, that anticompetitive discussions took place during the meeting.

(212) [*] [295] [*]

(213) On **2 December 1997** a global meeting between Bayer ([*]), DDE, Denka ([*]) and Enichem ([*] and [*]) was held in **Düsseldorf**.[296] [*] informed Tosoh about the outcome of the meeting through a subsequent telephone call (see recital (214)).

(214) On **9 December 1997** [*] (Denka) called [*] (Tosoh) to inform [*] of the outcome of the meeting held on 2 December in Düsseldorf (see recital (213)).[297] According to [*]'s notes, the competitors had spoken about new prices for a Korean customer which were valid as of 1 January1998. [*]'s notes also show that the next global meeting was to be held on 2 or 3 February and that the meeting scheduled for January 1998 was cancelled (see recital (210)). The meeting was finally held on 4 February 1998 (see recital (215)). Further discussions focused on EPDM. During the 1990s, changeover from CR to EPDM was mostly completed. CR grades for certain applications did not change over to EPDM, as they are not substitutable. Therefore an increase in the price of EPDM had little effect on demand for CR.[298]

- Five party meeting in London, 4 February 1998

(215) The following meeting with all five competitors present was held on **4 February 1998** in the Sheraton Airport Hotel in **London**.[299] Participants were [*] (Bayer), [*](DDE), [*] and [*] (Enichem), and [*]

293 [*]
294 [*]
295 [*]
296 [*]
297 [*]
298 See recital (152).
299 [*] pp. 16043-16044, 861-864, 6240-6246, 12213-12222 [*] TER mention as purpose for a trip to London ″[*]

(Denka) and [*] and [*] (Tosoh). [*] of Bayer had organised the meeting, which lasted less than two hours.[300]

(216) [*]'s (Tosoh) notes show that the competitors disclosed all shipment figures by regions globally for the year 1997 at the meeting in order to calculate market shares. DDE informed the others that a Chinese national plant located in Northern China had been shut down. Further, estimated demand from the individual members of the Confederation of Independent States was discussed. The competitors estimated the 1998 demand forecast with respect to different regions.[301]

(217) [*][302]

(218) [*]'s (Tosoh) notes show, amongst other things, a table indicating the capacities of the competitors:[303] [*]

(219) Tosoh explains, in the reply to the SO, that the figures in parentheses in the middle column of the table in recital (219) refer to the nominal capacity as published by IISRP whereas the numbers without parentheses refer to sales/shipment figures in 1997.

(220) Regarding Europe the parties discussed prices in Western Europe and in the United Kingdom. Bayer provided details regarding its prices, including those to specific customers, and proposed that all participants should raise the "*bottom price level*" in Europe in the third quarter of 1998.[304] That was, according to Tosoh, one of the main aims of the CR suppliers in 1998.[305]

(221) [*] [306] A joint resolution was adopted to ″[*]″ in the future.

(222) In its reply to the SO Denka admits that it attended the meeting. It contests, however, that the competitors discussed anticompetitive issues or that any confidential information was exchanged. Denka claims, furthermore, that it provided wrong capacity figures in order to hide its real utilization rate.

(223) After the meeting of 4 February, there were bilateral and/or trilateral meetings where the issues agreed in that meeting were discussed and which appear to have served as preparation for the next 5-party meeting.

(224) On **26 February 1998** [*] (DDE) met with [*] and possibly [*] (Tosoh) in **Tokyo**.[307] [*]'s notes show that [*] provided information on the envisaged closure of DDE's plant in Ireland. The reason for the plant

300 [*]
301 [*]
302 [*] this is confirmed by [*].
303 [*]
304 [*] this is confirmed by [*].
305 [*]
306 [*]
307 [*]

closure in Europe was its higher production cost compared to the plant in the US. [*] stated that the closure would take place in the period between July and September 1998. In addition, [*] explained that DDE would partially withdraw from Eastern Europe, as it was a low price level area. [*] mentioned that there should be a price increase in Europe in the third quarter of 1998 and that details should be discussed in June 1998 at a meeting in London. [*] again proposed to stick to the principle of *"regional supply",* which basically meant that each supplier should concentrate on its respective *"home market".* According to DDE the parties also discussed co-producer arrangements regarding certain CR types, such as "G types" and "W types".[308]

(225) On **20 April 1998** [*] (Bayer) met [*] and possibly [*] (DDE) in **Fribourg.**[309] [*]

(226) On **22 April 1998** [*] (Bayer) met with [*] and [*] (Denka), probably in the restaurant Shilla in **Düsseldorf.**[310] The expense sheet found during the inspections at Denka mentions as the reason for the meeting *"To speak about CR-5-office meeting."*

(227) On **5 May 1998** a trilateral meeting took place in **Singapore**.[311] Participants were [*] (DDE) and [*] (DDE Singapore), [*] (Tosoh) and [*] (Denka). The following day, on 6 May 1998, [*](DDE) send a fax to [*] (DDE), attaching a table with the market shares and shipment figures of all the competitors, that is to say, Denka, Tosoh, Tosoh and Denka combined, DDE, Bayer and Enichem, for all the IISRP regions from 1993 until 1997. [*][312]

- Five party meeting in June 1998 and introduction of a "rock-bottom-price-system"

(228) On **19 May 1998** [*] and [*] (Tosoh) met with [*] and of Enichem in **Milan**.[313] [*] 's notes show that the competitors decided to propose a *"rock-bottom-price-system"* in Europe in a meeting with the other competitors to be held on 4 June or 10 June 1998. [*] notes show that Enichem and Tosoh spoke about different grades of CR and individual customers, such as [*] and [*] In particular, they exchanged information on their prices and volumes for specific customers in Spain and Italy. With respect to small Spanish customers, located in Alicante, Tosoh said it kept both price and volume the same, whilst Enichem said it increased its prices but lost sales volume in the first quarter of 1998. With respect to the Italian customer [*], Enichem declared that its price of LIT 3800 was its *"*[*]*".* [*]'s notes show that Tosoh and Bayer's prices were discussed: Tosoh's price was LIT 3500 and Bayer's price

308 DDE explains that DDE produces different grades of CR suitable for different end-users' applications which are called "G types", "W types", "T types" and "A types" and that all these products are solid forms of CR. DDE further explains that the liquid form of CR used for some Neoprene applications are known as liquid dispersions, see p. 1042.

309 [*]

310 [*] 873-874, 6248-6251 [*]

311 [*]

312 [*]

313 [*]

LIT 3650. Tosoh and Enichem further noted that Bayer and DDE supplied [*] on the basis of long term contracts and offered volume discounts. Finally, Enichem informed Tosoh of its capacity.[314]

(229) On **20 May 1998** [*] and [*] (Tosoh) held two separate meetings, one with [*] and possibly [*] (Bayer), and a second with Denka in the Hotel Nikko in **Düsseldorf**.[315] [*]'s notes show that Bayer explained in detail the repercussions on the European business of its envisaged closure of its plant in the US. Bayer explained that they lost 40 - 45 % of sales in Italy in the period between January and May 1998. Furthermore the competitors spoke about the *"rock-bottom-price-system"* in Europe (see recital (228)). Finally, individual customers like [*] were discussed.

(230) According to [*] a regional meeting with all parties present took place on **10 June 1998** in **Milan**.[316] Attendees were [*] (Tosoh), [*] (Bayer) Enichem, Denka and DDE. The date of the meeting had already been discussed with Enichem during the meeting on 19 May (see recital (228)). [*]'s handwritten notes refer to a *"John"*, that is to say, a multilateral meeting (see recital (118)).

(231) According to [*] was probably informed about the outcome of the meeting by [*] during a telephone conversation.[317] The handwritten notes of [*] concerning the meeting show that the following issues were discussed: the Bayer-DuPont plant closures, currency unification, rock bottom prices, the announcement and effective date of a price increase, China plant, Enichem's regular plant maintenance to improve quality, the quality of Bayer products and finally, the timing of the next worldwide meeting in London or Amsterdam on 14 September 1998. [*][318]

- Bilateral and trilateral meetings in summer 1998 and five party meeting in London, 14 September 1998

(232) After the five party meeting in June 1998, bilateral and trilateral meetings continued as a follow-up to the previous multilateral meetings. The competitors tried to reach an agreement on the details of further price increases and monitored the functioning of the moratorium.

(233) A meeting between DDE, Denka and Tosoh took place in summer 1998 in **Tokyo**, probably **between 18 and 23 July 1998**.[319] Participants were [*], [*] and [*] (Tosoh), [*] and [*] (DDE) and [*] and [*] (Denka). At

314 [*]

315 [*] and pp. 12238-12244 [*]

316 [*] do not recall that this was a multilateral meeting).

317 The note reads: *"*[*]*",* as mentioned above in recital (118), John was a code-name for meetings between all five competitors, [*]

318 See [*], an internal note written by [*] on 23 June 1998 mentions that ″[*]″ The note mentions limit or bottom prices for Italy, Spain, Portugal, Northern Africa, Turkey, Greece and Poland, expressed in DEM/KG - such as 5.20 DEM for a Sulphur Type CR in Greece. Further [*] explains in the note that the new prices should not flexible, which is in line with the ″[*]″ explained by [*]

319 [*]

the meeting, DDE told Tosoh and Denka that it was determined to take a leadership role in trying to convince the other companies of the benefits of DDE's concept of *"regional supply"*. DDE requested that the Japanese companies sell solely to South East Asia whilst DDE would concentrate mainly on the USA market. DDE further offered that, if the Japanese companies were to concentrate on the Asian market, DDE might arrange for Bayer and Enichem to leave the Asian market. Further DDE proposed a co-ordinated price increase in Europe. According to DDE the parties also discussed co-producer arrangements during the meeting.

(234) On **30 July 1998** [*] (Bayer) met with [*] and probably [*] (DDE) in **Fribourg**.[320] [*] [321] [*][322]

(235) A five party meeting was held on **14 September 1998** in the Novotel Hotel in **London**.[323] The meeting was attended by [*],[*] and [*] (Tosoh), [*] (Bayer), [*] (DDE), [*] and [*] (Enichem) and [*]and [*] (Denka). Enichem handed out an agenda paper for the meeting. [*]On the basis of an analysis of evidence on the meeting it appears, however, that the major part of the issues mentioned in the agenda was discussed.

(236) [*] Those charts show shipment figures for the different IISRP regions. For each region the IISRP overall figure for shipments in kilo tonnes was filled in by Enichem. The table also already contained the shipment figures and shares for Enichem. The figures of the other competitors and their respective shares had to be filled in manually by the competitors.[324] [*][325]

(237) [*][326] [*]

(238) [*] had also taken notes during the meeting.[327] Those notes show that Bayer informed the competitors that its sales in North America decreased by ″[*]″, whilst its sales in Western Europe increased by ″[*]″. They also show that the competitors spoke about the ″[*]″.

(239) As regards the issues on the agenda proposed by Enichem, the participants of [*]. Although only Southern Europe and Poland were referred to in the Agenda (*″*[*]*″)* the discussion covered all of Western Europe. While there was a focus on increasing prices in Southern Europe and Poland in 1998, this was a long-standing topic. Enichem

320 [*]

321 See footnote 318.

322 [*]

323 [*] agenda mentions a "John" meeting, that is to say, a meeting between all five competitors, however [*] submits that [*] representatives do not remember that DDE attended this meeting) [*]), 1064, 11718-11722 [*] TER show that [*] was in London on 14 September 1998), pp. 6253-6257, 12255-12265 [*] TER mention as purpose for a trip to London ″[*] agenda mentions a *''*[*]*''*.

324 [*]

325 [*] explains that [*] does not recall the meaning of the numbers in the table headed [*]market shares based on the figures published by the IISRP, [*]

326 [*]

327 [*]

was continuously interested in increasing prices in its home markets. The details of such price increases in Southern Europe had been agreed. [*].[328]

(240) In the reply to the SO Denka admits that it attended the meeting. It contests, however, that the competitors discussed anticompetitive issues.

4.2.4. Period after September 1998

(241) In 1998 the situation on the CR market changed significantly as the overall CR production capacity was reduced. [*][329] DDE closed its CR production plant in Maydown, Northern Ireland, in July 1998 (with a capacity of 33 000 metric tonnes), and Bayer closed its CR plant in Houston, Texas (USA) on 30 September 1998 (with a capacity of 27 000 metric tonnes).[330] [*] Bayer and DDE had agreed to exchange their respective market shares and that each company would concentrate on producing certain products on its respective home continent.[331]

(242) After the multilateral meeting of September 1998, bilateral and trilateral meetings replaced the multilateral meetings.[332] [*].[333]

(243) [*] confirm a change in the type of contacts. [*] no more multilateral meetings took place after June 1999, but that at the time (end 1999-2000) [*] (DDE) took the role of periodically contacting the different competitors. According to [*] coordinated the contacts among competitors and suggested the introduction of a so-called new ''[*]'' agreement, that is to say, a new market-sharing agreement.[334] [*] normally kept the other competitors informed about the outcome of the discussions held on a bilateral and/or multilateral basis with the other cartel members and shared the information gathered with them.[335]

(244) According to [*] the meeting on 14 September 1998 was the last multilateral meeting. [*] however, that there was no agreement or mutual understanding to the effect that multilateral meetings would end after that meeting. [*] the fact that no meetings with all five parties were held after the meeting on 14 September 1998 can mainly be explained by two factors: the antitrust compliance programme implemented at Bayer[336] and the fact that supply of CR decreased in 1999 as a consequence of the plant closures by DDE and Bayer which,

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328 [*] An internal note drafted by [*] on 1 December 1998 confirms [*] statement: The note reads: ″[*]″ The date for the implementation of these minimum prices in Italy was 1 January 1999. Furthermore [*] mentions that these minimum prices are applicable also for Spain, Portugal and Eastern Europe and that an extra fee of 10 Pfennig should be charged for Greece and Turkey, [*]

329 [*] see also recital (205) and footnote 287.

330 [*] see also recital (91) and footnote 88.

331 [*]

332 [*]

333 [*]

334 This corresponds to Bayer's description of the introduction of a moratorium, see recital (116).

335 See p. 13913.

336 [*]

in turn, resulted in better efficiency for the two companies, and less need to discuss volumes and price increases.

(245) [*] submits that by the middle of 1999 meetings were held very frequently and mostly on a bilateral basis. [*][337] [338]

(246) [*][339] [340]

(247) [*] a more favourable balance for the producers between the supply and demand had been achieved and that this was due to the plant closures. [*] as a result, the exchange of sales volume information among the five companies was discontinued. [*][341]

(248) [*] [342]

(249) [*] it took until October 1999 for the plant closures by DDE and Bayer to result in a shortage of CR in Europe. [*][343] [*]only one year later, in 2000, demand for CR in Europe decreased as a situation of excess supply emerged. Therefore Bayer and Enichem increased their exports to the US. [*]DDE complaining about this in November 2001. That increase can be seen in the customs statistics of the USA as an increase of CR imports from Germany and France, where Bayer and Enichem produced CR.[344]

(250) After 1998 the competitors concentrated on agreements regarding price increases, as price rises could be pushed through much more easily due to the high demand relative to supply. Those increases were primarily discussed on a bilateral basis.[345] [*][346] Although the market share agreement stayed in place, its importance diminished due to the fact that the competitors produced CR at a very high capacity utilisation rate after the closure of DDE and Bayer's production sites in Maydown and Houston.

(251) [*] confirms that, by the middle of 1999, there was significant pressure within [*] to try and find ways to increase price. Accordingly [*] (DDE) increased [*] efforts to meet with [*] competitors. The main purpose of the bilateral and a few multilateral meetings at this time was to get sufficient support for price increases from the competitors. [*] mentions several contacts with [*] from Bayer, with Enichem and with the Japanese producers.[347]

337 [*]
338 [*]
339 [*]
340 [*]
341 [*]
342 [*]
343 [*]
344 [*]
345 [*]
346 [*]
347 [*]

(252) The evidence that the Commission has shows that there were fewer meetings during the years 2001 and 2002, but that the cartel continued to operate. [*] confirms that during those two years the bilateral meetings did not cease but became fewer. It submits that the contacts between competitors during those years primarily took place by means of an increasing number of telephone calls, in particular between [*] (DDE) and [*] (Bayer) and, to a lesser but still significant degree, between [*] and Enichem.[348]

(253) [*][349]

(254) [*][350] [351]

- New equilibrium and price increase initiatives in the 4th quarter of 1999

(255) On **10 December 1998** [*] (Bayer), [*] and probably [*] (DDE) and [*] (Enichem) met in the Arabella Sheraton Airport Hotel in **Düsseldorf**.[352] [*][353]

(256) In spring 1999, probably between **2 and 5 March 1999**, Tosoh ([*] and [*]) met with Denka ([*]) and DDE ([*] and [*]) in the Takanawa Tobu Hotel in **Tokyo**.[354] [*] [*], who was the primary speaker at the meeting, talked about regionalisation, that is to say, that the Japanese producers should exit Europe and European producers should exit South-East Asia. Moreover, it was discussed that DuPont would reduce its sales in Europe due to the closure of the production plant in Northern Ireland.

(257) On **13 April 1999** [*] and [*] (Tosoh) met with Enichem **in Milan** and, on **14 April 1999** at 10 a.m., with [*] (Bayer) in **Leverkusen**.[355] The topic of both meetings was the concept of ″[*]″ as proposed by DDE. That concept basically meant that each supplier should concentrate on servicing its ″[*]″. [*] (Tosoh) had the impression that Bayer and DDE had been discussing various subjects at length, in the absence of Tosoh.

(258) On **28 April 1999** [*] (Bayer) met with (DDE) in DDE's headquarters in **Wilmington**, USA.[356] [*] spoke about CR. They discussed the broad outline, that is to say, when the next price increases would be possible. DDE explains that there were important personnel changes in the spring of 1999 within DDE. [*] [*] was promoted to [*] for DDE. [*] subsequently preferred to meet with competitors on a one-on-one basis.

348 [*]
349 [*]
350 [*]
351 [*]
352 [*] According to [*] the name mentioned on the expense sheet ([*], Company Paguag) is a fictitious name and was used by [*] to conceal the true identity of the person [*] was meeting. In fact [*] was meeting [*] of DDE and [*] of Enichem, [*]
353 [*]
354 [*] In its reply to the SO Denka confirms that it attended this meeting. Denka claims however that this was just a courtesy visit and that Denka explained to DDE that regionalization was not an acceptable solution for Denka.
355 [*] agenda of 14 April 1999 reads: *"*[*]*"*.
356 [*]

Most frequently [*] met with [*] (Bayer) and several times [*] met Enichem and the Japanese producers.[357]

(259) On **5 May 1999** [*] (DDE) and [*](Bayer) met in the Restaurant Bistro Veneziano in **Leverkusen**.[358] [*][*] reviewed the price increase implemented on 1 January 1999.[359]

(260) On the occasion of the annual IISRP meeting in **Taipei**, [*] (DDE) held separate meetings with [*] (Denka) and [*] (Tosoh) on **9 May 1999** and with [*](Bayer) on a day between **10 and 13 May 1999**.[360] [*]

(261) Denka submits in its reply to the SO that its representatives only met with other representatives at social events during the conference. It claims that no anticompetitive discussions took place and contests that Denka organized the meeting.

(262) During a trilateral meeting between [*](Bayer), [*] (Enichem) and [*]and [*] (DDE) in the Hotel Forte Crest Agip in **Milan** on **11 June 1999**, [*] and [*]of Enichem were introduced as the new [*].[361] A meeting room was booked for five or seven persons between 10 a.m. and 5 p.m. by [*] (Enichem). [*] [*] submits that in the course of the meeting, Enichem expressed its dissatisfaction with the share of the CR market allocated to it, also in the light of the improved quality of its products. According to [*], the other participants strongly opposed Enichem's entry in the higher-end products and complained about the fact that Enichem was already trying to sell those products to some of their customers.[362]

(263) A meeting took place on **3 or 4 August 1999** in the Shinagawa Prince Hotel in **Tokyo**. The meeting was attended by [*],[*] and [*] (DDE), [*] and [*] (Denka) and [*] and [*](Tosoh).[363] [*][364]:

"[*]*"*

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357 [*]

358 [*] states that the names and topics mentioned on the expense claim *"*[*] – *Bayer Cord – SAP – EPDM Orange"* served to conceal the real reason for the meeting. The introduction of 'SAP' software and the production of EPDM in orange was in effect not discussed. [*] further states that [*] did not take part in the meeting. [*] only used a *"fake name"*, to conceal the real participants.

359 See footnote 328.

360 [*]

361 [*] shows that a coffee break and a buffet were ordered for five persons.

362 [*]

363 [*] TER mentions on 3 August 1999: *"*[*]*"*, [*] mentions on 3 August a taxi drive from Aoyama to Itabashi, regarding CR).

364 [*] explains that [*] wrote down in the memo during the meeting what [*] had written on the whiteboard. Then [*] typed what [*] had written in [*] handwritten memo into [*] computer and threw the handwritten notes away. The [*] document is an English document because [*] wrote down what [*] had written on the whiteboard or flipchart prepared in the meeting room in English, [*]

(264) [*][365][*][366]

(265) [*] admits, in its reply to the SO, that it attended the meeting. It claims, however, that it assumed it to be a courtesy visit. [*] confirms that DDE wanted to promote the idea of regionalization but claims that [*] did not agree to that strategy.

(266) On **14 or 15 September 1999** [*] (DDE) met with [*] [*](Enichem) in **Milan**.[367] [*] (Enichem) was new in the role of [*] for CR and [*] (DDE) explained to [*] how the industry worked. [*] submits that [*] (DDE) told [*] about the existence of a new *"*[*]*"* among competitors and that [*] was acting as the promoter of a new *"*[*]".[368] [*] recalls discussing the tightness of capacity in the CR market and telling [*] that DDE had decided on a price increase. According to [*] the competitors agreed during the meeting and the following telephone conversation on a price increase. The actual implementation of the price increase was discussed in a meeting between [*] and [*] which took place in Geneva in spring 2000. According to [*], a price increase was agreed upon during the September 1999 meeting and a subsequent telephone conversation.[369]

(267) A meeting took place on **17 September 1999** in **Fribourg** between DDE ([*]) and Bayer ([*]).[370] [*] [*] (DDE) thinks that [*] discussed the tightness of capacity in the CR market with [*] and informed [*] that DDE had decided on a price increase. DDE announced that price increase in Europe on 17 September 1999, with effect from 1 November 1999. The price increase was followed, at least to some degree, by Bayer and Enichem in the German and French markets.[371] [*] [372]

(268) On **20 September 1999** [*] (Bayer) met with [*] and [*] (Tosoh) in a private room in the Hotel Nikko in **Düsseldorf**.[373] [*][374]

(269) Another meeting was held on **2 November 1999** in the Hotel Nikko in **Düsseldorf** between Denka and Bayer. The meeting was attended by

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365 The price increase discussed was probably the one implemented on 1 November 1999 by DDE [*] and on 1 December 1999 by Bayer. An internal note prepared by [*] shows increases in Western Europe of 10% to 12.5% and in Eastern Europe of up to 13.6%, depending on the CR grade, [*]

366 [*]

367 [*]

368 [*]

369 [*]

370 [*]

371 [*]

372 [*] An internal note prepared by [*] on 22 September 1999 shows planned increases in Western Europe of 10% to 12.5% and in Eastern Europe of up to 13.6%, depending on the CR grade. The attachment to this note shows increases of 0.55 DM/KG for Baypren 100, Baypren 200 and Sulphur types, see [*]. These increases were to be announced from 15 October onwards, see email, [*]; several documents found at Denka show a price increase in autumn 1999, see pp. 17049, 17045, 17047, 17052 [*] .

373 [*]

374 [*] see also footnote 372.

[*] (Bayer) and [*] and [*] (Denka).[375] According to the restaurant bills found during the inspections at Denka, the participants also had lunch at the Japanese restaurant Benkay in Düsseldorf. [*] [376] According to Denka's reply to the SO this was a pure courtesy visit.

(270) On **6 January 2000** [*] (DDE) complained in an e-mail to [*] (DDE) about Bayer's inconsistent application of the price increase agreed upon for the end of 1999.[377] [*] reported on an incident showing that Bayer was not pursuing a price increase in Portugal. The e-mail reads: *"*[*]*".*[378]

- 2000: Price increase initiatives and continued functioning of regionalisation

(271) [*] a meeting took place **before 18 January 2000** in **Italy** between [*] (DDE), Bayer and Enichem during a meeting of the *"Price Committee"* of the Italian Rubber Trade Association. In an internal e-mail dated 18 January 2000 [*] (DDE) informed [*] (DDE) that *"*[*]*"* [379]

(272) On **28 February 2000** [*] (Bayer) met [*] (Tosoh) in the restaurant Eau de Cologne in **Cologne**.[380] [*].[381]

(273) On **20 March 2000** [*] (Bayer) met with [*] (DDE) in the Sheraton Airport Hotel in **Frankfurt**.[382] [*] had rented a separate room in the hotel for the meeting because [*] did not want to be seen with a competitor there. During the meeting [*] (DDE) complained to [*] (Bayer) that Bayer had not supported DDE's recent price increase in Italy and tried to get Bayer's support for a second wave of planned price increases. On 13 April 2000, [*] noted in an internal e-mail that *"We also know that another increase for Europe is in the works"*. [*]During the meeting the price increase for 1 June 2000 was discussed in detail, such as level of increase and regions and products affected.[383] [*] [384]

(274) [*] (Tosoh) met with [*] and [*] (Enichem) on **22 March 2000** at Enichem's headquarters in **Milan**.[385] [*] joined the meeting only to introduce himself and left again. The main purpose of the visit was to introduce [*]

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375 See pp. 867-869, 16044, 6263-6267, 6300-6304, 12295-12304 [*] TER mentions a trip to Düsseldorf with the purpose: *"*[*]*"* possibly also [*] was present at the meeting as [*] flew to Düsseldorf on 2 September) [*].

376 [*] see also footnote 372.

377 [*]

378 This is confirmed by an internal Bayer email from [*] which shows that *"*[*]

379 [*] submits in its reply to the SO that this might have been the same meeting as referred to in [*]'s leniency application as meeting "*end 1999-beginning 2000*" between [*] (Enichem) and [*] and [*] (Bayer), [*].

380 [*]

381 This was probably the price increase implemented by Bayer on 15 December 1999, see footnote 372.

382 [*]

383 [*]

384 [*]

385 [*]

(275) On **23 March 2000** [*] (Bayer) met with [*] and [*] (Tosoh) in **Amsterdam**.[386] The meeting took place in a private dining room in the restaurant Yamazato in the Hotel Okura. [*] (Tosoh) was introduced to [*] (Bayer). [*] (Tosoh) explained to Bayer that Tosoh's supply was tight at that moment and that Tosoh would therefore focus its sales activities on Asia. [*]'s handwritten notes of the meeting show that the competitors exchanged information about especially low prices, which were offered to certain customers or a certain area. Further they discussed target prices for CR. [*][387]

(276) In an internal e-mail dated 10 May 2000 [*] (DDE) reports on a WDK meeting in Germany.[388] DDE explains that the WDK is an association for CR customers and suppliers. The e-mail shows that during the meeting some suppliers made speculations that CR prices would go up by DEM 0.15 to 0.20 per kilo in June or July 2000.

(277) On **16 June 2000** a trilateral meeting was held between DDE ([*]), Tosoh ([*] and [*]) and Denka ([*] and [*]) in the Imperial Hotel in **Tokyo**.[389] The meeting was held in a private conference room in the hotel. [*][390]

(278) [*] the parties discussed potential cooperation in the meeting and noted that prices were going up in the market.[391] The reference at the bottom of the page mentioning October 4 week and August 3 week concern envisaged plant shutdowns such as annual maintenance shutdowns, namely a plant shutdown by Denka in Korea in October and an Enichem plant shutdown in France in August. The information on the plant shutdown of Enichem was given by [*] (DDE).[392]

(279) Two days after the meeting, [*] sent an e-mail to [*] (both DDE) informing [*] about a number of changes at Tosoh and a promotion for [*] at Denka, who was promoted to [*]. At the end of the e-mail [*] (DDE) adds: *"*[*] *plans to stay connected as* [*] *is right now."* [393]

(280) [*] [394] [*]

(281) A further meeting in Tokyo was organized on **5 December 2000** between DDE ([*] and [*]), Tosoh ([*] and [*]) and Denka ([*]) in the Grand Hotel in **Tokyo**.[395] [*] the parties discussed historical market

386 [*]

387 [*] see also footnote 383.

388 [*]

389 [*] 6275, 13102, 14045-14048 [*] agenda mentions on 16 June 2000 a business meeting from 09:00 until 12:00 and a Meeting: CR Basis from 13:00 onwards).

390 [*] In the reply to the SO Denka admits that it participated in this meeting. It contests however that it exchanged any confidential data and that [*]'s notes reflect what was said during the meeting.

391 [*]

392 [*]

393 Although [*] submits that a meeting was held on 16 June 2000 between [*] (Bayer) and [*] (DDE) in Fribourg, this seems improbable as [*]'s travel expenses show that [*] stayed in Tokyo from at least 13 June until 18 June 2000, [*]

394 [*]

395 [*]

share data and [*] (DDE) raised concerns about Denka's efforts to increase its market share in Europe. [*] claims in its reply to the SO that [*] did not attend the meeting at [*] and that its representatives joined only for the dinner afterwards out of courtesy. Denka submits that no anticompetitive discussions took place. However it confirms that DDE mentioned the regionalization concept.

- 2001: Further price increase initiatives and contacts to ensure that the regionalisation continued

(282) There are indications of two price increase initiatives in 2001: first in January[396] and second in June/July. Concerning the June/July 2001 price increase, Bayer announced a price increase for CR in Western Europe for 1 June 2001. Denka announced a price increase of 10 % for July 2001.[397]

(283) [*] submits that it increased prices in August 2001 in reaction to the price increases by Bayer, Denka and Enichem in July 2001.[398] [*] it had lost market share in Europe due to its price increases in 1999 and 2000, which were not optimally supported by the competitors. [*][399]

(284) [*][*] (Tosoh) met with [*] and possibly with [*] (Bayer) on **23 March 2001** in the Hotel Nikko in **Düsseldorf** for lunch.[400] [*] does not recall the content of the meeting but [*].[401]

(285) A document found at [*] shows that a meeting took place between [*] (Denka) and [*] (Bayer) in **May 2001** in **Düsseldorf**.[402] [*]the document is a presentation by [*] (Denka), preparing himself for a meeting with [*]from Bayer.[403] [*] [404]

(286) The document shows that market conditions, price increases, capacities and CR prices for different customers in Germany, France, Italy and Spain were discussed between the competitors.

(287) [*] in its reply to the SO, that the meeting was just a social event and that the note does not reflect what was really discussed between the competitors. From the handwritten remarks on the note it appears, however, that [*] used two different pencils and that some of the remarks reflect information gathered directly from Bayer during the meeting. This demonstrates further that at least some of the topics mentioned on the presentation paper were, in fact, the subject of the discussions between [*]

396 [*] and 17029 [*].
397 [*] pp. 17027, 17029, 17036 [*].
398 See footnote 401.
399 [*]
400 [*]
401 [*] see also recital (282).
402 See pp. 17037, 17038 [*]
403 See p. 16038-16039.
404 [*]

(288) On **21 or 22 August 2001** [*] (DDE) met with [*] and [*] (Tosoh) in the Hotel Okura in **Amsterdam**.[405] During the meeting [*] (DDE) informed [*] about the expected termination of [*]

(289) [*] [406] [*]

(290) In **November 2001** [*] (DDE) sent a fax to [*] (Bayer).[407] According to [*], the fax consisted of two pages. [*] phoned [*] in advance to let [*] know [*] would be sending a fax. The fax shows proposals for future supply management in the various IISRP regions. [*] (DDE) assigned a certain market share to each competitor in each of the IISRP regions. [*] then indicated the capacity of each competitor in a row marked ″[*]″, the competitor's resulting capacity share as a whole and in a row marked ″[*]″ the resulting utilisation rates. A second table underneath shows an extract of the first table showing only the IISRP regions *″3″* (that is to say, Western Europe), *″4″* (that is to say, Central and Eastern Europe including Russia) and *″6″* (that is to say, Central and East Asia), see recital (114). [*] The abbreviations '*W'*, '*WE*' and *'NA'* stand for 'worldwide', 'Western Europe' and 'North America' respectively.

(291) [*] a trilateral meeting took place in a restaurant in **Tokyo**, probably between **25 November and 1 December 2001**.[408] Participants were [*] and [*] from Tosoh, [*] from Denka and [*] and [*] from DDE. [*](DDE) complained that Bayer and Enichem were not pulling out of the USA market ″[*]″.[409] [*][410]

(292) [*] states, in its reply to the SO, that the meeting was just a social event and that no anticompetitive discussions took place during the dinner.

- Meetings and other contacts in 2002

(293) [*] the telephone records of [*] (DDE) show that [*] called [*] (Bayer) 26 times between January and November 2002. [*][411]

(294) [*] [412] [*] was envisaging buying some CR from DDE and no longer exclusively from Bayer's own rubber group. That led to complaints by [*] (Bayer) to [*] (DDE), as the Adhesives Division of Bayer was an internal customer of Bayer.

(295) [*] a meeting took place between [*] (DDE) and [*] and [*] (Denka) on **18 April 2002** in the Imperial Hotel in **Tokyo**. [*] [413]

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405 [*]
406 [*]
407 [*]
408 [*]
409 [*]
410 [*]
411 [*]
412 [*]
413 [*] TER mention a flight to Tokyo Narita airport on this day) 6277-6282 [*] TER mentions a *"CR China meeting"* on 17 April 2002 and [*] agenda records a meeting on 18 April between 16:00 and 21:00, see p. 13106).

(296) [*] admits, in its reply to the SO, that it attended the meeting. It claims, however, that no anticompetitive discussions took place and that the talks focused on the dissolution of [*].

(297) A trilateral meeting was held on **23 April 2002** in the restaurant Kulisse in **Leverkusen**. Participants were [*] (Bayer), [*] (DDE) and [*] (Polimeri/Enichem).[414] After the meeting [*] (Bayer) trained [*] (Bayer) as [*] successor. [*][415] [*]

(298) [*]

(299) [*] [416]

(300) [*][*] contests, in its reply to the SO, that the meeting had an anticompetitive scope. [*] Bayer wanted to buy CR from Polimeri and that the meeting served to discuss the conditions of that cross-supply. [*] a further topic was the deteriorating market situation of CR. [*] DDE and Bayer knew the sales data of all the other producers and that was it was therefore easy for them to calculate the data [*].

(301) [*][417] [*] Enichem was concerned about [*], as it feared another competitor on the market.[418]

(302) [*][419] The discussion focused on Denka's aggressive CR activities in Europe and Asia. [*] admits, in its reply to the SO, that it attended the meeting. It claims, however, that it was just a courtesy visit and that no sensitive information was exchanged.

(303) On **13 May 2002** the annual IISRP meeting was held in **Naples**. [*] Enichem, which at that time was [*], made a speech where [*] addressed the situation of the synthetic rubber industry generally. Then [*] made a comment that, with the synthetic rubber industry throughout the world suffering from an acute case of over-supply, producers desperately needed to develop a strategy to reduce production capacity. After [*] speech, [*] (Enichem) had taken [*] (DDE) aside and had asked [*] if [*] had got the message. [*] (DDE) then asked [*] whether Enichem could do something about liquid dispersions. Consequently [*] (DDE) arranged for [*] (DDE) to meet with [*] and [*] (Enichem) in Milan to discuss the issue.[420]

(304) [*] [421] [*]

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414 [*] The persons mentioned on the expense claim of Bayer, [*] and [*], were employees of Bayer and of a client of Bayer respectively, but they did not participate in the meeting. [*] used these names and the topic *"*[*] *"* to conceal the fact that [*] met with competitors.

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419 [*] pp. 13107, 12345, 13350, 13364-13366, 6094 [*] TER mention a trip to Europe with the purpose *"In regard to CR"* and a stay in Düsseldorf on 24 and 25 April).

420 [*]

421 [*]

(305) [*] both confirm their presence during the conference but contest, in their replies to the SO, that any anticompetitive discussions took place during the conference.

(306) An e-mail dated **4 September 2002** from [*] (DDE) to [*] (Denka) suggests that a meeting took place in the week of 9 September 2002.[422] [*] (DDE) does not recall if the meeting took place and what might have been discussed.

(307) [*] [423] [424] [425] [426]

(308) In an e-mail from [*] (DDE) to [*] (Enichem) of **3 October 2002** [*] (DDE) refers to the speech of [*] in Naples about rationalisation of capacity (see recital (303)). [427] [*] (DDE) mentions the fact that DDE had announced plans to shut down its Louisville plant in Kentucky [*].

(309) [*] [428] [429] [430] [431] [432]

(310) [*] [433] [434]

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434 [*] submits that the purpose of the meeting on 25 November was to discuss a co-producer agreement between DDE and Bayer, [*]

5. APPLICATION OF ARTICLE 81 OF THE TREATY AND ARTICLE 53 OF THE EEA AGREEMENT

5.1. Relationship between the Treaty and the EEA Agreement

(311) The arrangements described above applied to all the territory of the EEA for which a demand for Chloroprene Rubber existed, as the cartel members had sales in practically all the Member States and in the EFTA States, parties to the EEA Agreement.

(312) The EEA Agreement, which contains provisions on competition analogous to the Treaty, came into force on 1 January 1994. The infringement described above is deemed to have started on 13 May 1993. This Decision therefore includes the application as from 1 January 1994 of those rules (primarily Article 53(1) EEA) to the arrangements to which objection is taken.

(313) Insofar as the arrangements affected competition in the Common Market and trade between EC Member States, Article 81 of the Treaty is applicable. Insofar as the arrangements affected competition in the EFTA States which are part of the EEA ("EFTA/EEA States") and trade between the EC Member States and EFTA/EEA States or between EFTA/EEA States, this falls under Article 53 of the EEA Agreement.

5.2. Jurisdiction

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

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

5.3.1. Article 81 of the Treaty and Article 53 of the EEA Agreement

(315) 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.

(316) Article 53(1) of the EEA Agreement (which is modelled on Article 81(1) of the Treaty) contains a similar prohibition. However the reference in Article 81(1) to trade *"between Member States"* is replaced by a reference to trade *"between contracting parties"* and the reference to competition *"within the common market"* is replaced by a reference to competition *"within the territory covered by the ... [EEA] Agreement"*.

5.3.2. The nature of the infringement

5.3.2.1. Principles concerning agreements and concerted practices

(317) Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement prohibit *agreements* between undertakings, *decisions of associations of undertakings* and *concerted practices*.

(318) An *agreement* 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(1) of the Treaty would apply to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement.

(319) In its judgment in PVC II case[435], the Court of First Instance stated that *"it is well established in the case law that for there to be an agreement within the meaning of Article [81(1) EC] of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way"*.[436]

(320) If, for instance, an undertaking is present at meetings in which the parties agree on certain behaviour on the market, it may be held liable for an infringement even where its own conduct on the market does not comply with the conduct agreed.[437] It is, indeed, 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*".[438] 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.

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435 Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and others v Commission* (PVC II), [1999] ECR II-931, paragraph 715.

436 The case law of the Court of Justice and the Court of First Instance in relation to the interpretation of Article 81 of the Treaty applies equally to Article 53 of the EEA Agreement. See recitals No 4 and 15 as well as Article 6 of the EEA Agreement and Article 3(2) of the EEA Surveillance and Court Agreement, as well as Case E-1/94 of 16 December 1994, recitals 32-35. Reference will therefore be made only to Article 81 in the following, it being understood that the same considerations apply to Article 53 of the EEA Agreement.

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

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

(321) 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 in civil law. Moreover, in the case of a complex cartel of long duration, the term "agreement" can properly be applied not only to any overall plan or to the terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose. As the Court of Justice has pointed out, it follows from the express terms of Article 81(1) of the Treaty that agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.[439]

(322) Although Article 81 of the Treaty and Article 53 of the EEA Agreement draw a distinction between the concept of *"concerted practices*" and *"agreements between undertakings"*, the object is to bring within the prohibition of those Articles a form of 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.[440]

(323) The criteria of co-ordination and co-operation laid down by the case law of the Court, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the commercial policy which it intends to adopt in the common market. Although that requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.[441]

(324) Thus, conduct may fall under Article 81(1) of the Treaty as a *concerted practice* even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour.[442] 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.

(325) Although in terms of Article 81(1) of the Treaty the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal

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

440 Case 48/69, *Imperial Chemical Industries v Commission* [1972] ECR 619, paragraph 64.

441 Joined Cases 40-48/73 etc. *Suiker Unie and others v Commission* [1975] ECR 1663.

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

connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period. Such a concerted practice is caught by Article 81(1) of the Treaty even in the absence of anti-competitive effects on the market.[443]

(326) Moreover, it is established case law that the exchange, between undertakings, in pursuance of a cartel falling under Article 81 (1) of the Treaty, of information concerning their respective deliveries, which not only covers deliveries already made but is intended to facilitate constant monitoring of current deliveries in order to ensure that the cartel is sufficiently effective, constitutes a concerted practice within the meaning of that Article.[444]

(327) 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 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 objective into several different forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time. Article 81 of the Treaty lays down no specific category for a complex infringement of this type.[445]

(328) In its PVC II judgment[446], the Court of First Instance stated that *"[i]n the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [81] of the Treaty"*.

5.3.2.2. Agreements and concerted practices in this case

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

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

445 See again Case T-7/89 *Hercules v Commission*, paragraph 264.

446 Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and others v Commission* (PVC II), [1999] ECR II-931, paragraph 696.

(329) It is demonstrated in the facts described in Chapter 4 that during the periods identified in recital (3), Bayer, DuPont/DDE, Enichem, Denka and Tosoh:

(a) agreed upon the allocation and the stabilization of markets, market shares and sales quotas (referred to by the competitors as "regionalisation concept", "target market share plan", "moratorium") in certain Contracting Parties to the EEA Agreement and regions worldwide (recitals (137)-(140), (148), (150), (151), (153), (158), (160), (163), (166), (170), (171), (174), (177), (186), (188), (189), (199)-(206), (210), (215)-(221), (224), (233), (234), (235)-(239), (256), (257), (262), (263), (277), (281), (290), (291) and (297));

(b) agreed upon price increases and/or percentage price increases and/or target prices and/or price structures for chloroprene rubber in the EEA and worldwide on several occasions in the period 1993-2003 (recitals (148), (151), (153), (157), (158), (163), (170), (171), (174), (177), (188), (197), (199)-(206), (215)-(221), (224), (228), (230)-(231), (233), (234), (235)-(239), (258), (263), (266), (267), (268), (269), (273), (275), (297), (301) and (310));

(c) agreed upon the method and the dates of the price increases by market leaders in different European territories and worldwide (recitals (148), (151), (153), (158), (163), (170), (186), (199)-(206), (230)-(231), (234), (235)-(239), (267), (273) and (310));

(d) implemented the agreed price increases and ensured implementation by a monitoring system consisting of staggered announcement dates and a market leader arrangement for various European territories and worldwide and by sequential announcements to customers and/or public, the timing, order and form of which had been previously agreed upon (recitals (151), (158), footnote 208, recitals (163), (166), (171), (174), footnote 234, recitals (188), (203), (210), (215)-(221), (231), (235)-(239), (259), (267), (272) and (283));

(e) agreed upon minimum prices (referred to by the competitors as "ideal price lists by region", "price floors", "bottom price levels", "rock bottom prices") in different Contracting Parties to the EEA Agreement and worldwide and for certain customers (recitals (148), (163), (173), footnote 234, recitals (186), (199)-(206), (210), (215)-(221), (228), (229), (230)-(231) and (275));

(f) agreed upon the allocation of certain key customers to certain suppliers and pricing differentials (recitals (158), (163), (176), (191), (193), (228), (272) and (309));

(g) attended meetings and participated in conversations concerning the implementation of and the adherence to the agreements reached (recitals (137)-(140), (151), (158), (170), (199)-(206), (210), (215)-(221), (228) and (235)-(239));

(h) exchanged information on the pricing, supply capacity, sales of chloroprene rubber in the EEA and worldwide as well as other market relevant information also outside the context of monitoring compliance with specific agreements referred to in point (g) (recitals (137)-(140), (150), (151), (158), (160), (163), (174), (186), (188), (197), (199)-(206), (210), (215)-(221), (224), (227), (228),

(229), (230)-(231), (233), (235)-(239), (258), (263), (268), (271), (273), (274), (275), (285), (277), (281), (284), (290), (291), (297), (307) and (310));

(i) participated in other anticompetitive contacts in which market strategies were compared and possible future actions on the market contemplated (recitals (150), (176), (191), (192), (194), (197), (204), (213), (214), (224), (227), (229), (234), (255), (256), (257), (260), (262), (267), (268), (269), (271), (280), (294), (295), (302), (303), (307) and (309)).

(330) It is further demonstrated in Chapter 4 that Bayer and DuPont/DDE concerted, within the framework of the regionalization strategy, upon capacity reductions (recitals (139), (192), (194), (205)-(206), (217), (224), (229), (230), (255), (260), (291), (301), (303) and (308)).

(331) That concertation on capacity reductions was also known to the other members of the cartel as it was subject to discussions in multilateral meetings (see for example recitals (205)-(206), (224), (229), (230), (260), (291), (301), (303) and (308)). Liability for the concertation can therefore also be attributed to the cartel members which were not directly involved in the capacity reduction, as the closure of production facilities by Bayer and DDE contributed to the realisation of a shared objective, the realization of the regionalization strategy. It is settled case law "*that an undertaking that had taken part in such an infringement through conduct of its own which formed an agreement or concerted practice having an anti-competitive object for the purposes of Article 85(1) of the Treaty and which was intended to help bring about the infringement as a whole was also responsible, throughout the entire period of its participation in that infringement, for conduct put into effect by other undertakings in the context of the same infringement. That is the case where it is established that the undertaking in question was aware of the offending conduct of the other participants or that it could reasonably have foreseen it and that it was prepared to take the risk*".[447]

(332) The facts described in Chapter 4 and the behaviour of Bayer, DuPont/DDE, Enichem, Denka and Tosoh referred to in recital (329) clearly constitute an "agreement" within the meaning of Article 81(1) of the Treaty in the sense that the undertakings concerned explicitly agreed on certain conduct on the market. The behaviour consisted essentially of allocating markets, following a jointly preconceived pricing policy and refraining from competition with regard to customers and territories. The competitors agreed on market shares, target market shares, price increases and on their implementation.

(333) A number of undertakings or addressees, namely Bayer, Tosoh, [a company within the ENI group] and DuPont/DDE, do not contest their involvement in an infringement of Article 81 of the Treaty and their participation in anticompetitive agreements and concerted practices.

[447] See Case *Commission v Anic Partecipazioni* (referred to in footnote 439), paragraph 83.

The submissions of DuPont/DDE

(334) Although DuPont/DDE accepts its involvement in the anticompetitive arrangements described in Chapter 4 it claims that the plant closures in 1998 were not part of the cartel activity. It submits that DDE's plant closure had been under consideration since 1994 and that the decision to close down the plant in Europe was taken as that plant had lower capacity and higher production costs than the one in the US.

(335) The Commission does not claim that the plant closures of Bayer and DDE in 1998 in Europe and the USA were the outcome of an agreement but that they were part of a concerted practice in line with the regionalization strategy agreed upon between the competitors (recitals (330), (347)). That strategy was especially promoted by Bayer and DuPont/DDE. Although there are several indicia in the file that Bayer and DDE might have agreed upon the plant closures (see recitals (139), (192), (194), (205)-(206), (217), (224), (229), (230), (255), (260), (291), (301), (303), (308)) the Commission is not in possession of corroborated evidence showing that such an agreement was indeed reached. However, the evidence shows that the plant closures were already subject to multilateral and bilateral discussions between Bayer, DDE and their competitors at an early stage (recitals (139), (224), (229), (230)). They were part of the regionalization strategy and it is obvious that Bayer and DDE used those closures at least as an example of best practice before the other competitors to promote further adherence to the strategy (see recitals (205)-(206), (224), (229), (230), (260), (291), (301), (303) and (308)). This shows that Bayer and DDE knowingly carried out collusive plant closures which facilitated implementation of the agreed regionalisation by concentration on the home markets. Consequently the reduction of production capacity in the context of the regionalisation strategy and the subsequent plant closures by Bayer and DDE constitute a concerted practice within the meaning of Article 81(1) of the Treaty.

The submissions of Denka

(336) Denka contests the entire period of its participation in the anti-competitive activities. In the first place it claims that it only attended a few meetings because it was coerced by the European producers to do so. Denka submits that the European producers threatened to file an anti-dumping complaint in Europe against the Japanese producers. It further contests that there was any agreement between Denka and its competitors as it claims that there was no concurrence of wills between them. Denka submits that it did not participate in a market sharing agreement as it did not have any common objectives or joint intentions with the other producers of CR. Further Denka claims that the Commission does not have any evidence of an agreement between Tosoh and Denka on how to split the 13 % market share for Europe attributed to the Japanese producers. Furthermore, Denka submits that the Commission did not establish a concerted practice between the competitors as the contacts between them never had the object or effect

of influencing the market. In particular Denka contests that it was involved in price fixing as it wanted to gain market share in Europe, which was only possible by offering more attractive prices than the competitors. Consequently Denka claims that it was not involved in any monitoring system, as it did not participate in the price increase scheme. Denka also contests any allocation of key customers.

(337) Denka submits that, even if it exchanged some information, it did not participate in any collusive practice as it did not exchange commercially sensitive information in the meetings it attended. Denka explains that the shipment data cannot be considered sensitive information, as the European producers could easily estimate the shipment figures of the Japanese producers as being the difference between the official IISRP figures and their own shipments. Furthermore Denka claims that the figures it provided to its competitors were wrong and that it consequently obstructed the proper functioning of the cartel. Denka alleges that it rebutted any presumption that it benefited from the information exchanged, as it behaved independently on the market.

(338) With regard to the standard of proof in general, since the prohibition of cartels and the penalties which offenders may incur are well known, it is normal for cartel behaviour to take place in a clandestine fashion, for meetings to be held in secret and for the associated documentation to be reduced to a minimum. Even if the Commission discovers evidence explicitly showing unlawful contact between traders, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of any other plausible explanation, constitute evidence of an infringement of the competition rules.[448]

(339) In practice, the Commission is often obliged to prove the existence of an infringement under conditions which are hardly conducive to that task, when several years may have elapsed since the time of the events constituting the infringement.[449] Whilst sufficiently precise and consistent evidence must be produced to support the firm conviction that the alleged infringement took place, it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. Rather, it is sufficient if

448 See the analysis of the Court of Justice in the "*Cement*" case: Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland and others v Commission*, [2004] I-123, paragraphs 55-57.

449 As recognized by the Court of First Instance in Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 JFE Engineering Corp., formerly NKK Corp. (T-67/00), Nippon Steel Corp. (T-68/00), JFE Steel Corp. (T-71/00) and Sumitomo Metal Industries Ltd (T-78/00) v Commission, [2004] ECR II-2501,, paragraph 203.

the body of evidence relied on by the institution, viewed as a whole, meets that requirement.[450]

(340) Denka's arguments that it did not participate in any anticompetitive arrangements (see recitals (336) and (337)) should be assessed in the light of recitals (338) and (339). Denka admits its presence in a large number of bilateral and multilateral competitor contacts and meetings (see recitals (142), (150), (155), (156), (161), (164), (175), (178), (187), (189), (208), (211), (222), (240), (261), (265), (269), (280), (281), (287), (292), (296), (302), (305)). The direct evidence available from some of those meetings (see recitals (153), (159), (165), (199), (218), (235), (263), (285)) as well as the explanatory submissions from the immunity and leniency applicants in this case clearly identify the anticompetitive scope and nature of those meetings. The direct evidence consists of documents drafted at the time the various contacts between competitors were taking place (that is, documents drafted at a non suspicious point in time). Moreover, Denka's assertions are in contradiction with the statements of Bayer, Tosoh, DDE and [a company within the ENI group] who have, incriminating themselves, admitted the history of collusion in the CR industry and the collusion which heavily involved Denka.

(341) As far as Denka alleges that it participated in those contacts only because it was coerced to do so by the European producers, there is no evidence in the file to support that allegation (see recitals (398)-(401)). Even if coercion could be proved, this would not change the legal qualification of the contacts admitted to by Denka and those established otherwise by the Commission as collusive agreements and concerted practices. Coercion can, at the most, be an attenuating circumstance for the undertaking subject to threats (see recitals (577) and (578)). It does not, however, change the fact that Denka actively participated in anticompetitive arrangements.

(342) Denka claims that there was no concurrence of wills between Denka and its competitors and consequently no agreement and that it did not participate in a market sharing agreement as it did not have any common objectives or joint intentions with the other producers of CR. However, the agreement in this case was part of a worldwide cartel scheme aimed at establishing a balance between the CR producers throughout the world. Denka's interest in the European market and behaviour in the cartel cannot be seen in isolation of its interests in other regions of the world also covered by the arrangements. The participants limited their activities in Asia and supported common price increases in other regions of the world, which was clearly also in Denka's interest. Therefore Denka's argument that the European agreements were against the business interests of Denka cannot be followed, once the agreements are seen in their global context.

450 Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C250/99 P to C-252/99 P and C-254/99 P Limburgse Vinyl Maatschaapij and Others v Commission [2002] ECR I-8375, paragraphs 513 to 523; see also Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00, JFE et al, paragraphs 179 and 180.

(343) Furthermore, even if Denka had participated in the meetings and contacts with its competitors with a different objective than the competitors, this would be irrelevant for the qualification of its participation as a collusive agreement and/or concerted practice, as long as Denka did not declare that attitude manifestly and openly towards its competitors. According to settled case-law, it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel.[451] It is not sufficient for a participant in anticompetitive meetings and contacts to hold inner reservations against collusive arrangements. Denka claims that it was simply present during the meetings without participating actively in the discussions and without implementing the agreements. However, *"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*".[452] 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). As the Commission was able to establish that Denka participated in meetings between undertakings of a manifestly anti-competitive nature for almost 10 years, it was for Denka "*to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs".*[453] Even after an explicit request from the Commission during the Oral Hearing, however, Denka did not come forward with evidence showing any form of distancing from the agreements. Finally, the fact that the other participants protested against Denka's market behaviour and threatened retaliation should it not comply with the agreements is a clear indication that Denka had not publicly distanced itself from the cartel and that the other participants were under the impression that Denka had subscribed to the agreements but did not comply.

(344) Denka's claim that it could not openly distance itself from the agreements and cooperate with the Commission as it feared retaliation through anti-dumping action is neither convincing nor relevant. First of all, and with a real spirit of cooperation, the Commission would have been the best placed to deal with such a claim as it would have been

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451 Joint cases T-109/02 and others, *Bolloré,* judgment of 26 April 2007, paragraphs 188-189; Joint cases C-204/00 and others, *Aalborg Portland et al. v Commission*, [2004] ECR I-123, paragraph 81; Case C-199/92 *P Hüls v Commission*, [1999] ECR I-4287, paragraph 155; Case C-49/92P *Commission v Anic Partecipazioni SpA,* [1999] ECR I-4125, paragraph 96.

452 See Case T-141/89 *Tréfileurope Sales v Commission* [1995] ECR II-791, paragraph 85; Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 232; and Joined Cases T-25/95 and others, *Cement*, ECR [2000] II-491, paragraph 1389.

453 See Case C-199/92 *P Hüls v Commission*, [1999] ECR I-4287, paragraph 155, see also Case C-49/92P *Commission v Anic Partecipazioni SpA,* [1999] ECR I-4125, paragraph 96.

competent to address the cartel violation as well as the allegedly abusive antidumping complaint. Secondly, Denka could have kept evidence to prove that it actually wanted to distance itself but did not do so for fear of retaliation. However, even after an explicit request from the Commission in the Oral Hearing, Denka was not able to present such evidence to the Commission. Thirdly, even if Denka only participated due to its fear of retaliation, this would not change the legal qualification of its participation as anticompetitive agreements.

(345) Denka's argument that the Commission did not establish a concerted practice between the competitors as the contacts between them never had the object or effect of influencing the market contradicts the submissions of [*], which admitted that the aim of the agreements was the allocation of market shares and the stabilization of prices. Denka's argument is also contradicted by the market behaviour of the cartelists, which implemented most of the agreed market and price strategies, see recital (329). Even if Denka did not abide by the agreements and behaved independently on the market, which is not the case, it knew that its mere presence in the meetings had a direct effect on the behaviour of its competitors, which trusted, at least to a certain extent, in Denka's participation and implementation. Consequently, Denka's argument that the contacts did not have any effect on the market cannot be accepted.

(346) Finally, as regards Denka's claims that the exchange of information cannot be considered an exchange of sensitive information and that the figures it provided to its competitors were wrong, Denka admits to a certain extent that it provided (wrong) shipment data to its competitors (see, for example, recitals (155), (164) and (222)). Furthermore all its competitors confirmed the exchange of shipment figures and submitted that the information exchange included Denka. The detailed information reflected in several documents drafted at a time the infringement took place can only be explained by Denka's participation in that information exchange (see recitals (159), (165), (199), (218), (263), (285), (297) and footnotes 239, 275, 312 and 325). The fact that Denka admits that it provided wrong figures to its competitors clearly shows its awareness of the arrangements and their anticompetitive nature. The argument that the information provided by Denka cannot be considered sensitive as the European producers could easily estimate the Japanese shipment figures as being the difference between the official IISRP figures and their own shipments is not conclusive. The argument is based on a hypothetical presumption that all producers of CR collude and compare their shipment figures. Consequently, without an illicit cartel the competitors would not have been able to establish the figures of each CR producer. This demonstrates that the figures provided by the producers during the meetings, including Denka, were sensitive information, as they were not publicly available. It is obvious that Denka is trying to give the impression that it was the last link in the chain in the agreements, which is in no way supported by the evidence and the statements submitted by its competitors. Denka's argumentation that its behaviour cannot be considered illicit as its competitors were

involved in a cartel cannot be accepted. As stated in recitals (318), (324), a cartel is a common undertaking and Denka participated in the common undertaking by providing its shipment figures to the competitors.

(347) Hence, even if Denka contests certain events throughout the period of its participation in anticompetitive arrangements and even if it provides alternative interpretations to certain pieces of evidence, it has not succeeded in weakening the Commission's position, based on all the evidence and indicia taken together, that Denka was involved in agreements and/or concerted practices with its competitors throughout the lifetime of the cartel.

The submissions of [a company within the ENI group]

(348) [a company within the ENI group] contends, in its reply to the SO, that it did not implement any price increase agreed upon with its competitors.

(349) The implementation of cartel agreements is not a constitutive element for the proof of an agreement in the sense of Article 81(1) of the Treaty. If, for instance, an undertaking is present at meetings in which the parties agree on certain behaviour on the market, it may be held liable for an infringement even when its own conduct on the market is not in conformity with the conduct agreed.[454] It is uncontested that [a company within the ENI group] was present at several meetings during which price increases were discussed between the competitors (see recitals (151), (153), (157), (158), (163), (170), (171), (174), (177), (188), (197), (199)-(206), (215)-(221), (228), (230)-(231), (235)-(239), (266), (297) and (301)). [*] that such discussions took place during various meetings (see, for example, recital (266)). The evidence regarding those discussions is sufficient to establish [a company within the ENI group]'s participation in anticompetitive price fixing agreements. In addition there is evidence in the file that [a company within the ENI group] actually implemented at least some of the price increases agreed upon (see recitals (158), (165), (166), (188), (221), (228), (235)-(239), (267) and (283)).

(350) On the basis of the above considerations, it is concluded that the complex of infringements in this case presents all the characteristics of an agreement and/or a concerted practice in the sense of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

5.3.2.3. Principles concerning single and continuous infringement

(351) A complex cartel may properly be viewed as a *single and continuous infringement* for the time frame in which it existed. The Court of First Instance points out, inter alia, in the *Cement* cartel case that the concept of 'single agreement' or 'single infringement' presupposes a complex of practices adopted by various parties in pursuit of a single anti-

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

competitive economic aim.[455] The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. The validity of that 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.

(352) It would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which progressively manifested itself in both agreements and concerted practices.

(353) Although a cartel is a joint enterprise, each participant in the arrangement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries, or even cheating may occur, 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.

(354) The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and the same anti-competitive effect. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. 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 of it and was prepared to take the risk.[456]

(355) In fact, as the Court of Justice stated in its judgment in *Commission v Anic Partecipazioni,*[457] 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, as reiterated by the Court in the *Cement* cases, that an infringement of Article 81 may result not only from an isolated act but also from a series of acts or from a continuous 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 and taken in

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

456 See Case *Commission v Anic Partecipazioni* (referred to in footnote 439), paragraph 83.

457 Case *Commission v Anic Partecipazioni* (referred to in footnote 439).

isolation an infringement of Article 81 of the Treaty. When the different actions form part of an 'overall plan', because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.[458]

5.3.2.4. Single and continuous infringement in this case

(356) In this case, the conduct in question undoubtedly constitutes a single and continuous infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement.

(357) [*], the evidence is not sufficient for the Commission to establish continuity of the arrangements prior to 13 May 1993, which is the date of the first cartel meeting which is confirmed by Bayer and [*] and which is supported by indirect evidence submitted by DDE and [*] (see recitals (137) - (140) and (150)).

(358) For the period from 13 May 1993 to at least the meeting in Naples on 13 May 2002 the evidence referred to in this Decision shows the existence of a single and continuous collusion in the chloroprene rubber market between Bayer, DuPont/DDE, Denka, Tosoh and Enichem (recitals (137)-(303)). The parties expressed their joint intention to behave on the market in a certain way and adhered to a common plan to limit their individual commercial conduct in the chloroprene rubber market. The agreement to enter into that plan with a view to restricting competition can, therefore, be traced back at least to 13 May 1993. The collusion was in pursuit of a single anti-competitive economic aim: in particular the competitors aimed at conserving the status quo by agreeing on target market shares and sales quotas, which reflected the actual market shares in the reference year 1993. Thus preventing any competition on markets, the CR producers aimed, as a second step, to artificially increase CR prices in the EEA and worldwide. Further the competitors agreed through the lifetime of the cartel on minimum prices and customer allocation in the chloroprene rubber market.

(359) The agreements and concerted practices found to exist form part of an overall scheme which laid down the lines of the competitors' action in the market and restricted their individual commercial conduct with the aim of pursuing an identical anti-competitive object and a single economic aim, namely to distort the normal movement of prices in the world-wide market for chloroprene rubber and to restrict world-wide production by the allocation of volumes, quotas and markets. It would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which progressively would manifest itself in both agreements and concerted practices.

458 See Joined Cases C-204/00 and others, *Aalborg Portland et al. v Commission*, [2004] ECR I-123, paragraph 258. See also Case C-49/92, *Commission v Anic Partecipazioni* (referred to in footnote 439), paragraphs 78-81, 83-85 and 203.

(360) The plan, which was subscribed to by Bayer, DuPont/DDE, Denka, Tosoh and Enichem, was developed and implemented over a period that lasted 9 years, through a complex of collusive arrangements, specific agreements and/or concerted practices. Corporate reorganisations during the infringement period from 1993 to 2002 affected individual participants so that DuPont was replaced by its joint venture with Dow, DDE on 1 April 1996 (see recital (35)). Given the common design and common objective of eliminating competition in the chloroprene rubber market, the complex of collusive arrangements had 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.

(361) As far as Denka claims that the Commission has to respect the principle of individual responsibility it has been proven in recitals (340)-(347) that Denka was heavily involved in the cartel arrangements, participating in unlawful contacts and meetings. It did not "*put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs*"[459] as required by the Community courts. Consequently and as set out in recitals (351)-(355), Denka is responsible for the whole infringement as all the competitors shared the same unlawful purpose and the same anti-competitive behaviour, irrespective of Denka's role and involvement in each single event.

5.3.3. Restriction of competition

(362) The complex of agreements and/or concerted practices in this case had the object and effect of restricting competition in the Community and the EEA.

(363) 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:[460]

(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.

(364) These are the essential characteristics of the horizontal arrangements under consideration in this case. By allocating market shares and sales quotas the producers ensured a certain share of the CR business worldwide, eliminated competition for any additional market share and could gradually succeed in increasing the market price. Price being the main instrument of competition, the various collusive arrangements and

459 See Case C-199/92 *P Hüls v Commission*, [1999] ECR I-4287, paragraph 155, see also Case C-49/92P *Commission v Anic Partecipazioni SpA,* [1999] ECR I-4125, paragraph 96.

460 The list is not exhaustive.

mechanisms adopted by the producers were all ultimately aimed at inflating prices to their benefit. Allocation of volume quotas and price fixing by their very nature restrict competition within the meaning of Article 81(1) of the Treaty and Article 53 (1) of the EEA Agreement.

(365) The cartel has to be considered as a whole and in the light of the overall circumstances. The principal aspects of the complex of agreements and concerted practices which can be characterised as restrictions of competition are:

(a) allocating of market shares and sales quotas;

(b) agreeing upon price increases and fixing of target prices;

(c) allocating of customers;

(d) defining and applying a reporting and monitoring system to ensure the implementation of the restrictive agreements.

(366) The anti-competitive object of the arrangements is also shown by the fact that some of the producers took explicit action to conceal their meetings and to avoid detection of their agreements and documents (see recitals (117) - (122)).

(367) Regarding the anti-competitive object of the exchanges of confidential information and the other contacts with an anticompetitive purpose identified, for example, in recitals (150), (176), (191), (192), (194), (197), (204), (213), (214), (224), (227), (229), (234), (255), (256), (257), (260), (262), (267), (268), (269), (271), (280), (294), (295), (302), (303), (307) and (309), the arrangement has to be seen in its context and in the light of all the circumstances. Those contacts 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. It is apparent that the purpose of the parties was to ensure the stability of the prices and market shares.

(368) 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 (as shown in recitals (366)-(367)). Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved.[461]

(369) In this case, however, the Commission considers that, on the basis of the elements which are put forward in this Decision, it has also proved that the anti-competitive decisions have been implemented and that, thus, anti-competitive effects of the cartel arrangements have taken place.

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

(370) It is, in fact, proved, that not only the market share agreements but also most of the collusive price increases to which this Decision relates were effectively fully or partially implemented:

(a) the coordinated price increases taking effect in 1994, 1995, 1997, 1998, 1999 and 2001 were actually implemented by sequential announcements to customers, see: regarding 1994 recitals (151), (158) and footnote 208; regarding 1995 recitals (163) and (171); regarding 1997 recitals (203), (221) and footnote 282; regarding 1998 recitals (219), (231) and footnote 318; regarding 1999 recitals (239), (259), (267), (272) and footnotes 328 and 372 and regarding 2001 recital (283);

(b) the coordinated price increase which had been agreed upon in May 1995 and which was to be implemented on 1 September or 1 November 1995 was suspended in several countries, see recital (174) and footnote 234.

(371) [a company within the ENI group] contests any implementation of concerted price increases. However, there are clear indicia in the Commission's file that Enichem not only engaged in discussing prices and price increases with its competitors but that it also implemented at least some of them (see, for example, recitals (153)-(155), (159)-(160), (163)-(166), (228), (267)). A document in [*]'s handwriting from the Zurich meeting on 2 December 1994 reads ″[*]″ (recitals (163)-(166)). This shows that Enichem had implemented a price increase in November 1994, at least for its customer [*] in Spain. Similarly a document written by [*] during a meeting with Enichem on 19 May 1998 reads ″[*]″. It is clear from the context that Enichem had implemented a price increase in the first quarter of 1998 and had, in consequence, lost shares for a certain customer. Furthermore the fact that the competitors monitored the implementation of the agreements (see recital (329)) strongly hints at the implementation of the price increases agreed upon. However, in cases in which the anti-competitive object of the conduct in question is proved (as in this case), there is no need to establish actual anti-competitive effects (see (368) recital above). [a company within the ENI group]'s claim that it did not implement any agreed price increases would consequently be irrelevant, even if it was correct, which is not the case.

(372) The anticompetitive object of the arrangements is sufficient to support the conclusion that Article 81 of the Treaty and Article 53 of the EEA Agreement apply in this case.

(373) On the basis of the facts before the Commission, there is nothing to suggest that the conditions of Article 81(3) of the Treaty are fulfilled in this case.

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

(374) The continuing agreement between the producers had an appreciable effect upon trade between Member States and between Contracting Parties to the EEA Agreement.

(375) Article 81 of the Treaty is aimed at agreements which might harm the attainment of a single market between the Member States, whether by partitioning national markets or by affecting the structure of competition within the common market. Similarly, Article 53 of the EEA Agreement is directed at agreements that undermine the achievement of a homogeneous European Economic Area.

(376) The Court of Justice and Court of First Instance have consistently held that, *"in order that an agreement between undertakings may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States"*.[462] In any event, whilst Article 81 of the Treaty *"does not require that agreements referred to in that provision have actually affected trade between Member States, it does require that it be established that the agreements are capable of having that effect"*.[463]

(377) As mentioned in Chapter 2.3.2, the market for chloroprene rubber is characterised by trade between Member States. There is also trade between the Community and EFTA countries belonging to the EEA.

(378) The application of Article 81 of the Treaty and Article 53 of the EEA Agreement to a cartel is not, however, limited to that part of the members' sales that actually involve the transfer of goods from one state to another. Nor is it necessary, in order for those provisions to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States.[464]

(379) In this case, the cartel arrangements covered virtually all trade relations throughout the Community and EEA. Therefore, the existence of market allocations, sales quotas and price-fixing mechanisms must have resulted, or at least were likely to result, in the automatic diversion of trade patterns from the course they would otherwise have followed.[465]

(380) Insofar as the activities of the cartel related to sales in countries that are not members of the Community or the EEA, they lie outside the scope of this Decision.

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462 See Case 56/65 *Société Technique Minière* [1966] ECR 282, paragraph 7; Case 42/84 *Remia* and Others [1985] ECR 2545, paragraph 22 and Joined Cases T-25/95 and others, *Cimenteries CBR* [2002] ECR II-491.

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

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

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

5.3.5. Provisions of competition rules applicable to Austria, Finland, Iceland, Norway and Sweden

(381) The EEA agreement entered into force on 1 January 1994. For the period prior to that date during which the cartel operated, the applicable provision in this case is Article 81 of the Treaty. Insofar as the cartel arrangements covered Austria, Finland, Iceland, Norway and Sweden (then EFTA Member States), they were not caught by that provision.

(382) In the period 1 January to 31 December 1994, the provisions of the EEA agreement applied to the EFTA Member States which had joined the EEA. The cartel thus constituted a breach/infringement of Article 53 of the EEA Agreement as well as of Article 81 of the Treaty, and the Commission is competent to apply both provisions. The restriction of competition in those five EFTA states during 1994 falls under Article 53 of the EEA Agreement.

(383) After the accession of Austria, Finland and Sweden to the Community on 1 January 1995, Article 81 of the Treaty became applicable to the cartel insofar as it affected those markets. Article 53 of the EEA Agreement continued to apply in respect of the cartel in Iceland and Norway.

(384) In practice, insofar as the cartel affected Austria, Finland, Iceland, Norway and Sweden, it constituted a breach of the EEA and/or Community competition rules as from 1 January 1994.

5.3.6. Additional Considerations

5.3.6.1. Procedural claims by [a company within the ENI group] and Polimeri

(385) [a company within the ENI group] and Polimeri put forward a number of procedural claims, arguing in particular that the time to reply to the SO was too short, that sufficient reasons were not given for the extension of the deadline by 2 weeks, that the period for reply should not have started running upon reception of the DVD containing the Commission's file, that the Commission did not react in time to [a company within the ENI group] and Polimeri's applications for leniency, that the Commission did not react to [a company within the ENI group] and Polimeri's proposals to interview its employees, that the Commission should have informed [a company within the ENI group] and Polimeri earlier about the value of their cooperation, that the Commission only took a position on [a company within the ENI group] and Polimeri's requests for immunity, but not on their requests for leniency and that they should have had the right to withdraw the evidence they had provided to the Commission.

(386) The procedural claims raised by [a company within the ENI group] and Polimeri in their replies to the SO are ill-founded. Both [a company within the ENI group] and Polimeri received the SO on 15 March 2007 and received the DVD, giving access to the Commission's file, on 20 March. Both companies had access to all statements within one week of

notification of the Statement of Objections. The deadline for reply to the SO was extended to 15 May 2007, amongst others at the request of [a company within the ENI group] and Polimeri,. Consequently [a company within the ENI group] and Polimeri had two full months to prepare their replies in this case, which is not specifically complex. In the letter granting the extension [a company within the ENI group] was informed that the Commission does not take into consideration arguments purely related to difficulties in preparing the defence. Further the Commission rejected the argument that preparation of the defence required exhaustive research within the undertaking as the undertaking had been aware of the Commission's investigations for more than two years. Therefore an extension was granted for only two weeks, instead of the three weeks requested. Consequently [a company within the ENI group] and Polimeri had sufficient time to prepare their defence and both companies could fully deploy their arguments. Regarding the argument that the period for reply should only start running once the parties have complete access to the file (including access to all oral statements), the Court has confirmed that the period for reply to a SO starts running on the day on which the party receives the main documents of the file, which allows it to start analysing the Commission's objections against it and not on the day when access is granted to the entire file.[466] Therefore it was appropriate that the deadline started running on the day following receipt of the DVD containing the main elements of the Commission's file.

(387) As regards [a company within the ENI group] and Polimeri's claim that the Commission did not react in a timely manner to their applications for leniency, both companies were already informed orally, during a meeting with the Commission on 15 April 2005, about the status of their leniency applications, about the fact that immunity was no longer available and that [a company within the ENI group] and Polimeri were not the first companies to apply for leniency. During that meeting [a company within the ENI group] and Polimeri were also informed that it is not possible for the Commission to take any position in advance as to whether an applicant qualifies for leniency as the applicant has to decide the strategy of cooperation on its own. The letters sent to [a company within the ENI group] and Polimeri on 8 February 2006 were a purely formal act of acknowledgement of [a company within the ENI group] and Polimeri's leniency applications, pursuant to points 12, 14 and 25 of the Leniency Notice. In those letters, [a company within the ENI group] and Polimeri were informed once more that the Commission would evaluate the final position of each undertaking which filed an application for a reduction of a fine only at the end of the administrative procedure. Acknowledging the receipt of [a company within the ENI group] and Polimeri's leniency applications in February 2006 could in no way harm the rights of defence of those two companies.

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466 See judgment of the Court of First Instance in Case T-44/00, *Mannesmannröhren-Werke AG* v *Commission*, [2004] ECR II-729 at paragraph 65.

(388) The argument that the Commission proceeded incorrectly by not reacting to [a company within the ENI group] and Polimeri's proposal to interview their employees cannot be accepted, as the strategy of cooperation is a unilateral decision of the leniency applicant and the Commission would be acting in a discriminatory manner if it guided applicants. The Commission explained that to [a company within the ENI group] and Polimeri at the time the two companies made their first submission. [a company within the ENI group] and Polimeri also claim that they should have had the right to withdraw the evidence that they had submitted after their immunity application was rejected. Those two undertakings applied for immunity or, in the alternative, for a reduction of fines. The Leniency Notice, however, does not foresee the possibility for an applicant for the reduction of fines to withdraw the evidence provided to the Commission.

(389) [a company within the ENI group] and Polimeri's claim that the Commission should have informed them about the value of their cooperation earlier cannot be accepted as the assessment of whether evidence submitted by them represented any significant added value can only be made shortly before issuing the SO. Only at that stage could the Commission compare all the evidence provided by those two companies to the evidence already in its possession and form a full view of the significance on the evidence they provided for proving the case. Furthermore, the Leniency Notice only provides that the Commission will take a position on the cooperation before issuing the SO. [a company within the ENI group] and Polimeri in particular, as they were the last companies which cooperated with the Commission under the Leniency Notice in this case, had the opportunity until just before the SO was issued to complete their submissions. It would be contrary to the rationale of the Leniency Notice if the Commission were to indicate, at every stage of the procedure, the assessment which it made of the evidence submitted in the sense that cooperation from undertakings must come spontaneously. Such indications could also be said to distort the cooperation process. Where several undertakings ask to meet the Commission with a view to cooperating under the Leniency Notice, the Commission must ensure that it does not itself have an impact on the conditions of competition between undertakings that is inherent in the application of the Leniency Notice.[467] Such early assessments may also give indications about the value of the evidence the Commission has in the file, which the Commission is entitled not to disclose until the SO is issued. Otherwise the effectiveness of the Commission's investigation would be prejudiced, since the undertaking would already be able, at the first stage of the Commission's investigation, to identify the information known to the Commission and therefore the information that could still be concealed from it.[468] In any event, [a company within the ENI group] and Polimeri received the letter informing them about the value of their cooperation on 7 March

[467] See, to this effect, judgment of the Court of First Instance in Case T-15/02, *BASF v Commission*, [2006] ECR II-497, paragraph 504.

[468] Judgement of the Court of Justice in Case C-407/04 P, Dalmine, [2007] ECR I-835, paragraph 60.

2007, more than one week before the SO was notified to them in this case. Consequently the argument that they could not react to that letter and could not contact the hearing officer is unfounded.

(390) In this regard, [a company within the ENI group]'s claim that the Commission addressed self-incriminating questions to it in October 2006, without telling [a company within the ENI group] that it would not qualify for leniency, must also be rejected. In order to avoid discrimination between the parties involved, the Commission sent out requests for information in letters to all of the parties. According to settled case law, the privilege against self-incrimination can only be invoked if the Commission compelled the undertaking to reply.[469] A request for information pursuant to Article 18 of Regulation (EC) No 1/2003, in contrast to a decision pursuant to that Article 18, does not have such a compelling effect. The undertaking to which a request for information is addressed can simply refuse to answer self-incriminating questions. Finally, and as set out in recital (389), at the time those requests for information were sent out, the Commission was not in a position to assess whether the various leniency applications represented significant added value, given that that assessment also depended on the replies of the undertakings that offered their cooperation to the Commission.

(391) Finally, [a company within the ENI group] and Polimeri claim that the Commission only took a position on their requests for immunity, but not the requests for the reduction of fines. In this regard the Leniency Notice obliges the Commission only to react to an undertaking's application for immunity or to inform the undertaking in the event that it provided significant added value in the framework of an application for reduction of fines. The Leniency Notice does not require the Commission to inform an applicant for the reduction of fines if it fails to provide significant added value to the investigation and consequently does not qualify for leniency.

(392) As a result, the procedural claims put forward by [a company within the ENI group] and Polimeri must be rejected.

5.3.6.2. The CR types concerned

(393) In its reply to the Statement of Objections, Tosoh argues that the investigation and Decision in this case should not include the liquid form of CR, latex. It claims that the transportation costs for liquid CR were considerably higher than for solid CR and that, consequently, latex was not traded in the same way as solid CR. Tosoh claims that it does not produce large quantities of latex CR and that it sold that liquid form mainly in Japan.

(394) The argument submitted by Tosoh concerning the relevant product market cannot be accepted. As a general rule and in line with the *Tokai*

[469] Case 374/87, *Orkem v Commission*, [1989] ECR 3283, paragraphs 27, 28 and 32 to 35; Case C-301/04 P, *Commission v SGL,* [2006] ECR I-5915, paragraph 44-49.

judgment of the Court of First Instance, the market covered by a Commission decision is defined by the cartel arrangements and activities.[470]

(395) As explained in the factual part of this decision Chapter 4 one of the main features of the cartel agreements in this case was the exchange of information on shipment and sales figures (see recital (85)). The competitors compared those figures to the figures published by the IISRP on a monthly basis. The data that the CR manufacturers reported to the IISRP included all forms of CR, meaning not only solid CR but also the liquid form, latex. This was confirmed by Tosoh during the Oral Hearing at the request of the Commission and is not contested by any of the parties concerned. To be able to effectively compare the IISRP figures with those reported by the competitors during the collusive meetings, the competitors had to divulge their respective shipments and sales of all forms of CR, including shipments and sales of latex. Consequently, latex CR was part of the illicit arrangements, at least insofar as it involved the exchange of shipment and sales figures. This is further confirmed by Bayer (see recital (100)) which states in its submission that, when the entire market was reviewed, latex sales were included when the size of the CR market was being calculated.

(396) Furthermore there is evidence in the file showing that latex was also directly discussed between the competitors. The handwritten notes of [*] (Tosoh) of the meeting on 19 May 1998 with Enichem show under point 2 that probably Enichem's share in Latex was increasing *"LATEX share↑ = Latex"* and that this was object of the discussions between the two competitors.[471] Notes of [*] (Tosoh) indicate that the competitors exchanged precise price information in a meeting on 16 June 2000 (see recital (277)). [*] Evidence submitted by DDE also points to the fact that DDE implemented an agreed price increase in July 2000 (see footnote 383) and that it applied that price increase not only for all dry grades but also for the CR latex types.

(397) As a result, latex must be considered to have been part of the cartel arrangements and should therefore be covered by this Decision.

5.3.6.3. The alleged coercion of the Japanese producers

(398) [*]

(399) In its reply to the Statement of Objections [*] claims that it was coerced by the European producers to join the competitor meetings (see also recital (336)). [*] submits that the European producers (including Bayer, DuPont/DDE and Enichem) threatened to file an anti-dumping complaint in Europe against the Japanese producers. [*] submits that the threats prevented [*] from reporting the cartel to the Commission because of the potential impact of the European producers' retaliation.

[470] See judgment Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and others* v *Commission*, [2005] ECR II-10, at paragraph 90.

[471] [*]

[*]. [*] identified in its reply, as well as in an additional submission made in reaction to a question of the Commission during the Oral Hearing, several meetings during which such threats were allegedly made (see recitals (142), (155), (156), (161), (178) and (208)).

(400) The Commission could not establish to a sufficient standard of proof any coercion by Bayer, DuPont/DDE or Enichem. In the whole file there is no direct evidence of such coercion (documents drafted in at the time the infringement took place) [*][472] Those statements were self-serving (and not inculpatory statements, which have more probative value) and could not be corroborated sufficiently. [*] confirmation that there were threats by the European producers was only given in reply to the facts of the case as set out in the Statement of Objections. Consequently they cannot be treated as an independent source of corroboration and have, as such, no evidential value. Even after a specific request by the Commission during the Oral Hearing [*] was not able to provide any direct evidence of the allegedly regular threats. To that extent, and as mentioned in recital (344), it is also not credible that [*]

(401) Based on the above, it cannot be established that Bayer, DuPont/DDE or Enichem exerted pressure on the Japanese undertakings to join the cartel arrangements.

6. ADDRESSEES OF THIS DECISION

6.1. General principles

(402) As a general consideration, the subject of Community competition rules is the "undertaking", a concept that has an economic scope and that is not identical with the notion of corporate legal personality in national commercial or fiscal law. The "undertaking" that participated in the infringement is therefore not necessarily the same entity as the precise legal entity within a group of companies whose representatives actually took part in the cartel meetings. The term "undertaking" is not defined in the Treaty. However, in *Shell International Chemical Company v. Commission*, the Court of First Instance held that *"in prohibiting undertakings inter alia from entering into agreements or participating in concerted practices which may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the common market, Article 85(1) [now Article 81(1)] of the EEC Treaty is aimed at economic units which consist of a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision"*.[473]

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472 The only document constituting direct evidence and mentioning anti-dumping actions are handwritten notes submitted by Bayer, [*] However Bayer explained that the ″[*]″ concerned a possible anti-dumping complaint of [*], DSM and Bayer against DPDE on the EPDM market, [*]

473 See Case T-11/89, [1992] ECR II-757, paragraph 311. See also case T-352/94 *Mo Och Domsjö AB v Commission,* [1998] ECR II-1989, paragraphs 87-96, case T-43/02 *Jungbunzlauer v. Commission*,

(403) The Community-law concept of "undertaking" has always been a functional one. The concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or its precise legal form under national law.[474] For each undertaking that is to be held accountable for infringing Article 81 of the Treaty one or more legal entities should be identified, to bear legal liability for the infringement in this case. According to the case law, "*Community competition law recognises that different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Articles 81 EC and 82 EC if the companies concerned do not determine independently their own conduct on the market*".[475] If a subsidiary does not determine its own conduct on the market independently, the company which directed its market strategy forms a single economic entity with that subsidiary and may be held liable for an infringement on the ground that it forms part of the same undertaking.

(404) According to settled case-law of the Court of Justice and the Court of First Instance, the Commission can generally assume that at the time of the infringement, the parent company was able to exercise decisive influence on a wholly-owned subsidiary and actually did so without needing to check whether the parent company has in fact exercised that power.[476] However, the parent company and/or subsidiary can reverse that presumption by producing sufficient evidence that the subsidiary "*decided independently on its own conduct on the market rather than carrying out the instructions given to it by its parent company and such that they fall outside the definition of an 'undertaking*".[477]

(405) Where an infringement of Article 81 of the Treaty is found to have been committed, it is necessary to identify a 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.

(406) When an undertaking that has committed an infringement of Article 81 of the Treaty subsequently disposes of the assets which contributed to

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[2006] ECR II-3435, paragraph 125; case T-314/01 *Avebe v Commission*, [2006] ECR II-3085, paragraph 136; case T-330/01, *Akzo Nobel v Commission*, [2006] ECR II-3389, paragraph 83

474 Although an 'undertaking' within the meaning of Article 81(1) is not necessarily the same as a company having legal personality, it is necessary for the purposes of enforcing decisions to identify the legal or natural personality to whom the decision will be addressed. See Case T-305/94 *PVC,* [1999] ECR, II-0931, paragraph 978.

475 Court of Justice in Case 48/69 *Imperial Chemical Industries v. Commission,* [1972] ECR 619, paragraphs 132-133; Case 170/83 *Hydrotherm,* [1984] ECR 2999, paragraph 11 and Court of First Instance in Case T-102/92 *Viho v Commission,* [1995] ECR II-17, paragraph 50, cited in Case T-203/01 *Michelin* v *Commission,* [2003] ECR II-4071, paragraph 290.

476 Court of First Instance in Case T-30/05 *Prym Consumer v Commission*, judgment of 12 September 2007, not yet published, paragraphs 146-148*;* Court of First Instance in Joined Cases T-71/03 etc. *Tokai Carbon* and Others *v Commission*, [2005] ECR II-10, paragraph 60; Case T-354/94 *Stora Kopparbergs Bergslags v Commission,* [1998] ECR II-2111, paragraph 80, upheld by Court of Justice in Case C-286/98P *Stora Kopparbergs Bergslags v Commission,* [2000] ECR I-9925, paragraphs 27-29; and Court of Justice in Case 107/82 *AEG v Commission,* [1983] ECR 3151, paragraph 50.

477 Court of First Instance in Joined Cases T-71/03 etc. *Tokai Carbon and Others v Commission*, [2005] ECR II-10, paragraph 61.

the infringement and withdraws from the market in question, it continues to be answerable for the infringement if it has not ceased to exist.[478] If the undertaking which has acquired the assets carries on the violation of Article 81 of the Treaty, liability for the infringement should be apportioned between the seller and the acquirer of the infringing assets, each undertaking being responsible for the period in which it participated through those assets in the cartel. However, if the legal person initially answerable for the infringement ceases to exist, being purely and simply absorbed by another legal entity, that latter entity must be held answerable for the whole period of the infringement and thus liable for the activity of the entity that was absorbed.[479] The mere disappearance of the person responsible for the operation of the undertaking when the infringement was committed does not allow it to evade liability.[480] Liability for a fine may thus pass to a successor where the corporate entity which committed the violation has ceased to exist in law.

(407) Different conclusions may, however, be reached when a business is transferred from one company to another, in cases where transferor and transferee are linked by economic links, that is to say, when they belong to the same undertaking. In such cases, liability for past behaviour of the transferor may transfer to the transferee, notwithstanding the fact that the transferor remains in existence.[481]

6.2. Liability in this case

(408) It is established by the facts as described in Chapter 4 that the following legal entities directly participated in the infringement to which this Decision relates as explained in recitals (409)-(420):

(a) Bayer AG;

(b) E.I. DuPont de Nemours and Company;

(c) DuPont Performance Elastomers S.A. and DuPont Performance Elastomers L.L.C. as successors for the involvement of DDE L.L.C and DDE S.A.

(d) Denki Kagaku Kogyo K.K. and Denka Chemicals GmbH;

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478 Case T-6/89 *Enichem Anic v Commission (Polypropylene),* [1991] ECR II-1623; Case C-49/92P *Commission v Anic Partecipazioni,* [1999] ECR I-3125, paragraphs 47-49.

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

480 See Court of First Instance in Case T-305/94 *PVC II,* [1999] ECR II-931, paragraph 953. This point was confirmed by the Court of Justice in Joined Cases C-238/99 P etc. *Limburgse Vinyl Maatschappij N.V. and others v Commission* (PVC II). [2002] ECR I-8375.

481 See judgment in Joined Cases C-204/00 P (and other), *Aalborg Portland A/S a.o. v Commission* [2004] ECR I-267, paragraphs 354-360, as confirmed in Case T-43/02 *Jungbunzlauer AG v Commission*, [2006] ECR II-3435, par. 132-133.

(e) [a company within the ENI group] S.p.A. and Polimeri Europa S.p.A.;

(f) Tosoh Corporation and Tosoh Europe B.V.

(409) In order to identify the appropriate addressees of this Decision and to establish liability for the infringement within each undertaking, the following specifications must be made in respect of the respective legal entities:

- Bayer

(410) The evidence described in Chapter 4 shows that Bayer AG directly participated in the infringement from 13 May 1993 to 13 May 2002.

- Denka

(411) Denki Kagaku Kogyo Kabushiki Kaisha and Denka Chemicals GmbH participated directly in the infringement described in this Decision. Representatives of Denki Kagaku Kogyo Kabushiki Kaisha (see for example, recitals (150), (156), (168), (188), (194), (199), (210), (213), (227), (233), (256), (260), (263), (281) and (291)) and Denka Chemicals GmbH (see, for example, recitals (151), (158), (173), (174), (285) and (302)) participated in various cartel contacts between 13 May 1993 and 13 May 2002.

(412) In particular, at crucial points in the period of the infringement (for example, at meetings in May and July 1993 and in February, April and September 1998, see recitals (137), (143), (215), (226) and (235)) and also in the period after 1998 (for example, bilateral and trilateral contacts with competitors in 1999, 2000 and 2002, see recitals (269), (277), (280), (295) and (307)) Denka was represented in the cartel contacts by employees of both the mother company and Denka Europe, at the same time.

(413) In addition, Denki Kagaku Kogyo Kabushiki Kaisha exercised a decisive influence on the market behaviour of Denka Europe. As Denka Europe is 100% owned by Denki Kagaku Kogyo Kabushiki Kaisha (see recital (21)) the Commission may presume that the parent actually did exert decisive influence over its subsidiary's conduct. The following additional elements support the presumption.

(414) Denka Europe was formed in 1990 and since then has been a wholly owned subsidiary of Denki Kagaku Kogyo Kabushiki Kaisha. [*] (see recital (22)).

(415) From an operational point of view, the Organic Chemicals Department arranges a production schedule for the next month. If actual requirements deviate from the schedule, the Production Department at the manufacturing plant will be requested to alter the production schedule. At Denka the International Sales Section gathers estimated sales figures from (amongst other offices also) Denka Europe. A preliminary sales budget is presented to the [*]. After [*] approval, a

production budget is prepared by the production section. Thereafter, the budget plan is sent to Denka's President. A general price increase is decided upon by [*].

(416) Denka did not dispute that finding in its reply to the Statement of Objections.

(417) It follows from the fact that representatives of both mother company and subsidiary participated directly in the cartel arrangements, that the mother company was aware of the activities in which its subsidiary was involved.

(418) On the basis of the above, Denki Kagaku Kogyo Kabushiki Kaisha and Denka Chemicals GmbH should be held jointly and severally liable for the infringement committed by Denki Kagaku Kogyo Kabushiki Kaisha and Denka Chemicals GmbH during the period from 13 May 1993 until 13 May 2002.

- DuPont

(419) The evidence described in Chapter 4 shows that E.I. DuPont de Nemours and Company directly participated in the infringement from 13 May 1993 until the end of March 1996, when it transferred its CR business to the joint venture DuPont Dow Elastomers L.L.C. that it formed with Dow.

a) Dow and DuPont

(420) DuPont and Dow, as the parent companies of the joint venture DDE, should be held jointly and severally liable for the behaviour of the joint venture during the period from 1 April 1996 to 13 May 2002.

(421) This conclusion is based on objective factors demonstrating that DDE did not enjoy an autonomous position but, rather, that Dow and DuPont exercised decisive influence on the commercial conduct and policies of the joint venture on an equal footing.[482]

(422) First, the responsibilities of the Members Committee and its composition with high level executives from the parent companies as representatives show that the power to influence the general market behaviour of DDE lay in the hands of the parent companies.

(423) The parent companies set up a "Members Committee" in order to supervise the business of DDE and to approve certain matters pertaining to the strategic direction of DDE. Notably the Members Committee had powers to set the overall policy and vision of DDE, to approve the business and strategic plans and the annual operating plans of DDE, to elect or appoint the officers of DDE, to determine the banking policy of DDE and to approve all capital expenditure and

[482] This is in line with the judgment in Case T-314/01 *Avebe v Commission*, [2006] ECR II-3085, paragraphs 89-97, 123-127 and 138-141.

borrowing by DDE above certain levels (Sections 7.4. and 9.1 of the LLC Agreement). In addition, the Members Committee had the power to amend the business scope, to liquidate or otherwise dissolve DDE or to approve the merger or consolidation of DDE (Section 6.1. of the LLC Agreement). Those tasks were expressly reserved for the exclusive authority of the Members Committee. In general, the parent companies also had the right to delegate any powers and authority required for the management of the company to the Members Committee.

(424) DuPont and Dow each had the right to appoint an equal number of Member Representatives to the Members Committee. The decisions of the Members Committee were taken unanimously, with each shareholder having an absolute right of veto. Accordingly, neither shareholder was individually able to exercise decisive influence over DDE.[483]

(425) The representatives of the Members Committee were not employees of DDE, but of DuPont and Dow respectively. The representatives of both Dow and DuPont came from the senior executive level.[484] The lack of an independent *"board of directors with external representatives"* was also a factor in the Court of Justice's reasoning in *Stora Kopparbergs Bergslags v Commission* to reject the claim of autonomous action by the subsidiary.[485]

(426) Second, the Members Committee had the right to appoint the officers of DDE, responsible for the day-to-day business affairs, subject to the overall direction and control of the Members Committee (Section 9.1. of the LLC Agreement). The persons chosen for the top management posts in DDE came from a high management level within the respective parent companies, Dow and DuPont: [*] [486]

(427) Entrusting individuals with consecutive positions in the parent companies and the joint venture constitutes a classic mechanism to keep information flow and coherence within the members of the group (in this case between the joint venture and the parents) and guarantees predictability of management and on policy aspects.

(428) Finally, DuPont, as a participant in the cartel until the transfer of its CR activity into DDE, was fully aware of the existence of the cartel and must have been aware of the participation of DDE in the cartel. Presumably Dow must also have been aware of the existence of the

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483 [*]

484 [*] In its reply to the Statement of Objections DuPont explains that one of its representatives at the Members Committee had retired from DuPont immediately before the formation of DDE. It acknowledges that it had not indicated this in its reply of 3 January 2007 to the Commission's request for information on this matter.

485 Case T-354/94 *Stora Kopparbergs Bergslags v Commission,* [1998] ECR II-2111, paragraph 80, upheld by Court of Justice in Case C-286/98P *Stora Kopparbergs Bergslags v Commission,* [2000] ECR I-9925.

486 [*]

cartel see recital (438). This is an additional factor demonstrating that DuPont and Dow exercised a decisive influence on DDE's behaviour.

(429) In their replies to the Statement of Objections, DuPont and Dow claim that the responsibility rested with the joint venture, DDE. They both submit that DDE was responsible for its behaviour alone as it was an autonomous entity. DuPont submits that, by contrast to a situation where a parent company holds 100% of the shares in a subsidiary, there is no basis under Community law for the Commission to presume that the 50/50 joint venture DDE did not behave autonomously. It argues that, on the contrary, there is a presumption that DDE "as a full-function undertaking for the purposes of Community competition law" was acting autonomously and that any unlawful conduct on the part of DDE was the responsibility of DDE, not of its parents. Both DuPont and Dow refer, in this respect, to the Commission decision of 21 December 2005 in Case COMP/38433 – Rubber chemicals, which the Commission did not address to the parent companies of a 50/50 joint venture Flexys. Both DuPont and Dow also refer to the Commission notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings[487] in support of their claims that DDE operated as an autonomous undertaking. DuPont submits that the Commission itself, in the merger case approving establishment of DDE[488], found that DDE is an autonomous full-function concentrative undertaking and implicitly confirmed this when it approved the break-up of the joint venture[489]. Dow also argues that the Court of First Instance erred in law in the Avebe case[490] in assuming that a parent can have decisive influence in a joint venture, because Dow submits that the concept of a "single economic unit" as developed in *Viho*[491] does not apply to joint venture situations.

(430) Moreover, both DuPont and Dow refer to the Court of First Instance judgment in Case T-314/01 *Avebe v Commission* and argue that this case differs materially from that case *inter alia* in the following respects: DDE had a separate legal personality from its parent companies; DDE performed on a lasting basis all the functions of an autonomous economic entity; DDE did not rely on its parent companies to enter into agreements with third parties; DDE had premises/headquarters of its own and was not located at the premises of one of its parent companies; the parent companies did not assume their joint venture's commitments jointly and without limitation; there is no evidence to suggest that either parent company was aware of the cartel activity during the DDE joint venture period. DuPont adds that DDE's R&D, manufacturing, marketing, sales and legal functions were entirely separate from those of either of its parent companies. Dow adds

487 OJ C 66, 2.3.1998, p. 1-4.

488 Commission decision of 21 February 1996 in case M.663 Dow/DuPont.

489 Commission decision of 12 April 2005 in case M.3743 DuPont/DDE

490 See case *Avebe v Commission,* footnote 482 above.

491 Dow refers to paragraph 6 in the judgment of the Court of Justice of 24 October 1996 in case C-73/95 P, Viho.

that DDE's management was independent from that of its parent companies. In this context it also claims that, in the Statement of Objections, no facts were cited in paragraph 391 concerning the holding of consecutive positions in the parent companies and the joint venture. It submits that there are no Dow individuals who even held any "consecutive position" in Dow and DDE as regards the CR business.

(431) As the Court of Justice pointed out in *Avebe*, it is settled case-law that the anti-competitive conduct of an undertaking can be attributed to another undertaking where it has not decided independently upon its own conduct on the market but carried out, in all material respects, the instructions given to it by that other undertaking, having regard in particular to the economic and legal links between them.[492] The Court also found in *Avebe,* on the basis of established case-law, that it is, in principle, for the Commission to demonstrate such decisive influence on the basis of factual evidence, including, in particular, any management power one of the undertakings may have over the other.[493] In *Avebe* the Court accordingly found that the joint venture agreement established joint management power over the joint venture. Given the joint management power and the fact that the parent companies each held a 50% stake in the joint venture and, therefore, controlled all of its shares jointly, the Court found that the situation in that case was analogous to that in Case T-354/94 *Stora Kopparbergs Bergslags v Commission*, in which a single parent company held 100% of its subsidiary, for the purpose of establishing the presumption that that parent company actually exerted a decisive influence over its subsidiary's conduct.

(432) It follows from the above that the management power one undertaking has over another can constitute the factual evidence that demonstrates decisive influence over the other undertaking. Accordingly, in this case, the joint management power of DuPont and Dow with respect to the commercial conduct and policy of DDE and the fact that the parent companies exercised that power on an equal footing has been demonstrated in recitals (421) to (428), on the basis of the agreement setting up the joint venture (the so called LLC Agreement). The parent companies appointed an equal number of representatives to the highest decision making body in DDE, the Members Committee, which was set up to supervise the business of DDE and to approve certain matters pertaining to the strategic direction of DDE (see recitals (422) - (425)). The Members Committee was formed by high level executives of the parent companies, who were not employees of the joint venture. All

492 See case *Avebe v Commission,* footnote 482 above, in paragraph 135. See also Joined Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P et C-213/02 P Dansk Rørindustri and Others v Commission [2005] ECR, I-0000, paragraph 117, and Case C-294/98 P Metsä-Serla Oyj and Others v Commission [2000] ECR I-10065, paragraph 27.

493 See paragraph 136 in the *Avebe* judgment and the following case-law referred therein: *Dansk Rørindustri and Others v Commission*, paragraphs 118 to 122; Case C-196/99 P *Aristrain v Commission* [2003] ECR I-11005, paragraphs 95 to 99; Case T-9/99 *HFB and Others v Commission* [2002] ECR II-1487, paragraph 527.

important decisions were taken unanimously with an absolute veto right. Given that joint management power and the fact that DuPont and Dow jointly controlled shares in DDE, each holding a 50% share, contrary to the parties' arguments, the finding of liability of both parent companies is in line with the judgment in *Avebe*.[494]

(433) The factual situation in each case may be different and it is not necessary that the particular facts are always the same, because they in any case pertain to the structure that the joint venture's parents have decided to establish in each case. What counts is whether, on the basis of the facts particular to the case at hand, it is demonstrated that the joint venture's parents have exercised decisive influence over the joint venture's conduct, on the basis of factual evidence, in particular, any management power over the joint venture. Therefore, in order to prove management power over a joint venture, it is necessary to consider whether the facts in the case at hand demonstrate decisive influence, rather than to compare the particular facts in one case against those in another.

(434) In the light of the general legal principle explained in recital (431), contrary to DuPont's submission, there is no presumption that an infringement of Community antitrust rules by a joint venture, which has been deemed to be a full-function joint venture for the purposes of a Decision pursuant to the Merger Regulation[495], would be the responsibility of the joint venture alone and not of its parents. The full-function nature of a joint venture simply makes the joint venture similar to a normal subsidiary having a separate legal personality. Moreover, the case law referred to in *Avebe* sets the legal principle that is explained in recitals (431) and (432) of this Decision and which does not exclude joint ventures. The *Viho* case that DuPont refers to does not exclude the possibility that parent companies of a joint venture can be held liable for an antitrust infringement committed by the joint venture. As set out in recital (403), according to the case law different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Article 81 of the Treaty if the companies concerned do not determine independently their own conduct on the market. In the case of a joint venture it is possible to find that the joint venture and parents together form an economic unit for the purposes of the application of Article 81 of the Treaty if the joint venture has not decided independently upon its own conduct on the market. The fact that the parents of a joint venture can be held liable

494 See the judgment in case *Avebe v Commission* referred to in footnote 482above, in paragraphs 138-139

495 See the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation; Official Journal L 24, 29.01.2004, p. 1-22), particularly in Article 3. See also the Commission notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (Official Journal OJ C 66, 2.3.1998, p. 1-4), which provides guidance as to how the Commission interprets Article 3 of the EC Merger Regulation. Note also paragraph 16 of that notice, which says that "The applicability of Article 85 [now 81] of the Treaty to other restrictions of competition, that are neither ancillary to the concentration, nor a direct consequence of the creation of the joint venture, will normally have to be examined by the means of Regulation No 17 [now Regulation 1/2003]".

is in line with the practice of the Commission on this specific issue, following the above explained general legal principles (see recital (431))set by the Community Courts.[496]

(435) As for Dow's argument that in the Statement of Objections no facts were cited concerning the holding of consecutive positions in the parent companies and the joint venture, the facts are actually presented in the Statement of Objections just before the paragraph that Dow refers to. It is clear from the facts in the Statement of Objections (see for reference recitals (422) - (426) of this Decision, which reproduce the facts set out in the Statement of Objections) that the Commission never claimed that all consecutive management positions were held in the CR business. The issue to demonstrate that parents ensured a level of control in the joint venture is not whether they had high level positions in the same business, but that in general they came from high management level within the respective parent companies and that the appointment of the persons to carry out the day-to-day business was done by the Members Committee, which was the instrument for parent companies to supervise and set the strategic direction of the business of the joint venture.

(436) In their replies to the Statement of Objections, DuPont and Dow also argue that the Members Committee and/or the parent companies were not aware of the cartel activity. Dow states that it was not aware of the cartel activities prior to the Commission inspection in March 2003 at Dow's subsidiaries and that no cartel activities were ever discussed at the meetings of the Members Committee. DuPont and Dow maintain that management of DDE was independent of its parent companies and DuPont submits that there were no improper information flows between the joint venture and its parents. DuPont submits that, whilst the Members Committee was able to appoint the officers of DDE, individuals chosen were not selected according to whether they held high management positions in DuPont or Dow, but on the basis of the individuals' experience and that the reason was not to maintain the flow of information, but to provide some stability to the joint venture business. It submits witness statements of two of its former employees to support its claim that the Members Committee was not aware of any cartel activity.

(437) DuPont further submits the fact that some individuals, who were allegedly involved in the cartel as employees of DuPont and subsequently as employees of DDE, were the same ("subject to some additional individuals at the latter period"), undermines the finding in the Statement of Objections that DuPont must have been aware of the cartel activities in the DDE period. It further submits that DuPont employees who had been involved in cartel activity during the pre-DDE period were wholly transferred to DDE and that, thereafter, no-one who

[496] See Commission decision Case COMP/38.899 – Gas insulated switchgear of 24 January 2007, in particular in paragraphs 404-407, 427-435 and 385-403. Non-confidential version published at the Commission web-site: http://ec.europa.eu/comm/competition/cartels/cases/.

remained within the DuPont group had any knowledge of the cartel. Dow also argues that none of its employees were identified as having participated in the cartel and that the identified involvement of former Dow employees in any cartel activities was at best limited. It also submits that the three former Dow employees identified as having participated in the cartel were, at that time, employed by the joint venture and had no obligation or right to report to anybody in Dow. In support of their claims Dow and DuPont refer to a witness statement of a private practitioner, who DDE and its parent companies had engaged after the inspections in 2003 to investigate possible antitrust violations by means of internal investigations within DDE. In the context of the argument that DDE decided autonomously on matters related to CR, Dow also states that the CR Global Business Team (GBT), which was responsible for the CR business and was the management dedicated to the day-to-day operations of that part of the joint venture, mainly consisted of former DuPont employees who had already been active in the CR business prior to the formation of DDE.

(438) Regarding Dow and DuPont's arguments on their lack of awareness of the cartel activities of the joint venture, it was pointed out in recital (427) that entrusting individuals holding consecutive positions in the parent companies and the joint venture constitutes a classic mechanism to keep information flow and coherence between the joint venture and the parents. The allegedly inadequate functioning of that mechanism in respect of illegal conduct on the part of the joint venture is not proof of the lack of decisive influence on the part of the parent companies over the joint venture, for the question of decisive influence relates to the level of autonomy of the joint venture and not to the awareness of the parent companies with respect to the infringing behaviour of the joint venture. Furthermore, it is clear from the nature of the cartel in this case that the Members Committee must have been a central factor in shaping strategic decision making on actions of the joint venture on the CR market, which were also in the remit of this Committee. This is further confirmed by DuPont's reply to the Statement of Objections, where it explains that the closure of the CR operations at Maydown, Northern Ireland had been decided at the Members Committee on the basis of many considerations As explained in recitals (330) and (331), the concertation on capacity reductions (which included the plant closure) was carried out in the framework of the regionalisation strategy of the cartel. Therefore, contrary to the parties' argument that they were note aware of the joint venture's cartel activities, it is highly unlikely that the Members Committee would have discussed those issues, including the plant closure, without any reference to the cartel and the agreements concluded therein.[497] Moreover, with regard to the witness statement that Dow and DuPont have submitted in their responses to the Statement of Objections and to which they refer to demonstrate that the

[497] See in this respect case *Avebe v Commission*, in paragraph 115, footnote 482 above, stating that: *"Given that the cartel was an essential factor in shaping possible actions on the [...] market, it is completely out of the question that these topics could have been discussed without mentioning the existence of the cartel and the parameters resulting therefrom."*

parents/Members Committee were not aware of the infringement, the statement is about an internal investigation that concerned not only DDE, but also pre-1996 activities of DuPont in Europe, and that an important part of the investigation mandate was to help DDE obtain a favourable leniency treatment. In its leniency application DDE provides information for the period starting from its creation in 1996. However, subsequent to dismantling of the joint venture, in a response to a Commission request for information, DuPont and DPE submitted evidence for the period prior to 1996 (see for reference for example the evidence referred to in recitals (153), (159) and (165) of this Decision). This undermines the credibility of the internal investigation that the joint venture and its parents carried out after the inspections in 2003 as well as the statement submitted on the internal investigation.

(439) As explained in recital (428), an additional factor to be taken into account in the case of DuPont is that, as a direct participant in the cartel until the transfer of its CR activities into DDE, DuPont itself knew that the cartel existed and must therefore have known of DDE's participation in the cartel. Nevertheless, taking into account the joint management power of the parent companies in the 50/50 joint venture, in such a situation it would be difficult to find without any further evidence that only one of the shareholders, who had participated in the cartel prior to formation of the joint venture, exercised decisive influence on the joint venture. Concerning Dow's argument that the day to day operations were managed mainly by the former employees of DuPont, who had been active in the CR business prior to the formation of DDE, this fact alone does not prove that only DuPont and/or the joint venture should bear responsibility for the joint venture's behaviour. In particular, the evidence in Chapter 4 shows that DDE employees who had come from Dow also participated in the infringement while they were employed at DDE. Dow does not contest this, but merely argues that their participation was limited. In conclusion, the management structure of the joint venture indicates that the parent companies actually exercised decisive influence over the joint venture's conduct and none of the parties has adduced any convincing evidence to rebut that finding.

(440) In the light of the above, both of the parent companies, DuPont and Dow, should be held joint and severally liable for the behaviour of the joint venture.

b) DPE

(441) After the infringement the CR activities of DDE L.L.C and DDE S.A. were resumed by the following subsidiaries of DuPont: DPE L.L.C. and DPE S.A. (see recital (40)). Therefore, DPE L.L.C. and DPE S.A. should be held liable as successors for the involvement of DDE L.L.C and DDE S.A. in the infringement. DuPont, DPE L.L.C. and DPE S.A. have not disputed this in their reply to the Statement of Objections.

(442) In the light of recitals (420) to (440) and the general principles explained in recitals (404) and (406), Dow, DuPont, DPE L.L.C. and DPE S.A. should be held jointly and severally liable for DDE's conduct from 1 April 1996 to 13 May 2002.

- *Polimeri*

(443) [a company within the ENI group] S.p.A. (formerly EniChem S.p.A.) and Polimeri Europa S.p.A. should bear responsibility as direct participants in the infringement. The evidence described in Chapter 4 shows that both of them participated in the cartel from 13 May 1993 to 13 May 2002 under different names or legal/economic entities of which they are the legal and/or the economic successors.

(444) On 1 November 1997 EniChem Elastomeri S.r.l. was amalgamated by incorporation into EniChem S.p.A.. In the light of that fact and the general principles explained in recital (406), EniChem S.p.A. took over liability for the past actions of EniChem Elastomeri S.r.l. which ceased to exist as a separate legal entity.

(445) On 1 January 2002, EniChem S.p.A. transferred the "Elastomeri e Stirenici" business (including CR) together with other businesses to its 100 % subsidiary Polimeri Europa S.p.A., which became the economic successor of EniChem S.p.A. as far as those products are concerned. On 1 May 2003, EniChem S.p.A. changed its name to [a company within the ENI group] S.p.A.

(446) As explained in recitals (402)-(407), where the relevant business (including its main human and material elements) is transferred within the same undertaking from one company to another, the acquiring company may be held liable for the past behaviour of the entity which has transferred the business, notwithstanding the fact that the transferring company remains in existence. In such a case, the economic entity actually remains the same.[498]

(447) In this case, Polimeri Europa S.p.A. and [a company within the ENI group] S.p.A. belong to the same undertaking. That Polimeri should hold liability for [a company within the ENI group]'s past behaviour is also supported by the following factors.

(448) First, Polimeri acquired Enichem S.p.A.'s active CR businesses with effect from 1 January 2002, including all the main assets and employees. Before and after that reorganisation, Enichem S.p.A. was Polimeri's only shareholder. The transfer did not lead to the payment of any consideration to Enichem S.p.A. but was instead achieved through an increase of Polimeri's share capital and the issuance of the corresponding shares to Enichem S.p.A.. The total nominal value of those shares was established on the basis of a report rendered by an expert who was appointed by the Italian courts. The purpose of the

[498] See judgment in Joined Cases C-204/00 P (and other), *Aalborg Portland A/S a.o. v Commission* [2004] ECR I-267, paragraphs 354-360.

report was mainly to avoid an excessive evaluation of Polimeri Europa S.p.A.'s share capital which might have harmed the expectations of Polimeri Europa S.p.A.'s creditors.[499]

(449) Second, Enichem S.p.A.'s/[a company within the ENI group]'s assets and associated turnover have since considerably decreased and its current activity is limited to managing non-strategic shareholdings with a view to their sale to third parties or their liquidation, sale of any active plant to third parties or closure and securing thereof, dismantling closed plants and reclaiming contaminated land, managing services and utilities in shared plants with a view to their conversion into third-party services or to the establishment of consortia and managing pending litigation.

(450) There is therefore a serious risk that, by the time a decision imposing a fine in this case is addressed to and executed against it, [a company within the ENI group] will no longer possess sufficient assets for the payment of the fine.

(451) Third, in this case, Polimeri Europa S.p.A. took over the involvement in the cartel meetings as of 1 January 2002 until 13 May 2002, and the employees who had participated in the infringement as employees of EniChem S.p.A., continued to participate in the infringement as employees of Polimeri Europa S.p.A. (see recital (45) and Chapter 4).

(452) The reporting lines between [*] in the CR business also lead directly to the [*] of EniChem S.p.A. and Polimeri respectively.

(453) [*]

(454) [*] [500]

(455) The [*] of both EniChem S.p.A. (now [a company within the ENI group]) and Polimeri are responsible to [*]. The [*] were appointed by the shareholders of the company concerned. The [*] of EniChem Elastomeri was appointed by EniChem S.p.A.

(456) It follows from the above that Polimeri Europa S.p.A. should be held liable for the entire period of the infringement from 13 May 1993 to 13 May 2002. It is consequently not necessary to address this decision to [a company within the ENI group].

- Eni's liability for involvement of EniChem Elastomeri, EniChem S.p.A. (now [a company within the ENI group]) and Polimeri in the infringement

(457) Eni S.p.A. owned directly or indirectly almost 100 % of EniChem Elastomeri S.r.l., EniChem S.p.A. (now [a company within the ENI group] S.p.A.) and Polimeri Europa S.p.A. at the time they participated directly in the infringement. As also explained in recital (404), in the

499 See p. 14525, [*] in reply to the Commission's request for information of 16 November 2005.

500 [*]

case of wholly owned subsidiaries, the Commission may presume that the parent actually did exert decisive influence over its subsidiary's conduct. Thus, Eni should be held jointly and severally liable - together with Polimeri - for the behaviour of EniChem Elastomeri S.r.l., EniChem S.p.A. (now [a company within the ENI group] S.p.A.) and Polimeri Europa during the period from 13 May 1993 until 13 May 2002. In addition, there are further elements which confirm (and thus corroborate the presumption) that Eni S.p.A. exercised decisive influence over its subsidiaries.

(458) First, most, if not all of the board of directors of EniChem S.p.A. (1995-2001) and Polimeri (2002) were directly or indirectly appointed by Eni. As mentioned in recitals (452)-(455), the reporting lines between [*]in the CR business lead directly to the [*] of EniChem S.p.A. and Polimeri.

(459) Second, the concentration of the chemical activities forming the "Elastomeri e Stirenici" business first in EniChem S.p.A. and then in Polimeri indicates a clear intention of the Eni Group to keep a special focus on that business and to remain the master of its ultimate structure and conduction.

(460) In its reply to the SO, Eni has claimed that, contrary to the Commission's contention, earlier Commission decisions and the judgments of the Court of First Instance and the Court of Justice indicate that full control is not sufficient to establish a presumption of exercise of decisive influence. Eni contends that its responsibility has to be assessed differently from that of the other mother companies which were directly involved in the infringement. According to Eni, other factors than the 100% ownership should be present to establish liability, such as effective managerial power, management overlaps, information flow between parent company and subsidiary, direct involvement in the facts, operations on the same market and formation of a single economic entity, lack of assets in the subsidiary, the parent's acquiescence during the procedure or the involvement of a number of subsidiaries in the infringement. Eni describes itself as a pure financial holding company and contends that it did not have any influence on [a company within the ENI group] or Polimeri's commercial strategy or their operational decisions. Furthermore it claims that the decisions and strategies adopted by [a company within the ENI group] and Polimeri were discussed and taken within the operating division of those companies, without involving directly the board of directors or Eni in the decision making process.

(461) Eni's interpretation of the relevant precedents cannot be accepted.[501] As explained in recitals (402) - (406) and as recently confirmed by the Community Courts[502], it is established case law that the Commission

[501] Including the courts decision in Joined Cases T-109/02 and others, *Bolloré,* judgment of 26 April 2007, not yet reported.

[502] Court of First Instance in Case T-30/05 *Prym Consumer v Commission*, judgment of 12 September 2007, not yet reported, paragraphs 146-148.

can presume that parent companies exercise decisive influence on their wholly owned subsidiary. Where such a presumption applies, as in this case for Eni, it is for the parent company to reverse the presumption by adducing evidence demonstrating that its subsidiary decided independently on its conduct on the market. Failure to provide sufficient evidence on the part of the parent company amounts to a confirmation of the presumption and provides a sufficient basis for the imputation of liability. The presumption was not rebutted in this case.

(462) As to the argument which Eni has put forward in order to claim that its subsidiary acted autonomously, the following is observed.

(463) The allegation that there is no indication of direct involvement of the parent company in the anti-competitive conduct and its alleged lack of awareness is irrelevant. That argument is based on the erroneous premise that a parent company can only be held liable for the infringements committed by its subsidiaries if it can be established that it was aware of the infringement or it was directly involved in its organisation and implementation. Contrary to that contention, attribution of liability to a parent company for the infringement committed by its subsidiary flows from the fact that the two entities constitute a single undertaking for the purposes of the Community rules on competition[503] and not from proof of the parent's participation in or awareness of the infringement (see case law quoted in recitals (402) - (405)).

(464) The exercise of decisive influence on the commercial policy of a subsidiary does not require day-to-day management of the subsidiary's operation. The subsidiary's management may well be entrusted with the subsidiary, but this does not rule out the possibility for the parent company to impose objectives and policies which affect the performance of the group and its coherence and to discipline any behaviour which may depart from those objectives and policies.

(465) Eni has further claimed that chemical activities are not part of the core-business of the group. It was decided to leave the chemical activities to the exclusive management of separate subsidiaries (in particular Enichem/[a company within the ENI group] and Polimeri). The autonomous character of the chemical business is reflected in a document of corporate governance quoted in the reply to the SO which limits the scope for intervention by the parent company to operations which may endanger the financial situation of the company.

(466) Concerning the alleged facts that Eni has always limited itself to the function of a "holding company" with respect to its chemical activities, that Eni's chemical activities fall outside its "core business", that there was no management overlap between Eni and Enichem/[a company within the ENI group]/Polimeri and that there is no evidence of direct

503 See Cases T-71/03, T-74/03, T-87/03, and T-91/03 *Tokai Carbon v Commission,* [2005] ECR II-10, paragraph 54.

communications between parent and subsidiary or of Eni's involvement in Enichem's commercial activities, the following observations should be made.

(467) First, the definition of core business and the qualification of the role of a parent group in terms of "holding company" are not conclusive arguments with respect to the effective autonomy of a subsidiary. The fact that the parent company itself is not involved in the different businesses is not decisive as regards the question whether it should be considered to constitute a single economic unit with the operational units of the group. The division of tasks is a normal phenomenon within a group of companies. An economic unit by definition performs all of the main functions of an economic operator within the legal entities of which it is composed. Group companies and business units that are dependent on a corporate centre for the basic orientation of the commercial strategy and operations, for their investments and finances, for their legal affairs and for their leadership form a single economic unit and hence cannot be considered to constitute economic units in their own right.

(468) Concerning the "corporate governance" document to which Eni refers, control in respect of the matters referred to therein can, in fact, lead to control over significant aspects of the commercial policy of a company (as the parent company has an overriding right to consent to or oppose strategic financial and commercial decisions).

(469) Second, the concentration of the chemical activities forming the "Elastomeri e Stirenici" business first in EniChem S.p.A. and then in Polimeri show the strategic importance of that sector for the Eni Group.

(470) It is, in any event, unlikely that Enichem S.p.A. and Polimeri could act independently in the market in a situation where the parent company was systematically reorganizing their business.

(471) If anything, the fact that, as from 21 October 2002, Eni acquired direct full ownership over Polimeri proves that, by the restructuring of the chemical sector, the chemical activities forming the "Elastomeri e Stirenici" business (being the ones which performed best), were to remain within the direct control of the parent company.

(472) In this context, the Commission does not have to prove the existence of an information flow to apply the presumption that the parent exercised decisive influence over the subsidiary. On the other hand, a blanket denial of the flow of information from the subsidiary to the parent becomes implausible and certainly not sufficient to rebut the presumption.

(473) Similarly, the absence of a management overlap cannot be taken, under the circumstances of this case, as being a significant, let alone decisive, factor, in order to rebut the presumption.

(474) According to Eni, the application of the presumption would also lead to the breach of fundamental principles of justice. On the one hand, it would lead to the breach of the fundamental principle of direct and personal liability, as parent companies would be made liable for conduct which they did not commit. It claims that such a presumption would create an impossible burden on parent companies as the rebuttal of such presumption would become practically impossible which would therefore breach the presumption of innocence. Finally Eni claims that the Commission's approach would breach the corporate law principle of limited liability, as [a company within the ENI group] and Polimeri are individual legal entities and as such directly responsible for their conduct.

(475) Concerning the principle of personal liability, Article 81 of the Treaty is addressed to "undertakings" which may comprise several legal entities. In this context the principle of personal liability is not breached as long as different legal entities are held liable on the basis of circumstances which pertain to their own role and their conduct within the same undertaking. In the case of parent companies, liability is established on the basis of their exercise of effective control on the commercial policy of the subsidiaries which are materially implicated by the facts. Under those circumstances, the principle of personal liability is not breached. References to different areas of law where the principle of autonomy of a subsidiary plays a different role (such as under corporate law) is not appropriate.

(476) As to whether the burden imposed on 100% parent companies amounts to an impossible burden on parent companies by definition, when the law creates a presumption it is because the conclusion is generally true and only rarely false. This is what justifies reversing the burden of proof, and it is the essence of a presumption. It is because situations in which subsidiaries are controlled by their parent company but nevertheless remain entirely "autonomous" are extremely rare, that the law creates a presumption.

(477) What matters in this case is that the elements which Eni has put forward are not capable of rebutting the presumption.

(478) Based on the above Eni S.p.A. should be held jointly and severally liable with Polimeri for the actions of EniChem Elastomeri S.r.l., EniChem S.p.A. (now [a company within the ENI group] S.p.A.) and Polimeri Europa S.p.A. in the period from 13 May 1993 until 13 May 2002.

- *Tosoh*

(479) Tosoh Corporation and Tosoh Europe BV participated directly in the infringement described in this Decision since representatives of Tosoh Corporation (see, for example, recitals (137), (143), (173), (196), (199), (210), (214), (224), (228) ff, (235), (256) f, (260), (274) ff, (288), (291) and (295)) and of Tosoh Europe BV (in addition to the examples given

in recital (480) see, for example, recitals (150), (186), (189), (230), (272) and (284)) participated in various cartel contacts between 13 May 1993 and 13 May 2002.

(480) In particular, at many of the cartel activities, Tosoh was regularly represented by employees of both Tosoh Corporation and Tosoh Europe BV, at the same time (see, for example, recitals (137), (143), (173), (193), (196), (199), (215), (228) ff, (257), (268), (275), (277), (288) and (291)).

(481) In addition, Tosoh exercised a decisive influence on the market behaviour of Tosoh Europe BV. Tosoh Europe BV is Tosoh's regional trading company for Europe, the Middle East and Africa. It is a 100% subsidiary of Tosoh Corporation. The Commission may therefore presume that the parent actually did exert decisive influence over its subsidiary's conduct. The following additional elements support the presumption.

(482) Reporting lines existed between managers in the CR business, leading directly from Tosoh Europe to Tosoh's headquarter. Tosoh [*] ordinarily takes and implements decisions with regard to sales, prices and customers. [*] immediately reports to Tosoh's [*]on sales, prices and customers. Tosoh's [*] ultimately reports to Tosoh's [*]with regard to general CR sales issues and informs Tosoh's [*]about CR quantities requested by customers (see recitals (50), (52)).

(483) Tosoh did not dispute that finding in its reply to the Statement of Objections.

(484) It follows from the fact that representatives of both mother company and subsidiary participated directly in the cartel arrangements, that the mother company was aware of the activities in which its subsidiary was involved.

(485) On the basis of the above, Tosoh Corporation and Tosoh Europe BV should be held jointly and severally liable for the infringement committed by Tosoh Corporation and Tosoh Europe BV during the period from 13 May 1993 until 13 May 2002.

6.3. Addressees in this case

(486) Based on the foregoing, it has been established that the following companies directly participated in the infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement, or should bear liability for it, for the following periods :

(a) Bayer AG, from 13 May 1993 to 13 May 2002;

(b) E.I. DuPont de Nemours and Company, from 13 May 1993 to 13 May 2002;

(c) DuPont Performance Elastomers S.A., from 1 April 1996 to 13 May 2002;

(d) DuPont Performance Elastomers L.L.C., from 1 April 1996 to 13 May 2002;

(e) The Dow Chemical Company, from 1 April 1996 to 13 May 2002;

(f) Denki Kagaku Kogyo K.K., from 13 May 1993 to 13 May 2002;

(g) Denka Chemicals GmbH, from 13 May 1993 to 13 May 2002;

(h) ENI S.p.A., from 13 May 1993 to 13 May 2002;

(i) Polimeri Europa S.p.A., from 13 May 1993 to 13 May 2002;

(j) Tosoh Corporation, from 13 May 1993 to 13 May 2002;

(k) Tosoh Europe B.V., from 13 May 1993 to 13 May 2002.

7. DURATION OF THE INFRINGEMENT

7.1. Limitation Period

(487) Pursuant to Article 25(1)(b) of Regulation (EC) No 1/2003, the power of the Commission to impose fines or penalties for infringements of the substantive rules relating to competition is subject to a limitation period of five years. For continuing infringements, the limitation period begins to run on the day the infringement ceases.[504] Any action taken by the Commission for the purpose of the preliminary investigation or proceedings in respect of an infringement interrupts the limitation period and each interruption starts time running afresh.[505]

(488) In this case, the Commission investigation started with the surprise inspections pursuant to Article 14(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty[506] on 27 March 2003. Hence, for infringements which ceased prior to 27 March 1998 no fines may be imposed.

(489) For the purpose of the investigation in this case, the infringement ceased on 13 May 2002 (see recital (515)). The Commission investigation started with the surprise inspections pursuant to Article 14(3) of Regulation No 17 on 27 March 2003. This shows that the Commission has the power to impose fines or penalties in this case.

(490) DuPont claims in its reply to the SO that prescription should apply to any infringement by DuPont before the creation of its joint venture with Dow, DDE, on 1 April 1996. DuPont submits that DDE has to be treated as a distinct undertaking from DuPont and that consequently DuPont's involvement in the cartel ended on 1 April 1996.

(491) As regards that claim, DuPont's direct involvement in the infringement ended on 1 April 1996 when it withdrew from the chloroprene rubber

504 Article 25(2) of Regulation (EC) No 1/2003.
505 Article 25(3) to (5) of Regulation (EC) No 1/2003.
506 OJ 13, 21.2.1962, p. 204/62. Regulation repealed by Regulation (EC) No 1/2003.

market in favour of its joint venture with Dow, DDE (see recital (419)). However and as explained in recitals (420) - (440) DuPont (together with Dow) bears liability for the infringement of DDE beyond that date. Therefore it can not be considered that DuPont's involvement in the infringement ceased with the creation of DDE in 1996.

7.2. Duration

(492) It is apparent from the facts described in Chapter 4 that Bayer, Denka, DuPont/DDE, Eni and Tosoh were involved in the cartel arrangements at least from 13 May 1993 until 13 May 2002.

(493) In its reply to the Statement of Objections, [a company within the ENI group] contests that it was involved in any collusive agreements prior to February 1994 or later than November 2000. Polimeri claims that the Commission arbitrarily chose the starting and the end date and that during Polimeri's responsibility for the CR business from 1 January 2002 onwards, no anticompetitive contacts occurred. Denka contests, in its reply to the Statement of Objections, any involvement in the anticompetitive arrangements. It states that the Commission does not have any clear and consistent evidence of illicit contacts prior to April 1994 or after September 1998. Denka claims that any further contacts after that date were courtesy visits and as such legitimate.

(494) The description of the cartel history and the duration of the agreements are not contested [*] companies have [*] confirmed the starting and end date [*] showing [*] contacts between the CR producers [*] following the end date established by the Commission.

(495) [*] Hence, the Commission's assessment under competition rules and the application of any fines is limited to the period from 13 May 1993, which is the date of the first cartel meeting which [*] is supported by indirect evidence [*].

(496) Regarding the meeting on 13 May 1993, [*] during that meeting each of the companies disclosed to other producers for the first time its sales figures in six to seven regions of the world. [*][507] Furthermore [*] confirms that the market share agreement among the cartel participants was reached in Florence in May 1993 (see recital (150)).

(497) Denka has confirmed in its reply to the Statement of Objections that it participated not only in the official IISRP meeting in Florence but also in a side meeting called by DuPont. Denka claims, however, that that side meeting had no anticompetitive purpose and that, during the meeting, the first threats concerning anti dumping complaints were made.

(498) Denka's claim that the meeting on 13 May 1993 in Florence did not have any anticompetitive purpose cannot be accepted. Not only does [*] submit that the topic of the meeting was the allocation of market

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shares, but [*]and [*] [*] remember, independently of each other (without having being present at the meeting), that the market share plan was agreed upon during the Florence meeting in March 1993 (recitals (140) and (150)), [*] That DuPont had booked the necessary meeting room for the side meeting can already be seen from [*]'s travel expenses, see recital (137). Consequently, three competitors have corroborated independently from each other that the meeting in Florence in May 1993 had an anticompetitive background. Denka has not succeeded in weakening the Commission's position, based on all the evidence and indicia taken together.

(499) As to [a company within the ENI group]'s claim that it did not participate at the meeting in Florence, [*] has explicitly identified Enichem as a participant at that meeting (see recitals (137), (138)). [*] only mentions doubts as to the representative of Enichem ([*] or [*]), not as to Enichem's presence. Furthermore, the fact that the target market share plan was agreed upon in Florence [*] is a strong indicia for the fact that Enichem was present at that crucial meeting, as the other competitors would not have been able to agree on the plan without Enichem's approval. [*]. Hence [a company within the ENI group] has not succeeded in weakening the Commission's position as regards the starting date.

(500) Consequently the starting date of 13 May 1993 applies to Bayer, DuPont, Denka, Enichem and Tosoh. The starting date for Dow is 1 April 1996, the day that the joint venture with DuPont became active on the market (see recital (35)). The same starting date (1 April 1996) applies to DuPont Performance Elastomers S.A. and DuPont Performance Elastomers L.L.C. the successors of DDE (see recitals (35) and (40)).

(501) With regard to the end date of the infringement, it is not possible to ascertain the exact date when the participants stopped their collusive contacts and the cartel ceased to produce its effects.

(502) [*].[508] Hence, the assessment under competition rules and the application of any fines in this case will be limited to the period until 13 May 2002, which is the date of the IISRP meeting held in Naples.

(503) Evidence in the possession of the Commission shows that the market share agreements between the competitors were still in place on 13 May 2002 as [*] from Bayer drafted notes showing that a concerted price increase for CR in Western Europe must not change the market shares stipulated in the ″[*]″ (see recital (304)). For [*] the moratorium was one of the key features of the cartel, allocating specific market shares to each of the competitors. Those market shares were, as described above in Chapter 4, subject to regular revision and discussion amongst all competitors. The handwritten reference to the ‘‘[*]’’ indicates that specific target market shares for 2002 had been

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established in the framework of the moratorium and on the basis of the market shares of 2001. [*]'s notes further show that [*] reflected on the possible effects of a price increase in Western Europe on the stipulated market shares and that [*] drew the conclusion that the price increase and moratorium would not necessarily harm each other. [*]'s notes further indicate that price discussions were held with the competitors during the meeting.

(504) [a company within the ENI group] and Polimeri's arguments that the end date chosen by the Commission is exclusively based on a leniency submission and not corroborated by other evidence and that the cartel ended in November 2000 must be rejected.

(505) The end date chosen by the Commission is based on a document drafted at the time the infringement took, constituting direct evidence. Although the document was drafted only with the purpose to brief [*], who participated in the IISRP conference in Naples, that does not diminish its evidential value as it clearly shows that one of the core elements, the market share agreement or "moratorium", was still in place. The direct link between the moratorium and planned price increases in Western Europe show further that pricing discussions were still on the agenda when the competitors met. [*]'s handwritten notes even indicate that not only DDE but also Enichem had already given their agreement for the next collusive price increase.

(506) It is only natural that the evidence relating to the cartel arrangements in the Commission file for the period after September 1998 is less complete than for the period before that date. [*] due to Bayer's antitrust compliance programme, the competitors became more cautious. Contacts were mostly held bilaterally and arrangements were increasingly made by telephone. Against that background it is obvious, taking together all the evidence and indicia in the file, that the agreements continued uninterrupted at least until May 2002. This conclusion is strengthened by the submissions made by [*]According to settled case law, Article 81 of the Treaty continues to apply to cartels that are no longer in force if they continue to produce their effects after they have formally ceased to be in force.[509] This is particularly the case where the undertaking participating in the infringement has not distanced itself from the agreement constituting the infringement.

(507) [a company within the ENI group]/Polimeri did not put forward any evidence that might be interpreted as revealing a desire on their part to distance themselves from the purpose of the agreement leading to the infringement.[510] On the contrary there is evidence that, in 1999, the competitors discussed Enichem's market shares for the future (recital (262)) and price increases for spring 2000 (recital (266)). In 2000, price discussions with Enichem were followed up between the competitors

509 Case T-59/99 *Ventouris Group Enterprises* v *Commission* [2003] ECR II-5257, paragraph 182 *et seq*.; Case T-14/89 *Montedipe* v *Commission* [1992] ECR II-1155, paragraph 231; Case 243/83 *Binon* v *AMP* [1985] ECR 2015, paragraph 17.

510 Case T-59/99 *Ventouris Group Enterprises* v *Commission* [2003] ECR II-5257, paragraph 193.

and information about the price policy of the competitors was passed on to Enichem (recitals (271), (273) and (274)). Shipment figures exchanged in June 2000 between Tosoh, Denka and DDE include [a company within the ENI group]'s figures. This and the fact that regionalization worked out to the satisfaction of the competitors in 2000 and 2001 shows that the agreements were in place without interruption (see recitals (277) and (281)). There are not only indicia that Enichem was implementing an agreed price increase in July 2001, but also that DDE tried to work out a revised market share agreement in November 2001 (recitals (283) and (290)). Finally, there was not only the IISRP meeting in Naples in May 2002 (recitals (303)-(305)) but also, prior to that, a meeting between Bayer, DDE and Polimeri in April 2002 (recital (297)). [*]'s handwritten notes of that meeting are self explanatory and refer to future price increases and the market share agreement. At the meeting Enichem explicitly explained to its competitors that it did not follow an ″[*]".

(508) Taking all those elements together there is no reason for the Commission to believe that [a company within the ENI group]/Polimeri stopped its participation in the cartel arrangements prior to 13 May 2002.[511]

(509) Denka's claims that, after September 1998, the competitors only held courtesy visits and that there is no evidence for anticompetitive behaviour after that date must also be rejected.

(510) As described in recitals (241)-(245), [*] the form of competitor contacts changed after 1998, but all of them confirm that the contacts did not cease and that the arrangements stayed in place. [*]

(511) As mentioned in recital (505) it is obvious that, due to the change of structure, the evidence relating to the cartel arrangements in the Commission file for the period after September 1998 is less complete then for the period before that date, as competitor contacts were mostly held bilaterally and arrangements were increasingly made by telephone (recital (506)). However there is plenty of evidence showing Denka's involvement in the cartel agreements even after September 1998 (see recitals (256), (260), (263), (269), (277), (279), (280), (281), (282), (285), (290), (291), (295) and (302)). The bilateral and trilateral meetings regularly dealt with topics such as regionalisation, price policies, price increases and the market share agreements, which can be seen not only from the submissions made by [*] but also from documents drafted at a time the infringement took place (see, for examples, recitals (263), (277), (279), (285) and (303)-(305)). The evidence set out in Chapter 4 shows that the anticompetitive agreements were in place without interruption at least until May 2002 and that Denka was frequently involved in those illicit contacts.

[511] In this context [a company within the ENI group] has pleaded guilty for participating in an international conspiracy to fix prices of chloroprene rubber from September 1999 to April 2002 in front of the US District Court in San Francisco (see recitals (74), (75)).

(512) Further indicia for the ongoing anticompetitive agreements is the fact that the competitors tried to conceal their illicit contacts during the period after September 1998 and until May 2002 (for example, [*] (Tosoh) used, in [*] handwritten notes of a meeting with Denka and DDE in June 2000, a code in Japanese language in which country names represent producers, see recital (277)). This shows clearly that the competitors themselves did not perceive their contacts as pure courtesy visits but that they were aware of the anticompetitive nature of their meetings. As regards that meeting [*], who participated for DDE, reported to [*] that [*] of Denka *"*[*]*"* (recital (279)).

(513) Furthermore there are elements in the file that strongly point to Denka's involvement in collusive contacts even after the date chosen by the Commission as the end date of the infringement (see recital (306), (307) and (309)).

(514) Hence, even if [a company within the ENI group], Polimeri and Denka contest certain events covering the later cartel period and even if they provide alternative interpretations to certain pieces of evidence, they have not succeeded in weakening the Commission's position, based on all the evidence and indicia taken together, that Enichem and Denka were also involved in agreements and/or concerted practices with their competitors from 13 May 1993 to 13 May 2002.

(515) It follows that, considering the corporate reorganisations that occurred during the time the infringement took place (recitals (409)-(420)) the duration of the infringement by each of the parties is as follows:

(a) Bayer AG: from 13 May 1993 to 13 May 2002, that is to say, 9 years;

(b) E.I. DuPont de Nemours and Company: from 13 May 1993 to 13 May 2002, that is to say, 9 years;

(c) DuPont Performance Elastomers LL.C and DuPont Performance Elastomers S.A.: from 1 April 1996 to 13 May 2002, that is to say, 6 years and 1 month;

(d) The Dow Chemical Company: from 1 April 1996 to 13 May 2002, that is to say, 6 years and 1 month;

(e) Denki Kagaku Kogyo K.K. and Denka Chemicals GmbH.: from 13 May 1993 to 13 May 2002, that is to say, 9 years;

(f) ENI S.p.A. and Polimeri Europa S.p.A..: from 13 May 1993 to 13 May 2002, that is to say, 9 years;

(g) Tosoh Corporation and Tosoh Europe B.V.: from 13 May 1993 to 13 May 2002, that is to say, 9 years.

8. REMEDIES

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

(516) Where the Commission finds that there is an infringement of Article 81 of the Treaty it may require the undertakings concerned to bring such infringement to an end in accordance with Article 7(1) of Regulation (EC) No 1/2003.

(517) Given the secrecy in which the cartel arrangements were carried out, it is not possible to declare with absolute certainty that the infringement has ceased. It is therefore necessary for the Commission to require the undertakings to which this Decision is addressed to bring the infringement to an end (if they have not already done so) and henceforth to refrain from any agreement, concerted practice or decision of an association of undertakings which would have the same or a similar object or effect.

(518) The prohibition applies to all meetings and multilateral or bilateral contacts between competitors with a view to restricting competition between them or enabling them to concert their market behaviour.

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

(519) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose fines on undertakings where either intentionally or negligently, they infringe Article 81 of the Treaty and/or Article 53 of the EEA Agreement. Under Article 15(2) of Regulation No 17[512] which was applicable at the time of the infringement, the fine imposed on 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.

(520) In fixing the amount of any fine, pursuant to Article 23(3) of Regulation (EC) No 1/2003, regard must be had both to the gravity and to the duration of the infringement. In setting the fines to be imposed, the Commission will refer to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003[513] (hereafter, "*the Guidelines on fines*").

8.3. The basic amount of the fines

8.3.1. Calculation of the value of sales

(521) In determining the basic amount of the fine to be imposed, the Commission takes the value of each undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA. In this case, the sales of chloroprene rubber made by each undertaking in the EEA during the

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

513 OJ C 210, 1.9.2006, p. 2

business year ended on 31 December 2001 (the last full business year of the infringement) will be considered (see Annex).

(522) As regards Denka's claim that the basic amount of the fine to be imposed should not be calculated on the basis of the market shares in 2001, as Denka constantly increased its market share, the Commission's consistent practice of relying on the last full year of the cartel's operation as the relevant year for determining the basic amount of the fine has been accepted by the Community courts.[514] In this case there are no indications that the market shares in 2001 were not representative also for the time the infringement took place. Therefore Denka's claim in that regard has to be rejected. The same is true in respect of [a company within the ENI group]'s argument that [a company within the ENI group]'s turnover for CR in 2001 was higher than in the earlier years of the infringement.

8.3.2. Determination of the basic amount of the fines

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

8.3.3. Gravity

(524) As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30% of the value of sales. In order to decide whether the proportion of value of sales to be considered in a given case should be at the lower or at the higher end of that scale, the Commission has regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.

(525) In this case the competitors agreed upon the allocation and the stabilization of markets, market shares and sales quotas for chloroprene rubber, coordinated price increases, agreed upon minimum prices, allocated customers and exchanged competitively sensitive information. Market sharing and price fixing arrangements are by their very nature among the most harmful restrictions of competition. Therefore, the proportion of the value of sales taken into account for this infringement should be set at the higher end of the scale.

(526) The estimated combined EEA market share of the undertakings participating in the infringement (having regard to the last full business year of the infringement) was 100 % (see recital (55)). The geographic

514 See, for example, the judgment of the Court of First Instance in Case T-319/94, *Fiskeby v Commission* [1998] ECR II-1331, at paragraph 41, which provides as follows: *"As 1990 was the last full year of the infringement found in Article 1 of the Decision, reference to the turnover in that year allowed the Commission to assess the size and economic power of each undertaking in the cartonboard sector and the scale of the infringement committed by each one of them, those factors being relevant to an assessment of the gravity of the infringement."*

scope of the infringement was worldwide (see section 2.3). For the purposes of establishing the gravity of the infringement, this means that the whole of the EEA was covered by the cartel. Furthermore, and as indicated in recitals (370)-(373), it has been established that the infringement was systematically implemented.

(527) In their replies to the Statement of Objections, Denka, Tosoh and [a company within the ENI group]/Polimeri have raised various arguments aiming at attenuating the gravity of the infringement.

(528) Denka has argued that, in determining gravity, consideration should also be given to the following circumstances: Denka did not participate in any price fixing, market sharing, coordinated capacity reduction or any other anticompetitive practice, its participation in meetings was only of mitigated gravity as the exchange of information is not as serious and does not have as great an impact on the market as price fixing, market sharing or capacity reduction and the information provided by Denka was either public or wrong.

(529) As regards Denka's argument that it was only involved in the exchange of information, it has been demonstrated in recitals (340)-(350) that Denka was involved in all kinds of anticompetitive arrangements listed in recital (329). As far as Denka claims that it provided exclusively information that was either public or wrong, it is settled case law that an undertaking which, despite colluding with its competitors, follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit.[515] The mere fact of cheating at the expense of the other cartel members cannot have any influence on the gravity of the infringement.

(530) Similar conclusions can be drawn in respect of [a company within the ENI group]/Polimeri's arguments about the limited effects and/or implementation of the infringement. For the purposes of assessing gravity, it is sufficient to establish that the infringement was generally implemented (as has been established in recitals (370)-(373)), regardless of the alleged existence of particular instances of non-implementation. As far as the circumstances raised by [a company within the ENI group] and Polimeri are specific to their individual position and behaviour, they will be considered when examining the applicability to them of mitigating circumstances.

(531) Tosoh claims in its reply to the SO that the starting amount of the fine to be imposed on it should be limited to the turnover generated with solid CR, that the basic amount should reflect that Tosoh was the smallest player and that Tosoh was not involved in agreeing and implementing capacity reductions.

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515 See Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 9; judgment of the Court of First Instance in Joined Cases T-71/03 etc., *Tokai Carbon and others* v *Commission*, cited in footnote 470; judgment of the Court of First Instance in Case T-44/00, *Mannesmannröhren-Werke AG* v *Commission*, [2004] ECR II-729 at paragraphs 277-278, and judgment of the Court of First Instance in Case T-327/94, *SCA Holding* v *Commission,* [1998] ECR II-1373, at paragraph 142.

(532) As regards the product concerned, recitals (393)-(397) show that latex was also covered by the illicit arrangements. Tosoh's size and importance on the market is already reflected in the value which is used as a basis for the determination of the basic amount of the fine to be imposed.

(533) Concerning the argument put forward by Tosoh, Denka and [a company within the ENI group]/Polimeri that they were not involved in capacity reductions, it has been demonstrated that those three undertakings were not only involved in the main features of the cartel, such as market allocation and price fixing (see recital (329)), but that they were also aware of and consequently liable for the capacity reductions by Bayer and DDE. As set out in recital (331), liability for that concertation can be also attributed to the cartel members which were not directly involved in the capacity reduction, as the closure of production facilities by Bayer and DDE contributed to the realisation of a shared objective, the realization of the regionalization strategy. Furthermore each of the elements in which Tosoh, Denka and [a company within the ENI group]/Polimeri were involved directly, such as market sharing and price-fixing, have to be considered by their very nature as a very serious infringement of Article 81 of the Treaty.[516] Consequently the fact that they were not involved directly in capacity reductions can not qualify their behaviour as less serious.

(534) Hence, none of those arguments are capable of undermining the conclusions set out in recitals (525) to (526) on the factors which have to be considered when establishing the gravity of an infringement.

(535) In conclusion, and taking into account the factors discussed, the proportion of the value of sales of each undertaking involved to be taken into account in order to establish the basic amount of the fines to be imposed should be 21%.

8.3.3.1. Duration

(536) As explained in recital (515) the infringement lasted for 9 years for Bayer, DuPont, Denka, Enichem and Tosoh and for 6 years and 1 month for Dow and DPE. In accordance with point 24 of the Guidelines on fines, the amount determined under recital (534) should therefore be multiplied by 9 for Bayer, DuPont, Denka, Enichem and Tosoh and by 6.5 for Dow and DPE.

8.3.3.2. Additional amount

(537) In order to deter undertakings from entering into market sharing or horizontal price fixing agreements such as those at issue in this case, the basic amount should be increased by an additional amount ("the entrance fee"), as indicated in point 25 of the Guidelines on fines. For

[516] See to the same effect judgments in Case T-241/01 *SAS v Commission,* [2005] ECR II-02917, at paragraph 122, and in case T-38/02 *Danone v Commission,* [2005] ECR II-04407 25 October 2005, at paragraph 148.

that purpose, in the light of the circumstances of the case and, in particular, the factors discussed in recitals (525) to (526), an additional amount of 20% of the value of sales is appropriate.

(538) Regarding Denka's argument that no entrance fee should be imposed on it as it was not involved in price fixing, market sharing or output limitation, recitals (340)-(350) show Denka's involvement in the anticompetitive arrangements listed in recital (329).

8.3.3.3. Conclusion on the basic amount

(539) The basic amounts of the fines to be imposed on each undertaking are therefore as follows:

All amounts are in EUR

Bayer AG	134 000 000
DuPont of which jointly and serially with: - DPE - Dow	79 000 000 59 000 000 59 000 000
Denka	47 000 000
ENI	59 000 000
Tosoh	9 600 000

8.4. Adjustments to the basic amount

8.4.1. Aggravating circumstances

8.4.1.1. Recidivism

(540) At the time the infringement took place, Bayer and Enichem had already been the addressees of previous Commission decisions concerning cartel activities.[517] The fact that the undertakings repeated the same type of conduct either in the same industry or in different sectors from that in which they had previously incurred penalties shows that the first penalties did not prompt those undertakings to change their conduct. That constitutes an aggravating circumstance. Considering that Eni and Bayer are recidivists, that aggravating circumstance justifies an increase of 60% in the basic amount of the fine to be

[517] See, in particular, Commission Decision 86/398/EEC of 23 April 1986 (*Polypropylene)*, OJ L 230, 18.8.1986, p.1, where Anic S.p.A., a subsidiary of the ENI Group was found to have participated in the cartel; Commission Decision 94/599/EC of 27 July 1994 (*PVC II)*, OJ L 239, 14.9.1994, p. 14 where Enichem S.p.A was found to have participated in the cartel and Commission Decision 2002/742/EC of 5 December 2001 (*Citric Acid*) OJ L 239, 6.9.2002, p. 18, where Harmann & Reimer Corporation, a wholly owned subsidiary of Bayer AG, was an addressee of the Commission Decision.

imposed on Eni and an increase of 50% in the basic amount of the fine to be imposed on Bayer.

(541) In reply to the arguments put forward by [a company within the ENI group] and Polimeri in their responses to the Statement of Objections, it is irrelevant whether the new infringement is committed in a different business sector or in respect of a different product. It is sufficient that the same undertaking has already been punished for similar infringements.[518] The requirement that the infringements must be "similar" is satisfied by the fact that the previous Decisions cited and this Decision concern market sharing and collusion on prices. As for the requirement that the "person" must be the same, that requirement is satisfied when the same undertaking commits the infringements concerned. There is no requirement that the legal entities within the undertaking, products and personnel should be the same in all Decisions.[519] In any event, internal reorganisations cannot have any effect on the assessment of the existence of this aggravating circumstance.

(542) The argument that the previous Decisions are too old to constitute precedents for recidivism is not accepted either. The Commission's PVC-II Decision was taken in 1994, one year after Eni started participating in the cartel which is the object of this Decision. As for the 1986 Decision (*Polypropylene)*, this was only seven years before the start of the infringement in this case in 1993. In *Danone v. Commission*, the Court of First Instance ruled that Article 15 of Regulation No 17 does not specify any maximum period for repeat offences[520], which is also applicable for Article 23 of Regulation (EC) No 1/2003.

8.4.2. Mitigating circumstances

(543) In reply to the Statement of Objections, several undertakings have claimed that various mitigating circumstances should apply in their cases.

8.4.2.1. Passive and /or minor role

(544) The great majority of the undertakings invoked mitigating circumstances for their minor and/or passive role in the cartel.

(545) In general, the Commission accepts that an exclusively passive or "follow-my-leader" role played by an undertaking in an infringement may, if established, constitute a mitigating circumstance. A passive role implies that the undertaking adopts a 'low profile', that is to say that it does not actively participate in the creation of any anti-competitive

518 Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, paragraph 284. See also Case T-38/02 *Groupe Danone v Commission*, judgment of 25 October 2005, paragraphs 353 to 355.

519 Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, paragraph 290.

520 Case T-38/02 *Groupe Danone v Commission,* judgment of 25 October 2005, paragraphs 353 to 355.

agreements.[521] 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 ordinary members of the cartel,[522] and also the existence of express declarations to that effect made by representatives of other undertakings which participated in the infringement.[523] In any event, it is necessary to take account of all the relevant circumstances in each particular case.

(546) According to [a company within the ENI group], the decline of the CR market hit Enichem even worse than the other companies on the market. [a company within the ENI group] claims that the acquisition of the business led to high additional costs and that Enichem tried to dump CR on the market. Consequently [a company within the ENI group] had different objectives than its competitors and the competitors could not count on [a company within the ENI group]'s cooperation. As Enichem was especially active on the USSR market, which collapsed after 1989, it lost a considerable amount of CR sales. Furthermore, CR in Southern Europe had lower prices due to the lower quality produced by Enichem and the lower standards in Southern Europe. For that reason [a company within the ENI group] could not enter the Northern European market and it was therefore also impossible to align prices in Southern Europe with the ones in Northern Europe. [a company within the ENI group] claims that it was not a market leader in Southern Europe and that the only country where Enichem was market leader was France, as its production site was located there. [a company within the ENI group] further states that it tried on various occasions to sell the CR business and, as it did not succeed, it started behaving aggressively on the market again. According to [a company within the ENI group], its low market share, the difficult market situation and the poor CR quality forced it to follow the other cartel members and sit at the table with them. It claims that it had a minor role and the status of a passive observer in the cartel, which can also be deduced from the fact that it is accused of having participated in only 42 out of 81 meetings. In a similar vein Polimeri claims that it had contact with competitors on only three occasions during which no price agreements were made and that it always behaved aggressively on the market.

(547) Denka contends that the whole cartel was a purely European cartel with the aim of keeping the Japanese producers out of the market. Consequently it describes its own role as a passive, low profile cartel member which provided the other members with no or wrong information. Denka claims that, in this way, it undermined and obstructed the functioning of the cartel. Finally Denka contends that it participated only in 30 cartel meetings.

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521 Case T-220/00 *Cheil Jedang* v *Commission* [2003], ECR II-2473, paragraph 167; also Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon v Commission of the European Communities* [2004], ECR II-1181, paragraph 331.

522 Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 343.

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

(548) Tosoh asserts, in its reply to the SO, that it was the smallest player in the CR market and that it did not act as a leader or instigator in the cartel.

(549) Finally DuPont submits, in its reply to the SO, that its cartel involvement at the beginning of the DDE period was substantially limited and that during the beginning of the DDE period it overtly adopted competitive conduct in the market.

(550) [a company within the ENI group]/Polimeri and Denka's attempts to portray themselves as passive players and irregular participants in the cartel meetings are not convincing. The evidence in the file points to consistent, regular and active participation in the infringement. The frequency of their contacts with the other producers throughout the entire period of the infringement, as described in Chapter 4, and especially their regular participation in the meetings between all the competitors is incompatible with any notion of a passive player.

(551) [a company within the ENI group]'s claim that it had different objectives than the other cartel members in joining the collusive agreements does not change the nature or role played by that undertaking in the arrangements. The role of each undertaking in the infringement is based on its actions and not on its motivation or objectives. Evidence in the file shows that [a company within the ENI group] was a driving force in the cartel not only in the later stage when negotiating, for example, higher market shares for its CR products (recital (262)) but already in the early period when it agreed to lead price increases in certain European countries (see recital (153)). There is no evidence in the file that [a company within the ENI group]'s role in the cartel agreements changed when Polimeri took over the business at the beginning of 2002.

(552) Denka's claim that the infringement in this case was a purely European cartel and that Denka consequently had no interest in joining and participating in the arrangements is disproved by the facts described in Chapter 4. It is clear from the evidence and the submissions of [*] that this was a worldwide cartel including especially the European, Asian and American markets (see also recital (342)). Like [a company within the ENI group], Denka certainly had its own objectives in joining the cartel arrangements, but as explained in recital (551), the role of each undertaking in the infringement is based on its actions and not on its motivation or objectives. Denka was a key player in the cartel and an important worldwide producer of CR. It had a significant market share on the European market throughout the period of the infringement and was present in all important meetings between the competitors (see recital (340)).

(553) Denka's attempt to diminish its own role by stating that the European producers could easily estimate the Japanese shipment figures as being the difference between the official IISRP figures and their own

shipments is, as explained in recital (346), a circular argument and inappropriate to demonstrate a minor or passive role in the cartel.

(554) As regards Denka's argument that it undermined and obstructed the functioning of the cartel, such disruption has not been demonstrated. The mere fact that an undertaking which participated in an infringement with its competitors did not always behave on the market in the manner agreed between them is not proof of disruption of the cartel (regarding the implementation of the agreements by Denka see also recitals (572)-(575)). 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.[524] The mere fact of cheating at the expense of the other cartel members cannot therefore be admitted as a mitigating circumstance.

(555) As to the claims raised by [a company within the ENI group] and Tosoh, absence of leadership cannot be equated to a passive or minor role in the infringement. Although proof of a leadership role may, in certain circumstances, give rise to an increase of the fine on the grounds that it constitutes an aggravating circumstance, the absence of such a factor does not constitute a mitigating circumstance. During the lifetime of the cartel, all the undertakings subject to this Decision without exception participated in one way or another in market sharing and price fixing. Consequently, there is nothing to distinguish those undertakings and to suggest that any of them played a minor or passive role in the infringement.

(556) Finally DuPont's claim that DDE's involvement in the early period of DDE was substantially limited is also not convincing. DuPont and Bayer were, from the outset, driving forces for the organization of the cartel and the implementation of the agreements. The evidence in Chapter 4 shows that DuPont's involvement in the anticompetitive arrangements was steady and continuous. Already in the early days of the cartel, DuPont was responsible for leading price increases in certain European countries (see recital (153).

(557) The argument that [a company within the ENI group]/Polimeri, Denka, Tosoh and/or DDE played only a passive and/or minor role in the infringement cannot therefore be considered to constitute a mitigating circumstance.

8.4.2.2. Participation in few elements of the infringement

(558) Some of the undertakings claim that the fact that they did not participate in all the elements of the agreement constitutes a mitigating circumstance.

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524 See Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 9; judgment of the Court of First Instance in Joined Cases T-71/03 etc., *Tokai Carbon and others* v *Commission*, cited in footnote 470; judgment of the Court of First Instance in Case T-44/00, *Mannesmannröhren-Werke AG* v *Commission*, [2004] ECR II-729 at paragraphs 277-278, and judgment of the Court of First Instance in Case T-327/94, *SCA Holding* v *Commission,* [1998] ECR II-1373, at paragraph 142.

(559) To that effect, Tosoh and Denka argue that the regionalisation concept was mainly promoted by DDE and Bayer. Tosoh further claims that price increases after 1998 were primarily decided upon by Bayer and DDE. Denka claims, on a more general level, that it was not involved in any anti-competitive activities.

(560) [a company within the ENI group] argues that its involvement in the cartel was less intensive after November 2000 and that the cartel continued in 2001 and 2002 only on the initiative of DDE and Bayer. [a company within the ENI group] further claims that it did not implement any concerted price increases.

(561) As a general rule, there is no reason to apply a reduction in the fine for not having participated in all the years of the infringement, since this will be taken into account when determining the duration of the infringement. In addition, it has been shown in Chapter 4 that Tosoh and Denka were also involved in all important aspects of the cartel, in particular in market sharing, regionalisation and price increase agreements (see recital (329)). The Courts have consistently stated that *"an undertaking may be held responsible for an overall cartel even though it is shown that it participated directly only in one or some of the constituent elements of that cartel, if it is shown that it knew, or must have known, that the collusion in which it participated was part of an overall plan and that the overall plan included all the constituent elements of the cartel"*.[525]

(562) Apart from and in addition to those considerations, the investigation showed that [a company within the ENI group]/Polimeri participated in a single and continuous infringement from May 1993 until May 2002 (see recitals (499), (500) and (504)-(508)). During that period [a company within the ENI group]/Polimeri was involved in all of the elements of the cartel listed in recital (329), including the implementation of price increase agreements (see recitals (348)-(349)). It is only normal that in the case of a long lasting cartel, the Commission is in possession of stronger evidence of more frequent contacts between the cartelists for certain periods. This cannot however lead to the conclusion that periods in which less contacts took place or for which less evidence is available have to be considered as periods in which the participation of the cartel members was limited to certain elements. Changing degrees in intensity do not alter the very serious nature of the involvement and cannot have any impact on the fine in this case.

(563) As regards Denka's denial of any participation in the infringement, the Commission cannot but refer to the evidence described above and in particular to the assessment made in recitals (340)-(347), showing that

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

Denka was involved in agreements and/or concerted practices with its competitors throughout the lifetime of the cartel.

(564) The fact that all the cartel members were present in most of the multilateral meetings leads to the conclusion that they were perfectly aware of the overall plan of the constituent elements of the cartel.

(565) Therefore the claims regarding participation in few elements of the infringement cannot be accepted.

8.4.2.3. Termination of the infringement

(566) [a company within the ENI group] claims that it terminated its involvement in the infringement at the latest in November 2000 and that that fact should constitute a mitigating circumstance. Both [a company within the ENI group] and Polimeri submit that, with the new management and the restructuring of [a company within the ENI group], any anticompetitive contacts ceased.

(567) As mentioned in recital (561) there is no reason to apply a reduction in the fine for not having participated in all the years of the infringement, since this will be taken into account when determining the duration of the infringement. Furthermore and as explained in recitals (504)-(508), there is evidence in the file that [a company within the ENI group]/Polimeri were involved in the collusive contacts until May 2002.

(568) Consequently [a company within the ENI group]'s claim in this regard cannot be accepted.

8.4.2.4. Non-implementation

(569) Denka and [a company within the ENI group]/Polimeri claim that the amount of the fines to be imposed on them should be reduced because they either did not or did not fully implement the anti-competitive agreements. Denka explains that it did not adopt the arrangements and that it continued to compete with the other producers. It claims that it increased its sales and market share in the EEA, that it lowered its prices and that it increased capacity when appropriate. Denka draws the conclusion that its competitive conduct on the market was never affected by any collusion.

(570) [a company within the ENI group] explains that it just pretended to participate in the price increases and that it lauded the efforts of the competitors to increase prices but offered at low prices in order to gain quantity. [a company within the ENI group] claims that it did not apply any of the agreed price increases and that its price policy was independent from the agreements. In the same vein Polimeri submits that it did not apply any of the agreements or price increases.

(571) Similarly, Tosoh submits that the effects of its involvement were rather limited. Tosoh claims that it tried not to follow price increases fully and that it kept up competitive pressure vis-à-vis Bayer, DDE and Enichem.

(572) First of all, it is clear from the facts as set out in Chapter 4 that both [a company within the ENI group] and Denka implemented at least the market share agreements. This is confirmed by [a company within the ENI group] [*] and not contested in its reply to the Statement of Objections. Denka's participation in the cartel agreements and its implementation of those agreements has been proven in recitals (336)-(347) and (370)-(371). For there to be implementation of cartel agreements it is not necessary that each member of the cartel implemented each feature of the cartel to the same extent. It is only normal that each participant implements only some parts of the agreements and cheating is common between cartelists.

(573) Following [a company within the ENI group]'s and Denka's arguments would mean that an undertaking that fails to implement an agreed price increase because the market is not prepared to absorb it could claim a mitigating circumstance. This is incompatible with the ratio of competition law which has been confirmed by the Community courts. According to case law, the Commission is not required to recognise non-implementation of a cartel as a mitigating circumstance unless the undertaking relying on that circumstance is able to show that it clearly and substantially opposed the implementation of the cartel, to the point of disrupting the very functioning of it, and that it did not give the appearance of adhering to the agreement and thereby incite other undertakings to implement the cartel in question. The fact that an undertaking did not behave on the market in the manner agreed with its competitors 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.[526] Indeed, the fact that a cartel agreement is not honoured does not mean that it does not exist.[527] In this case, the infringement committed does not cease to be an infringement merely because a participant may have succeeded in deceiving the other members of the cartel and in using the cartel to its own advantage by not complying in full with the prices fixed.[528] The mere fact of cheating at the expense of the other cartel members cannot therefore be admitted automatically as a mitigating circumstance.

(574) The Commission’s undisputed conclusion on this point is set out in recitals (370)-(371), where it is stated that the arrangements were implemented. That conclusion is not altered by the fact that the implementation may have been less than fully successful in achieving the intended impact on the market because of buyer resistance and/or remaining competition. None of the above mentioned companies (see

526 Case T-44/2000, *Mannesmannröhren-Werke AG v Commission* [2004] ECR II-2223, paragraph 277; Case T-327/94 *SCA Holding v Commission* [1998] ECR II-1373, paragraph 142.

527 Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraphs 233, 255, 256 and 341.

528 Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 9, concerning the assessment of attenuating circumstances.

recitals (569)-(571)) provided any indication that they demonstrated any desire, or undertook any action, to deliberately abstain from implementing the agreements they concluded in respect of the EEA during the period in which they adhered to them.[529] A difference in the degree to which they implemented the agreements cannot be regarded as a real failure to implement them.[530]

(575) Neither Denka nor Tosoh or [a company within the ENI group]/Polimeri have shown that they clearly and substantially opposed the implementation of the cartel, to the point of disrupting the very functioning of it, or avoided giving the appearance of adhering to the agreement so as not to incite other undertakings to implement the cartel. As they did not clearly distance themselves from what was agreed at the anti-competitive meetings which they attended, they retained responsibility for participation in the cartel. It would otherwise be too easy for undertakings to reduce the risk of being required to pay a heavy fine if they were able to take advantage of an unlawful cartel and then benefit from a reduction in the fine on the ground that they had played only a limited role in implementing the infringement, when their attitude encouraged other undertakings to act in a way that was more harmful to competition.[531]

(576) In view of the foregoing, the allegedly limited involvement in and/or implementation of the infringement by Denka, Tosoh and [a company within the ENI group]/Polimeri cannot be considered to constitute mitigating circumstances.

8.4.2.5. Coercion

(577) As already set out in recitals (398)-(399), [*] alleged that Bayer, DuPont/DDE and Enichem put pressure on them to participate in the arrangements, by threatening anti-dumping measures in Europe.

(578) As already concluded (see recital (400)-(401)), there is not sufficient evidence in the Commission's file that either Bayer, DuPont/DDE or Enichem exerted pressure on Tosoh and/or Denka to join the cartel arrangements. In any event, even if coercion had been proven, that would not have constituted a mitigating circumstance in respect of those two undertakings. Proof of coercion may, in certain circumstances, give rise to an increase of the fine on the grounds that it constitutes an aggravating circumstance, or to the loss of preferential treatment under the Leniency Notice. However, a company that is coerced by other participants to participate in a competition law infringement should inform public authorities.[532] In the light of such an

529 Joined Cases T-25/95 and others, *Cement*, ECR [2000] II-491, paragraphs 4872 to 4874.

530 Case T-220/00 *Cheil Jedang* v *Commission* [2003]ECR II-02473, paragraphs 194-199.

531 Case T-44/00 *Mannesmannröhren-Werke AG* v *Commission*, cited above, at paragraphs 277-279 and Joined Cases T-259/02 to T-264/02 and T-271/02, *Raiffeisen Zentralbank Österreich a.o. v Commission*, 14 December 2006, paragraph 491.

532 See Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon v Commission of the European Communities* [2004], ECR II-1181, paragraph 344; case T-62/02 *Union*

option, which respects the law, participation in illegal cartel activities cannot be justified. Denka's submission that it could not publicly distance itself due to the threat of retaliation and that it could not approach the competition authorities, as it did not have enough inside knowledge, is therefore not credible, as explained in recital (400).

8.4.2.6. Effective co-operation outside the Leniency Notice

(579) [a company within the ENI group] and Polimeri have argued that their cooperation should be considered as a mitigating circumstance under point 29 of the Guidelines on fines as effective co-operation outside the Leniency Notice.

(580) [a company within the ENI group] and Polimeri argue that they continuously cooperated with the Commission [*]. Polimeri claims that it informed the Commission about dates, participants and subjects of competitor contacts, although they were not anticompetitive.

(581) To the extent that [a company within the ENI group] and Polimeri's cooperation merits a reduction, this will be considered when applying the Leniency Notice.[533] Taking into account all the facts, it is concluded that there are no exceptional circumstances present in this case that could justify granting [a company within the ENI group] and Polimeri a reduction in the fine that would otherwise have been imposed for effective cooperation falling outside the Leniency Notice.[534]

8.4.3. Conclusion on the aggravating and mitigating circumstances

(582) As a result of the aggravating circumstance taken into account, the basic amount of the fine to be imposed on Eni should be increased by 60% to EUR 94 400 000 and the fine to be imposed on Bayer should be increased by 50% to EUR 201 000 000.

8.4.4. Specific increase for deterrence

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

Pigments v Commission [2005], ECR II-5057, paragraph 63, Joined Cases C-189/02 P and others *Dansk Rørindustri v Commission* [2005], ECR I-5425, paragraph 369, Case T-9/99 *HFB Holding v Commission* [2002], ECR II-1487, paragraph 178, Case T-38/02 *Groupe Danone v Commission* [2005], ECR II-4407, paragraph 164, Joined Cases T 109/02 and others *Bolloré v Commission* judgment of 26 April 2007, paragraph 639.

533 See recitals (639)-(653) below. See also Case T-15/02, *BASF v Commission*, [2006] ECR II-497, at paragraph 586.

534 See Commission decision of 20 October 2005 in case C. 38281 *Raw Tobacco Italy*, recital 385. See also Joined Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 *P Dansk Rørindustri and Others v Commission* [2005] ECR I-5425 paragraphs 380-382 and Case T-15/02 *BASF v Commission*, [2006] ECR II-497, paragraphs 585-586.

(584) In this case Enichem, Dow, DuPont, and Bayer have a particularly large turnover beyond the sales of goods or services to which the infringement relates, and the turnover of each of them is, in absolute terms, much larger than that of Tosoh and Denka.

(585) As specified in point 30 of the Guidelines on fines, the Commission can apply a specific increase for deterrence in cartel cases in consideration of the size of the undertaking's turnover beyond the sales of goods or services to which the infringement relates, even if it was not possible to estimate the amount of gains improperly made as a result of the infringement (point 31 of the Guidelines on Fines), as appears to be the case here.

(586) In summary, in order to set the amount of the fines at a level which ensures that they have a sufficient deterrent effect, it is appropriate, to apply a multiplication factor to the fines to be imposed. In 2006, the financial year preceding this Decision, the total turnover of the undertakings to which this Decision is addressed was as follows: Eni: EUR 86 105 million, Dow: EUR 39 124 million, Bayer: EUR 28 956 million, DuPont: EUR 21 839 million, Tosoh: EUR 5 350 million and Denka: EUR 2 254 million. On that basis, it is appropriate not to apply any multiplier to the fines to be imposed on Bayer, DuPont, Tosoh and Denka and to multiply by 1,4 the fine to be imposed on Eni and by 1,1 the fine to be imposed on Dow.

8.4.5. Conclusions on the adjusted basic amounts

(587) The adjusted basic amounts of the fines to be imposed on each undertaking are therefore as follows:

All amounts are in EUR

Bayer AG	201 000 000
DuPont of which jointly and serially with: - DPE - Dow	79 000 000 59 000 000 64 900 000
Denka	47 000 000
ENI	132 160 000
Tosoh	9 600 000

8.5. Application of the 10 % of turnover limit

(588) Article 23(2) of Regulation (EC) No 1/2003 provides that *"For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year"*.

(589) In this case, the ceiling of 10% of turnover is not reached in respect of the fines to be imposed on any of the undertakings to which this Decision is addressed.

8.6. Application of the Leniency Notice

(590) As indicated in Chapter 3, the investigation in this case was initiated after information was brought to the attention of the Commission by Bayer, which expressed its willingness to cooperate with the Commission and applied for immunity under the terms of the Leniency Notice. Subsequent to the first inspection, Tosoh submitted an application for immunity and, in the alternative, for a reduction of fines and DDE applied for a reduction of its fine. After having received the first request for information, [a company within the ENI group] and Polimeri applied for immunity from fines or - alternatively - for a reduction in their fines under the terms of the Leniency Notice. Recitals (591)-(653) therefore address whether the parties concerned satisfied the conditions set out in the Leniency Notice.

8.6.1. Bayer

(591) Bayer was the first undertaking to inform the Commission about a secret cartel concerning sales of CR. Bayer applied for immunity on 18 December 2002 and expressed its willingness to cooperate with the Commission under the terms of the Leniency Notice. [*]

(592) Prior to the application, the Commission had not undertaken any inspection into the alleged cartel nor did it have in its possession any evidence to carry out an inspection. As the information provided by Bayer enabled the Commission to adopt a decision to carry out inspections pursuant to Article 14(3) of Regulation No 17, Bayer was granted conditional immunity from fines pursuant to point 8(a) of the Leniency Notice. The inspections took place on 27 March 2003 and 9 July 2003.

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

(594) According to the evidence in the Commission's possession, Bayer terminated its involvement in the infringement at the latest at the time

at which it first submitted evidence to the Commission. Furthermore, and as set out in recitals (398)-(401), the Commission could not establish that Bayer exerted pressure on the Japanese undertakings to join the cartel arrangements, despite the allegations of Tosoh and Denka. However, Bayer's cooperation pursuant to point 11(a) of the Notice has to be subject to further scrutiny, as it is not clear if Bayer fulfilled its obligation to provide the Commission with all evidence relating to the suspected infringement.

(595) Due to a number of inconsistencies in Bayer's statements, such as diverging dates and venues of meetings and contradictory statements of different Bayer employees, the Commission addressed a formal request for information to Bayer [*] under Article 18 of Regulation (EC) No 1/2003, asking for clarifications.[535] [*] the Commission addressed a further formal request for information to Bayer listing a number of dates and asking Bayer to provide for each of those dates and relevant individuals, any travel record, expense claim, extract of agenda, notes or memoranda or other documents relating to the meetings supposedly held on those dates.[536]

(596) In its response [*] to the latter request for information Bayer submitted certain documents, [*][537]. Those documents had not been submitted to the Commission before, but the [*] had, however, already been submitted to [*].[538]

(597) [*]

(598) [*] Bayer submitted further documents, such as [*] [539] [*][540]. [*] .

(599) In consideration of the above, the Commission concluded that Bayer had not provided it expeditiously and spontaneously with all the evidence available relating to the suspected infringement. In particular Bayer had failed to provide the Commission with

(a) [*]

(b) [*]

(600) Bayer disclosed that information to the Commission only following explicit requests for information and a state of play meeting. Bayer had, however, already disclosed that information to another jurisdiction [*] .

(601) As a consequence the Commission set out its doubts as to whether Bayer had fulfilled its cooperation obligations pursuant to point 11(a) of the Leniency Notice in a separate chapter in the Statement of Objections, which was only addressed to Bayer. Bayer was further

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given the opportunity to comment on the Commission's allegations in the Oral Hearing.

(602) Throughout the procedure and in reply to the SO, Bayer brought forward a set of arguments and claims, explaining why it had not provided the above mentioned (see recital (599)) pieces of evidence to the Commission at an earlier stage of the procedure. Bayer does not dispute that it was aware of the existence of those pieces of evidence and admits that it made a selection of the documents it submitted to the Commission in the framework of its immunity application. Bayer's main argument is that, at the time of its first submissions, it was asked by the Commission to make a pre-selection of evidence and provide only clear-cut evidence of clear-cut cartel meetings and information of fundamental importance. It claims that it followed the instructions given by the Commission and that those instructions changed over the years. Bayer further claims that it submitted decisive evidence to the Commission, that the documents in question were submitted promptly upon request and that the Commission's allegations concern only four documents relating to three meetings.

(603) Regarding the information on [*] Bayer explained that the [*].[541] Therefore Bayer claims that the [*] was not clear-cut evidence of a cartel meeting.

(604) In its reply of [*] to the Commission's request for information of [*] Bayer stated that [*].[542]

(605) However, during its cooperation with the Commission, Bayer has submitted a number of other [*] to support the existence of anticompetitive meetings, which are not corroborated by any statement or other document.

(606) In its reply of [*] to the Commission's request for information of [*] [543][*]. [544]

(607) Regarding [*] Bayer claims that the [*] in itself cannot be considered evidence. More specifically, Bayer submits that the [*] contained no facts previously unknown to the Commission and that it had only *"double indirect evidential value."*[545] Again Bayer explains that the document was submitted to the [*] as Bayer was instructed to submit all documents related to the pricing or sales of CR.

(608) It is clear from the facts that Bayer did not submit all evidence in its possession spontaneously to the Commission. Bayer had knowledge of the existence of that evidence as it had already submitted the same documents in [*] to the [*]. It provided that evidence only at the

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explicit request of the Commission. In this respect the wording of point 11(a) of the Leniency Notice is clear and unambiguous. It requires the undertaking to provide the Commission expeditiously with all evidence that comes into its possession or is available to it relating to the suspected infringement.

(609) Bayer's argument that it had not provided the [*] as it has only "double indirect evidential value"[546], must be rejected. The fact that evidence is indirect does not deprive a document of any evidential value. As Bayer itself submits, [*]. Therefore, the [*] constitutes contemporaneous documentary evidence [*]. The argument that the [*] was not reliable throughout also does not help Bayer. Only if the [*] itself were unreliable in its entirety, a claim which was not even put forward by Bayer, could it be found that the document in question lacks any evidential value.

(610) As Bayer itself recognizes in its reply to the Commission's request for information of [*], only the Commission has the necessary tools to conduct a cartel investigation by means of inspections and requests for information.[547] According to settled case law, the cooperation under the Leniency Notice has to be genuine and *"it is in principle for the Commission to decide whether a particular item of information is necessary to enable it to bring to light an infringement of the competition rules".*[548] Therefore it is indispensable, as set out in the Leniency Notice, that the immunity applicant submits all evidence available to it, meaning direct as well as indirect evidence, as soon as it has positive knowledge of its existence. Only in this way can it be guaranteed that the Commission makes full use of its investigative tools and powers. That being said, and in accordance with the wording of the Leniency Notice itself, there is no room for discretion for the immunity applicant to choose which kind of evidence to submit, as long as it can be related directly or indirectly to the behaviour subject to the immunity application.

(611) Any act by the immunity applicant which objectively conflicts with the provisions of point 11 of the Leniency Notice can result in the loss of the favourable treatment conditionally granted to it by the Commission.[549] In assessing whether Bayer has met the conditions set out in the Leniency Notice, the Commission has to take into consideration all the particularities of this case.

(612) The duty to cooperate in point 11(a) of the Leniency Notice is an essential part of the immunity applicant's duties when conditional immunity is granted under the Notice. As such, it should be interpreted in the light of the underlying rationale for the Commission's policy of

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548 See the judgment in Case C-94/00, *Roquette frères/Commission*, [2002] ECR I-9011, at paragraph 78.

549 See in particular point 30 of the Notice: *"Failure to meet any of the requirements set out in sections A or B, as the case may be, at any stage of the administrative procedure may result in the loss of any favourable treatment set out therein."*

granting immunity to certain cartel members, namely their decisive contribution to the investigation or finding of the cartel infringement.[550]

(613) Bayer's conduct has certainly slowed down the Commission investigation. Furthermore, and above all, a reduction under the Leniency Notice can be justified only where the information provided and, more generally, the conduct of the undertaking concerned might be considered to demonstrate genuine cooperation on its part.[551]

(614) On the other hand it is undisputable that it was Bayer's contribution that triggered the Commission's investigation in this case. Furthermore the Commission cannot establish that Bayer's failure to provide the [*] documents in discussion was the result of unwillingness to genuinely cooperate. On the contrary, Bayer, as an immunity applicant, would not have obtained any advantage from withholding information in respect of [*] while having previously [*].

(615) The documents in question [*] do not establish either the starting date or the end date of the infringement. Furthermore, as Bayer points out in [*], Bayer had spontaneously provided the Commission with information and evidence concerning [*] for the whole duration of the cartel. In the context of the whole investigation and given the information submitted later by other applicants, the documents not submitted to the Commission by Bayer turned out not to be fundamental for the establishment of an infringement. Also, and as regards quantity, it is true that Bayer had already provided [*] spontaneously [*].

(616) Finally, Bayer provided the missing evidence as soon as it was prompted by the Commission. When the Commission offered more precise guidance as to what was required, Bayer's cooperation increased considerably.

(617) Given the special circumstances of this case as elaborated above in recitals (608)-(616), it would be disproportionate to withdraw immunity from Bayer. Consequently, Bayer should be granted immunity from any fines that would otherwise have been imposed on it.

8.6.2. Tosoh

(618) Tosoh submitted an application under the Leniency Notice on 15 July 2003 [*]

(619) [*] had carried out unannounced inspections at the premises of Dow Deutschland Inc. and Denka Chemical GmbH (see Chapter 3).

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550 See recital 431 of Commission Decision of 20 October 2005 in case COMP/38.281 – Italian Raw Tobacco.

551 Joined Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 *P Dansk Rørindustri and Others v Commission* [2005] ECR I-5425 paragraphs 394-395.

(620) Concerning the earlier years of the infringement and, in particular, the period from 1993 until 1996, the evidence available to the Commission, until it received Tosoh's application, consisted of statements, some diary extracts and travel documents received from Bayer. [*]

(621) The evidence submitted by Tosoh in July and October 2003 therefore represented significant added value for the purposes of points 21 and 22 of the Leniency Notice as it strengthened the Commission's ability to prove the cartel.

(622) In determining, pursuant to point 23 of the Leniency Notice, the percentage reduction of the fine for which Tosoh qualifies within the band of 30% to 50%, the Commission takes into account the extent to which the evidence submitted by Tosoh represents added value, as well as the time at which Tosoh submitted that evidence. At the time Tosoh approached the Commission, the Commission already possessed evidence submitted by Bayer and seized during the inspections. However, the information supplied by Tosoh allowed the Commission to establish facts which the Commission could not have otherwise established and corroborated various instances for which the incriminating value of the available evidence was not obvious. [*]

(623) The quantity, quality and value as well as the timing of the information submitted by Tosoh therefore allowed the Commission to better prove the facts in question and to interpret the documents obtained. The information submitted [*] was detailed and therefore extensively used by the Commission in the pursuance of its investigation.

(624) In addition, according to the evidence in the Commission's possession, Tosoh terminated its involvement in the infringement at the latest at the time at which it first submitted the evidence.

(625) In view of the foregoing, Tosoh should be granted a reduction of 50% of the fine that would otherwise have been imposed on it.

(626) The total fine imposed on Tosoh should therefore be EUR 4 800 000.

8.6.3. DuPont/DDE

(627) DDE LLC and DDE SA submitted an application under the Leniency Notice on 21 November 2003, consisting of a detailed oral statement and about 180 annexes. In its submission DDE gave an overview of the product market and the market players and gave information on its company structure and the persons involved in the cartel on its behalf. The submission covers the period from 1996 (when DDE came into existence) until November 2002, mentioning dates of meetings, participants and topics discussed. The annexes provided consisted of travel expense records from 1996 until 2002 and correspondence with competitors and within the company, giving mostly indirect evidence of the contacts between the competitors, explained in the oral submission.

(628) DDE's initial submission was followed by two further submissions on 16 December 2003 and 6 November 2006 (provided by DPE, the successor of DDE). The only purpose of the submission of 16 December 2003 was to give some additional background information on DDE, the CR industry and the key players. It did not provide any further evidence on anticompetitive arrangements. The submission of 6 November 2006 was given in response to the Commission's request for information pursuant to Article 18 of Regulation (EC) No 1/2003 of 6 October 2006, asking for clarification of information provided by DDE in its application and travel documents and other pre-existing documents relating to meetings between DDE and competitors. The submission contained contemporaneous written evidence of the infringement (such as handwritten minutes of several competitor meetings), proving and corroborating, in particular, the early stage of the cartel in 1994, 1995 and 1996.

(629) DDE provided evidence on the content of several meetings previously unknown to the Commission such as the meetings on 5 May 1997 in Vancouver at the fringe of an IISRP meeting, before 18 January 2000 in Italy at the fringe of a meeting of the Italian Rubber Trade Association or on 18 April 2002 between Denka, Tosoh and DDE in Tokyo.

(630) [*]

(631) [*] regarding the reasons and the way the nature of competitor contacts changed in 1998 from multilateral to bilateral or trilateral [*]confirmed that, by the middle of 1999, meetings were held very frequently and mostly on a bilateral basis and that [*] of DDE took a leading role in the cartel during that time. [*]

(632) [*]

(633) [*] with respect to the period after 1996 (the time when DDE was created) and its submission of November 2006 also provided corroboration with respect to the period from 1993 to 1996. [*]

(634) The evidence submitted by DDE/DPE in November and December 2003 as well as in November 2006 therefore represented significant added value for the purposes of points 21 and 22 of the Leniency Notice as it strengthened the Commission's ability to prove the cartel.

(635) In determining, pursuant to point 23 of the Leniency Notice, the percentage reduction of the fine for which DDE/DPE qualifies within the band of 20% to 30%, the Commission takes into account the extent to which the evidence submitted by DDE/DPE represents added value, as well as the time at which DDE/DPE submitted that evidence. DDE/DPE approached the Commission 10 months after the Commission had carried out surprise inspections at Dow and 4 months after the Commission's inspections at Denka. [*]

(636) In addition, according to the evidence in the Commission's possession, DDE/DPE terminated its involvement in the infringement at the latest at the time at which it first submitted the evidence.

(637) In view of the foregoing, DuPont/DPE and Dow should be granted a reduction of 25% of the fine that would otherwise have been imposed on them.

(638) The total fine imposed on DuPont should therefore be EUR 59 250 000, the total fine for DPE should be EUR 44 250 000 and the total fine for Dow EUR 48 675 000.

8.6.4. Syndial/Polimeri

(639) Syndial and Polimeri, two subsidiaries of Eni S.p.A., each submitted an application under the Leniency Notice on 15 April 2005. [*]

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(648) [*] [552]

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(650) [*]

(651) Polimeri challenged the Commission's findings in the SO. In particular, it maintains that Syndial had already suspended its participation in the cartel prior to the transfer of the CR business to Polimeri. However, Polimeri's involvement in the agreements is established in this Decision on the basis of other evidence.

(652) Polimeri's leniency application and the evidence provided did not relate to any fact that was not yet known to the Commission. Therefore, whereas the information provided by other applicants still represented significant added value within the meaning of point 21 of the Leniency Notice, that argument is not valid in respect of Polimeri.

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(653) In conclusion, the information provided by Polimeri does not represent significant added value on the basis of which the Commission should grant a reduction of the fine in application of the Leniency Notice.

(654) As regards Polimeri and Eni's claims, that any leniency granted for Syndial's cooperation with the Commission should also be taken into account in the calculation of the fines to be imposed on them, and considering that Syndial itself is not an addressee of this decision, those claims must be rejected as Syndial 's cooperation was not sufficient to constitute significant added value as explained in recitals (640)-(649).

8.7. The amounts of the fines imposed in this proceeding

(655) The fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 should therefore be as follows:

(a) Bayer AG: EUR 0;

(b) E.I. DuPont de Nemours and Company: EUR 59 250 000;
of which jointly and severally with
(i) DuPont Performance Elastomers S.A. for EUR 44 250 000 and
(ii) DuPont Performance Elastomers L.L.C for EUR 44 250 000 and
(iii) The Dow Chemical Company for EUR 48 675 000;

(c) Denki Kagaku Kogyo K.K. and Denka Chemicals GmbH,
jointly and severally: EUR 47 000 000;

(d) ENI S.p.A. and Polimeri Europa S.p.A,
jointly and severally: EUR 132 160 000;

(e) Tosoh Corporation and Tosoh Europe B.V.,
jointly and severally: EUR 4 800 000,

HAS ADOPTED THIS DECISION:

Article 1

The following undertakings have infringed Article 81 of the Treaty and - from 1 January 1994 – Article 53 of the EEA Agreement by participating, for the periods indicated, in a single and continuing agreement and /or concerted practice in the chloroprene rubber sector:

(a) Bayer AG: from 13 May 1993 to 13 May 2002;

(b) E.I. DuPont de Nemours and Company: from 13 May 1993 to 13 May 2002; DuPont Performance Elastomers S.A., DuPont Performance Elastomers L.L.C and The Dow Chemical Company: from 1 April 1996 to 13 May 2002;

(c) Denki Kagaku Kogyo K.K. and Denka Chemicals GmbH: from 13 May 1993 to 13 May 2002;

(d) ENI S.p.A. and Polimeri Europa S.p.A: from 13 May 1993 to 13 May 2002;

(e) Tosoh Corporation and Tosoh Europe B.V.: from 13 May 1993 to 13 May 2002.

Article 2

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

(a) Bayer AG: EUR 0;

(b) E.I. DuPont de Nemours and Company: EUR 59 250 000;
of which jointly and severally with
(i) DuPont Performance Elastomers S.A. for EUR 44 250 000 and
(ii) DuPont Performance Elastomers L.L.C. for EUR 44 250 000 and
(iii) The Dow Chemical Company for EUR 48 675 000;

(c) Denki Kagaku Kogyo K.K. and Denka Chemicals GmbH,
jointly and severally: EUR 47 000 000;

(d) ENI S.p.A. and Polimeri Europa S.p.A,
jointly and severally: EUR 132 160 000;

(e) Tosoh Corporation and Tosoh Europe B.V.,
jointly and severally: EUR 4 800 000;

The fines shall be paid in Euros, within three months of the date of the notification of this Decision, to the following account:
Account No:

0050915991 of the European Commission with:

ING BANK N.V., Financial Plaza, Bijlmerdreef, 109, NL-1102 BW Amsterdam

(Code SWIFT: INGBNL2AXXX – Code IBAN: NL22INGB0050915991)

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Article 3

The undertakings listed in Article 1 shall immediately bring to an end the 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 the same or similar object or effect.

Article 4

This Decision is addressed to:
Bayer AG
Kaiser-Wilhelm-Allee
D-51368 Leverkusen
Germany

E.I. DuPont de Nemours and Company
1007 Market Street
19898 Wilmington, DE
USA

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2, chemin du Pavillon
CH – 1218 Le Grand-Saconnex, Geneva
Switzerland

DuPont Perfomance Elastomers L.L.C.
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300 Bellevue Parkway
19809 Wilmington, DE
USA

The Dow Chemical Company
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Eagle Ridge II
2125 Ridgewood Drive
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USA

Denki Kagaku Kogyo K.K.
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Japan

Denka Chemicals GmbH

Wehrhahn Center
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40211 Düsseldorf
Germany

ENI S.p.A.
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00144 Rome
Italy

Polimeri Europa S.p.A.
Piazza Boldrini 1
20097 San Donato Milanese
Italy

Tosoh Corporation
Shiba-Koen first Building
3-8-2, Shiba, Minato-Ku
Tokyo 105-8623
Japan

Tosoh Europe B.V.
Crown Building-South
Hullenbergweg 359
1101 CP Amsterdam Z.O.
The Netherlands

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

Done at Brussels, 05/12/2007

For the Commission

[signed]
Neelie KROES
Member of the Commission

ANNEX I

Size and relative importance in CR in 2001

Undertaking	EEA turnover (2001) (Value/EUR million)	Market shares (2001) (Value in %)
Bayer	[*]	[*]
Denka	[*]	[*]
DuPont/Dow/DDE	[*]	[*]
Eni	[*]	[*]
Tosoh	[*]	[*]
TOTAL	[*]	100