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COMP/F/38.443

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,

COMMISSION DECISION

of 21 December 2005

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

(Case COMP/F/38.443 – Rubber chemicals)

(Only the English, German and Spanish texts are authentic)

(Text with EEA relevance)

COMMISSION DECISION

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and Article 53 of the EEA Agreement**

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(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty¹ and, in particular, Articles 7(1) and 23(2) thereof,

Having regard to the Commission Decision of 12 April 2005 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty²,

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

² OJ L 354, 30.12.1998, p. 18.

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions³,
Having regard to the final report of the Hearing Officer in this case⁴,

WHEREAS:

A. Introduction

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

- Bayer AG
- Chemtura Corporation (former Crompton Corporation)
- Crompton Europe Ltd.
- Crompton Manufacturing Company, Inc. (former Uniroyal Chemical Company, Inc.)
- Flexsys N.V.
- General Química SA
- Repsol Química SA
- Repsol YPF SA.

(2) The addressees of this Decision participated in a single, complex and continuous infringement of Article 81 of the Treaty and of Article 53 of the EEA Agreement, involving the fixing of prices and the exchange of confidential information concerning certain rubber chemicals in the EEA and worldwide.

(3) The Commission initiated an investigation into the rubber chemicals industry after it received an application for immunity from fines in April 2002 from Flexsys N.V.

³ OJ [...], [...], p. [...].

⁴ OJ [...], [...], p. [...].

B. The industry subject to the proceeding

1. THE PRODUCTS

- (4) Rubber chemicals are synthetic or organic chemicals that act as productivity and quality enhancers in the manufacture of rubber. They are used by the rubber industry to make a wide range of rubber parts for use in many different applications. The automotive industry is the largest user of rubber parts, mainly in tyres (accounting for two thirds of all rubber parts) but also in hoses, seals, belts, etc.. Rubber parts also find application in industrial machines and equipment, building and construction, sports and leisure and healthcare products.
- (5) The following categories of rubber chemicals are widely recognised within the industry: antidegradants, accelerators, vulcanising agents and other rubber-related chemicals. They can also be classified on the basis of their end-use as tyre or non-tyre products. At the technical level, there appears to be at least some limited supply-side substitutability both between the various categories and across the categories themselves, except in the case of insoluble sulphur which is a vulcanising agent not generally considered as a rubber chemical. On the demand side, vulcanising agents are often considered to form a separate product market.
- (6) Antidegradants and accelerators are by far the most important subcategories in terms of market value, accounting for approximately 85-90 % of all rubber chemicals.
- (7) Anti-degradants are essential for ensuring long life for rubber parts by protecting them against oxidation and light. They are performance enhancers for finished rubber. There are two types of anti-degradants: antiozonants, which are used to protect finished rubber products from damage created by ozone, and antioxidants, which protect finished products from damage caused by oxidation. The anti-degradant product category includes products identified by abbreviations such as PPD (paraphenylenediamines; an antiozonant) and TMQ (an antioxidant) and 4ADPA (an intermediate product).
- (8) Accelerators are used to speed up the so-called vulcanisation process by which raw rubber is converted to its final state and rubber parts acquire the physical properties required for their intended application. Within the category of accelerators a further distinction can be made between primary and secondary (ultra) accelerators. Pre-vulcanisation inhibitors (PVI) form a further category of accelerators.
- (9) Primary accelerators increase the speed and/or reduce the temperature at which vulcanisation occurs. The main primary accelerators are sulphenamides (such as TBBS, CBS, MBS) and thiazoles (such as MBTS, MBT, ZMBT). Ultra accelerators, also referred to as activators, are used for certain applications in conjunction with primary accelerators to improve cross-

linking efficiency and maximise the overall effect of accelerators. This group includes mainly thiurams, DTCs (dithiocarbamates), DPGs and a number of other secondary accelerators known by their chemical abbreviations such as NDBC, TDEC, ZBEC, ZDBC, ZDEC, ZMDC, ZEPC, TMTD.

- (10) The category of other rubber-related chemicals includes primarily retarders, which are applied to delay the vulcanisation process until the desired moment, and white fillers, which increase the strength and durability of finished rubber products.
- (11) While there are indications that at least the arrangements described in this Decision concerning the year 1996 covered all categories of rubber chemicals without distinction or specification (recital (68)), the evidence is conclusive with regard to primary accelerators, antiozonants (PPDs) and antioxidants (TMQs). Hence, for the purposes of these proceedings, the Commission considers that the products affected by these arrangements cover these three categories of rubber chemicals.

2. THE UNDERTAKINGS SUBJECT TO THE COMMISSION'S PROCEEDINGS

2.1 The addressees of this Decision

2.1.1 Flexsys

- (12) Flexsys N.V. (hereinafter "Flexsys") is a joint venture currently owned 50/50% by Solutia Inc. (USA) and Akzo Nobel N.V. (Netherlands), with headquarters in Brussels. Flexsys was formed on 1 January 1995 between Monsanto Company (USA) and Akzo Nobel N.V. as a concentrative full-function joint venture, which was approved by the Commission on 19 January 1995 under the Community merger control rules⁵. The parent companies transferred all their relevant assets to the joint venture on 1 January 1995 and withdrew entirely from the rubber chemicals market. In 1997, Monsanto placed the assets of its chemical division, and the shares of stock or equity interests of Flexsys, into a new entity, Solutia Inc., which replaced Monsanto as the parent company of Flexsys. Flexsys performs its functions as an autonomous economic entity on the market.
- (13) The holding company for Flexsys is Flexsys Holding B.V. of which Akzo Nobel Chemicals International B.V. holds 50%, the remaining 50% being held by Solutia Inc and Solutia Europe N.V. together.
- (14) Flexsys is the largest rubber chemical producer in the world. In 2004, its world-wide turnover for all products and services was approximately EUR 425 million.⁶ The turnover generated from sales of rubber chemicals are set out in Tables 1 and 2 (recital (33)).

2.1.2 Bayer

⁵ Decision Akzo Nobel/Monsanto of 19 January 1995, case n° IV/M.523

⁶ Flexsys letter dated 26 April 2004, file p. 10706, updated on 17 November 2005.

- (15) Bayer AG (hereinafter “Bayer”) is a German publicly owned corporation involved, among others, in chemical and polymer industries. The rubber chemicals business of Bayer AG was transferred from 1 January 2003 to Bayer Polymers and then, on 1 December 2003, to Bayer MaterialScience AG. The rubber chemicals business of Bayer MaterialScience AG was then transferred to Lanxess Deutschland GmbH (“Lanxess”). This transaction became effective as of 30 September 2004 with the registration in the register of commerce. Lanxess was, until 28 January 2005, 100% owned by Bayer AG. On 28 January 2005, the company went public and is now called Lanxess AG.⁷
- (16) Until the reorganisation, rubber chemicals were produced by Bayer and its wholly-owned subsidiaries in Spain and Belgium. These products were sold by Bayer’s regional marketing companies established in the regions concerned, and sales to key accounts were settled by key account managers of Bayer in Leverkusen, where the marketing of rubber chemicals was centralised. All the affiliates responsible for the marketing of these products were either Bayer’s own business divisions or its wholly-owned subsidiaries who reported to Bayer’s sales managers in Leverkusen and received instructions from them.⁸
- (17) In 2004, Bayer’s world-wide turnover for all products and services was approximately EUR 29.7 billion.⁹ The turnover generated from sales of rubber chemicals are set out in Tables 1 and 2 (recital (33)).

2.1.3 Crompton/Uniroyal (now Chemtura)

- (18) Crompton Corporation, the name of which was changed to Chemtura Corporation in 2005 (hereinafter “Crompton” or “Chemtura”, respectively) is a publicly held corporation established in the United States. It was formed through a merger of Crompton & Knowles Corporation and Witco Corporation on 1 September 1999. It is the third largest rubber chemical producer worldwide. Crompton’s registered office is in Greenwich, Connecticut, USA, and it has 35 key manufacturing facilities worldwide.
- (19) Rubber chemicals were included into Crompton’s activities on 21 August 1996, when it acquired another US company, Uniroyal Chemical Company, Inc. (hereinafter “Uniroyal” or “UCC”), now Crompton Manufacturing Company, Inc. (hereinafter “Crompton Manufacturing”) which still exists as a legal entity within the Crompton group. The rubber chemicals business, which continues to exist organisationally within Crompton, was carried out under the Uniroyal name until late 2002. Crompton’s rubber chemicals business now forms part of Crompton’s performance chemicals and elastomers, or PCE Group.
- (20) In the corporate structure of the Crompton group, Crompton is the ultimate parent company owning 100% of Uniroyal. Uniroyal, in turn, has direct or

⁷ See Bayer’s reply to SO p.3.

⁸ Bayer letter of 15 April 2004, section 1, file p. 07970-07973.

⁹ Bayer letter dated 15 April 2004, section 3, file p. 08017.

indirect ownership of the following European subsidiaries that have sold rubber chemicals manufactured by the companies of the Crompton group: Crompton Europe Ltd., the United Kingdom (hereinafter “Crompton Europe”); Crompton Europe B.V, the Netherlands; Crompton Chimica S.r.l., Italy; and Crompton Chemical S.r.l., Italy. Although Crompton’s name was changed to Chemtura in 2005, the entities subject to these proceedings, i.e. Crompton, Uniroyal and Crompton Europe are still referred to collectively as “Crompton/Uniroyal”). Crompton Europe (formerly Uniroyal Chemical Ltd.) is currently a wholly-owned sales subsidiary of Uniroyal, of which it was part prior to the acquisition of Uniroyal by Crompton in 1996.

- (21) The management of the rubber chemicals business in Crompton, Uniroyal and Crompton Europe is closely intertwined. For instance, [...] of Crompton [...] gave instructions to Uniroyal’s [...] who, in turn, instructed [...] and [...] of Uniroyal, both based at Crompton Europe premises in the United Kingdom. Crompton’s [...] was also based in the United Kingdom, and he gave instructions to Crompton Europe’s key employees involved in the marketing and sale of rubber chemicals [...] and [...]. There was also close contact between [...] of Uniroyal and [...] of Crompton, who mutually informed each other of their contacts with competitors.¹⁰
- (22) In 2004, Crompton’s world-wide turnover for all products and services was approximately EUR 2.06 billion.¹¹ The turnover generated from sales of rubber chemicals are set out in Tables 1 and 2 (recital (33)).

2.1.4 *General Química, Repsol Química and Repsol YPF SA*

- (23) General Química S.A. (hereinafter “General Química” or “GQ”), is a Spanish company active in the chemical industry. It does not currently produce a whole range of rubber chemicals but is limited to certain primary accelerators (CBS, TBBS, MBTS) and antioxidants (TMQ). It ceased to produce ultra accelerators (carbamates) between 1992 and 1993 and has thereafter acquired them from Akzo and, subsequently, from Flexsys. GQ started to sell sulphenamides, thiazoles (both primary accelerators) and TMQ (antioxidant) outside Spain as of January 1990. GQ is currently a wholly-owned subsidiary of Repsol Química SA (“Repsol Química”) who acquired 91% of GQ’s shares from BBV (Banca Bilbao Vizcaya) in 1989 and the remaining 9% on 28 December 1993. Repsol Química is wholly-owned by Repsol YPF SA (Repsol YPF SA is the result of the acquisition by Repsol SA, who owned 100% of Repsol Química, of YPF SA).
- (24) In 2004, GQ’s total world-wide turnover for all products and services was EUR 59.49 million, that of Repsol Química EUR 1.9 billion and that of Repsol YPF SA EUR 41.7 billion¹² The turnover generated from sales of rubber chemicals are set out in Tables 1 and 2 (recital (33)).

2.2 Other undertakings

¹⁰ Crompton oral statement of 11 May 2004, file p. 10821, as well as transcript p. 10735-10737.

¹¹ Crompton letter dated 3 March 2004, file p. 10510.

¹² GQ letter of 15 November 2005 .

2.2.1 Akzo

- (25) Akzo Nobel NV (hereinafter “Akzo”) is a publicly quoted Dutch company, formed in February 1994 by the merger between Akzo NV of the Netherlands and Nobel Industrier AB of Sweden.¹³ Akzo produced rubber chemicals until it formed a joint venture (Flexsys) with Monsanto in January 1995 (recital (12)). It transferred its own activities in rubber chemicals to Flexsys and withdrew entirely from that market.
- (26) The legal entities within the Akzo Nobel group in charge of the production and supply of rubber chemicals before Flexsys were Akzo Nobel Chemicals B.V., within the Netherlands, and the operational subsidiaries of the holding company Akzo Nobel Chemicals International B.V., outside the Netherlands.

2.2.2 Monsanto Company (now Pharmacia Corporation)

- (27) Monsanto Company (hereinafter Monsanto) was a publicly quoted US company active in the chemical industry until 1997. Monsanto produced rubber chemicals until it formed a joint venture (Flexsys) with Akzo in January 1995 (recital (12)). It transferred its own activities in rubber chemicals to Flexsys and withdrew entirely from that market.
- (28) The legal entity within the Monsanto group in charge of the production and supply of rubber chemicals prior to the formation of Flexsys was Monsanto. The rubber chemicals production assets and employees in the United States were part of Monsanto's Chemical Division, which was not a separate legal entity. In 1997, Monsanto placed the assets of its chemical division and the shares of stock or equity interests of Flexsys, into a new company called Solutia Inc. which replaced Monsanto as the parent company of Flexsys. In 2000, Monsanto Company merged with Pharmacia Corporation and was renamed Pharmacia Corporation. It is currently a wholly owned subsidiary of Pfizer Inc.

2.2.3 [...]

(29) [...]

(30) [...]

2.2.4 [...]

(31) [...]

(32) [...]

3 Supply of rubber chemicals

- (33) The major global producers of rubber chemicals are Flexsys (Belgium), Bayer (Germany) and Crompton (USA), accounting together for approximately a

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Case N IV/M.390 - AKZO/NOBEL INDUSTRIER - Decision of 10/01/1994.

half of the world-wide rubber chemical market. There are a number of significant smaller competitors, such as General Quimica (Spain), Duslo (Slovakia), Istrochem (Slovakia), Noveon (USA) and Great Lakes (USA), as well as many minor competitors, particularly in Asia. The estimated world-wide and EEA-wide market shares are set out in Tables 1 and 2.

Table 1: Estimates of turnover and market shares world-wide in the year 2001 for all rubber chemicals:

Supplier	World-wide sales in EUR [‘000s]	World-wide market share**
Flexsys	[...]	[20-30%]
Bayer	[...]	[10-20%]
Crompton	[...]*	[10-20%]
General Quimica	[...]	[0-10%]
Others	626	41.7%
Total	1 500 000	100%

Source: The figures have been revised by the parties’ replies to the Commission’s requests for information: Flexsys letter dated 29 November 2005, GQ letter dated 29 November 2005 and 2 December 2005, Bayer letter dated 21 November 2005 and Chemtura letter dated 30 November 2005. They do not include insoluble sulphur, produced only by Flexsys and not generally considered to belong to the same product market as rubber chemicals. The figures in square brackets are confidential.

*Crompton’s figures exclude Octamine, an antioxidant produced only by Crompton and not by the other addressees.

**Based on the Commission’s estimation of the total world-wide turnover in 2001 (EUR 1.5 billion). The parties’ estimations range from EUR 1.2 billion to 2.3 billion . Chemtura has been unable to provide an estimation of the total market value.

Table 2: Estimates of turnover and market shares in the EEA in the year 2001 for rubber chemicals, including antioxidants, antiozonants and primary accelerators:

Supplier	Community/EEA sales in EUR [‘000s]	Community/EEA market share**
Flexsys	[...]	[20-30%]

Bayer	[...]	[20-30%]
Crompton	[...] *	[0-10%]
General Quimica	[...]	[10-20%]
Others	55.4	27.7%
Total	200 000	100%

Source: The parties' replies to the Commission's requests for information: Flexsys letter dated 29 November 2005, GQ letter dated 29 November 2005 and 2 December 2005, Bayer letter dated 21 November 2005 and Chemtura letter dated 30 November 2005. The figures in square brackets are confidential.

*Crompton's figures exclude Octamine, an antioxidant produced only by Crompton and not by the other addressees.

**Based on the Commission's estimation of the total EEA turnover in 2001 (EUR 200 million). The parties' estimations are EUR 180 million, EUR 204 million and EUR 462 million. Chemtura has been unable to provide an estimation of the total market value.

4 Demand for rubber chemicals

- (34) The major segments of rubber chemicals demand are the tyre industry which consumes approximately 55-60% of global rubber chemicals and the non-tyre segment (synthetic rubber and industrial rubber products or "IRP") which consumes the balance. As a total, about 90 % of rubber chemicals go into automotive applications.
- (35) The major customers for rubber chemicals are the globally operating big tyre companies Michelin (France), Goodyear (USA), Bridgestone/Firestone (Japan), Continental (Germany) and Pirelli (Italy), accounting together for about 35-40% of world-wide consumption. The non-tyre segment is highly fragmented, the main consumers being Poly-One (USA, Mexico), Hutchinson (Europe, South America) and Trelleborg (Europe, USA, South America and Asia).
- (36) The world-wide distribution of demand for rubber chemicals is around 20-25% North America, 25-30% Europe, 40-45% Asia and 5-7% Latin America.
- (37) The global growth in demand for rubber chemicals is estimated to be about 2.5% to 3.0% per year, of which the developed economies of Western Europe, North America and Japan account for 0% to 1% and the emerging economies of Asia and Eastern Europe for 5% to 10%. According to Flexsys, the years 1995 through 2000 were economically strong for the rubber chemical industry. Much of this growth was catch-up following the

contraction in demand in the early 1990's associated with the collapse of the East European and CIS (Commonwealth of Independent States) economies.

5 Geographic scope of the rubber chemicals business

- (38) The Commission decision¹⁴ clearing the Flexsys joint venture in 1995 (hereinafter the “Flexsys Decision”) concluded that the geographic market for rubber chemicals was becoming increasingly globalised. This was because the major suppliers were present in each of the principal economic regions of the world, the main customers of rubber chemical products were tending to operate on a global basis and price negotiations were often conducted on a world-wide basis. All competitors and nearly all tyre manufacturers considered the relevant geographic market as worldwide.¹⁵
- (39) Crompton has, in its reply to the Statement of Objections, pointed out that the geographic market definition made under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings¹⁶ in 1995 may no longer be relevant. It submits that due to a number of factors, such as significant EU/US price and production cost differentials, transport and tariff costs and the excess capacity in Europe, it has not been economically viable, at least not for Crompton, to import significant volumes of rubber chemicals to Europe. More specifically, Crompton has pointed out that Community and US tariffs for 6PPD and TMQ were 6,5% during the period under investigation and the transport costs approximately 5 % and 11%, respectively. It further estimates that, based on Eurostat data, in 2002 accelerator imports into the Community accounted only for some 3,9% of the accelerator demand.
- (40) Crompton was the only addressee of the Statement of Objections advancing this argument, the other addressees accepting the global dimension of the business as described therein (Flexsys, Bayer) or explicitly affirming the global nature of the rubber chemicals business (General Quimica, [...] and [...]). In this regard, the Commission points out that the geographic scope of business has to be assessed in relation to the whole industry concerned and not to the commercial decisions of one individual participant. The Commission bases its assessment on the following considerations.
- (41) First, in its application for leniency in October 2002, Crompton itself confirmed what was already established in the Flexsys Decision, by stating that in the mid-1990's, the different regional businesses of Uniroyal (the United States, Europe, Latin America and Asia) operated largely independently but that thereafter the tyre customers became more global in their organisation and required a single global price, which also pushed the rubber chemicals companies to reorganise their business on a global basis.¹⁷ This trend is confirmed by an internal Uniroyal note dated 23 November 1995

¹⁴ Decision Akzo Nobel/Monsanto of 19 January 1995, case n° IV/M.523

¹⁵ Idem, paragraph 20.

¹⁶ OJ L 395, 30.12.1989, p.1. Corrected version in OJ L 257, 21.9.1990, p.13. Regulation as repealed by Regulation (EC) No 139/2004 (OJ L 24, 29.1.2004, p.1).

¹⁷ Crompton oral statement of 8.10.2002: transcript section 6.12, p. 3-4 (file p. 10803).

reporting that “*rubber chemicals is a w.w. business to a large degree*”.¹⁸ Flexsys has also stated that it was only until the mid-1990’s that supply and demand were “more regional”, whereafter there was a shift towards globalisation and, indeed, after 1995 the parties reached understandings about “multi-regional” price increases.¹⁹ Bayer has also described the geographic scope of its business as world-wide.²⁰ Moreover, the *Rubber Chemicals World Data Book* 2004 concludes that there are “few, if any, barriers among the world’s regional markets.”²¹

- (42) Second, the Commission observes that while transport costs and tariff barriers might well lead to somewhat higher costs, they have not prevented the producers from trading on a worldwide basis.²² This is demonstrated by the Eurostat data showing that in the period 1995-2001 there were rubber chemicals imports into the EEA from elsewhere and vice versa. For instance, imports of antioxidising preparations for rubber (including TMQ) from the United States into the Community from 1995 until the end of 2001 nearly doubled in volume,²³ whereas during the same period imports of PPDs fluctuated in terms of volume²⁴ and those of prepared rubber accelerators decreased significantly²⁵. Even if the trade volumes were not considered significant, this would not alter the conclusion that there were trade flows between the different regions.
- (43) As a number of different factors may affect the volume of trade, including *inter alia* exchange rate fluctuations, it is impossible to estimate how important the trade volume would have been in the absence of global price increases coordinated by the addressees of this Decision at least in 1996 (recital (68)), July 2000 (recital (121)) and July 2001 (recital (143)). The organisation and operation of the cartel itself in the world-wide market, as shown by these agreements to raise prices globally, confirms the worldwide character of the rubber chemicals. Indeed, the fact remains that the producers involved in the infringement cartellised the global market for rubber chemicals.
- (44) Hence, the Commission maintains the reasoning put forward in the Statement of Objections and disagrees that the markets in this sector could be qualified as only regional with no interaction between different regions. Therefore the Commission concludes that the nature of the rubber chemicals business was such that arrangements in the global market were likely to affect competition

¹⁸ File p. 09935.

¹⁹ Flexsys oral statement of 7.1.2005, file p. 10712; 10715.

²⁰ File p. 08006.

²¹ The summary of *Rubber Chemicals World Data Book* 2004, published by Notch Consulting Group, available at http://notchconsulting.com/pdf/Rubber_Chem.pdf.

²² See case COMP/E-1/36.604, Citric Acid, recital 38, in which average transport costs of 5-7% of the final purchase price were considered low.

²³ Product code 3812 3020 - quantity in 100 kg in .000000: 10873 (1995), 12440 (1996), 15298 (1997), 17536 (1998), 26970 (1999), 22822 (2000) and 19391 (2001)

²⁴ Product code 2921 5190 – quantity in 100 kg: 17705 (1995), 21502 (1996), 14581 (1997), 16439 (1998), 7921 (1999), 12557 (2000), 8854 (2001).

²⁵ Product code 3812 1000 – quantity in 100 kg: 11939 (1995), 10576 (1996), 5507 (1997), 5578 (1998), 3325 (1999), 3269 (2000), 3063 (2001).

in the EEA and that it is not necessary to define precisely a relevant geographic market in a cartel case such as this one.

6 Interstate trade

- (45) The sales volumes of the undertakings subject to these proceedings show that there is considerable trade among Member States and minor volumes are also sold in Norway, Iceland and Lichtenstein which are members of the European Free Trade Association (“EFTA”), and Contracting Parties to the EEA Agreement. Bayer, Flexsys and Crompton have production sites and/or sales outlets in several Member States from which they make shipments throughout the EEA. General Química, established in Spain, also sells rubber chemicals in most Member States.

C. Procedure

3. THE COMMISSION'S INVESTIGATION

- (46) On 22 April 2002 attorneys representing Flexsys, as well as its parent companies Solutia (former Monsanto) and Akzo, met with Commission officials to reveal the existence of anti-competitive practices in the rubber chemicals sector and to submit an oral application for immunity from fines pursuant to the 2002 Commission notice on immunity from fines and reduction of fines in cartel cases²⁶ (“the Leniency Notice”). Flexsys supplemented its application by oral statements and documentary evidence on 31 May 2002, 10 July 2002, 19 December 2002 and 7 January 2005.
- (47) On 14 June 2002, conditional immunity was granted to Flexsys by a Commission decision.
- (48) On 26 and 27 September 2002, the Commission carried out unannounced inspections at the premises of Bayer (Germany), Crompton Europe (United Kingdom) and General Química (Spain) pursuant to Article 14 of Regulation 17: First Regulation implementing Articles 85 and 86 of the Treaty.²⁷
- (49) On 8 October 2002, Crompton's representatives met with Commission officials in order to submit an oral application for immunity from fines or reduction of fines under the Leniency Notice. Crompton supplemented its application by a further oral statement with supporting documentary evidence on 14 October 2002. The Commission informed Crompton of its intention to apply a reduction of 30-50% of a fine by a letter dated 12 November 2002. Crompton answered orally to a number of Commission's questions on 21 April 2004 and provided a further oral statement and documentary evidence on 11 May 2004.
- (50) On 24 October 2002, Bayer submitted an application for immunity from fines or reduction of fines under the Leniency Notice and supplemented it by oral statements and supporting documents on 19 December 2002, 6 January 2004 and 24 September 2004. By a letter dated 3 November 2004, the Commission informed Bayer of its intention to apply a reduction of 20-30% of any fine that would otherwise have been imposed.
- (51) On 25 March 2003, the Commission sent requests for information under Article 11 of Regulation No 17 to [...] and [...] which replied on 5 May 2003 (“[...] Article 11 reply”) and 30 April 2003 (“[...] Article 11 reply”), respectively.

²⁶ OJ C 45, 19.2.2002, p. 3.

²⁷ OJ No 13 of/62, 21.2.1962, page. 204. Regulation repealed by Regulation (EC) No 1/2003.

- (52) On 26 September 2003, the Commission sent a request for information under Article 11 of Regulation No 17 to General Química which replied, after the Commission's reminder, on 2 March 2004 ("GQ Article 11 reply").
- (53) On 1 March 2004 and 3 March 2004, the Commission sent requests for information under Article 11 of Regulation No 17 to Bayer and Crompton which replied on 15 April 2004 ("Bayer Article 11 reply") and on 2 April 2004 (Crompton Article 11 reply"), respectively.
- (54) On 7 June 2004, General Química submitted a written statement with annexes in application for a reduction of fines under the Leniency Notice ("GQ submission of 7 June 2004"). By a letter dated 3 November 2004, the Commission informed General Química of its intention to apply a reduction of up to 20% of any fine that would otherwise have been imposed.
- (55) On 12 April 2005, the Commission initiated proceedings in this case and adopted a Statement of Objections against Bayer, Crompton, Crompton Europe, Uniroyal, Flexsys, Akzo Nobel, Pharmacia, General Química, Repsol Química, Repsol YFP, [...], [...], [...] and [...].
- (56) All the parties to which the Statement of Objections had been addressed submitted written comments in response to the objections raised by the Commission.
- (57) The undertakings had access to the Commission's investigation file in the form of a copy on CD-ROM. With the CD-ROM, 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 CD-ROM 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.
- (58) An Oral Hearing on the case was held on 18 July 2005. The undertakings to which the Statement of Objections had been addressed, with the exception of Akzo, Pharmacia and Repsol, took part in the Hearing.
- (59) In view of the elements brought forward by the undertakings in their replies to the Statement of Objections and at the Oral Hearing, the Commission has decided to close the proceedings against [...], [...] and [...], forming the [...] group, as well as Akzo Nobel N.V., Pharmacia Corporation, and [...] .

4. INVESTIGATIONS IN OTHER JURISDICTIONS

- (60) In the United States, the Department of Justice announced on 15 March 2004, that Crompton Corporation had agreed to plead guilty to charges of participation in an international conspiracy to fix prices of rubber chemicals sold in the US and elsewhere from 1995 to 2001.²⁸ On 14 July 2004, the

²⁸

Press release of Department of Justice, Monday, March 15, 2004 (www.usdoj.gov).

Department of Justice further announced that Bayer AG had agreed to plead guilty for participating in this conspiracy.²⁹

²⁹ Press release of Department of Justice, Wednesday, July 14, 2004 (www.usdoj.gov).

D. Description of the events

- (61) The Commission has evidence that Bayer, Crompton/Uniroyal and Flexsys have participated in meetings and other contacts to coordinate pricing of certain rubber chemicals to be sold in the EEA and elsewhere, as well as to exchange information on sales to customers. During these contacts they reached agreements to raise prices of certain rubber chemicals at least in 1996, 1998, 1999, 2000 and 2001. There are also a number of indications that at least sporadic collusive activities within the rubber chemicals industry took place throughout the 1970's,³⁰ 1980's³¹, the early 1990's³², and in particular in mid-1990's, when a so-called "Club" operated among the major producers of rubber chemicals.³³ However, the Commission has sufficiently firm and convincing evidence of the existence of the cartel among Flexsys, Bayer and Crompton/Uniroyal only in the period covering the years 1996-2001. There is also sufficient evidence to establish that General Quimica, which must be considered a fringe player, was on certain occasions implicated in these arrangements.
- (62) Before setting forth the details of these events in the chronology in Section 6 with regard to Flexsys, Bayer and Crompton/Uniroyal and Section 7 with regard to the fringe players, the basic principles of the arrangements in the rubber chemicals sector are briefly described in Section 5.

5. THE BASIC PRINCIPLES AND FUNCTIONING

- (63) Coordination of price increases normally followed a general pattern, involving contacts among the competitors during a preparatory phase preceding the announcement to customers, thereafter during the negotiations with customers, and lastly after the contracts had been made to monitor compliance and success on the market. During the contacts preceding the coordinated action, the parties sought support for a suggested price increase and agreed upon its amount, the products and territory covered, as well as the leader and the timing of the announcements. During the implementation phase, the focus was on the customers' reactions to the announced price increases and exchanges on the positions regarding price negotiations with the customers.³⁴ The follow-up contacts included typically the exchange of detailed information on contracted volumes and prices with specific customers.
- (64) According to Bayer's description, in practice the producers agreed on a certain amount for the increase and at the same time on a fall-back amount

³⁰ File p. 10823, 10784.

³¹ File p. 10876, 10902; 10823, 10784; 10821, 10735.

³² File p. 10823, 10785; 10821, 10767-10768; 10876, 10903.

³³ File p. 02165, 10876, 10904, 10821, 10823, 10735, 10766-10768; 10823, 10784; 10735. According to Crompton, the "Club" had existed among Bayer, Monsanto and Akzo already in the 1980's and Uniroyal was introduced to it in 1989..

³⁴ File p. 10814, 02560-02561.

below this, depending on the historic allocation of sales volumes (for an example, see recital (130)). Within this frame, the producers had certain scope for negotiation. This implied that even when a price increase was “negotiated down” by customers and even when the fall-back position was undershot, the increase may have been successful overall.³⁵

- (65) Until 1998, the duration of the contracts with customers varied from one producer to another. This led to the failure of some attempts to increase rubber chemical prices by common agreement because certain producers had long-term contracts with their customers, and a price increase was not possible during the term of the contract (see, e.g. recitals (98)-(99)). To avoid these problems Bayer and Flexsys agreed to make their contracts with tyre customers for a uniform maximum duration of six months, effective from 1 January and 1 July, respectively. Crompton/Uniroyal joined this agreement around the middle of 1998 by agreeing to reduce the duration of its contracts to six months.³⁶
- (66) The success of any price increase depended on the producers being content to maintain their market shares at the prevailing level, hence the need to stabilise market shares and to establish a compensation scheme in case the proportions changed. In the event that the delivery volumes changed as a result of a price increase and a producer gained or lost market shares, the participants had an understanding that they would allow a party who incurred important volume losses to regain volume at the expense of the other competitors.³⁷ In such case, a producer who had gained volume could hold back at some customers to allow for this kind of compensation.³⁸ Bayer believes that due to this reparation mechanism the market shares of rubber chemicals producers did not change significantly as a result of the coordinated price increases.³⁹
- (67) Bayer has provided further details of the functioning of the compensation mechanism as follows. Each customer's largest supplier (in terms of sales) set its prices slightly below the target prices agreed with the competitors to make sure that the customer in question made the contract with this supplier. The aim was to prevent shifts in market share at the expense of the incumbent. If, during the negotiations a customer pointed out that a competitor had made a lower-priced offer, the incumbent contacted its competitor and asked for an explanation. If the competitor indeed won the contract and thus gained market share, the losing supplier sought to offset its loss with another customer by offering a lower price than the competitors. In order not to jeopardize the overall success of the coordinated price increase, this supplier informed the competitors that it would apply a lower price than agreed only because this allowed it to offset the market share lost from another customer (see, e.g. recitals (85), (91) and (162)).⁴⁰

³⁵ File p. 02458.

³⁶ File p. 02455.

³⁷ File p. 10876, 10894.

³⁸ File p. 02456.

³⁹ File p. 10814, 02560-02561.

⁴⁰ File p. 10814, 02560-02561; 10821, 10726-10728, 10774-10775.

6. THE CHRONOLOGY OF THE EVENTS AND CONTACTS AMONG FLEXXSYS, BAYER AND CROMPTON/UNIROYAL

6.1. The price increase of 1 January 1996

- (68) In 1996, Flexsys led a world-wide price increase on rubber chemicals taking effect on 1 January 1996. Flexsys has disclosed that this price increase was coordinated in prior bilateral meetings involving Flexsys, Bayer and Uniroyal, in which it informed these competitors about its intention to increase the prices of rubber chemicals worldwide, with the latter two supporting the idea.⁴¹ According to Crompton, this price increase included all rubber chemicals.⁴²

6.1.1. Preparatory phase

Involvement of Bayer

- (69) Based on Bayer's recollection, there was a meeting in Brussels, the exact date of which can no longer be established, involving at least Mr. [...] of Bayer and Messrs. [...] and [...] of Flexsys. In this meeting, Flexsys presented charts indicating target prices for rubber chemicals by country and urged Bayer to follow its price increase effective from 1 January 1996. For 6PPD, the objective was to reach a price of about DEM 9 in place of the prevailing DEM 6. According to Bayer, its representative left the meeting, making it clear that he considered the meeting illegal and the price increase targets unrealistic.⁴³
- (70) Flexsys' statement contradicts Bayer's account concerning the price increase of January 1996. Flexsys recalls two bilateral meetings in which Bayer indicated that it would support the initiative of Flexsys to increase rubber chemicals prices. In the first of these, held in Brussels on 10 October 1995 between Flexsys (Messrs. [...] and [...]) and Bayer (Mr. [...]), Flexsys disclosed the level of its coming price increase, and Mr. [...] expressed doubts about customer reaction but indicated that Bayer would follow, if Flexsys led.⁴⁴ In the second meeting with Mr. [...] in Leverkusen in the autumn of 1995: *"Bayer was not sure about the success of the increase because it was so large. It needed a three-month waiting period for the adjustment of prices to avoid the appearance of collusion. Flexsys agreed but was worried about losing significant market share. Bayer assured that there was no reason to worry and that it would follow in three months."*⁴⁵ In its reply to the Statement of Objections, Bayer contests that it gave such promises.
- (71) Bayer's support for the price increase is stated in an internal memorandum dated 5 December 1995 as follows: "We should watch for Uniroyal support of

⁴¹ File p. 10876, 10889-10890.

⁴² File p. 10727, 10757.

⁴³ File p. 02532.

⁴⁴ File p. 10876, 10889; 10819, 10717-10719.

⁴⁵ File p. 10876, 10889.

Flexsys increase then support. This 1/1/96 increase appears to be global. Bayer will support”.⁴⁶ Bayer contests any link between this note and any coordination of the price increase with its competitors. For Bayer, this note should be interpreted only as showing Bayer’s strategy to get the highest price on the market; it did not know what Flexsys and Crompton would do. The Commission points out, however, that Bayer has itself admitted having been informed about Flexsys’ intentions (recital (69)). Hence, Bayer knew about the price increase beforehand and could then easily follow the events on the market to support the initiative of Flexsys. Against this background, Bayer’s statement that its decision to raise prices was taken autonomously cannot be given much credence.

- (72) Further evidence of Bayer’s support for the 1996 price increase is found in a Flexsys e-mail summarising the result of a later meeting with Bayer, held on 28 July 1997 (recital (89)). This e-mail, marked “*CONFIDENTIAL - Please destroy after reading!*”, reports the following with regard to the 1996 price increase: “...Bayer in his [Mr. [...]] opinion had been on board by and large. He felt that the aimed increase was too high in the first place and that we had not appreciated both, the impact of the smaller suppliers nor the spare volume which was available. According to [...],[...] had reluctantly agreed to support, however, with quite an opposition internally. ...”⁴⁷ Bayer has indicated in its reply to the Statement of Objections that Mr. [...] does not agree with the content of this e-mail. However, it does not say anything about Mr. [...]. Considering the other competitors’ statements about the collusive nature of this price increase, it is difficult to see why Mr. [...] would have given this explanation, if no agreement on the price increase existed among the competitors.

Involvement of Uniroyal

- (73) According to Flexsys, Uniroyal agreed to support the price increase in their bilateral contacts preceding the announcement.⁴⁸ More specifically, Flexsys recalls a meeting between Mr. [...] (Flexsys) and Uniroyal’s representatives Messrs. [...] and [...] possibly in London in the autumn of 1995. In this context, Flexsys mentioned its intentions with regard to the price increase, and Mr. [...] supported the idea, stating, however, that Uniroyal could not follow immediately because of staggered contracts with certain customers but would follow when it could.⁴⁹ Crompton cannot confirm this particular meeting in the absence of evidence, but according to its statement, in August 1995 at least Mr. [...] of Uniroyal and Mr. [...] of Crompton Europe (then Uniroyal Chemical Ltd) were aware of collusion in connection with the European January 1996 price increase.⁵⁰ Crompton has also disclosed that Flexsys had, already in June 1995, communicated to Uniroyal a “feeling” that

⁴⁶ File p. 10270.

⁴⁷ File p. 0030.

⁴⁸ File p. 10876, 10889-10890.

⁴⁹ File p. 10876, 10889-10890.

⁵⁰ File p. 10821, 10726, 10736-10737.

it was going to lead a price increase and that these two firms had reached a consensus that “if one led a new price increase, the other would follow”.⁵¹

- (74) Uniroyal’s intention to follow Flexsys is confirmed by an internal e-mail dated 16 November 1995 in which Mr. [...] (Uniroyal) informs Mr. [...] (Uniroyal) of the following: “I intend to follow the Flexsys increase in N.A. at [...]. There is no protection for the Jan-Mar period. [...] indicates we will endeavour to implement the increase Jan. 1. ... In Europe, we would like to do the same.”⁵²

6.1.2 Implementation and outcome

- (75) Uniroyal increased its prices as of 1 January 1996, which is evidenced by its internal e-mail dated 22 January 1996 stating that the price increase was “being pushed by the ‘big three’”,⁵³ and an e-mail dated 6 February 1996 confirming the price increase.⁵⁴ According to Bayer, the reference to the price increase being pushed by the “big three” cannot be understood as an indication of an agreement that Bayer would participate in the price increase. Bayer has further pointed out that in this context Crompton has referred to a meeting involving only Mr. [...] and Mr. [...] of Uniroyal and Mr. [...] of Flexsys on 9 February 1996, with no indication of any contact with Bayer.⁵⁵ The Commission notes, however, that while Bayer’s involvement in this price increase was discussed earlier in recitals (69)-(72), this reference to “the big three” further strengthens the finding that Bayer indeed was supporting the price increase.
- (76) Bayer’s attempts to implement the price increase are confirmed in an internal memorandum dated 9 January 1996 in the following terms: “January 1 price increase appears to have been accepted by BFS and General Tire, with negotiations in process at Goodyear and Michelin”.⁵⁶ While Bayer points out that these notes do not entail any proof of prior contacts with competitors, in the context of the anticompetitive contacts and other indications pointing to collusion with regard to this price increase, as set forth in recitals (69)-(72)), it is not plausible that Bayer’s decision to raise prices was taken autonomously.
- (77) Flexsys recalls having had regular phone conversations and meetings with Mr. [...] of Bayer regarding customers and Bayer’s implementation of the price increases after the announcement of the January 1996 price increase,⁵⁷ which Bayer, however, contests.⁵⁸

⁵¹ File p. 10771; see also an e-mail dated 4 November 1995 in which Mr. [...] reports hearing news from two customers that Flexsys would be increasing prices across product lines, effective January 1996 (file p. 10028; 10786).

⁵² File p. 10086; 10087-10091; 09936, 10493-10494.

⁵³ File p. 10097.

⁵⁴ File p. 10055; 10821, 10726-10727, 10757.

⁵⁵ File p. 10821, 10757-10758.

⁵⁶ File p. 10271.

⁵⁷ File p. 10876, 10890, 1092; 10819, 10717-10719.

⁵⁸ File p. 08169-08170, 08197, 10817, 09756-09760.

- (78) The price increase of January 1996 was a failure for Flexsys. It found out that Bayer and Uniroyal had not kept their side of the deal. Its senior management, however, held to the price increases and did not allow discounts. As a consequence, Flexsys ended up losing volume and key customers.⁵⁹ The aftermath of the January 1996 price increase was also discussed between [...] of Crompton Europe (then Uniroyal Chemical) and [...] of Flexsys in the summer of 1996.⁶⁰ In August 1996, Flexsys decided to terminate the price increase to regain the lost volume by reducing prices without informing Bayer and Uniroyal.⁶¹
- (79) Flexsys has stated that it broke its relationship with Bayer some time in the second half of 1996, not trusting the latter, although Mr. [...] had assured Flexsys that Bayer's volume had remained the same and that it had not taken business away from Flexsys.⁶² Bayer maintains that there was no relationship to be broken up, and in any case, Mr. [...] denies having given the said assurances.

6.2. The alleged “silent period”

- (80) The Commission has no evidence of possible coordinated price increases in 1997. In their replies to the Statement of Objections and in the arguments presented at the Oral Hearing, Crompton and Bayer have alleged that there was a break or a “silent period” in the arrangements around 1996 and 1997.⁶³ The Commission observes, however, that even if no price agreements were made or applied in one year of a long-term cartel, this does not mean that the cartel was totally inactive. Indeed, after a couple of months of silence following Flexsys' unilateral termination of the 1996 price increase in August 1996, Flexsys resumed its contacts with both Bayer and Uniroyal at the latest in November 1996.

6.2.1. The second half of 1996

Contacts between Flexsys and Bayer

- (81) In November 1996, Mr. [...] (Flexsys) called Mr. [...] (Bayer) and quoted this conversation to his superiors Messrs. [...],[...] and [...] in an e-mail dated 22 November 1996 with regard to pricing.⁶⁴ While Bayer cannot rule out that Mr. [...] had spoken with Mr. [...] on the phone, it contests that the information on prices and capacity reported in this e-mail come from Mr. [...]. However, this e-mail was marked “*‘destroy’ after reading*” by its author, which as such is apt to raise serious suspicions. While it is not possible to verify the origin of the information concerning the supply capacity, the following passages indicate clearly that at least pricing strategies were discussed between Mr. [...] and Mr. [...]:

⁵⁹ File p. 10876, 10890-10891; 10823, 10786.

⁶⁰ File p. 10821, 10737.

⁶¹ File p. 10876, 10891.

⁶² File p. 10876, 10890-10891.

⁶³ The Commission notes that Crompton had not identified such a silent period in its earlier submissions.

⁶⁴ File p. 0022-0023; see also 10876, 10891.

“- when asked about his comments regarding the statements on pricing, I received final proof that [...] words and mind are in distinct disharmony. Whilst he publicly states that with ‘pricing at the current level we do see a problem as to who can supply...’, he actually believes that current levels are on the high side”.

“- Bayer has increased their 4A capacity by 40% this year and the next expansion step currently underway, will effectively double B’s total output. – we and you have the means to call the shots in the future and maybe 5 DM is the right level ...’ .⁶⁵

Contacts between Flexsys and Crompton/Uniroyal

(82) Towards the end of 1996, a number of meetings were also held between Flexsys and Crompton/Uniroyal to exchange information on prices.⁶⁶ One of these meetings was held in Connecticut on 26 November 1996 between Messrs. [...] and [...] of Flexsys, as well as Mr. [...] of Crompton and Mr. [...] of Uniroyal. In that meeting, pricing charts were presented showing general price levels in the Community and in the US. Flexsys representative recalls that *"there was a discussion with [...] saying 3.50\$ was a good price for PPDs"* and there was also discussion about the price level Crompton/Uniroyal, Flexsys and Bayer had charged to Bridgestone.⁶⁷

(83) Uniroyal (Mr. [...]) and Flexsys (Messrs. [...] and [...]) also met on 5 December 1996.⁶⁸ On this occasion, Flexsys provided information on its current pricing commitments to certain customers and discussed the possibility of further price increases. This information was passed on within Uniroyal in an internal report dated 8 December 1996, which summarises the outcome of this meeting as follows:

*“...5. Flexsys has a \$1.75/LB budgeted 6PPD price in their 1997 plan, including regaining 85% of their volume. They hope the price level is not reached but they are prepared to go there to get share back. 6. Flexsys will not lead another price increase in the next 2-3 years. They don’t know who will, given Bayer’s penchant to fill their plants and questioned our ability to hang tough to get the price up. In another part of the conversation [...][[...] wondered if it wouldn’t be better to focus on groups of products for increase candidates rather than the traditional announcement concerning all R.C. at one time. ... 12 Indicated they are at 6.5 DM range with new pricing at Michelin. Bayer in the same range and Duslo around 6.35. ...”.*⁶⁹

(84) As further evidence of the exchange of pricing information between Flexsys and Crompton/Uniroyal, an internal Flexsys e-mail of 16 December 1996 refers to a recent meeting between Mr. [...] of Flexsys and Mr. [...] of Uniroyal who *"apologised for wrong info given. [...] had pushed him to do so. Essentially, [...] had communicated invoice prices but 'ignored' rebates and special deals. As a result, [...] was instructed to no longer be the*

⁶⁵ File p. 0023, emphasis added.

⁶⁶ File p. 10876, 10891, 10823, 10786-10787; 10821, 10726-10728.

⁶⁷ File p. 10876, 10891.

⁶⁸ File p. 10823, 10786-10787; 05105; see also p. 09629, 10821, 10758.

⁶⁹ File p. 10029-10030; 10821, 10758-10760.

*spokesperson for U [Uniroyal] but instead that [...] would cover all of U's future communications."*⁷⁰

- (85) In late December 1996, as a result of a number of meetings in November and December between Flexsys and Crompton/Uniroyal, the latter gave up some of its share at Michelin to compensate Flexsys for some of the losses it incurred in connection with the January 1996 price increase.⁷¹

6.2.2. Relevant events in 1997

Contacts between Bayer and Crompton/Uniroyal

- (86) A meeting was held in Leverkusen on 23 January 1997 between Mr. [...] of Uniroyal and Messrs. [...],[...] and [...] of Bayer. An internal memorandum, addressed by Mr. [...] to Mr. [...] of Uniroyal, reports the outcome of the meeting among others as follows: "...*Much discussion about recent events in R.C. [rubber chemicals] pricing. While Bayer understands Flexsys' motives in leading price down, they claim there is not much they can do about this. [...] insistent there was not W.W. share gain by Bayer over last two years and consequently they took no business from Flexsys and is not about to give any up... In summary, Bayer not sure a level of price stability has been reached now. [...] feels if Flexsys is still unhappy with volume, more action will be taken. ...*".⁷² While Bayer does not dispute that this meeting took place due to a product swap and that the past 1996 price increase may have been discussed in this context, it stresses that no future-oriented discussions took place.
- (87) An internal Crompton/Uniroyal e-mail dated 30 January 1997 further elaborates on a conversation between Messrs. [...] (Uniroyal) and [...] (Bayer) concerning the lost or gained sales volumes in 1996: "... *HE THEN UPDATED ME ON THE TRIP TO BRUSSELS. ...BAYER STUCK TO THEIR STORY THEY PICKED UP NOTHING BEYOND ORGANIC GROWTH, LEAVING THE TWO TO CONCLUDE UCC MUST HAVE PICKED UP I TOLD HIM NO WAY. I WOULD LIKE TO SEE OUR 1995 VS. 1996 FIGURES AND GO BACK ON THIS WITH HIM. ANYWAY, THEY STUCK TO THE APPROACH THAT THEY WILL DEFEND THEIR EXISTING SHARE AND SEE NO REASON TO GIVE ANYTHING UP. ...*".⁷³
- (88) Bayer recalls that on 3 April 1997, Mr. [...] of Uniroyal called Mr. [...] to invite him to a "courtesy"-meeting,⁷⁴ at which at least Bayer's Mr. [...], and possibly Mr. [...], and Uniroyal's Mr. [...] and Mr. [...] participated on 19 June 1997.⁷⁵ Bayer's representatives cannot recall any exchanges of information on prices, capacities or market strategies on that occasion,

⁷⁰ File p. 0026; 10876, 10891-10892.

⁷¹ File p. 10821, 10758.

⁷² File p. 10183, 10031-10032; 10823, 10787.

⁷³ File p. 10092.

⁷⁴ File p. 08171-08172, 08206.

⁷⁵ Bayer reply to the Statement of Objections, to which Mr. [...] travel expense document is attached. Mr. [...] can neither confirm nor rule out that this meeting took place.

although an internal memorandum of Uniroyal dated 22 June 1997, with subject “June 16 Week Meetings” reports the following:

“...Bayer

5. See no way for PPD price to turn around until mid '98. Too much capacity and they are changing their thinking into longer term contracts. Goal is to keep share and grow with the market. Seemed intent on pursuing this regardless. 6. May have given Michelin new price. ...”⁷⁶

Contacts between Bayer and Flexsys

- (89) In 1997, Flexsys accused Bayer of having taken volume from Flexsys in connection with the failed 1996 price increase in at least two meetings, the first one in January 1997 between Mr. [...] of Bayer and Messrs. [...] and [...] of Flexsys,⁷⁷ and the second one in Cologne on 28 July 1997 between Mr. [...] of Bayer and Mr. [...] of Flexsys.⁷⁸ The outcome of the latter meeting is summarised in an internal Flexsys e-mail (marked “CONFIDENTIAL - Please destroy after reading!”) dated 31 July 1997, submitted by Flexsys with the explanation that it reflects the fact that “no further plans had been hatched as of mid 1997 but that the relationship with Bayer was being rebuilt and Bayer was signalling its willingness to join Flexsys in future plans”.⁷⁹ Bayer, in turn, has contended that this document should be interpreted as merely reflecting Mr. [...] subjective impressions, not as indicating Bayer’s intentions. However, the following passages of this three-page e-mail clearly indicate that it is not merely based on a subjective impression on the part of its author and that the participants were still cautious after the failure of the 1996 price increase but open to reconciliation:

“... At several occasions did he [...] refer to a not so satisfying meeting in Brussels, where he was left with the impression of an arrogant and uncompromising Flexsys. I [...] have told him where we had come from and that a welcoming and co-operative attitude was probably asking/expecting too much!

...

In conclusion, [...] seems to be on Board to support any constructive changes away from the current trend, however, stated that he would only be open to any major change in pattern with the commitment of all parties involved. Essentially, he pointed out, that a minimum floor price or any other ‘superficial’ arrangement would not bring any solid results. He in turn had a small team chartered to suggest anything that would be constructive enough to reverse the current trend but apparently failed to receive anything substantial. Again he would be open and co-operative to join any substantial initiative. Bayer apparently has accepted status quo for the time being and as he called it, brought their house in order on cost improvement projects and capacity expansion to defend their position and actually would try to gain above market growth on PPD’s. I told him that this was a controversial statement to achieve

⁷⁶ File p. 05117; 10039-10040, 10823, 10787-10788; 10095.

⁷⁷ File p. 02452; 03295-03301.

⁷⁸ File p. 0030-0032; 02453; 10814, 02557-02558.

⁷⁹ File p. 10876, 10892.

“peace” to which he responded that quote “we of course wouldn’t do anything stupid...”

...

- felt very strong about the avoidance of any forward long term price commitment. Insisted that this would be detrimental for any chance to increase later and stated that it was clearly against Bayer’s policy. Did not tell him about our Goodyear situation other than confirming that we also had been approached. When confronted with the fact that B was the first who committed until end ’98 on Accelerators at Goodyear, he stated that this has been much debated and was a kind of a protective measure and perhaps a message that ‘we’ can do it too. ...”⁸⁰.

- (90) The contacts between Bayer and Flexsys were thereafter resumed at the latest on 4 December 1997, when Mr. [...] of Bayer met with Mr. [...] of Flexsys in Verviers (Belgium) to rebuild the relationship between their companies.⁸¹

6.2.3. *Contacts between Flexsys and Crompton/Uniroyal*

- (91) In 1997, exchange of customer-specific pricing information occurred in bilateral discussions between Mr. [...] of Uniroyal and Mr. [...] of Flexsys. Such a conversation is reported in an internal Flexsys’ e-mail of 28 March 1997 relating that Mr. [...] received a call from [...] providing details of a competitive Bayer pricing initiative at Goodyear and that Uniroyal made retaliatory responses at Michelin and Cooper:

“...[...] confirmed that Bayer had taken 2000 tons PPD business at Goodyear from Uniroyal. Confirmed Bayer had quote for PPD at \$1.75/lb F.O.B. in North America and DEM 6.15/kg delivered in Europe. Uniroyal matched Bayer to hold on to the remainder of their business but refused to provide price protection through 1998 which Bayer has agreed to.”⁸²

- (92) On 9 June 1997, there was a meeting between Crompton/Uniroyal (Messrs. [...],[...]) and Flexsys (Mr. [...]).⁸³ The issues discussed in this meeting are summarised in handwritten notes submitted by Crompton, including the following: *“Flexsys acknowledges pricing has fallen below even their worst case projections, particularly in PPDs ... Acknowledged that accelerators, particularly TBBS/CBS are more of a profitability concern. Thinks that pricing can be “turned around” only with Bayer’s support. ... Flexsys has had no real dialogue with them since last July. They will wait until Bayer come to them. ... Flexsys cannot lead next price increase. UCC [Uniroyal Chemical Company] wouldn’t be successful w/o Bayer. ...”*⁸⁴
- (93) Crompton has disclosed that in June 1997 *“[...] knew [...] was colluding with competitors in Europe”*.⁸⁵ During the week of 16 June 1997, specifically,

⁸⁰ File p. 0030, emphasis added.

⁸¹ File p. 10819, 10718; 10814, 02558. For possible contacts in September, see also 10819, 10718; 02453, 10814, 02552-02571.

⁸² File p. 0028; 10876, 10892; 10821, 10774. In its reply to the Statement of Objections, Bayer has indicated that Crompton may have received the information from Goodyear.

⁸³ File p. 10823, 10787; p. 10093-10094.

⁸⁴ File p. 10035; see also p. 05111, 10034.

⁸⁵ 10729 (cited in footnote 130 of the Statement of Objections).

along with other competitors (recital (88)) Uniroyal (Messrs. [...],[...]) had a meeting with Flexsys (Messrs. [...],[...],[...]), at which the participants exchanged information concerning rubber chemicals pricing policy and market strategies.⁸⁶ An internal memorandum dated 22 June 1997, submitted by Crompton, summarises the conclusions reached in this meeting with regard to Flexsys as follows:

“Flexsys

...

5. Market place situation is poor in their estimation. Pricing is too low. They are now reasonably satisfied with the regaining of share and look for ways to stabilize the price then return it to more normal levels. Worried about Bayer’s market philosophy, thinking they were targets to be run out at one time. ...”⁸⁷

- (94) With regard to TMQ (an antidegradant) specifically, there was a meeting in London on 25 September 1997 between Uniroyal’s Messrs. [...] and [...] and [...] of Flexsys. Uniroyal’s notes regarding this meeting relate that Flexsys had expressed its willingness to increase the price of TMQ, concluding that *“if we lead, they will follow”*.⁸⁸
- (95) Crompton/Uniroyal also had telephone conversations with Flexsys representatives at the end of 1997. A Flexsys representative recalls that [...] of Uniroyal told him that Uniroyal and Flexsys should not fight on certain customers of PPD but should split the business and keep the price where it was.⁸⁹
- (96) As further evidence of Crompton/Uniroyal’s discussions on pricing with both Bayer and Flexsys, an internal e-mail circulated within Uniroyal on 10 December 1997 regarding a European customer reports the following: *“Bayer and Flexsys indicated prices were stable and no up or down movement was foreseen. Neither wanted to change their share position. This is the first negotiation since July 1996 where the price has remained stable from the two big competitors. This is a good sign”*.⁹⁰ According to Bayer, this information may have been provided by the customer in question, Pirelli Europe.

6.3. Relevant events in 1998

6.3.1. Bilateral contacts during the first part of the year

- (97) According to Flexsys, contacts among the rubber chemicals producers increased from 1998 onwards.⁹¹ During the first half of 1998, a number of bilateral contacts occurred among Bayer, Flexsys and Crompton/Uniroyal to discuss the past and explore further possibilities to raise prices for rubber chemicals:

⁸⁶ File p. 10039-10040; 05117; p. 10823, 10787-10788; 10093-10094; 10821.

⁸⁷ File p. 10039.

⁸⁸ File p. 05122, 10044, 10045-10046; see also p. 10823, 10788.

⁸⁹ File p. 10876, 10893; 10821, 10727-10729.

⁹⁰ File p. 10047.

⁹¹ File p. 10876, 10892; see also p. 10893; 02456.

- (a) on 27 January 1998, a Uniroyal representative had a telephone conversation with [...] (Flexsys) during which the former recorded, among others, the following: “a) [...] will represent Flexsys at the [...] Uniroyal meeting; b) Flexsys, despite a loss of 2,000 million tonnes, is ready to call a truce; c) [...] agrees to a price floor of 3.7 for CIS...”.⁹²;
- (b) on 11 March 1998, Mr. [...] of Bayer and Mr. [...] of Uniroyal met for dinner in Middlebury (United States) and discussed the failure of the 1996 price increase,⁹³ and the next day Mr. [...] met with Messrs. [...] and [...] of Uniroyal⁹⁴;
- (c) on 26 March 1998, Mr [...] of Bayer met with Mr. [...] of Flexsys in Verviers (Belgium) and, according to Bayer, may have discussed the timing and scope of a possible joint price increase⁹⁵;
- (d) on 29 April 1998, Mr. [...] of Uniroyal spoke to Mr. [...] of Flexsys about a price increase for primary accelerators both in Europe and the United States.⁹⁶

6.3.2. *An agreement to increase accelerator prices in October 1998*

- (98) According to Crompton, an agreement between Flexsys and Bayer to increase accelerator prices in Europe as from 1 October 1998 was reached in a multilateral meeting in Brussels on 24 July 1998 involving Uniroyal ([...]), Flexsys ([...] and [...]) and Bayer ([...] and [...]).⁹⁷ Crompton/Uniroyal was not active in the relevant European market, and therefore it was not party to the agreement concerning Europe. Nevertheless, it states that Uniroyal’s employee “*recalls this as the most orchestrated and collusive ‘agreement’ he ever made*”, apparently with regard to the intention to raise prices also world-wide.⁹⁸ The outcome of this meeting is summarised in an internal memorandum of Crompton/Uniroyal, containing among others the following self-explanatory passages:

“...3. GROUND RULES AGREED BY ALL. TALK IN NET-NET TERMS. NO LYING. 4. AGREED FOR SAKE OF EQUALIZING PRICES, A.15DM/KG FREIGHT WOULD BE ADDED TO G.Y. FOB PRICES. ... 5. FLEXSYS WILL COORDINATE CONTACTS WITH G.Q AND ISTRO. [...] HAS THE RELATIONSHIP. ...11. LOTS OF DISCUSSION ABOUT A NEXT STEP AFTER EUROPE. [...] QUITE CONCERNED ABOUT APPEARANCES IF THEY RAISE [PRICES] IN EUROPE WITHOUT ANNOUNCING INTENT TO RAISE ELSEWHERE. IN THE END, [...] SAID BAYER WAS ABSOLUTELY COMMITTED TO EUROPE INCREASE AND FELT THAT ASIA WAS NEXT, FOLLOWED BY [LATIN AMERICA]. THEY PUT [NORTH AMERICA] LOWER ON THE TOTEM POLE. 12. THE BAYER POSITION WILL BE TO PUT THROUGH THE INCREASE HERE AND ALL AGREED THE INTENT WAS TO DO SO AROUND THE WORLD. JLG INDICATED WHAT UCC

⁹² File p. 10823, 10789, 10198-10201, 05136-05137, 10070.

⁹³ File p. 10814, 02558-02559; 02581.

⁹⁴ File p. 10068-10069; 10821, 10729.

⁹⁵ File p. 10814, 02559, 03265, 10274, 03013-03018.

⁹⁶ File p. 10821, 10762.

⁹⁷ File p. 10823, 10789; 02453-02455; 10821, 10763.

⁹⁸ File p. 10763-10765, see also point 12 in the cited memorandum.

HAD DONE WITH G.Y. MBTS BID. 13. THREE MAJORS CHARACTERIZED AS MICH/BF/G.Y, SECOND TIER IS PIRELLI/CONTI DUNLOP. THIRD TIER IS OTHER TIRE AND FOURTH IS NON TIRE. ALL AGREED THAT THERE IS A SMALL PREMIUM OF THE SECOND GROUP OVER THE FIRST. ...27. AGREED ON THE FOLLOWING:

	BIG THREE	NEXT THREE	OTHER TIRE	NON-TIRE
CBS	5.05	5.10	5.20	PLUS 25 PF
TBBS	5.85	5.90	6.00	PLUS 25 PF
MBT/MBTS	4.05	4.10	4.20	PLUS 20 PF

...30. AGREED THAT FLEXSYS WILL CYCLE BACK WITH JLG ON HOW THIS GETS IN PUBLIC DOMAIN. MAIN REASON FOR INCREASE IS POOR MARGINS.”⁹⁹

- (99) This price increase of 5-10%, a draft announcement of which was circulated at Bayer on 27 July 1998,¹⁰⁰ was to be led by Bayer with effect from 1 October 1998. Bayer states, however, that it withdrew this increase on 12 August 1998 by advising Bayer agencies not to communicate the price increase to customers in the second half of August, as foreseen.¹⁰¹ As the reason for this, Bayer has explained that Flexsys would have been able to follow due to its long-term contracts with certain customers.¹⁰² The Commission has no evidence showing that this price increase was implemented.

6.3.3. Bilateral contacts during the second half of 1998

- (100) Contacts between Bayer and Flexsys continued in autumn 1998 over the telephone and in person. At a meeting held on 11 September 1998, in which the new Flexsys [...] Mr. [...] was introduced as the successor of Mr. [...], Flexsys expressed its willingness to co-operate and “restructure” the market together with its competitors.¹⁰³ According to Bayer, the idea was that with a total share of 55% of the world-wide market Flexsys, Bayer and Crompton/Uniroyal should together be in a position to do this, and the smaller players could be controlled through acquisitions and/or cooperation agreements.¹⁰⁴
- (101) On 8 October 1998, Uniroyal’s Mr. [...] had a meeting with [...] of Flexsys to discuss, among other things, competitors, pricing and capacity, which is evidenced by hand-written notes taken by Uniroyal’s employee at this meeting.¹⁰⁵ Crompton has further disclosed that later the same day Messrs. [...] and [...] of Uniroyal had dinner with Messrs. [...] and [...] of Flexsys, specifying that they “would not have ever met with someone like [...] without having some discussion of market conditions”.¹⁰⁶

⁹⁹ File p. 10048-10049, 05140.

¹⁰⁰ File p. 03394; 03393.

¹⁰¹ File p.02453-02455; 03392; 03386.

¹⁰² File p. 02455.

¹⁰³ File p. 03385-03394; 02453-02455.

¹⁰⁴ File p. 10814, 02567-02568.

¹⁰⁵ File p. 10050-10051; 10823, 10789.

¹⁰⁶ File p. 10821, 10775.

- (102) Thereafter, on 12 October 1998, Uniroyal's Mr. [...] met with the product manager for accelerators (Mr. [...]) of Bayer to discuss pricing strategies. Uniroyal's note concerning this meeting contains, among others, the following: "*no deals with majors to go up in 1999*".¹⁰⁷
- (103) Bayer (Messrs. [...] and [...]) and Flexsys (Mr. [...]) had a further meeting on 17 November 1998, where the failure of the latest price increase and further steps to be taken were at issue.¹⁰⁸ Mr. [...] also met with Mr. [...] of Uniroyal on the same day at the Düsseldorf airport and may have discussed rubber chemicals prices in this context.¹⁰⁹ In connection with these contacts, Bayer, Flexsys and Crompton/Uniroyal also agreed to reduce the duration of their contracts with tyre customers to six months, effective from 1 January and 1 July of each year, so that long-term contracts would no longer stand in the way of future price increases.¹¹⁰
- (104) Bayer and Flexsys made a secrecy-agreement at the end of 1998 or the beginning of 1999. This agreement, which referred to a possible co-operation in Asia, was, according to Bayer, also a cover for discussions on price increases. With this agreement the intention of the parties was, in Bayer's own words, to counter suspicions that the discussions might have an illegal content.¹¹¹

6.4. Coordinated price increases in 1999 and 2000

- (105) In 1999 and 2000, Bayer, Flexsys and Crompton/Uniroyal coordinated two closely intertwined price increases for PPDs (antidegradant) and primary accelerators, the first one taking effect on 1 October 1999 (non-tyre customers) and on 1 January 2000 (tyre customers) and the second one on 1 July 2000.¹¹²
- (106) The preparation of both of these price increases started in early 1999 in multilateral meetings between Bayer, Crompton/Uniroyal and Flexsys. Flexsys, Crompton and Bayer have admitted that there were at least two meetings in the first half of 1999 between Flexsys (Mr. [...]), Bayer (Mr. [...]) and Uniroyal (Mr. [...]) concerning the participants' common intentions to increase prices for rubber chemicals and stabilise market shares.¹¹³ One of these meetings took place in the Flexsys offices in Brussels on 2 January 1999 and another one at a restaurant outside Brussels (Verviers, Belgium) most likely in March 1999.¹¹⁴ In the latter meeting, the participants agreed on the categories of rubber chemicals covered by price increases to be implemented on 1 January 2000 and 1 July 2000, their timing, territorial

¹⁰⁷ File p. 10052, 05145; 10823, 10790.

¹⁰⁸ File p. 03356, 02453-02455.

¹⁰⁹ File p. 10814, 02559; 03267.

¹¹⁰ File p. 02455.

¹¹¹ File p. 02457; 10814, 02568.

¹¹² File p. 0043-0057.

¹¹³ File p. 10876, 10893-10894; 10823, 10777, 10789-10790; 10814, 02556-02557.

¹¹⁴ File p. 10814, 02556-02557, 02574, 03269, 10275; 10821, 10777.

scope and target amounts, as well as how the announcements would be made and who would take the lead.¹¹⁵

6.4.1. *Price increases effective 1 October 1999 and 1 January 2000*

(107) Bayer was the leader of a price increase of 9% on primary accelerators (sulphenamides and thiazoles) and 7% on antioxidants (PPDs) that became effective on 1 October 1999 for non-tyre customers and on 1 January 2000 for tyre customers.¹¹⁶ This price increase concerned only Europe and its purpose was to bring European prices closer to the then prevailing higher US prices before a global price increase was undertaken in the second half of 2000.¹¹⁷ The multilateral preparatory meetings described in recital (106) were followed by bilateral contacts between Flexsys, Bayer and Crompton/Uniroyal in which the participants discussed further details before the announcement of the price increase (recitals (108)-(111)). The price increase was implemented by all the participants through public and individual customer announcements, and compliance was thereafter monitored by exchanges of information on customer reactions and contracted prices (recitals (112)-(119)). Finally, each of the major three competitors expressed satisfaction with the successful outcome (recital (120)).

6.4.1.1. Preparatory contacts

(108) Both Flexsys and Bayer have admitted having had frequent meetings between July and September 1999 involving Mr. [...] of Bayer and Mr. [...] of Flexsys. While the official subject matter of these meetings concerned certain supply issues or investment arrangements, the up-coming price increases foreseen for 1 October 1999 (non-tyre customers) and 1 January 2000 (tyre customers) were also part of the discussion.¹¹⁸ The Sales Director of Flexsys (Mr. [...]) confirmed to the Key Account Manager of Bayer (Mr. [...]) during a lunch in Brussels on 29 September 1999 that Flexsys would follow Bayer with a price increase of about 10%.¹¹⁹

(109) Bayer was also in contact with Crompton/Uniroyal to ensure support for the price increase. On 3 September 1999, Mr. [...] of Bayer informed Mr. [...] of Uniroyal over the phone of Bayer's intention to increase PPD prices by 7% and accelerator prices by 9%, effective 1 October 1999 in Europe and Turkey, but not in North America. This conversation is reported in a handwritten note and an internal e-mail of Crompton/Uniroyal dated 3 September 1999.¹²⁰ In reply to this e-mail, a Crompton/Uniroyal employee affirmed that confirmation had been received from Bayer Italy concerning the price

¹¹⁵ File p. 10814, 02556-02557, 02574, 03269, 10275; 10821, 10777-10778. The date of this meeting is not entirely certain, as Bayer thinks it might have been on 17 March and Crompton believes it was on 31 March.

¹¹⁶ Bayer's decision to increase its rubber chemicals prices was made in an internal meeting held on 17 August 1999 (see file p. 10273, 02461), and internal instructions to advise customers of this action were circulated on 31 August 1999 (file p. 02943-02944, 02970).

¹¹⁷ File p. 10876, 10893.

¹¹⁸ File p. 10876, 10894-10895, 10814, 02552-02571.

¹¹⁹ File p. 10876, 10896.

¹²⁰ File p. 09959, 09961, 10823, 10790; 10098-10100.

increase and that "... *A formal letter shall be sent to Bayer non-tire customers by mid of September announcing increases from October 1st*".¹²¹

- (110) Further discussions between Bayer and Crompton took place in a meeting held in Middlebury, United States, on 27 September 1999.¹²² Crompton's support for the price increase was finally confirmed by Mr. [...] (Crompton) in an internal e-mail dated 15 October 1999 to Mr. [...] (Crompton) regarding Crompton's meetings with Flexsys and Bayer in October and November: "*WE are supporting the price increase in Europe ... we want to see higher prices worldwide.*"¹²³
- (111) In this context, bilateral contacts occurred also between Crompton/Uniroyal and Flexsys. An undated note, relating to a conversation between a Crompton/Uniroyal employee and Mr. [...] of Flexsys, discusses pricing and refers to a possibility of increasing prices in 2000.¹²⁴

6.4.1.2. Implementation and outcome

- (112) Bayer announced its price increase on certain antioxidants and primary accelerators concerning non-tyre customers publicly in the trade press on 22 September 1999.¹²⁵ Bayer faxed its draft customer notification letter to Mr. [...] of Crompton Europe on 23 September 1999¹²⁶. The exact date on which the price increase concerning tyre customers was announced is not known to the Commission.
- (113) Uniroyal's draft notification letter, dated 29 September 1999, was circulated internally on 28 September 1999.¹²⁷ Uniroyal's price lists for Europe confirm a price increase of 5% for Flexzone effective 1 January 2000 for tyre customers.¹²⁸
- (114) Members of Flexsys sales force were asked to notify customers of the coming 1 January 2000 price increase during the week of 18 October 1999.¹²⁹
- (115) Customer reactions to the announced price increases were discussed in numerous implementation and co-ordination follow-up contacts between Flexsys and Bayer, involving primarily Messrs. [...] and [...] from Flexsys, and Messrs. [...] and [...] from Bayer.¹³⁰ These two competitors also exchanged data about deliveries to important customers in order to monitor the market share developments. Bayer has provided an example of such data exchange.¹³¹ While the document itself refers to market research as the source

¹²¹ File p. 09959.

¹²² File p. 10814, 02562-02563; see also p. 02595-02596; 10821,10779.

¹²³ File p. 10022-10023; 10823, 10790.

¹²⁴ File p. 04786-04787.

¹²⁵ File p. 03273-03274, 02942, 02974-02975.

¹²⁶ File p. 09957.

¹²⁷ File p. 09948-09952.

¹²⁸ File p. 10579-10587; 10101-10103.

¹²⁹ File p. 10876, 10895; 0041; 02978.

¹³⁰ File p. 10876, 10896, 02459-02461; 10814, 02552-02571.

¹³¹ File p. 02499-02500.

of information, Bayer has stated that the information was derived from discussions with Flexsys.¹³²

- (116) In this context, a number of contacts also took place at a higher hierarchical level, including meetings on 1 October 1999 between Messrs. [...],[...] and [...] (Bayer), and Messrs. [...],[...] and [...] (Flexsys),¹³³ on 18 November 1999 between Messrs. [...] and [...] (Bayer) and Mr. [...] (Uniroyal),¹³⁴ as well as on 3 March 2000 between Messrs. [...],[...] and [...] of Bayer and Messrs. [...] and [...] of Crompton/Uniroyal.¹³⁵ According to Bayer, the general aim of these meetings was not to convey specific instructions for action at the operational level but rather to show mutual trust with regard to the coordinated price increases.¹³⁶
- (117) Between November 1999 and January 2000, Crompton/Uniroyal had various telephone calls and scheduled meetings with both Bayer and Flexsys to get information on the exact volumes, prices and rebates agreed with customers, as indicated by a series of handwritten notes¹³⁷ taken by a Crompton/Uniroyal employee, among others, on 22 November 1999 (with a heading “[...]”),¹³⁸ 24 November 1999 (with a heading “[...]”),¹³⁹ 20 December 1999 (with a heading “[...]”),¹⁴⁰ 21 December 1999 (with a heading “[...]”),¹⁴¹ 5 January 2000 (with a heading “[...]”).¹⁴²
- (118) As example, in one of these conversations, on 24 November, Mr. [...] of Bayer informed Mr. [...] of Crompton Europe that Bayer had reduced price increases to 5% for PPD and to 7% for accelerators.¹⁴³ Crompton/Uniroyal noted that it will “*most likely follow the decrease in Europe to 5% from 7%*”, but Mr. [...] is reported to have said that “*this is not the time to reduce price at [...] in N.A. [North America] – wrong signal in support of a price increase later in 2000*”.¹⁴⁴
- (119) There were further discussions between Bayer’s Mr. [...] and Flexsys’ Mr. [...] about the implementation of the price increase in a meeting held in Verviers (Belgium) on 3 December 1999, although the official agenda of this meeting concerned certain product swap arrangements.¹⁴⁵ Mr. [...] also met with Mr. [...] of Uniroyal in Cologne on 25 May 2000.¹⁴⁶

¹³² File p. 02459-02461.

¹³³ File p. 03275, 10814, 02562.

¹³⁴ File p. 10023; 10024-10025; 10823, 10790, p. 10814, 02568.

¹³⁵ File p. 10814, 02568-02569.

¹³⁶ File p. 10814, 02567-02568.

¹³⁷ File p. 09967-09982; 10823, 10791.

¹³⁸ File p. 09978.

¹³⁹ File p. 09978 and 09977.

¹⁴⁰ File p. 09971.

¹⁴¹ File p. 09971.

¹⁴² File p. 09968-09969.

¹⁴³ File p. 09979; 10071.

¹⁴⁴ File p. 09976.

¹⁴⁵ File p. 10277, 03271; 10814, 02563.

¹⁴⁶ File p. 03181, 03261; 10814, 02564.

- (120) The successful implementation of the January 2000 price increase by each participant is demonstrated by the following evidence in the Commission's file:
- (a) a handwritten note dated 5 January 2000 confirming Crompton/Uniroyal's satisfaction with the accelerator price increase (5% at Goodyear and 7-8,5% at other customers);¹⁴⁷
 - (b) internal correspondence within Flexsys on 13 January 2000 reflecting on the next steps following the successful increase of certain rubber chemicals prices in Europe as of January 1;¹⁴⁸
 - (c) the statement of Flexsys concerning a meeting on 28 January 2000 between Mr. [...] of Flexsys and Mr. [...] of Bayer in which the success of this price increase was discussed;¹⁴⁹
 - (d) Bayer's internal documents referring to successful implementation of a European-wide price increase on 1 January 2000 and setting out the outcome of the price increase by key customer and by product by indicating gained or lost quantities for each competitor.¹⁵⁰

6.4.2. *The price increase effective 1 July 2000*

- (121) After the successful implementation of the first price increase in 2000, Flexsys, Bayer and Crompton/Uniroyal agreed, on the basis of bilateral contacts, to carry out the second step of raising the price of primary accelerators and PPDs, as they had planned in the three-party meetings in 1999 (recital (106)). This price increase, effective from 1 July 2000, was led by Flexsys and it was broader in geographic scope than the first one, covering the world-wide market of the rubber chemicals concerned. It was prepared in bilateral contacts between the participants throughout the period from January to May 2000 (recitals (122)-(124)) and effectively implemented in the negotiations with customers after the public and individual announcements (recitals (125)-(133)). Compliance was thereafter monitored in bilateral contacts between the major competitors, showing a varying degree of satisfaction (recitals (134)-(142)).

6.4.2.1. Preparatory phase

- (122) Once the sales directors of Flexsys had prepared a recommendation for raising the prices,¹⁵¹ the company informed both Bayer and Crompton/Uniroyal about its intentions. In February 2000 Bayer was already aware of Flexsys' intentions to raise rubber chemicals prices, as is apparent from a set of its internal e-mails.¹⁵² Details concerning the price increase,

¹⁴⁷ File p. 09969, 10116.

¹⁴⁸ File p. 0045; 10876, 10897.

¹⁴⁹ File p. 10876; 10897-10898.

¹⁵⁰ File p. 10280, 10281-10284, 10285, 02936-02940.

¹⁵¹ File p. 0043-0045; 0049-0054; 10876, 10897.

¹⁵² File p. 03034-03036; 03168.

such as the size and the product scope, were discussed in preparatory meetings involving Mr. [...] of Bayer and Mr. [...] of Flexsys on 28 January 2000¹⁵³ and 1 May 2000¹⁵⁴. Thereafter, Mr. [...] informed Mr. [...] by telephone about Flexsys' decision to go ahead with a 10 % increase on primaries and PPDs, either by telling him directly what the decision was or by asking him to watch Flexsys' web-site for the announcement.¹⁵⁵

- (123) Similar contacts occurred between Flexsys and Crompton/Uniroyal. Mr. [...] of Crompton offered his support for the coming price increase at a lunch with the [...] of Flexsys ([...]) on 2 February 2000¹⁵⁶ and later in April or May confirmed Crompton/Uniroyal's agreement by telephone to Mr. [...], with details on percentages on PPDs and accelerators.¹⁵⁷ Flexsys faxed its customer notification letter to Crompton/Uniroyal on 4 May 2000.¹⁵⁸ As documentary evidence of Crompton/Uniroyal's support, hand-written notes found at its offices contain the following indications: *"Flexsys will announce this week and next";*¹⁵⁹ *"We will follow or announce 10% across the board PPD, Accelerators, TMQ, Octamine, No OT or AZ blowing agents. Last week of April, effective 1, June 2000 ...Bayer will not lead. Flexsys will delay as long as possible"*¹⁶⁰.
- (124) There were also bilateral contacts between Bayer and Crompton/Uniroyal with regard to the price increase led by Flexsys. Such contacts took place, among others, on 29 February 2000 (a meeting between Mr. [...] and Mr. [...])¹⁶¹ and on 4 March and 4 April 2000, when Bayer (Mr. [...]) informed Crompton/Uniroyal over the phone about its intention to send letters to customers announcing a price increase in Europe.¹⁶²

6.4.2.2. Implementation

- (125) Flexsys announced its price increase of 10%, effective 1 July 2000, on primary accelerators and PPDs by posting it on the company web-site on 8 May 2000.¹⁶³ In a subsequent internal e-mail dated 25 June 2000 Mr. [...] gave instructions to adjust the increase down to 8% in response to similar adjustments by Bayer and Uniroyal.¹⁶⁴
- (126) Bayer implemented the price increase shortly after Flexsys and informed both Flexsys and Crompton/Uniroyal about it before and after the announcement to customers. As evidence, a telephone note found at Crompton Europe records

¹⁵³ File p. 10876, 10897-10898.

¹⁵⁴ File p. 03262, 10814, 02563-02564.

¹⁵⁵ File p. 10876, 10898.

¹⁵⁶ File p. 10876, 10896, 10898.

¹⁵⁷ File p. 10823, 10791.

¹⁵⁸ File p. 10132.

¹⁵⁹ File p. 10588.

¹⁶⁰ File p. 10590.

¹⁶¹ File p. 10814, 02563-02564; 10117.

¹⁶² File p. 09961; 10823, 10792.

¹⁶³ File p. 10876, 10897-10899, 0049-0052 and 03304 (draft customer notification letter including increases on PPDs, primary accelerators and TMQs).

¹⁶⁴ File p. 0055-0057.

that Mr. [...] of Bayer informed a Crompton/Uniroyal employee on 15 May 2000 of Bayer's intention to shortly advise its sales forces of the price increase and to send the price announcement out to its customers.¹⁶⁵ Bayer finally announced its price increase effective 1 July 2000 by customer notifications on 19 May 2000.¹⁶⁶ Bayer also received copies of Crompton/Uniroyal's and Flexsys' letters announcing a corresponding price increase to their customers, concerning PPDs, primary accelerators and TMQs.¹⁶⁷ Bayer's notification letter addressed to its Italian customers was also circulated at Crompton/Uniroyal in early June.¹⁶⁸

- (127) Crompton/Uniroyal informed its sales forces by e-mail on 5 May 2000 about the forthcoming increases of rubber chemical prices.¹⁶⁹ Prior to the announcement of the increase to its world-wide customers by notifications on 17 and 30 May 2000,¹⁷⁰ Crompton/Uniroyal's intention to increase the prices of all of its products by 6% as of 15 May was published in the trade press.¹⁷¹ An internal e-mail of Crompton/Uniroyal dated 9 June 2000 confirms that the company was fully supporting the price increase.¹⁷²
- (128) Soon after the announcement, e-mails were exchanged within Crompton/Uniroyal to verify that the price quotations of Bayer and Flexsys were consistent with those of Crompton/Uniroyal.¹⁷³
- (129) Flexsys and Bayer had customer-specific discussions about implementation of the price increase, typically to discuss concerns each had about the other's actions at a particular customer, or to test a customer claim of a lower offer from the competitor. Such a contact took place, for example, on 26 May 2000 between Mr. [...] of Flexsys and Mr. [...] of Bayer.¹⁷⁴
- (130) In June and July 2000, Crompton/Uniroyal had telephone discussions with both Bayer and Flexsys to exchange information on the negotiations with specific customers and the prices agreed with each of them. A series of handwritten notes found at Crompton Europe reflect the contents of these conversations which took place at least on 18 July 2000 (with headings "[...]" and "[...]"), 5 July 2000 (with headings "[...]" and "[...]"), 21 June 2000 (with heading "[...]"), 14 June 2000 (with heading "[...]"), and 13 June 2000 (with headings "[...]", "[...]" and "[...]").¹⁷⁵ These notes also include a non-dated summary of the current and proposed prices of Bayer and

¹⁶⁵ File p. 10013.

¹⁶⁶ File p. 10015-10018; 03302; see also p. 05298-05299.

¹⁶⁷ File p. 03303-03304.

¹⁶⁸ File p. 10015-10018.

¹⁶⁹ File p. 10119.

¹⁷⁰ File p. 10593; 10595-10596, 04608-04609; 10597-10598; 10599-10600; 10601.

¹⁷¹ File p. 09399.

¹⁷² File p. 10594; 10121-10131.

¹⁷³ File p. 10133-10152, 10153-10160.

¹⁷⁴ File p. 10876, 10899, 10814, 02564, 02601.

¹⁷⁵ File p. 09985-10014;

Crompton/Uniroyal (“UCC”) to certain key customers for each product, showing similarity for example as follows:¹⁷⁶

<i>“Conti EURO/kg Bayer 6PPD</i>			<i>UCC 6PPD (net)</i>	
<i>Current</i>	2.97		3.02	2.96
<i>Proposed</i>	3.27		3.32	3.25
<i>Fallback</i>	3.17	→	3.22	3.16
<i>%</i>	6.73%			6.76%”

- (131) The evidence in the Commission’s file includes examples of implementation of the price increase in negotiations with certain customers. For instance, Crompton/Uniroyal’s notes taken on 13 June 2000 reflect a discussion between Crompton Europe (Mr. [...]), Bayer (Mr. [...]) and Flexsys (Mr. [...]) with regard to the refusal of Michelin to pay increased prices and the agreement of the suppliers to hold the line.¹⁷⁷ Later on 28 July 2000, Mr. [...] reported to Mr. [...] (both of Crompton) that Michelin was ready to accept only a 2-3% increase instead of the announced 7% but that Crompton/Uniroyal finally succeeded in convincing Michelin to pay the higher prices.¹⁷⁸
- (132) Hence, the parties implemented the price increase on the market and ensured compliance with the agreement by exchanging information during the period of negotiations with customers.
- (133) After the price increase had been implemented in the negotiations with customers, Bayer, Flexsys and Crompton/Uniroyal continued to exchange customer-specific information about prices and sales volumes. As an example of such exchange, notes taken by an employee of Crompton Europe (Mr. [...]) on 18 July 2000 reflect his conversations with Mr. [...] of Flexsys and Mr. [...] of Bayer during which the latter two provided information about their prices for 6PPD applied, among others, in Europe.¹⁷⁹

6.4.3. Outcome and follow-up contacts

- (134) From the point of view of Flexsys, the price increase was ultimately a failure. It resulted in Flexsys suffering a significant volume loss, and Bayer was blamed for taking volume.¹⁸⁰
- (135) The outcome of the price increase was discussed in two meetings between Mr. [...] of Flexsys and Mr. [...] of Bayer, the first held in Verviers (Belgium) on 10 August 2000¹⁸¹ and the second on 31 August 2000.¹⁸²

¹⁷⁶ File p. 10000.

¹⁷⁷ File p. 10005-10006; 10823, 10792.

¹⁷⁸ File p. 10163-10164.

¹⁷⁹ File p. 09985-09986, 10823, 10793.

¹⁸⁰ File p. 10876, 10899; 02461-02462.

¹⁸¹ File p. 03359, 03345; 10814, 02565.

¹⁸² File p. 10814, 02565, 02606-02607.

Flexsys also complained about its volume losses to Crompton/Uniroyal. Mr. [...] reported to the Crompton [...] such a discussion with Mr. [...] of Flexsys in an internal e-mail of Crompton/Uniroyal dated 11 August 2000 (marked “read and delete”) as follows: “*With regard to future increases, he says Flexsys is not eager to participate at this moment since they lost out in the recent round. This is not a final position, however. They feel we played by the book but Bayer played “games” to gain share*”.¹⁸³

- (136) Flexsys sought to re-establish its position with major customers by lowering its prices, and in August 2000, Flexsys committed to Goodyear that it would hold its prices firm in 2001, with the exception of accelerators.¹⁸⁴
- (137) Crompton/Uniroyal is reported to have complained to Bayer that it had not gained anything from the price increases implemented in 2000 due to the dollar exchange rate.¹⁸⁵ In October 2000, however, Mr. [...] of Crompton informed Mr. [...] of Uniroyal that the mid-2000 price increase was “holding”.¹⁸⁶
- (138) Bayer, in turn, also succeeded in keeping its market share after the second price increase of 2000, as compared to its share in 1999.¹⁸⁷ The success of the price increase for Bayer is also shown by the following statement of Mr. [...], made at an internal meeting held at Bayer on 23 August 2000: “... *these results were possible only through concerted practices and because everyone was on the same line*”.¹⁸⁸
- (139) There were frequent follow-up contacts between the major competitors during the autumn of 2000 to discuss the outcome of the second price increase. Mr. [...] of Flexsys and Mr. [...] of Bayer met in Leverkusen some time in September 2000, at the request of the former, to discuss, among other things, the losses suffered by Flexsys because the others had appeared not to follow the rules.¹⁸⁹ In this meeting, Mr. [...] assured Mr. [...] that Bayer had exactly the same interest as Flexsys in implementing price increases on the market and later at lunch gave a promise that Bayer would cooperate with Flexsys as a “silent follower” based on a “blind understanding”.¹⁹⁰
- (140) Crompton/Uniroyal arranged meetings with both Flexsys and Bayer for 31 October or 1 November 2000 concerning “Goodyear 2001 Negotiations Change”, which is evidenced by a series of e-mails dated 25 and 26 September 2000 exchanged internally within Crompton/Uniroyal.¹⁹¹ Various other contacts between Mr. [...] of Uniroyal and Mr. [...] of Flexsys took

¹⁸³ File p. 10165-10166; 10167-10168.

¹⁸⁴ File p. 10876, 10899.

¹⁸⁵ File p. 02462-02463.

¹⁸⁶ File p. 10821, 10744.

¹⁸⁷ File p. 02461-02462.

¹⁸⁸ File p. 02530. Quotation translated at the Commission from the German original: “...*diese Ergebnisse nur durch abgestimmtes Verhalten möglich waren, und weil alle am gleichen Strang ziehen*”.

¹⁸⁹ File p. 02461-02462; 02529.

¹⁹⁰ File p. 02530.

¹⁹¹ File p. 09919-09920, 10823, 10793-10794.

place in October 2000 to discuss the aftermath of the mid-2000 price increase.¹⁹²

- (141) Flexsys interrupted its contacts with Bayer in the fourth quarter of 2000 and informed Bayer of this by telephone on 31 October 2000.¹⁹³ On the same day, Messrs. [...] and [...] of Bayer had a meeting with Messrs. [...] and [...] of Uniroyal to monitor the coordinated price increases carried out in 2000, but no further price increases were considered.¹⁹⁴
- (142) In December 2000, Crompton Europe and Bayer exchanged detailed information on prices charged to specific customers in different geographic areas, which is shown by telephone notes of Mr. [...] dated 12, 13 and 14 December 2000,¹⁹⁵ as well as several other notes and documents found at the premises of Crompton Europe.¹⁹⁶ An example of such exchange is an e-mail dated 7 December 2000, with mention “*Please destroy this E-mail after reading*”, reporting a conversation between a Uniroyal representative and a Bayer Product Director with regard to pricing.¹⁹⁷ The result of the mid-2000 price increase was also discussed at a meeting in the United Kingdom some time in December (or, according to Crompton, on 11 January 2001) involving Mr. [...] of Bayer and Mr. [...] of Crompton Europe and Mr. [...] of Uniroyal.¹⁹⁸

6.5. A global price increase effective 1 July 2001

- (143) After the contract negotiations with the global tyre customers in December 2000, the rubber chemical producers experienced downwards pressure on prices due to competition, predicted reduction of demand and decrease of raw material cost.¹⁹⁹ As a consequence, Crompton/Uniroyal proposed and led the next price increase effective on 1 July 2001, which was agreed with Flexsys and Bayer in 2001.²⁰⁰ According to Flexsys, the products involved were the same as in the 2000 raises, namely primary accelerators and antidegradants (PPDs), but not TMQ (antioxidant) which was not increased in 2001.²⁰¹ Bayer, however, also supported and implemented an increase for antioxidants (recitals (144) and (151)). As with the earlier coordinated price increases, the preparation started several months before the announcement, in this case in late 2000, with meetings and telephone conversations between the major competitors to ensure support (recitals (144)-(149)). The price increase was effectively implemented by all three parties and controlled by post-announcement contacts during the period of negotiations with customers (recitals (150)-(158)) and thereafter (recitals (159)-(163)).

¹⁹² File p. 10821,10745.

¹⁹³ File p. 02462; 10814, 02565-02566.

¹⁹⁴ File p. 10814, 02565-02566.

¹⁹⁵ File p. 09903-09909.

¹⁹⁶ File p. 09899-09901.

¹⁹⁷ File p. 10026; 10823, 10794.

¹⁹⁸ File p. 10814, 02566-02567, 10821, 10746.

¹⁹⁹ File p. 10496; 10186; 02462-02463.

²⁰⁰ File p. 10823, 10795; 10186, 04566; 10823, 10780, 10795; 10074-10075.

²⁰¹ File p. 10901.

6.5.1. Preparatory phase

Bayer's support for the price increase

- (144) Bayer offered its support for Crompton/Uniroyal's price increase initiative in Europe and North America on several occasions in the first quarter of 2001. The first piece of evidence concerning Bayer's support dates from 30 January 2001 when Mr. [...] of Uniroyal reported the following in an internal e-mail: *"...my intelligence source in Bayer indicated that they ([...]) fully support an across-the-board increase in accelerators, oxidants and anti-ozonants in North America and Europe effective 01.07.2001..."*²⁰²
- (145) Bayer's support for the price increase was ensured by Mr. [...] at meetings held with Crompton/Uniroyal around February 2001 in the United States²⁰³ and in the United Kingdom upon condition, however, that Flexsys would also follow.²⁰⁴ Bayer's agreement was later confirmed by Mr. [...] at a dinner with Mr. [...] of Crompton in Middlebury on 5 March 2001, concerning which Crompton/Uniroyal's notes state that Mr. [...]: *"Did not talk about conditions to support price increase as [...] [[...]] did."*²⁰⁵ During a subsequent telephone conversation with a Crompton/Uniroyal representative on 19 March 2001, Mr. [...] of Bayer further promised not to use the price increase to get "additional quantity" in the market but insisted that Crompton/Uniroyal provide documentation that Flexsys would participate, as noted by Crompton/Uniroyal's representative during this conversation.²⁰⁶

Flexsys' support for the price increase

- (146) Flexsys has disclosed that in November and December 2000, Mr. [...] of Crompton had contacts with Flexsys [...] during which the former proposed a global price increase in the mid to high single percentage digits.²⁰⁷
- (147) On 26 January 2001, Flexsys' price schedules were faxed to Crompton/Uniroyal, including prices of accelerators, antiozonants, antioxidants, vulcanizing agents and other rubber chemicals.²⁰⁸
- (148) Flexsys confirmed its support for Crompton/Uniroyal's initiative at the latest in April 2001. According to Crompton, Mr. [...] of Crompton checked this with the Flexsys [...] Mr [...] just before the price increase notifications were sent out on 6 April 2001.²⁰⁹ As documentary evidence of this, for instance, a notebook record dated 12 April 2001, found at Crompton Europe, states: *"Price increase – Flexsys will support; top of the house – [...]."*²¹⁰ Another

²⁰² File p. 10604; 10823, 10795; 10072-10073; 03196.

²⁰³ File p. 10795.

²⁰⁴ File p. 02462-02463. For earlier meetings between Crompton/Uniroyal and Bayer in December 2000 and January 2001, 10814, 02552-02571; 10821, 10746-10747.

²⁰⁵ File p. 09885; 10823, 10795-10796; 10797, 10814, 02552-02571, 02531, 09918, 10821, 10748.

²⁰⁶ File p. 09875-09899, 10823, 10796.

²⁰⁷ File p. 10876, 10900.

²⁰⁸ File p. 09524-09528.

²⁰⁹ File p. 10821, 10749-10750.

²¹⁰ File p. 09883.

note dated 17 April 2000 states that "given the size of this increase, they [Flexsys] will have to move their prices up".²¹¹

- (149) The Flexsys [...] Mr. [...] also had conversations with Mr. [...] of Bayer during which Mr. [...] assured Mr. [...] of Flexsys' support for Crompton/Uniroyal's price increase initiative, other than at Goodyear. This occurred in connection with a business trip to Brussels in March or April 2001²¹² and at a meeting held most likely on 3 May 2001.²¹³

6.5.2. Implementation and negotiations with customers

- (150) Crompton/Uniroyal led the price increase by announcing a worldwide price increase of 7-10%, effective 1 June 2001, in a press release published in Rubber & Plastic News on 6 April 2001.²¹⁴ It is noteworthy that the customers' notification letters were sent either on that same day or later in April and May 2001 so that they learned about the price increase through the publication before receiving their notification letters.²¹⁵ This prompted [...] to suspect the producers of operating as a cartel, accusing Crompton/Uniroyal of purposefully sending a signal to the other competitors to increase prices, in the same way as Flexsys had done the preceding year by announcing its price increase on the internet.²¹⁶
- (151) Bayer's internal correspondence confirms that it followed the price increase.²¹⁷ In an internal e-mail of 10 April 2001, Mr. [...] of Bayer states that because of at least a temporary decline in worldwide demand and the tyre industry's expectation of price decreases as of 1 July 2001 they "... hope for a good deal of 'creative luck' in order to make Crompton-Uniroyal's worldwide price increase of RC [rubber chemicals], that was announced yesterday, a success...".²¹⁸ Bayer received, through its wholly-owned subsidiary Rhein Chemie Corporation, a copy of Crompton/Uniroyal's letter.²¹⁹
- (152) Flexsys followed Crompton/Uniroyal's price increase, with some exceptions, such as [...] where Flexsys had already committed to hold customer's cost steady through the end of 2001²²⁰ and informed Crompton/Uniroyal about this by phone on 10 May 2001²²¹ and on 31 May 2001²²². As further evidence of

²¹¹ File p. 09844; 10823, 10796.

²¹² File p. 02462-02463.

²¹³ File p. 10876, 10901, 02531.

²¹⁴ File p. 03331; 03334; 10780.

²¹⁵ File p. 10607-10610; 10611; 10612-10615; 10616-10629; 10630-10642; 10652-10654; 10104-10105; 10108-10111.

²¹⁶ File p. 10106.

²¹⁷ File p. 03331, 03190; 10564, 10279; see also p. 05298-05299

²¹⁸ File p. 10562-10563 and 10565. Quotation translated at the Commission from the German original: „Preis-Mengen-Relation Vulkanox 4020 / KCH-Preiserhöhung“, "... werden wir höllisch aufpassen und auf eine gehörige Portion ‚gestalterischen Glücks‘ bauen müssen, um die von Crompton-Uniroyal gestern angekündigte weltweite Preiserhöhung für KCH einen Erfolg werden zu lassen..."

²¹⁹ File p. 03323-03326.

²²⁰ File p. 10876, 10901, 09875.

²²¹ File p. 09875.

²²² File p. 09869, 10823, 10797.

this, an internal Crompton/Uniroyal e-mail dated 20 June 2001 reports a conversation between a Crompton/Uniroyal employee and [...] of Flexsys as follows: “*He did ask about the price – your new price is valid from 01.06.01, but he says Flexsys prices are not rising until 01.07.01. He would like your new price to start from 01.07.01 to match, and he will also change from flake to drop from this date*”.²²³ On the same day, [...] of Crompton Europe gave instructions to apply the new price from 1 July with regard to certain products.²²⁴

- (153) Flexsys also informed Bayer about its price increase by telephone on 16 May 2001, and this call was reported in internal e-mails circulated within Bayer.²²⁵
- (154) After the announcement, Crompton/Uniroyal and Bayer had frequent telephone conversations during the negotiations with customers preceding the entry into force of the price increase on 1 July 2001. The contents of these discussions were recorded in the notes of a Crompton/Uniroyal employee on, among others, 15 May 2001,²²⁶ 23 May 2001,²²⁷ 31 May 2001,²²⁸ 11 June 2001,²²⁹ 25 June 2001,²³⁰ 26 and 27 June 2001.²³¹ These notes show that Bayer provided Crompton/Uniroyal with detailed information about its price quotations, customers’ reactions, orders and additional volume requests.
- (155) The extent to which the price increase went through in the negotiations with customers depended on the customer and product in question.²³² The following notes found at Crompton Europe confirm that the price increase was holding in May/June and was successfully implemented at least in the negotiations concerning certain products and certain customers:
 - (a) a note written by a Crompton/Uniroyal employee of his conversation with [...] of Bayer on 4 May 2001 reports that Bayer’s price increase at Goodyear is “*holding on 6PPD + Q [TMQ] + DCBS*” but not on other products;²³³
 - (b) a note from Mr. [...] (Crompton Europe) dated 31 May 2001 relates, with regard to a customer, that “*Thiazole price increase holding*” and goes on by questioning “*What are Bayer increases – are they consistent with ours and Flexsys? Yes, on an announced basis*”;²³⁴
 - (c) an undated handwritten note found at Crompton Europe contains the following: “[...] – *Bayer good on their word*” and “*We held price on Flexzone*”;²³⁵

²²³ File p. 09965.

²²⁴ File p. 09965 ; 10112.

²²⁵ File p. 03198.

²²⁶ File p. 09874.

²²⁷ File p. 09872.

²²⁸ File p. 09869.

²²⁹ File p. 09861.

²³⁰ File p. 09857-09858.

²³¹ File p. 09856.

²³² Examples of implementation problems at certain customers are detailed on file p. 10749-10752.

²³³ File p. 09876.

²³⁴ File p. 09869; 10823, 10797.

²³⁵ File p. 09888.

- (d) Crompton/Uniroyal's handwritten note of 27 June 2001 concerning a conversation with Mr. [...] of Bayer reports, with regard to Acrochem, that "price increase suspension not supported by Bayer".²³⁶
- (156) On the other hand, Crompton/Uniroyal did not get support for its price increase concerning Naugard Q (a TMQ), which is stated in a note dated 11 June 2001.²³⁷ As a consequence, Crompton/Uniroyal withdrew the previously announced price increase on this product and informed its customers accordingly on 12 June 2001.²³⁸
- (157) Certain customers reacted negatively to the price increase. [...] refused to accept any price increase, complaining about a Uniroyal/Flexsys/Bayer cartel, but Crompton/Uniroyal decided to stick to the agreement at the risk of losing business.²³⁹ [...] also questioned the justification of the price increase when the cost of raw materials appeared to be decreasing,²⁴⁰ and suspected collusion between the three main producers.²⁴¹ Later [...] agreed, however, to pay an increased price, although not at the level proposed by Crompton/Uniroyal.²⁴²
- (158) Crompton's internal report dated 26 June 2001 concerning May 2001 confirms that it was maintaining the price increase for most products in spite of strong customer reactions.²⁴³

6.5.3. *The outcome and follow-up contacts*

- (159) Shortly after the price increase became effective on 1 July 2001, there was a meeting in Frankfurt on 16 July 2001 between Mr. [...] of Bayer, Mr. [...] of Uniroyal and Mr. [...] of Crompton Europe. While Bayer recalls that the discussion concerned the failure of the price increase,²⁴⁴ Crompton's recollection is that the participants agreed to limit volumes at Goodyear and Michelin and concluded that the increase seemed to be a reasonable success, despite the fact that Bayer had delayed it until September.²⁴⁵
- (160) In July, Bayer and Crompton/Uniroyal continued to exchange confidential information on customers' price decrease requests and prices charged to specific customers, as shown by Crompton/Uniroyal's notes dated 24 July 2001,²⁴⁶ 25 July 2001,²⁴⁷ and 27 July 2001,²⁴⁸ reflecting conversations with Mr. [...] of Bayer. Sometimes these contacts were made to verify rumours

²³⁶ File p. 09856.

²³⁷ File p. 10655.

²³⁸ File p. 10656-10657.

²³⁹ File p. 10658; 10662; 10664-10665; 10106.

²⁴⁰ File p. 10499 ; 10498 ; 10486.

²⁴¹ File p. 09962, 10670-10671; 10823, 10798-10799.

²⁴² File p. 10666, 10823, 10798; 10821, 10750-10752.

²⁴³ File p. 09333; see also p. 10114-10115; 10189.

²⁴⁴ File p. 10814, 02567.

²⁴⁵ File p. 10751-10753.

²⁴⁶ File p. 09855.

²⁴⁷ File p. 09853.

²⁴⁸ File p. 09852.

that Bayer was quoting lower prices at a customer than Crompton/Uniroyal,²⁴⁹ or to check whether Bayer could quote a specific price at a customer. As an example of the latter, a note dated 25 July 2001, found at Crompton Europe, recorded the following: *"Turk Pirelli asked Bayer to quote 6PPD at E 3.30. [...] undecided if he will quote. Told him we were lower than that but suggested that they not quote. He [...] will discuss with [...]"*.²⁵⁰

(161) According to Crompton, the contacts between Mr. [...] of Uniroyal and Flexsys representatives stopped abruptly at some point in late summer of 2001, as the latter no longer returned Mr. [...] calls.²⁵¹

(162) In August and September 2001, several documented contacts between Crompton/Uniroyal and Bayer show that compliance with the agreed price increase was effectively ensured and that it affected at least certain customers, as evidenced by the following notes found at Crompton Europe:

(a) a handwritten note dated 9 August 2001, reflecting a conversation with Mr. [...] of Bayer states:²⁵²

"Bayer will quote a lower price increase but limit their volume to what was agreed last February."

(b) a handwritten-note dated 27 September 2001, reflecting a telephone conversation between Messrs. [...] and [...] of Crompton Europe and Mr. [...] of Bayer states:²⁵³

"Bayer told Michelin N.A. they will not supply more than the contract/plan. [...] [Michelin] is pissed.

...

- Titan

*MBS – Bayer offering special price as shelf life expiring.
Raised prices 1 July.*

...

Gave clear position that they won't accept more than their allocation for the ½ yr – or accept orders at a rate higher than the allocation. Got a very snooty letter from [...] on this. ..."

(163) Nevertheless, the price increase no longer appeared to hold in the autumn of 2001. Eventually, it failed to produce the desired result and the participants ended up losing volumes and decreasing prices. The following examples in the Commission's file reflect this outcome:

(a) a handwritten note dated 7 August 2001, apparently based on a conversation between Crompton/Uniroyal and Flexsys employees, reports Flexsys' volume losses due to the price increase,²⁵⁴

²⁴⁹ File p. 10823, 10798-10799.

²⁵⁰ File p. 09853, 10823, 10798.

²⁵¹ File p. 10821, 10733-10734.

²⁵² File p. 09849, 10821, 10739-10740.

²⁵³ File p. 04614-04615; 10821, 10740-10743; 02463-02464.

- (b) Bayer's overview of the market, as presented at a budget meeting of September 2002, relates that "*a mis-managed price increase in Q3/01 led to sharp price decreases beg. 2002*";²⁵⁵
- (c) Crompton/Uniroyal informed [...] in October 2001, that all its rubber chemical prices will revert to the 2 January 2001 prices.²⁵⁶ Later in December an internal e-mail reports the following with regard to price increases in 2000 and 2001: "*The second increase was the straw that broke the camels back. We have been on damage control ever since ...*".²⁵⁷
- (164) Based on Crompton's statement, the outcome of the price increase was further discussed between Flexsys and Uniroyal on 17 October 2001, when Mr. [...] of Flexsys and Mr. [...] of Uniroyal also talked about the upcoming global price negotiations with tyre companies to explore whether the price could be maintained.²⁵⁸

7. INVOLVEMENT OF FRINGE PLAYERS

- (165) The Spanish General Química and the two [...] producers [...] and [...] are minor players in the global market for rubber chemicals, with market shares ranging from 1% to 5%. None of them produces a whole range of rubber chemicals. Their production is limited to certain products in the primary accelerator and antioxidant groups. Regardless of their modest total market shares, these three competitors have been able to put pressure on the market prices and gain market share to the detriment of their bigger competitors due to their relatively high market shares in certain territories and customers. This explains the interest of the other producers in seeking their participation in price cooperation.²⁵⁹

7.1. General Química SA

- (166) In its application for leniency, General Química confirmed having been informed, first by Flexsys in a meeting held in GQ headquarters in Spain in October 1999 and later in a meeting with Flexsys and Bayer on 28 October 1999 in Brussels, that there was an agreement to raise the price of primary accelerators as of January 2000 (recital (107)).²⁶⁰
- (167) GQ's involvement in this price increase had already been disclosed to the Commission by Flexsys in its statement of 10 July 2002, according to which GQ had given it an understanding during telephone conversations in late 1999 or early 2000, between [...] of Flexsys and GQ's representatives, that it would follow the price increase of 1 January 2000.²⁶¹ GQ has, however,

²⁵⁴ File p. 09910, 10876, 10901.

²⁵⁵ File p. 10272; 03348-03349.

²⁵⁶ File p. 09912-09917.

²⁵⁷ File p. 09945, 10278.

²⁵⁸ File p. 10821, 10752-10753.

²⁵⁹ File p. 02456.

²⁶⁰ File p. 09268.

²⁶¹ File p. 10876, 10895.

stated that while Mr. [...] of Flexsys had informed it, in a meeting held in early October 1999 in GQ headquarters in Bilbao, about the upcoming price increase of 9% on accelerators and 10% on antioxidants,²⁶² it adhered to the agreement in the meeting of 28 October 1999 between Flexsys (Mr. [...]), GQ (Messrs. [...] and [...]) and Bayer (Mr. [...]).²⁶³ In this meeting, Flexsys and Bayer informed GQ of their intention to increase the price of primary accelerators (sulphenamides and thiazoles) based on an agreement between them, without indicating Crompton's involvement. The pricing of antioxidants and carbamates was no longer discussed, nor was there any discussion about controlling compliance with the agreement or when and how the increase was to be applied: *"The general idea perceived by GQ was that it was sought to apply an increase as of 1 January 2000 but GQ did not co-ordinate any price announcement nor agreed any term on which the increase would apply nor Bayer or Flexsys attempted to do so"*.²⁶⁴

(168) While GQ has submitted that it did not attempt to implement the price increase at the level of 9% proposed by its competitors because of, among other things, its excessive size,²⁶⁵ it is not disputed that GQ took account of the information obtained from its competitors in determining its own pricing policy. Indeed, GQ raised its prices as of 1 January 2000 albeit at a lower level than the proposed 9%:

(a) GQ gave instructions to its distributors on 30 November 1999 to raise the prices of sulphenamides and thiazoles as of 1 January 2000;²⁶⁶

(b) GQ negotiated with Goodyear and Michelin between October and December 1999, about price increases on rubber chemicals for the year 2000;²⁶⁷

(c) in late January 2000, GQ attempted to negotiate with a distributor to obtain a price increase of 9% on thiazoles and sulphenamides, with a retroactive effect as of 1 January 2000, but apparently had to contend with a much lower increase due to competitive pressures.²⁶⁸

7.2. Other undertakings

(169) There are a number of indications that [...] and [...] may have participated in at least some of the collusive activities with the other rubber chemicals producers in the mid-1990's and in the period 1998-2001.²⁶⁹ In view of the elements brought forward by [...] and [...] in their replies to the Statement of Objections and at the Oral Hearing, as well as the exonerating evidence in the Commission's file in their regard,²⁷⁰ the Commission has, however, come to

²⁶² File p. 09268.

²⁶³ File p. 09269-09270.

²⁶⁴ File p. 09270-09271.

²⁶⁵ File p. 09272.

²⁶⁶ File p. 04008-04009; 01978.

²⁶⁷ File p. 10292-10293 ; 10294-10295 ; 03680-03681, 10296, 03683.

²⁶⁸ File p. 03548-03556.

²⁶⁹ File p. 02459, 02569, 10041-10043, 10788, 10096, 0036-0038, 02449, 10895-10899, 09889, 09969.

²⁷⁰ File p. 10161-10162, 10606, 10792, 10053, 09845, 10792, 10797, 10171, 10169-10170, 02464-02465, 10171-10174.

the conclusion that it lacks sufficient evidence to address a Decision to [...] (including its parent company [...] and the sales agent [...]), and to [...]. The proceedings against these two undertakings will therefore be closed.

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

8. RELATIONSHIP BETWEEN THE TREATY AND THE EEA AGREEMENT

- (170) The arrangements described in Part D applied to virtually all the territory of the EEA for which demand for rubber chemicals existed, as the cartel members had sales in practically all the Member States and EFTA States parties to the EEA Agreement (Norway, Iceland and Liechtenstein).
- (171) The EEA Agreement, which contains provisions on competition analogous to the Treaty, came into force on 1 January 1994. The infringement described in Part D of this Decision is deemed to have started on 1 January 1996. The relevant EEA rules (primarily Article 53(1) of the EEA Agreement) therefore also apply to the arrangements to which objection is taken.
- (172) In so far as the arrangements affected competition in the Common Market and trade between Member States, Article 81 of the Treaty is applicable. The operation of the cartel in EFTA States that are part of the EEA and its effect upon trade between the Community and Contracting Parties to the EEA or between Contracting Parties to the EEA fall under Article 53 of the EEA Agreement.

9. JURISDICTION

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

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

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

- (174) 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.

- (175) Article 53(1) of the EEA Agreement (which is modelled on Article 81(1) of the Treaty) contains a similar prohibition. However, the reference in Article 81(1) of the Treaty to "trade between Member States" is replaced in the former provision 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".

10.2. The nature of the infringement

10.2.1. Principles concerning agreements and concerted practices

- (176) Article 81 of the Treaty and Article 53 of the EEA Agreement prohibit *agreements* between undertakings, decisions by associations of undertakings and *concerted practices*, provided that the conditions of application of these provisions are met.²⁷¹
- (177) An *agreement* for the purposes of Article 81(1) of the Treaty can be said to exist when the parties, expressly or implicitly, jointly adopt a plan determining the lines of their respective action (or abstention) on the market. It does not have to be made in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The agreement may be express or implicit in the behaviour of the parties, since a line of conduct may be evidence of an agreement. Furthermore, it is not necessary, in order for there to be an infringement of Article 81 of the Treaty, for the participants to have agreed in advance upon a comprehensive common plan. The concept of *agreement* in Article 81(1) of the Treaty may apply to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement.
- (178) 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.²⁷² 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*".²⁷³ Such distancing should take the

²⁷¹ The case law of the Court of Justice and the Court of First Instance in relation to the interpretation of Article 81 of the Treaty applies equally to Article 53 of the EEA Agreement. See recitals No 4 and 15 as well as Article 6 of the EEA Agreement, Article 3(2) of the EEA Surveillance and Court Agreement. 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.

²⁷² Case T-334/94 *Sarrió v Commission* [1998] ECR II-01439, paragraph 118.

²⁷³ 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,

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).

- (179) An agreement for the purposes of Article 81(1) of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract at civil law. Moreover, in the case of a complex cartel of long duration, the term “agreement” can properly be applied not only to any overall plan or to the terms expressly agreed upon but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose, as well as the measures designed to facilitate the implementation of price initiatives.²⁷⁴ As the Court of Justice, upholding the judgement of the Court of First Instance, has pointed out in Case C-49/92P *Commission v Anic Partecipazioni SpA*²⁷⁵ it follows from the express terms of Article 81(1) of the Treaty that agreement may consist not only of an isolated act but also of a series of acts or a continuous conduct.
- (180) Although Article 81 of the Treaty draws a distinction between the concept of “*concerted practice*” and that of “*agreements between undertakings*”, the object is to bring within the prohibition of that Article 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.²⁷⁶ 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.
- (181) 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

paragraph 232; and Case T-25/95 *Cimenteries CBR / Commission* [2000] ECR II-491, paragraph 1389.

²⁷⁴ See also the judgement of the Court of First Instance in Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, at paragraph 256.

²⁷⁵ See [1999] ECR I - 4125, at paragraph 81.

²⁷⁶ Case 48/69 *Imperial Chemical Industries v Commission* [1972] ECR 619 at paragraph 64.

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.²⁷⁷

- (182) 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.²⁷⁸
- (183) Although in terms of Article 81(1) of the Treaty the concept of a concerted practice requires not only concerting between undertakings but also conduct on the market resulting from the concerting and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such concerting and remaining active on the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concerting 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.²⁷⁹

10.2.2. Principles concerning single and continuous infringement

- (184) A complex cartel may be viewed as a *single and continuous infringement* for the time frame in which it existed. The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. The validity of this assessment is not affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute a violation of Article 81 of the Treaty. In fact, as the Court of Justice stated in its judgement in *Commission v Anic Partecipazioni*, the agreements and concerted practices referred to in Article 81(1) of the Treaty necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged. It follows that infringement of that article may result not

²⁷⁷ Joined Cases 40-48/73, etc. *Suiker Unie and others v Commission* [1975] ECR 1663, at paragraphs 173 and 174.

²⁷⁸ 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, [1995] ECR, p. II-1057, II-1063 and II-1191, at paragraph 72.

²⁷⁹ Case C-199/92 *P Hüls v Commission*, [1999] ECR I-4287, at paragraphs 158-166.

only from an isolated act but also from a series of acts or from a continuous course of conduct.²⁸⁰

- (185) Although a cartel is a joint enterprise, each participant may play its own particular role. Some participants may have a more dominant role than others. Internal conflicts and rivalries, or even cheating may occur, but that will not prevent the arrangement from constituting an agreement and/or concerted practice for the purposes of Article 81(1) of the Treaty where there is a single common and continuing objective.
- (186) The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same anti-competitive object or effect. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. This is certainly the case where it is established that the undertaking in question was aware of the unlawful behaviour of the other participants or could have reasonably foreseen it and was prepared to take the risk.²⁸¹ In this regard, the Courts have consistently stated that “an undertaking may be held responsible for an overall cartel even though it is shown that it participated directly only in one or some of the constituent elements of that cartel, if it is shown that it knew, or 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”²⁸².

10.2.3. Application to the behaviour of Flexsys, Bayer and Crompton/Uniroyal

10.2.3.1. Agreement and/or concerted practice in this case

- (187) The facts described in Part D demonstrate that Flexsys, Bayer and Uniroyal (Crompton/Uniroyal since 21 August 1996) were involved in anticompetitive activities as follows:
- (a) agreement to raise prices of certain rubber chemicals in the EEA and worldwide at several occasions in the period 1996-2001 (recitals (68)-(74), (98), (105)-(111), (121)-(124), and (143)-(149));

²⁸⁰ Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4325, paragraphs 78-81, 83-85 and 203.

²⁸¹ See *Commission v Anic Partecipazioni*, at paragraph 83.

²⁸² 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.

- (b) implementation of the agreed price increases by sequential announcements to customers and/or public, the timing, order and form of which had been previously agreed upon between the competitors (recitals (75)-(76), (112)-(114), (125)-(127) and (150)-(152);
- (c) attendance at meetings and participation in conversations to monitor implementation of and adherence to the agreements reached (recitals (77)-(78), (86)-(89), (115)-(119), (128)-(133), (135), (139)-(142), (152)-(154), (159)-(162);
- (d) other exchange of information on the pricing, supply capacity and sales of certain rubber chemicals in the EEA and elsewhere (recitals (81), (82)-(84), (88), (91)-(93), (101));
- (e) participation in other anticompetitive contacts in which market strategies were compared and possible future actions on the market contemplated (recitals (83)-(97), (88)-(89) and (103).

(188) The addressees do not contest their involvement in an infringement of Article 81. It is beyond dispute that the express price increase arrangements between Flexsys, Bayer and Crompton during the period from 1998 to 2001 (recitals (98)-(164)) had all the characteristics of a full “agreement” within the meaning of Article 81(1) of the Treaty. The undertakings concerned clearly expressed their joint intention and/or reached a common understanding to behave on the market in a specific way, and with a common objective, and thereafter monitored compliance with these agreements. The implementation of the agreements through sequential public announcements and/or notifications to customers, as well as the subsequent conversations and meetings in which implementation was monitored through exchanges of information on customer negotiations, the contracts achieved and the outcome of the price increases, all form part of the same overall and illegal scheme. It should be noted, however, that the concept of agreement does not require that the arrangement in question be implemented or produce effects on the market. Hence, the fact that the price increase agreed between the competitors for 1 October 1998 was withdrawn before it was announced to customers (recitals (98)-(99)) in no way affects the finding that an agreement was entered into the object of which was to restrict competition.

(189) With regard to the period prior to 1998, there is no dispute between Flexsys and Crompton/Uniroyal about the collusive nature of the global price increase covering all rubber chemicals in 1996. This collusion can be adequately characterized as an agreement from the legal perspective in that the undertakings concerned reached a common understanding to conduct themselves on the market in a specific way, and with a common objective, and thereafter took measures to implement the price increase on the market (recitals (75)-(76)). Even if strictly speaking no agreement was reached, this

behaviour would still constitute an infringement of Article 81 as a concerted practice, since the contacts between competitors were clearly followed by the parties' conduct on the market through notification of the price increases to customers or other measures of implementation (recitals (75)-(76)). Bayer is the only addressee that has contested these facts and their legal characterisation as agreements and/or concerted practices in violation of Article 81. Bayer's arguments will be dealt with separately in recitals (195) to (201).

- (190) Some factual elements of the illicit arrangements, such as exchanges of confidential information and the steps in the bargaining process leading up to comprehensive agreements, could aptly be characterised as concerted practices that facilitated the coordination of the parties' commercial behaviour. This concerns, in particular, the contacts between Bayer, Crompton/Uniroyal and Flexsys in late 1996 and 1997 when exchanges of confidential information and disclosure of the competitors' intentions with regard to pricing, sales and/or production strategies took place (recitals (81) to (96)). Indeed, the exchanges of information on sales volumes, prices and customers between the competitors allowed the producers in question to take account of this information when determining their own behaviour on the market. The same applies to the comparisons of the strategies and discussions on possible future actions on the market, which enabled the parties to influence their competitors' conduct and to adjust their own behaviour according to their competitors' strategies. These conversations between the competing manufacturers improved predictability and reduced uncertainty as to the competitors' conduct on the market.
- (191) In so far as the characterisation of certain behaviour as a concerted practice requires subsequent conduct on the market following the exchanges of information, it can be presumed that the undertakings taking part in such concerting and remaining active on the market take account of the information exchanged with competitors in determining their own conduct on the market (for the legal principle, see recital (183)). Yet, in Crompton/Uniroyal's case, the Commission does not have to rely exclusively on this presumption, since there are examples in the Commission's file showing that these contacts influenced the concrete price and volume offers that it made to its customers. As examples of this, one may cite Crompton/Uniroyal's fictitious statements to customers regarding supply capacity and artificial quotations to compensate Flexsys for its lost sales volumes (recitals (85) and (91)).²⁸³ Indeed, Crompton has explicitly admitted

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For concrete examples, see Crompton oral statement of 11 May 2004, p. 10821, as well as transcript p. 10726-10728, 10774-10775.

having used the information it received from Flexsys in 1997 to form its own pricing strategy for a particular customer.²⁸⁴

- (192) In this regard, Crompton cannot validly argue that its own behaviour during the alleged silent period in 1997 did not constitute an infringement although the Commission was prepared to consider in the Statement of Objections that certain contacts with the fringe players²⁸⁵ and the contact between the employees of Crompton and Flexsys on 2 September 2002 (recitals (356) to (362)) were not constitutive of agreements or concerted practices in violation of Article 81. The Commission highlights that just because it finds the evidence insufficient to incriminate the behaviour of another undertaking – be that due to uncertainties and vagueness in that evidence or to the fact that the information relies on an unsupported unilateral statement of a participant – this does not invalidate the evidence and the Commission’s findings against Crompton. Indeed, the level of detail of the evidence concerning Crompton’s undisputed discussions on customer specific pricing with its competitors in late 1996 and 1997 (see, in particular, recitals (82) to (84) and (91)) is not comparable to Crompton’s indications about the alleged behaviour of GQ during that period or of Flexsys after the latter had been granted conditional immunity. Furthermore, Crompton has itself admitted having had a meeting with Flexsys in September 1997 in which a possible price increase concerning TMQs was discussed with an understanding that “*if we lead, they will follow*” (recital (94); see also recital (216)).
- (193) In general, regardless of whether the different elements of behaviour qualify separately as agreements or concerted practices, it is not necessary for the Commission, particularly in the case of a complex infringement of long duration, to characterise conduct as exclusively one or the other of these forms of illegal behaviour.²⁸⁶ The concepts of agreement and concerted practice are fluid and may overlap, as in this case. 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 indeed be artificial to analytically sub-divide into several different forms of infringement what is clearly a continuing common enterprise having

²⁸⁴ Crompton oral statement of 11 May 2004, p. 10821, as well as transcript p. 10774.

²⁸⁵ Crompton cites, for instance, a contact between GQ and Bayer on 30 January 1997 concerning a supply agreement and its own unilateral allegation that GQ had indicated to be “full” and unhappy with current prices on 2 April 1997.

²⁸⁶ Joint cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij NV et al. v. Commission*, ECR [1999], p. II-00931, para. 696 (the “PVC II” judgement).

one and the same overall objective, which in this case was to restrict competition in the market of rubber chemicals.

- (194) Based on the foregoing, the different elements of behaviour of the addressees of this Decision can be considered to form part of an overall scheme to distort prices and regulate the market of rubber chemicals. Under these circumstances, the Commission considers that this complex of infringements presents all the characteristics of an agreement and/or concerted practice in the sense of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

10.2.3.2. The behaviour of Bayer prior to 1998

- (195) Bayer insists that it did not participate in any infringement before March 1998, claiming lack of sufficient evidence on its alleged anticompetitive activities prior to that date. While the Commission accepts to drop the objections with regard to the events in 1994 and 1995, it rejects Bayer's argument concerning the January 1996 price increase.
- (196) With regard to the standard of proof in general, the Commission points out that 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 another plausible explanation, constitute evidence of an infringement of the competition rules.²⁸⁷
- (197) Indeed, 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.²⁸⁸ 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

²⁸⁷ 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 and others v. Commission, judgment of 7 January 2004, paragraphs 55-57.

²⁸⁸ 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., anciennement 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 of the European Communities, judgement of 8 July 2004, paragraph 203.

is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement.²⁸⁹ Hence, even if Bayer contests, or cannot confirm, certain events and even if it provides alternative interpretations to certain pieces of evidence, it has not succeeded in weakening the Commission's position, based on the all the evidence and indicia, taken together, that Bayer was also involved in agreements and/or concerted practices with its competitors prior to 1998.

- (198) In general, Bayer's assertions are in contradiction with the concurring statements of Flexsys and Crompton, who have, incriminating themselves, admitted the collusive history in the rubber chemicals industry and the collusion which also involved Bayer in connection with the price increase in 1996 (recitals (61)-(74)). Bayer's involvement in the individual cartel events is therefore consistent with the overall pattern of the cartel organised within the club and through bilateral contacts, as described by both Flexsys and Crompton.
- (199) With regard to the price increase of 1 January 1996 specifically, Bayer and Flexsys have provided a different interpretation of whether an understanding had been reached between the two undertakings on Bayer's participation in the contemplated price increase ((recitals (69) and (70)). It is, however, well-established case law that, where participation in an anticompetitive meeting has been established, as in this case, it is for the undertaking in question to put forward evidence to establish that its participation in that meeting was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in the meeting in a spirit that was different from theirs.²⁹⁰ In this case, Bayer has admitted having attended a manifestly anticompetitive meeting in which Flexsys presented the idea of the price increase with precise price targets, although it claims to have given a clear impression that it did not agree with the price increase and that it found the meeting illegal, without however adducing any evidence that it publicly distanced itself from the price increase. Rather, the subsequent events and Bayer's own behaviour clearly confirm the Commission's conviction that Bayer did not distance itself from the price increase of 1996 but rather adhered to the agreement. There is, for instance, no indication that Bayer announced to the other parties that it would take no further part in similar meetings. On the contrary, Bayer did not decline contacts with Flexsys and Crompton/Uniroyal after the announcement of the price increase but willingly participated in discussions about its

²⁸⁹ Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschaap and Others v Commission* [2002] ECR I-8375, paragraphs 513 to 523; see also Case T-67/00, T-68/00, T-71/00 et T-78/00, *JFE et al*, judgement of 8 July 2004, ECR [2004] I-123, paragraphs 179 and 180.

²⁹⁰ See the above cited case *Cement*, paragraph 81. See also Case C-199/92 P, *Hüls v Commission* [1999] ECR I-4287, paragraph 155, and Case C-49/92 P, *Commission v Anic* [1999] ECR I-4125, paragraph 96).

follow up and implementation, blaming smaller competitors for the negative outcome (recitals (72), (86)-(87), (89)). Bayer's support for this price increase was also confirmed in its internal correspondence (recital (71)), and it finally implemented a price increase in the negotiations with customers (recital (76)).

- (200) Hence, Bayer must be considered to have tacitly approved of Flexsys' unlawful initiative concerning the price increase in 1996, since it has not shown that it distanced itself from the content of such an initiative or that it reported it to public authorities, thus effectively encouraging the continuation of the infringement and compromising its discovery.²⁹¹ Bayer itself has reported that its representative was well aware of and concerned about the illegal nature of the meeting in question, but there is no indication that he made any efforts to report this illegality to public authorities.
- (201) Finally, even assuming that no agreement had been reached between Flexsys and Bayer on the 1996 price increase, Bayer's behaviour would still qualify as a concerted practice, since the contact with a competitor was clearly followed by Bayer's own conduct on the market, i.e. implementation of a price increase.
- (202) With regard to Bayer's activities during the alleged "silent period" in late 1996 and 1997, it suffices to refer to the considerations set out in recitals (190) and (191) to conclude that Bayer's exchanges of information and discussions on pricing and other market strategies with the other producers during this period, in particular those reported in recitals (81) and (89), can be qualified as a concerted practice.
- (203) The Commission concludes, nevertheless, based on the considerations set out in recital (193) that the different elements of Bayer's behaviour together form part of an infringement that was clearly a continuing common enterprise having one and the same overall objective, which in this case was to restrict competition in the market for rubber chemicals. All these elements can thus be considered to form part of an overall scheme to distort prices and regulate the market.
- (204) Under these circumstances, the Commission considers that Bayer's behaviour in the period prior to 1998 presents all the characteristics of an agreement and/or concerted practice in the sense of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement. Bayer's argument that its conduct prior to 1998 did not amount to an infringement of Article 81 is therefore rejected.

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See, in this sense, the judgement of 28 June 2005 in joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, Dansk Rørindustri A/S et al. (so-called "Pre-insulated Pipes"), paragraph 143.

10.2.3.3. Single and continuous infringement

- (205) While there are a number of indications that collusive arrangements occurred between the rubber chemicals producers already in the early 1970's and 1980's, the evidence is too vague for the Commission to establish continuity of the arrangements prior to 1996. The Commission has clear evidence of a practically uninterrupted series of collusive activities between Flexsys, Bayer and Crompton/Uniroyal from 1996 until the end of 2001. Crompton entered into the arrangements on 21 August 1996 when it acquired Uniroyal, the latter remaining on the market as Crompton's wholly-owned subsidiary.
- (206) It has been established in Part D of this Decision that Flexsys, Bayer and Uniroyal (since 1996 Crompton/Uniroyal) agreed repeatedly on several coordinated price increases to be applied during the period 1996-2001. These price increases became or were to become effective at least on 1 January 1996, 1 October 1998, 1 October 1999, 1 January 2000, 1 July 2000 and 1 July 2001. As the joint preparation of each price increase normally started several months prior to its announcement and entry into force, and compliance was thereafter monitored in meetings and conversations that took place during the following months, contacts between the competitors in connection with these price increases occurred continuously. This series of anticompetitive activities was undoubtedly aimed at restricting competition and raising the prices of rubber chemicals on the market over the competitive levels without notable changes in the respective market shares.
- (207) Indeed, the essence of this infringement can be derived from Crompton's statement that "there was a contact between competitors from at least the mid 1990's, before, during and after every price increase for rubber chemicals or at least an attempt to have such contact."²⁹² These price increases were agreed upon on a yearly basis, except for 1997, when lack of trust between the parties prevailed as a result of the failure of the 1996 price increase. Price fixing was, hence, without any doubt an ongoing process within the rubber chemicals cartel and not a single or sporadic occurrence.
- (208) In their replies to the Statement of Objections and in the arguments presented at the Oral Hearing, Crompton and Bayer have contested the continuity of the infringement from 1996 over to the year 1998 and the following period. Crompton alleges that there was a break of approximately one year in the cartel activity from late 1996 to late 1997/early 1998, which it had however not identified in its previous submissions. It has later submitted a study setting forth economic evidence on prices during "the break in anti-competitive behaviour from 1996 through 1998". Bayer, in turn, submits that this

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Crompton oral statement of 14.10.2002; p. 4 of the transcript.

interruption lasted over two years, from the beginning of 1996 to March 1998, pointing out that no agreements were entered into in 1996 either, since the price increase of 1 January 1996 was agreed upon already in 1995.

- (209) These arguments are not supported by the facts of the case, as described in recitals (80) to (96). As regards Bayer's argument on the price increase of January 1996, it is sufficient to note that this price increase was to be applied in 1996, and it was not until August of that year that Flexsys abandoned it, implying thus that the agreement had some effect during 1996, even if it was entered into in 1995. It would be artificial to limit the duration of an agreement to the date when it was reached, without counting the time of its preparation and foreseen application. This is particularly true in this case where price increases were agreed upon generally once or twice a year.
- (210) Bayer's contention that the cartel "*was terminated in a way that was apparent for everybody*" in 1996 cannot be upheld either. In this context, Bayer wrongly accuses the Commission of having disregarded the statements of Flexsys according to which Flexsys "*abandoned the arrangements in August 1996*" and "*broke up the relations*". In fact, paragraph 106 of the Statement of Objections (recital (78) of this Decision) reports that Flexsys decided to terminate the price increase in August 1996, and paragraph 107 (recital (79) of this Decision) acknowledges that Flexsys broke up its relationships with Bayer in the second half of 1996. It is, however, noteworthy that Flexsys explicitly stated in this context that it terminated the price increase "*without informing Bayer and Uniroyal*". Flexsys was thus clearly deviating from the agreement in its own self-interest, without withdrawing entirely and explicitly from the cartel. That Flexsys did not even intend to do so is evidenced by the fact that it resumed the contacts with its competitors after only a few months of silence (recitals (81) to (85)), with detailed discussions on both current and desired price levels. Moreover, the evidence cited in recitals (81) to (96) of this Decision showing exchanges of confidential information and contemplation of possibilities for future price increases is such that Flexsys itself has not contested having continued the infringement throughout 1997.
- (211) Moreover, both Bayer and Crompton merely cite incidents showing an alleged breakdown in the cartel activities without, however, even attempting to demonstrate that they had explicitly withdrawn from the cartel and made it clear to the other participants that they no longer wished to go on. There is indeed no evidence that either Bayer or Crompton had totally ended their involvement in the cartel or demonstrated their willingness to terminate the infringement, regardless of a temporary lack of communication, and Flexsys does not even make such an argument. In this regard, the infringement by the other cartel members must be distinguished from that by General Quimica who was a passive fringe player and whose involvement in

only sporadic cartel events could be proven (recital (168)). Crompton's argument that the fact that General Quimica was found to have interrupted its infringement without any announcement to the other parties should also justify a finding of two separate infringements in its case is again not valid. If the Commission does not possess sufficient evidence of a continuous infringement by one or more of the fringe players, whose involvement was sporadic compared to the main active members, this does not invalidate the evidence against the other participants and free them from their respective responsibilities (see also discussion in recital (192) above).

- (212) The fact is that price increases were agreed upon on a yearly basis from at least 1996 to 2001, except for 1997, when lack of trust between the parties prevailed as a result of the failure of the 1996 price increase. It is only normal in a cartel of long duration that ups and downs follow each other and periods of conflict can hardly be avoided, including a return to more competitive prices. If the price level went down, this was the result of a power struggle and crisis inside the cartel, not of a real desire to return to conditions of free competition, which is unequivocally shown by the subsequent repeated common efforts of the producers to raise prices on the market (recitals (98) to (164)). A price war is a normal consequence of and punishment for deviation in a cartel and as such is not, as Crompton appears to claim, incompatible with an overall continuous purpose to distort prices and restrict competition. The members of a cartel remain, after all, competitors, any one of whom could be tempted at any time to take advantage of the others' discipline in complying with cartel prices by lowering its own prices with a view to increasing its market share, whilst maintaining relatively high prices overall.
- (213) It is, accordingly, in this context of internal crisis within the cartel that the Commission must read Bayer's citations of the alleged "exculpatory" evidence referring to "rebuilding process" and achievement of "peace", and not as proof that one infringement was terminated and a new one started. Bayer's assertion that the Commission had, in paragraph 120 of the Statement of Objections (recital (89) of this Decision), withheld exculpatory passages from a document dated 31 July 1997 to prove the continuity of the infringement does not lead to a different conclusion. On the contrary, a fuller quotation of this mail of three pages in recital (89) shows that it reports the outcome of an anticompetitive meeting between Flexsys and Bayer, suggested also by the instruction "*Please destroy after reading!*". A quick glance at this document is sufficient to conclude that it is not based merely on its author's subjective impression and that Bayer indeed did signal, as Flexsys has explained, its willingness to join Flexsys in its future plans. It also reinforces the Commission's conviction that the cartel had only been in crisis, not terminated, after the failure of the 1996 price increase.

- (214) Against this background, the phenomenon of declining price levels in the period 1996-1998 is not inconsistent with continuation of the cartel, in contrast to what Crompton maintains. Apart from the price war within the cartel, such trends could also possibly be explained by a decrease in the raw material prices or other factors. It may well also be true that no agreements on prices were made in a certain period within the duration of the infringement. This does not, however, imply that the infringement was totally suspended or terminated with regard to all of its elements. Internal conflicts, rivalries and cheating may occur, or a tacit agreement may even exist that no changes to the status quo were achievable, but this will not prevent the arrangement from constituting an agreement/concerted practice for the purposes of Article 81(1) of the Treaty where there is a single common and continuing objective to restrict competition in a particular market, as in this case.
- (215) There is, moreover, a clear continuity of method and practice of the cartel scheme throughout the entire period of infringement. When the mutual trust between the participants was gradually re-established during the second half of 1997, the same undertakings continued to discuss the rubber chemicals market and plan further price increases which were also pursued in the following years (recitals (98) to (164)).
- (216) Finally, the anticompetitive contacts were not entirely suspended during the alleged silent period from late 1996 to late 1997/early 1998. Bayer, Crompton and Flexsys still met and spoke over the phone to exchange confidential information and to plan appropriate market strategies. Even if these contacts, as Crompton points out, “*for the main part*” expressed regret and recrimination about the failure of the cartel and unease about the market situation in general and were not related to future price increases, it is sufficient to recall what was said in connection with the legal characterisation of these contacts in recitals (190), (191) and (202) and the self-explanatory evidence cited therein (recitals (81) through (96)) to conclude that the cartel was not totally abandoned. Examples of exchanges of detailed information on prices and customers in late 1996 and in 1997 in bilateral contacts between Crompton, Bayer and Flexsys are cited, in particular in recitals (81)-(84), (89) and (91). Furthermore, Crompton has itself explicitly admitted having used the information it received from Flexsys in 1997 to form its own pricing strategy at a particular customer.²⁹³ Even more flagrantly, Crompton has stated that in June 1997 “[...] *knew [...] was colluding with competitors in Europe*” (recital (93)), which as such is incompatible with absence of any cartel activity. The only conclusion the Commission can reach in these circumstances is that the infringement did not end during the

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File p. 10821, 10774.

alleged silent period, regardless of whether or not specific price agreements were entered into or applied.

- (217) For the sake of completeness, it must be observed that a cartel cannot be considered terminated, if the participants still meet and deal with the aftermath of the latest coordinated price increase and speculate on opportunities for future action on the market (see, in particular recitals (82)-(83), (88)-(89), (92)-(97)).
- (218) Whilst Crompton has not contested the facts as such and the contacts between the competitors during this alleged silent period, it claims that these activities did not pursue a continuing common economic objective, as during a price war the participants could not have sustained a single economic purpose. The Commission rejects this argument. The contacts between Bayer, Crompton/Uniroyal and Flexsys in the period from late 1996 until late 1997/early 1998 pursued the same common continuous objective of distorting the prices and restricting competition in the rubber chemicals sector. Even if they did not always fully succeed in achieving this aim, the overall will of the parties to regulate the rubber chemicals market by cartel arrangements never ceased to exist. In such context, a price war resulting from deviation from the cartel cannot be considered to put an end to the overall objective to restrict competition. If the parties truly wanted to quit the cartel around 1996 and 1997, complaints about the past and negotiations about the future would no longer have been necessary. It is also shown that these discussions gradually led to a concrete agreement to raise prices in 1998 (recital (98)).
- (219) It follows that, taken as a whole, the activities of the cartel formed part of an overall scheme which laid down the lines of the participants' action in the market and restricted their individual commercial conduct with the aim of continuously pursuing an identical anticompetitive object and a single economic purpose, namely to distort the normal movement of prices in the EEA and the world-wide market for rubber chemicals. The Commission therefore considers that 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 in reality a single infringement which manifested itself in a series of anti-competitive activities throughout the period of operation of the cartel.²⁹⁴
- (220) This characterization is not affected by the fact 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 and Article 53 of the EEA Agreement.²⁹⁵

²⁹⁴ Case T-13/89 *Imperial Chemical Industries v Commission* [1992] ECR II-1021, paragraphs 259-260.

²⁹⁵ Case, C-49/92 *Commission v Anic Partecipazioni* [1999] ECR I-4325, paragraph 81.

Accordingly, in this case the Commission considers that there is ample evidence to illustrate that Flexsys, Crompton/Uniroyal and Bayer committed a single, complex and continuous infringement affecting the world-wide and EEA markets of rubber chemicals.

10.2.4. Application to the behaviour of General Quimica

- (221) As regards General Quimica's involvement in the collusive arrangements in the period from October 1999 to 30 June 2000, it has been established and it remains undisputed that General Quimica attended meetings and participated in conversations in 1999 and 2000 during which its competitors disclosed their intentions to raise prices of certain rubber chemicals as of 1 January 2000 (recitals (166) and (167)), that it expressed its support for this price increase (recital (166)), or at least did not distance itself from the agreed price increase, and that it raised its prices following these contacts (recital (168)).
- (222) GQ's behaviour could be regarded as satisfying the requirements of an agreement. It remains unchallenged that during the contacts summarised in recital (221), GQ adhered to the agreement of Flexsys and Bayer by promising to follow their jointly prepared price increase or by not openly distancing itself from it.²⁹⁶ In so doing it expressed its intention to behave in a certain way and permitted the others to operate on the assumption that it would behave on the market as agreed during the contacts in which they participated. General Quimica must also have been aware that the purpose of these contacts was anticompetitive, as its competitors disclosed their intentions to raise prices and thereby sought to influence GQ's conduct on the market. Furthermore, the Commission has no indication that GQ adopted any action to distance itself from what was discussed during these contacts, as required by case law in order to relieve an undertaking of responsibility for an infringement (recital (178)). Hence, GQ has to be considered to be a party to this agreement, even if it did not fully abide by the outcome of the conversations with its competitors.
- (223) It has also been established that General Quimica took account of the information concerning its competitors' intentions to raise prices, as it took measures to implement the agreed price increase. This was done by giving instructions to its distributors and/or by negotiating with customers in order to obtain a price increase (recital (168)). Even if GQ did not strictly apply the proposed percentages or did not fully achieve the desired outcome, that does not alter the fact that it did implement the price increase at least partially. Indeed, implementation of target prices implies not that prices corresponding to the agreed

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In its reply to the Statement of Objections, GQ has specified that it was not aware of Uniroyal's involvement in this price increase.

price objective be applied, but merely that the parties endeavour to approach their price objectives.²⁹⁷ This is exactly what happened in GQ's case. In any event, the fact that GQ did not comply in full with the prices fixed does not mean that it therefore charged the prices that it would have been able to charge in the absence of the cartel.

- (224) While this kind of line of conduct consisting of anticompetitive meetings and the subsequent implementation of the understandings reached at those meetings can legitimately be regarded as evidence of an agreement, it could also be appropriately characterized as part of a concerted practice consisting of concertation with competitors prior to taking action on the market and the subsequent conduct on the market (for the legal principle, see recital (183)). It follows that even if the constitutive elements of an agreement were not present, the arrangements in question would still form a concerted practice contrary to Article 81 of the Treaty and Article 53 of the EEA Agreement.
- (225) In any case, considering what was stated above in recital (193), it is not necessary for the Commission to characterise conduct as exclusively one or other of these forms of illegal behaviour, once it has been established that these different forms of infringement shared a common objective, which in this case was manifestly to restrict competition and distort the normal movement of prices in the rubber chemicals market. Hence, it must be concluded that the infringement committed by General Quimica during the period from October 1999 to June 2000 presents all the characteristics of an agreement and/or concerted practice in the sense of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

10.3. Restriction of competition

10.3.1. Object

- (226) Article 81(1) of the Treaty and Article 53 (1) of the EEA Agreement expressly include as restrictive of competition agreements and concerted practices which²⁹⁸:
- (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.
- (227) Specifically, the fixing of a price, even one which merely constitutes a target, affects competition because it enables all the participants in a

²⁹⁷ Case T-224/00, *Archer Daniels Midland Company and others v Commission of the European Communities*, paragraphs 160 and 271.

²⁹⁸ The list is not exhaustive.

cartel to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be.²⁹⁹ More generally, such cartels involve direct interference with the essential parameters of competition on the market in question.³⁰⁰ By expressing a common intention to apply a given price level for their products, the producers concerned cease to determine independently their policy in the market and thus undermine the concept inherent in the provisions of the Treaty relating to competition.³⁰¹

- (228) The characteristics of the horizontal arrangements under consideration in this case constitute essentially price fixing, of which agreeing upon percentage price increases is a typical example. By planning common action on price initiatives with price increases, the undertakings aimed at eliminating the risks involved in any unilateral attempt to increase prices, notably the risk of losing market share. Prices being the main instrument of competition, the various collusive arrangements and mechanisms adopted by the producers were all ultimately aimed at inflating prices for their benefit and above the level which would be determined by conditions of free competition.
- (229) Price fixing by its very nature restricts competition within the meaning of both Article 81 of the Treaty and Article 53 of the EEA Agreement.
- (230) The **anticompetitive object of the parties** is also shown by the fact that Bayer, Uniroyal/Crompton and Flexsys took explicit action to conceal their meetings and to avoid detection of their agreements and documents. In practice, this is seen, for example, in several documents in the Commission's file instructing the reader to destroy the document after reading (e.g. recitals (72), (89), (135), (142)), as well as in Bayer's attempts to disguise certain discussions behind apparently legitimate agreements (recital (104)).
- (231) Regarding the anti-competitive object of the exchanges of confidential information and the other contacts with an anticompetitive purpose identified in recitals (81), (82)-(84), (88), (100)-(103) the arrangement has to be seen in its context and in the light of all the circumstances. These 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.

²⁹⁹ Case 8/72 *Vereeniging van Cementhandelaren v Commission* [1972] ECR 977, paragraph 21.

³⁰⁰ Case T-141/94 *Thyssen Stahl v Commission* [1999] ECR II-347, paragraph 675.

³⁰¹ Case T-311/94 *BPB de Eendracht v Commission* [1998] ECR II-1129, paragraph 192.

- (232) Hence, the complex of agreements and/or concerted practices, as described in part D of this Decision, had as its object the restriction of competition within the meaning of Article 81 of the Treaty and Article 53 of the EEA Agreement.

10.3.2. *Effect*

- (233) It is settled case-law that for the purpose of application of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement there is no need to take into account the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved.³⁰²
- (234) It follows that, in this case, violation of Article 81 of the Treaty and Article 53 of the EEA Agreement occurred even when certain price increases agreed upon between the competitors did not prove successful or were not even implemented. This applies, for instance, to the failed price increase of 1 January 1996 (recital (78)) and the one foreseen for 1 October 1998 but abandoned before announcement to customers (recital (99)).
- (235) Furthermore, even if the parties perceived the final outcome of some of the price increases as failure, this does not necessarily imply that they produced no effect on the market. It is quite normal that a leader of a price increase loses some market share, which is a risk that the undertaking in question voluntarily assumes in collusive situations like those in question in these proceedings. In this case, by taking turns in leading the price increases implemented in 2000 and 2001, Bayer, Crompton/Uniroyal and Flexsys could level out some of these risks and losses. Moreover, a partially implemented or a short-term price increase also affects prices and harms consumers, even when such effect is felt for a shorter period of time than planned and desired by the participants. If the precise price increase targets were not always entirely achieved, they still had some effect on the way in which the cartel members approached negotiations with customers and thus at least some effect on prices achieved, which is also compatible with Bayer's description in recital (64).
- (236) The following elements show that most of the collusive price increases which are the subject of this Decision were effectively implemented and had anti-competitive effects on the market:
- (a) the coordinated price increases taking effect in 1996, 1999, 2000 and 2001 were actually implemented by sequential announcements to customers (recitals (75)-(76), (112)-(114), (125)-(127), (150)-(152));

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

- (b) the price increase of 1 January 2000 was successfully implemented in the negotiations with customers following the announcements (recitals (120), (168));
 - (c) the price increase of 1 July 2000 was at least partially accepted by the customers (recitals (131), (134)-(138));
 - (d) the price increase of 1 July 2001 held for certain products albeit for a shorter period than planned (recitals (155)- (163)).
- (237) Hence, in this case, the Commission considers that, on the basis of the elements which are put forward in part D , it has also proved that the cartel arrangements produced actual anti-competitive effects on the market.

10.4. Article 81(3)

- (238) The provisions of Article 81(1) of the Treaty may be declared inapplicable under Article 81(3) in the case of an agreement or concerted practice which contributes to improving the production or distribution of goods or to promoting technical or economic progress, provided that it allows consumers a fair share of the resulting benefit, does not impose restrictions that are not indispensable to the attainment of those objectives and does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.
- (239) Restriction of competition being the sole object of the naked price fixing arrangements which are the subject of this Decision, there is no indication that the agreements and concerted practices between the rubber chemicals producers entailed any efficiency benefits or otherwise promoted technical or economic progress. In any event, none of the parties has claimed that the conditions of Article 81(3) were met. Hardcore cartels, like the one which is the subject of this Decision, are indeed, by definition, the most detrimental restrictions of competition that benefit only the participating producers, not consumers.
- (240) Accordingly, the conditions for exemption provided for in Article 81(3) are not met in this case and the prohibition imposed by Article 81(1) remains fully applicable.

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

- (241) According to the case-law of the Court of Justice "in order that an agreement between undertakings may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States". In any event, whilst

Article 81(1) of the Treaty "does not require that provisions have actually affected trade between Member States, it does require that it be established that the agreements are capable of having that effect".³⁰³

- (242) Furthermore, the application of Article 81 of the Treaty and Article 53 of the EEA Agreement to a cartel is not restricted to the part of sales by participants in the cartel which actually involve a physical transfer of goods from one Member State or EEA Contracting Party to another, nor is it necessary to demonstrate that the individual participation of each of the cartel members, as opposed to the cartel as a whole, affected trade between Member States or EEA Contracting Parties.³⁰⁴
- (243) As explained in recital (45), it is a feature of the rubber chemicals market that there is a substantial volume of trade between Member States and between EEA Contracting Parties. Hence, the complex of agreements and concerted practices between the cartel members had an appreciable effect on this trade.
- (244) In this case, the cartel arrangements covered virtually all trade throughout the Community and EEA. The existence of a price-fixing mechanism must have resulted, or was likely to result, in the automatic diversion of trade patterns from the course they would otherwise have followed.³⁰⁵

11. ADDRESSEES

11.1. General principles

- (245) Measures enforcing the Community and EEA competition rules should be addressed to a legal entity. Despite the fact that Article 81 of the Treaty and Article 53 of the EEA Agreement are applicable to undertakings, and the concept of undertaking has an economic scope, only entities with legal personality can be liable for their infringement.³⁰⁶ It is accordingly necessary to define the undertaking that is to be held accountable for the infringement of Article 81 by identifying one or more legal persons to represent the undertaking.

³⁰³ See Case 56/65 *Société Technique Minière* [1966] ECR 282, paragraph 7; Case 42/84 *Remia and Others* [1985] ECR 2545, paragraph 22 and Joined Cases T-25/95 and others, *Cimenteries CBR* [2002] ECR II-491. See also Case C-306/96 *Javico* [1998] ECR I-1983, paragraphs 16 and 17; and Case T-374/94 *European Night Services* [1998] ECR II-3141, paragraph 136.

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

³⁰⁵ See Joined Cases 209 to 215 and 218/78 *Van Landewyck and others v Commission* [1980] ECR 3125, at paragraph 170.

³⁰⁶ 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 applying and enforcing decisions to identify an entity possessing legal or natural personality to be the addressee of the measure. Case T-305/94, *PVC*, [1999] ECR, p. II-0931, paragraph 978.

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”. If a subsidiary does not determine its own conduct on the market independently, its parent forms a single economic entity with the subsidiary, and may be held liable for an infringement on the ground that it forms part of the same undertaking.

- (246) Parent companies can be considered liable for the infringements of Article 81 committed by their subsidiaries, when the latter are not able to autonomously determine their behaviour on the market.³⁰⁷ According to established case-law, when a parent company owns the totality (or almost the totality) of the shares of a subsidiary, at the time the latter commits an infringement to Article 81, it can be presumed that the subsidiary follows the policy laid down by the parent company and thus does not enjoy such an autonomous position.³⁰⁸
- (247) Any presumption of decisive influence in cases of wholly owned subsidiaries remains rebuttable. However, it is up to the party wishing to rebut the presumption to produce sufficient evidence to support such a rebuttal. General assertions unsupported by convincing evidence are not sufficient in this regard. To rebut the presumption it must be shown either that the parent company was not in a position to exert a decisive influence on its subsidiary's commercial policy, or that the subsidiary was autonomous (i.e., that the parent company, although being in a position to exert decisive influence, did not actually exert it as regards the basic orientations of the subsidiary's commercial strategy and operations on the market).

11.2. Liability in this case

- (248) It has been established in Part D that during the periods identified in recital (265) below, the following undertakings were directly involved in the infringement:

– Flexsys N.V.

³⁰⁷ Case 48/69 *Imperial Chemical Industries v. Commission*, judgment of 14 July 1972, [1972] ECR 619, paragraphs 132-133; case 170/83 *Hydrotherm* [1984] ECR 2999, at par. 11; case T-102/92, *Viho v. Commission* [1995] ECR II-17, at par. 50.

³⁰⁸ Case 107/82 *AEG v Commission* [1983] ECR 3151, at paragraph 50; Case C-310/93P, *BPB Industries & British Gypsum v. Commission* [1995] ECR I-865, at par. 11; Case T-354/94 *Stora Kopparbergs Bergslags AB v Commission*, [1998] ECR II-2111, at paragraph. 80; Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *LVM and others v. Commission* (PVC II), [1999] ECR II-931, at paragraphs 961 and 984; Case T-203/01 *Michelin v Commission*, [2003] ECR II-4371 at paragraph 290; Joined cases T-71, 74, 87 and 91/03 *Tokai Carbon Co. Ltd and others v Commission*, judgment of 15 June 2005 (not yet published) at paragraphs 59-60).

- Bayer AG
- Crompton Corporation (now Chemtura), Uniroyal Chemical Company Inc (now Crompton Manufacturing Company, Inc.), and Crompton Europe Ltd (former Uniroyal Chemical Ltd)
- General Quimica SA.

(249) In order to identify the appropriate addressees of this Decision and to establish the liability for the infringement within each undertaking, the following specifications must be made in respect of Crompton/Uniroyal and General Quimica.

Crompton/Uniroyal (now Chemtura)

(250) In the case of the Crompton/Uniroyal group, two periods must be distinguished. As regards the period preceding the acquisition of Uniroyal by Crompton on 21 August 1996 (i.e. from 1 January 1996 to 20 August 1996), this Decision should be addressed to Uniroyal and its wholly-owned sales subsidiary Crompton Europe (formerly Uniroyal Chemical). While certain individuals (Messrs. [...],[...]) who participated in the cartel meetings in 1995 and 1996 (recitals (73) and (75)) were employees of the parent company Uniroyal, they were based at the subsidiary's premises in the United Kingdom and gave direct instructions to the employees of the subsidiary with regard to the pricing of rubber chemicals. Both of these entities were thus implicated in the infringement within a single economic unit that was responsible for the production and/or sale of rubber chemicals in Europe. Clearly, the subsidiary did not decide independently but essentially carried out the instructions of its parent company. These entities must therefore bear joint and several liability for the infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement.

(251) The second relevant period concerning the liability within the Crompton/Uniroyal group runs from 21 August 1996 when Crompton acquired 100% control of Uniroyal which, in turn, retained 100% ownership in Crompton Europe (recitals (19)-(20)). Since that acquisition, Uniroyal has continued to exist as a separate legal person which has been active in the rubber chemicals business under the effective control of Crompton, as is apparent from the management links and reporting structures between these entities, explained by Crompton. Based on these elements, there is no doubt that, for the purposes of application of Article 81 of the Treaty and Article 53 of the EEA Agreement, Crompton, Uniroyal and Crompton Europe have, since 21 August 1996, formed a single economic unit (that is to say, a single undertaking) which was ultimately managed by Crompton.

- (252) Furthermore, it has been established in Part D of this Decision that each of these entities has been directly involved in the cartel activities, with employees from each of them participating in the collusive contacts and implementing the cartel decisions at times. While most of these contacts involved Uniroyal's employees, Crompton Europe's direct participation is apparent, among others, from recitals (73), (78), (112), (118), (131), (133), (142), (152), (155), (159) and (162), and the parent company Crompton's direct participation, for instance, from recitals (82), (110), (116), (123), (131), (135), (145) and (146). Crompton's executives also gave direct instructions, for instance, to the Uniroyal [...] for rubber chemicals (Mr. [...]) to meet with competitors.³⁰⁹ Uniroyal's executives, in turn, informed Crompton Europe's key individuals of their contacts with competitors, and vice versa.³¹⁰
- (253) Under these circumstances, the Commission considers it appropriate to hold Uniroyal and Crompton Europe jointly and severally liable for the period from 1 January 1996 until 31 December 2001. As Crompton joined this undertaking only on 21 August 1996, it should be held jointly and severally liable for the infringement with Uniroyal and Crompton Europe for the period from 21 August 1996 until 31 December 2001. The Decision should therefore be addressed to Uniroyal, Crompton Europe and Crompton.

General Química/Repsol Química/Repsol YPF

- (254) General Química is a wholly-owned subsidiary of Repsol Química which, in turn, is wholly-owned by Repsol YPF (hereafter also referred to collectively as "Repsol"). Based on the 100% ownership and the human link created by the "Administrador unico" between GQ and Repsol Química, the Commission considered Repsol to be liable for GQ's conduct and addressed the Statement of Objections to all three entities, stating that it considered them to be jointly and severally liable for the infringement.
- (255) Repsol and GQ have contested the attribution of liability, submitting that Repsol was neither involved in nor aware of GQ's behaviour and that GQ carried out its business in the rubber chemicals market as an autonomous entity.
- (256) For the purposes of attributing liability within a group of companies, a parent company can be presumed liable for the illegal conduct of its wholly-owned subsidiaries, unless it reverses the presumption of actual exercise of decisive influence over these subsidiaries. Such a presumption cannot be rebutted by alleging that the parent company did not encourage or impose the illegal behaviour upon its

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Crompton oral statement of 11 May 2004, p. 10821, as well as transcript p. 10744.

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Crompton oral statement of 11 May 2004, p. 10821, as well as transcript p. 10735-10737; 10744-10745.

subsidiaries. In fact, a parent company can be held liable for the conduct of its subsidiaries, if it exercised or is presumed to have exercised (and the presumption is not reversed) decisive influence over the general commercial policy of the latter (i.e. if the parent company determines or is presumed to have determined the basic orientation of the commercial strategy and operations of the subsidiary), regardless of whether such influence consisted specifically in encouraging the illegal behaviour or in imposing such behaviour upon the subsidiaries. For the same reasons, when the said presumption applies, the undertaking concerned cannot reverse it by simply stating that the parent company was not directly involved in or was not even aware of the cartel.

- (257) The contention that Repsol was not entrusted with the day-to-day business or the operational management of GQ is also not sufficient to reverse the presumption of its decisive influence over GQ. It is, in fact, not unusual that a parent company, having set up a wholly owned subsidiary for the carrying out of a certain activity, does not continue to remain involved in the daily management of that subsidiary. Similarly, lack of indications of collusive activities in official minutes of board meetings does not, as such, prove anything, since it would be very unlikely in practice that a company would reveal its illicit activities in any official minutes.
- (258) Repsol and GQ have also provided documents clarifying their relationships, the management structure and reporting requirements. According to them, GQ's annual business plan and sales objectives are not subject to approval by Repsol, and there were no overlaps in the management boards of Repsol and GQ during the period of the infringement. Repsol has also provided an explanation for the fact that GQ has been left alone to manage its commercial policy without interference from the parent company, since it acquired GQ as a necessary part of a larger package rather than for interest in its business and has since attempted to sell GQ several times without success. There are no industrial relationships, synergies or vertical overlaps between the activities of the parent and the subsidiary, as GQ manufactures products that are unrelated to Repsol's petrochemical activities, and Repsol does not supply raw materials to GQ or vice versa. Furthermore, for instance in 2004 GQ's turnover accounted for less than 0,2 % of Repsol's total turnover.
- (259) The Commission notes, however, that Repsol was the sole shareholder of GQ for quite a number of years, since 1994. It was, hence, in a position to gain knowledge of what was happening within GQ and could be assumed to do so based on the 100 % control and the overall responsibility relating thereto, including antitrust compliance. Repsol has provided documents showing that it has attempted to sell GQ's capital to a number of potential investors, including several competitors of GQ involved in the present case. However, even assuming that these attempted sales could demonstrate

that Repsol was not particularly interested in GQ's business, this does not mean that Repsol was not interested in exercising decisive influence over GQ to ensure that the goodwill and commercial value of GQ would not diminish during the period necessary to find an interested buyer.

- (260) The Commission further observes that attribution of liability for a subsidiary's market behaviour does not require that the parent company's business overlaps or is closely connected with the subsidiary's business. It is only normal that different activities and specialisations are assigned to different entities within a corporate group. In the same line of reasoning, lack of overlap in their respective management boards does not as such indicate GQ's autonomy, considering that it reported to Repsol Quimica on its sales, production and financial results, as is apparent from the documents submitted by Repsol.
- (261) Repsol has also submitted that the fact that GQ determined autonomously the prices of the products which Repsol Italia (its non-exclusive agent for Italy) would sell on the Italian market, shows that GQ acted autonomously and that its interests were divergent from those of Repsol. According to the Commission, however, the fact that GQ entered into an agency contract with Repsol Italia shows that there are vertical links between Repsol and GQ, contrary to what Repsol claims. Furthermore, the fact that GQ informed Repsol Italia of an increase in the price of its products, does not constitute evidence of a conflict of interests between GQ and its parent companies, because any increase in GQ's turnover resulting from a price increase of its products would also increase the turnover of Repsol.
- (262) Even though the "Administrador unico" has delegated the powers with regard to the operational management of GQ, he still acts as a link between GQ and Repsol Quimica, through whom information on sales, production and financial results are passed to the parent company. Furthermore, GQ's financial results are consolidated with those of the Repsol group, implying that its profit or loss, albeit marginal as compared to the total result of the group, are reflected in the profit or loss of the whole group. The Commission also further notes that Repsol Quimica and Repsol YPF jointly replied to the Statement of Objections.
- (263) Finally, the Commission points out that, contrary to what Repsol contends, the situation of Flexsys with regard to its parent companies is radically different from that of Repsol with regard to GQ. In the case of a joint venture, jointly owned by its parents (and over which none of the parents has de facto or de jure sole control) the joint venture can be presumed to be autonomous from its parent companies (i.e. can be presumed to constitute a separate undertaking with respect to its parents). In contrast, a parent company and its wholly owned

subsidiary (such as Repsol and GQ) can be presumed to form a single undertaking for the purpose of Article 81 of the Treaty.

- (264) In these circumstances, the Commission considers that Repsol Química and Repsol YPF SA have not rebutted the presumption of liability for GQ's behaviour. They should therefore be held jointly and severally liable for GQ's infringement.

11.3. Addressees in this case

- (265) Based on the foregoing, it has been established that the following companies have infringed Article 81 of the Treaty and Article 53 of the EEA Agreement as follows:
- Bayer AG, Crompton Manufacturing Company, Inc. (former Uniroyal Chemical Company Inc.), Crompton Europe Ltd., and Flexsys N.V., bearing liability from 1 January 1996 to 31 December 2001;
 - Chemtura Corporation (former Crompton Corporation), bearing liability from 21 August 1996 to 31 December 2001;
 - General Química SA, Repsol Química SA and Repsol YPF SA: bearing liability from 31 October 1999 to 30 June 2000.

12. LIMITATION PERIODS AND DURATION OF THE INFRINGEMENT

12.1 Application of limitation periods

- (266) 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 only begins to run on the day the infringement ceases.³¹¹ 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.³¹²
- (267) In this case, the Commission investigation started with the surprise inspections pursuant to Article 14(3) of Regulation No 17 on 26 September 2002. Hence, for illegal conduct which ceased prior to 26 September 1997 no fines may be imposed.

³¹¹ Article 25(2) of Regulation No 1/2003.

³¹² Article 25(3) to (5) of Regulation No 1/2003.

12.2. Duration of the infringement

12.2.1. *Flexsys, Bayer and Crompton/Uniroyal*

- (268) Whilst there are a number of indications that collusive arrangements between the producers of rubber chemicals occurred already in the early 1970's, the exact date on which the infringement started can no longer be established with certainty. The Commission has sufficiently firm and convincing evidence of a continuous series of anticompetitive contacts involving Flexsys, Bayer and Uniroyal starting from the coordinated price increase of 1 January 1996 (recitals (68)-(79)). Although the parties already discussed this price increase in the course of the latter half of 1995, the precise starting point of these discussions for each party can no longer be ascertained. Hence, the Commission will in this case limit its assessment under Article 81 of the Treaty and the application of any fines to the period beginning on 1 January 1996, when the price increase was to become effective.
- (269) The duration for Crompton Corporation will be counted from 21 August 1996, when it acquired Uniroyal (recital (19)), it being understood that Uniroyal survived as a legal entity and continued to participate in the infringement as a wholly-owned subsidiary of Crompton.
- (270) With regard to the end date of the infringement, it is not possible to ascertain the exact date when the participants ended their collusive contacts and the cartel ceased to produce its effects. The last coordinated price increase of 1 July 2001 was to be applied until the end of the normal 6-month contract period, i.e. 31 December 2001.³¹³ While there is no evidence that Flexsys, Bayer or Crompton/Uniroyal explicitly withdrew from the cartel before the Commission's inspections on 26 September 2002, Flexsys was under an obligation to terminate its infringement by the time it applied for immunity without, however, raising the other parties' suspicions about its application and the Commission's subsequent investigation by an explicit withdrawal. In this specific case, it was unlikely that the cartel could go on without the market leader Flexsys, and even though there is no evidence that either Bayer or Crompton explicitly terminated their involvement, the Commission considers that it does not have sufficient evidence that the cartel lasted beyond the last coordinated price increase in 2001. Hence, the end date is established at 31 December 2001 for Flexsys, Bayer and Crompton.
- (271) Considering the corporate reorganisations that occurred during the period of the infringement, the duration of the infringement for Flexsys, Bayer and Crompton/Uniroyal is as follows:

³¹³

Note that since 1998, contracts in this industry have normally been negotiated for six months.

- Flexsys: from 1 January 1996 to 31 December 2001; i.e. six years.
- Bayer: from 1 January 1996 to 31 December 2001, i.e. six years;
- Crompton Manufacturing (including Crompton Europe): from 1 January 1996 to 31 December 2001; i.e. six years;
- Chemtura: from 21 August 1996 to 31 December 2001; i.e. five years and four months.

12.2.2. General Química

- (272) As it is no longer possible to establish the precise date of GQ's first anticompetitive contact with a competitor in early October 1999, GQ's participation in the infringement is deemed to have started on 31 October 1999. GQ's involvement is considered to have ended on 30 June 2000, this being the date until which the price increase of January 2000 was in principle valid.
- (273) It follows that the duration of the infringement for General Química, Repsol Química SA and Repsol YPF SA is from 31 October 1999 until 30 June 2000, i.e. eight months.

13. REMEDIES

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

- (274) Where the Commission finds that there is an infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement it may require the undertakings concerned to bring such infringement to an end in accordance with Article 7 of Regulation (EC) No 1/2003.
- (275) While it appears from the facts that in all likelihood the infringement effectively ended by the end of 2001, it is necessary to ensure with absolute certainty that the infringement has ceased.
- (276) 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 which might have the same or a similar object or effect.
- (277) The prohibition applies to all secret meetings and multilateral or bilateral contacts between competitors aimed at restricting competition between them or enabling them to concert their market behaviour.

13.2. Article 15(2) of Regulation No 17 and Article 23(2) of Regulation (EC) No 1/2003

- (278) Under Article 15(2) of Regulation No 17 and Article 23(2)(a) of Regulation No 1/2003³¹⁴, the Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently they infringe Article 81 of the Treaty and/or Article 53 (1) of the EEA Agreement. For each undertaking and association of undertakings participating in the infringement, the fine must not exceed 10% of its total turnover in the preceding business year.
- (279) In fixing the amount of any fine the Commission must have regard to all relevant circumstances and particularly the gravity and duration of the infringement.
- (280) In relation to each undertaking, the fine imposed for each infringement should reflect any aggravating or attenuating circumstances.
- (281) The Commission proposes to set fines at a level sufficient to ensure deterrence.

14. THE BASIC AMOUNT OF THE FINES

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

14.1 Gravity

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

14.1.1. Nature of the infringement

- (284) The infringement in this case consisted primarily of secret collusion between cartel members to fix prices in the EEA and elsewhere, supported by the exchange of confidential information. These kinds of horizontal restrictions are, by their very nature, among the most serious violations of Article 81 of the Treaty and Article 53 of the EEA Agreement.

14.1.2. The actual impact of the infringement

³¹⁴ 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 “the Community rules giving effect to the principles set out in Articles 85 and 86 [now Articles 81 and 82] of the EC Treaty [...] shall apply *mutatis mutandis*”. (OJ L 305/6 of 30 November 1994)

- (285) In its reply to the Statement of Objections and at the Oral Hearing, Crompton has brought forward elements to show that the cartel was overall “largely ineffective” and “largely unsuccessful”, claiming that the powerful customers could not be seriously harmed by any collusion in view of their means to suppress any attempts to raise prices to an unacceptable level for any length of time. In support of its arguments, Crompton submitted on 28 October 2005 an economic study, which concludes that price increases between 1998 and 2002 were largely ineffective as they could not be sustained primarily due to buyer power. Crompton therefore maintains that the gravity should be assessed at no higher level than serious, rather than very serious.
- (286) Based on the Commission’s findings in recitals (235) and (236) with regard to the implementation and the effects of the rubber chemicals cartel, Crompton’s argument must be dismissed. Its explanations are far from effective in demonstrating that the cartel could not have played any role in the setting and fluctuation of prices in the rubber chemicals market. It remains undisputed that the collusive practices of the rubber chemicals producers had some impact in the market, which Crompton implicitly admits by claiming that the cartel was “largely”, and not entirely, ineffective. The fact that, in spite of the cartel’s efforts, the results sought by the participants were not entirely achieved, or the price increases could not be sustained, may illustrate the difficulties encountered by the parties in increasing prices in a specific market situation, but it does not prove in any way that the cartel had no effect on the market, nor that prices were not kept above competitive level at least for some period of time.
- (287) True, increases in raw material costs and other factors may cause industry-wide price increases, but it has been uncontestably established by the facts in this case that the price increases were preceded by contacts between the producers who agreed on simultaneous or sequential percentage price increases once or twice a year during the period 1996-2001, except for 1997. Whilst it is not possible to measure precisely to what extent prices would have changed in the absence of collusion, what can be said, however, is that with regard to the EEA, the cartel arrangements were at least partially implemented and such implementation did have some impact (for references, see recital (236)). This conclusion is not weakened by the fact that some of the price increase attempts failed, as it has been established that the rubber chemicals cartel members expressed their satisfaction on several occasions regarding the success of price increases (see recitals (120), (138), (159)). There are also concrete examples in the file demonstrating how certain customers accepted to pay higher prices (recitals (131) and (157)).
- (288) If on some occasions the prices of specific companies did not follow the intended trend, this does not reduce the gravity of the infringement because the actual impact of the infringement should be assessed by taking into account its effect on the relevant market as a

whole. General Quimica's contention that its actual price increase in 2000 was smaller than that agreed with the competitors must therefore also be dismissed. As to its further claim that its fine should be reduced on the ground that its participation had only a minimal effect, or no effect at all, due to its small size compared to the other participants, the Commission observes that the effect of the cartel must be assessed for the cartel as a whole and not separately for each participant. GQ's size will be appropriately taken into account in the relative weightings of the undertakings based on their respective market shares and claims concerning non-implementation will be assessed in connection with attenuating circumstances.

(289) Furthermore, it must be highlighted that irrespective of the Commission's finding that the infringement had a restrictive effect, the fact that it had a restrictive object which was intrinsically very serious must, in any event, be a more significant factor in the Commission's categorisation of the infringement as very serious than factors relating to its effects. The effect which an agreement or concerted practice may have had on normal competition is not a conclusive criterion in assessing the proper amount of the fine. As confirmed by case law, factors relating to the intentional aspect, and thus to the object of a course of conduct, may be more significant than those relating to its effects, "*particularly where they relate to infringements which are intrinsically serious, such as price-fixing and market-sharing*".³¹⁵

(290) Based on the foregoing, the Commission's conclusion is that the arrangements, in so far as they pertained to the EEA market, were at least partially implemented and did have an impact on the market even where this impact was weaker or shorter than intended by the participants. Consequently, the gravity of the infringement cannot be assessed at a lesser level than very serious in this regard.

14.1.3. The size of the relevant geographic market

(291) The rubber chemicals cartel was essentially a world-wide cartel. The infringement covered the whole of the common market and, following its creation, most of the EEA.

14.1.4. Conclusion on the gravity of the infringement

(292) Taking into account the nature of the infringement committed and the fact that it covered the whole of the common market and, following its creation, most of the EEA, the Commission considers that the addressees have committed a very serious infringement of Article 81

³¹⁵ Case T-141/94 *Thyssen Stahl v Commission* [1999] ECR II-347, paragraphs 635-636. See also cases T-241, *SAS v Commission*, 18 July 2005, in particular paras 84, 85, 130 and 131; T-49/02 to T-51/02, *Brasserie nationale a.o. v Commission*, 27 July 2005, paras 178 and 179; T-38/02, *Groupe Danone v Commission*, 25 October 2005, in particular paras 147, 148 and 152.

of the Treaty and 53 of the EEA Agreement. In the Commission's view, these factors are such that the infringement must be regarded as very serious, even if the actual impact of the infringement cannot be measured.

14.2. Differential treatment

14.2.1 World-wide approach to relative weighting

- (293) Within the category of very serious infringements, the scale of likely fines makes it possible to apply differential treatment to undertakings in order to take account of differences in their effective economic capacity to cause significant damage to competition. For this purpose, the undertakings concerned can be divided into different categories, established according to their relative importance in the relevant market. The fact that the Commission has the power to impose sanctions only within the EEA does not preclude it from taking into consideration worldwide turnover derived from sales of the relevant product in order to evaluate the economic capacity of the members of the cartel to harm competition within the EEA.
- (294) In this case, the relative weight of the undertakings concerned varies depending on whether the relevant geographic area, within which the market share of each undertaking is measured, is considered to be global or EEA-wide. This is particularly relevant in Chemtura's case, as it is the third largest player in the world-wide market but a less significant player in the EEA market.
- (295) In their replies to the Statement of Objections, GQ, [...] and [...] have pleaded for the world-wide market shares to be taken into account in the calculation of the fines, reflecting the global geographic scope of the rubber chemicals business.
- (296) Crompton, in turn, has contended that the geographic dimension should be confined to EEA, asserting essentially that the cartel was not organised on a worldwide basis and that, in the absence of geographic market allocation and in view of Crompton's limited imports to EEA, competitive reserves were not withheld from the EEA market. Crompton's European production plant alone, the argument goes, constituted its competitive potential in the EEA and capacity to affect this market as there is no factual link between such capacity and global presence, and significant over-capacity and decreasing customer demand in Europe precluded the need for imports. In support of these arguments Crompton submitted, on 28 October 2005, an economic study concluding that market conditions in the United States did not constrain those in Europe, *inter alia* because prices in the United States were substantially above prices in Europe for almost all the period 1996-2002 making it unprofitable to import rubber chemicals from the United States to Europe. Crompton claims, therefore, that even if the global market was retained as the

relevant geographic scope of the rubber chemicals business, the Commission should, in this case, take into account only Crompton's market share in the EEA. Such an approach would, in Crompton's view, be justified by the principle of proportionality and equal treatment as set forth in case law.³¹⁶

(297) Crompton's argument that the cartel was not organised on a worldwide-basis is not supported by the facts. It is undisputed – and even explicitly stated by Crompton³¹⁷ – that contacts between the rubber chemicals producers took place on a global basis. Even though the scope of the cartel varied from European to world-wide during the period of its existence, most of the price increases agreed between the competitors were global, i.e. those of 1996 (recital (68)), July 2000 (recital (121)) and July 2001 (recital (143)). In fact, only one of the price increases that were finally implemented on the market was limited to Europe, i.e. that of January 2000 (recital (105)). Even then, the European price increase was only the first step in the global increase of July 2000, and it was agreed upon with the aim of bringing the then lower European prices closer to the prevailing US prices before the global price increase was undertaken (recital (107)). The only other known price increase agreement that was limited to Europe, albeit not finally implemented, was made in 1998 also with the intention to raise the price around the world (see recital (98)). The objective of the cartel was therefore clearly to control the world-wide market for rubber chemicals, which is also confirmed by Bayer's non-contested statement cited in recital (100). It is, hence, both legitimate and necessary to conclude that the rubber chemicals cartel was essentially a world-wide cartel.³¹⁸

(298) With regard to the territorial dimension of the rubber chemicals business, it must be observed that if the rubber chemicals business was truly regional so that a regional price increase could not have been undermined by cheaper imports from elsewhere, it is difficult to see why the parties would have agreed on global price increases and made efforts to harmonise prices in different regions.

(299) While Crompton submits that it does not import significant volumes of rubber chemicals to Europe and that its competitive potential in the EEA is limited to its European production plant, it does not contest that some imports occur, as also confirmed by the Eurostat data cited in recital (42). It is impossible to measure precisely to what extent such imports could have grown during the infringement period, if collusive price increases were not implemented outside the EEA. The fact is that by adhering to the collusive price increases, Crompton

³¹⁶ Crompton refers, in particular, to Joined cases T-236/01, T-239/01, T-244/01, T-246/01, T-251/01 and T-252/01, *Tokai Carbon Co. Ltd and Others v Commission*, paragraph 219 et seq.; and T-224/00, *ADM v Commission*, paragraph 204-205, 207 et seq.

³¹⁷ Crompton oral statement of 8.10.2002: transcript section 6.12, p. 3-4.

³¹⁸ See e.g. paragraphs 6 and 260 of the Statement of Objections.

deliberately gave up one of the most important parameters of competition, namely the acquisition of additional market share in Europe, by reducing its prices. If Crompton had not taken part in the price-fixing cartel, it would have been free to set its price policy without any commitment to its competitors, and therefore to sell below the prices fixed by the cartel and so increase its market share in Europe.³¹⁹ In the same line of reasoning, the Commission does not consider that the fact that Crompton's EEA turnover in rubber chemicals in 2001 was some [...] of its worldwide sales of rubber chemicals would warrant a different approach in its case with regard to the other participants.

- (300) Unlike Crompton appears to suggest, geographic market allocation is not required to retain the global market as the reference area in the determination of the relative weight of the undertakings concerned.³²⁰ Indeed, even in the absence of geographic market allocation in the rubber chemicals cartel, global price increases likely had the effect of keeping competitive potential out of the European market to which cheaper products could otherwise have been imported from elsewhere to increase competition. In this respect, the Commission notes, in particular, that the arrangements at the global level harmed consumers in the EEA not only because the European producers agreed in those arrangements to increase prices in the EEA, but also because they were able to do so without having to fear competition from cheaper imports. The price increases in the other parts of the world thereby contributed to the overall effectiveness of the agreed price increases in the EEA.
- (301) Based on the foregoing, the Commission considers that there are no compelling reasons to treat Crompton any differently than the other cartel members for the purposes of determining their relative weight within the affected market. Given the circumstances of this case, in particular the fact that the cartel itself was essentially world-wide and its object was to control prices globally and the way in which competitive reserves were thus withheld from the EEA market by potentially reducing the flow of otherwise cheaper imports into the EEA, the undertaking's world-wide product turnover provides a precise estimation of each company's relative capacity and contribution to the overall damage caused to competition in the EEA. Moreover, the world-wide product turnover of any given party to the cartel also gives an indication of its contribution to the effectiveness of the cartel as a whole or, conversely, of the instability which would have affected the cartel had it not participated. The case law cited by Crompton indeed requires that the Commission rely on the turnovers

³¹⁹ This way also Court of First Instance in *Specialty Graphite* (T-71/03), paragraph 188.
³²⁰ See *Specialty Graphite* (T-71/03), paragraph 194.

in the market affected by the infringement, which in this case is the world-wide market for rubber chemicals.³²¹

14.2.2 *Classification of the undertakings concerned*

- (302) As the basis for the comparison of the relative importance of an undertaking in the markets concerned, the Commission considers it appropriate to take in this case the respective world-wide product market shares. In order to determine the individual weight of participants in the infringement, the global market shares in 2001, the last full year of the infringement, will be used. Based on the arguments set forth by Crompton and Bayer, the Commission takes into consideration that the product scope of the cartel covered antiozonants, antioxidants and primary accelerators. This will be reflected in the lower EEA-market value which will be used as an element in the calculation of the starting amounts of fines. However, in the determination of the relative weight of the parties the Commission relies on the global market shares for all rubber chemicals as estimated in paragraph 48 of the Statement of Objections and not contested by the parties. Except for Flexsys, which receives immunity from fines, these market shares are more favourable to each addressee as a basis for the calculation of the starting amount than the case in which the Commission were to take into account, for such calculation, the turnover achieved by each of the addressees for antioxidants, antiozonants and primary accelerators.³²² Flexsys was the largest market operator in the world, with a market share of approximately [20-30] %. It is therefore placed in a first category. Bayer, with a market share of approximately [10-20] %, is placed in a second category. Crompton, with a market share of approximately [10-20] %, is placed in a third category. Finally, General Quimica, with a market share of approximately [0-10] %, is placed in a fourth category. The starting amounts will be fixed proportionally, albeit not arithmetically, having regard to the market shares.
- (303) Whilst the Commission measures the relative weight of the undertakings based on their global market shares, in setting the starting amounts it also takes into account the significance of the rubber chemicals sector in the EEA. The estimated value of the relevant rubber chemicals sales in the EEA in 2001, the last full year of the infringement, was approximately EUR 200 million. In this

³²¹ Crompton refers, in particular, to Joined cases T-236/01, T-239/01, T-244/01, T-246/01, T-251/01 and T-252/01, *Tokai Carbon Co. Ltd and Others v Commission*, paragraph 219 et seq.; and T-224/00, *ADM v Commission*, paragraph 204-205, 207 et seq.

³²² The parties' own data of their global turnover for antioxidants, antiozonants and primary accelerators were as follows: Flexsys EUR [250-300] million, Bayer EUR [150-200] million, Chemtura EUR [100-150] million and GQ EUR [0-50] million. As the size of Flexsys, the largest producer, is smaller compared to the other producers for those three product categories than for all rubber chemicals, this would lead to higher relative importance of the other addressees, regardless of the estimated size of the total market.

context, it is also noteworthy that if a certain producer sells only a limited category of rubber chemicals, which is the case of General Quimica producing only certain primary accelerators and TMQs, this will be reflected in the lower relative market share within the larger product category and thus ultimately in a lower relative amount of the fine.

(304) On this basis, the appropriate starting amounts for those undertakings that will receive a fine are as follows:

- First category: Flexsys EUR 38 million;
- Second category: Bayer EUR 23 million;
- Third category: Chemtura,
Crompton Manufacturing and Crompton Europe EUR 17 million;
- Fourth category: General Quimica,
Repsol Quimica and Repsol YPF EUR 3 million.

14.3. Penalties imposed in other jurisdictions

(305) In so far as Crompton relies on the penalties imposed in other jurisdictions, referring apparently to the settlements concluded in North America, those settlements do not in any way alter the gravity of the infringement in the EEA and cannot therefore be taken into consideration as attenuating circumstances either.³²³ The Commission also recalls that the fines imposed by the authorities of third countries are in respect of violations of their competition law, and there is no overlap with the jurisdiction of the Commission to fine undertakings for violations of EEA competition law.

(306) Similarly, payments of damages in civil law actions which have the objective of compensating for the harm caused by cartels to individual companies or consumers cannot be compared with public law sanctions for illegal behaviour. Damage claims by injured customers are thus a normal consequence of illegal behaviour and the Commission cannot take into account, for the benefit of Crompton, the damages paid, or to be paid, to customers in the United States and Canada because of the losses sustained on those markets.

(307) Finally, as to Crompton's world-wide product turnover, it has already been explained that world-wide product turnover is taken into account when deciding on differential treatment of undertakings participating in a global cartel, which in no way implies that the undertakings are being penalised twice for the same behaviour. In this respect, it is also noteworthy that even if the relative weighting between the

³²³

T-236/01 Tokai Carbon (Graphite Electrodes), paragraph 348.

undertakings concerned is based on their worldwide market shares, the starting amounts of the fines are based on the sectoral EEA market value indicated in recital (303).

14.4. Sufficient deterrence

(308) Within the category of very serious infringements, the scale of likely fines also makes it possible to set the fines at a level which ensures that they have sufficient deterrent effect, taking into account the size of each undertaking.

(309) Crompton maintains that there is no need to increase its fine for the purpose of deterrence, *inter alia*, because it has already taken measures to prevent future cartel violations, such as antitrust compliance programme and termination of the employment of key individuals involved in the rubber chemicals cartel, and it has been fined and faced with numerous civil actions in North America.

(310) The Commission rejects Crompton's claim. It is impossible for the Commission to know how effective the measures taken by Crompton will prove to be in preventing cartel infringements in the future. In general, the Commission considers that each separate infringement merits a separate fine, which should be proportionate to the size of the undertaking in order to be effective. Imposing a sufficiently high fine on large undertakings for each separate infringement they commit deters future violations. There is no reason to decide that a lower fine should be imposed on Crompton than is justified by its size. Moreover, as has been explained in recital (306) fines and civil liabilities in other jurisdictions are legal consequences of illegal behaviour, and as such they do not affect the need for the Commission to ensure deterrence in respect of future violations of the competition rules.

(311) In this respect, the Commission notes that in 2004, the most recent financial year preceding this Decision, the total turnovers of the undertakings were as follows: Bayer EUR 29 billion; Crompton approximately EUR 2 billion; Flexsys approximately EUR 425 million, and Repsol YPF EUR 41.7 billion. Accordingly, the Commission considers it appropriate to multiply the fine for Bayer by 2 and for Repsol by 2,5.

(312) As a result, the starting amounts of the fines to be imposed on each undertaking become as follows:

- Flexsys EUR 38 million;
- Bayer EUR 46 million;
- Chemtura, Crompton
Manufacturing and Crompton Europe EUR 17 million;

- General Quimica, Repsol Quimica and Repsol YPF EUR 7.5 million.

14.5. Increase for duration

(313) As regards duration, Flexsys, Bayer and Uniroyal (including Crompton Europe) committed an infringement of six years, i.e from 1 January 1996 to 31 December 2001, whereas for Crompton Corporation, the parent company of Uniroyal, the duration is five years and four months, i.e. from 21 august 1996 to 31 December 2001. All of these undertakings committed an infringement of long duration. The starting amounts of the fines should consequently be increased by 10 % for each full year of infringement. They should be further increased by 5 % for any remaining period of 6 months or more but less than a year. This leads to a percentage increase of the starting amount for each undertaking as follows:

- Flexsys: 60%;
- Bayer: 60%;
- Crompton Manufacturing and Crompton Europe: 60%;
- Chemtura: 50%.

(314) General Quimica committed an infringement of eight months, i.e. from 31 October 1999 until 30 June 2000. Its infringement amounting to less than one year, no increase will be applied to the fine to be imposed on it.

14.6. Conclusion on the basic amounts

(315) The basic amounts of the fines to be imposed on each undertaking are therefore as follows:

- Flexsys: EUR 60.8 million;
- Bayer: EUR 73.6 million;
- Crompton Manufacturing and Crompton Europe: EUR 27.2 million;
Of which Chemtura: EUR 25.5 million;
-
- General Quimica, Repsol Quimica and Repsol YPF: EUR 7.5 million.

(316) It must be further specified that, of the total amount of the fine to be imposed on Crompton/Uniroyal, Crompton Corporation's liability should be limited in function of its time as the parent company of the

Crompton/Uniroyal group, i.e. since 21 August 1996. Accordingly, Crompton Corporation should be liable for EUR 25.5 million.

15. AGGRAVATING AND ATTENUATING CIRCUMSTANCES

15.1. Aggravating circumstances

(317) The Commission has not found any aggravating factors in this case.

15.2. Attenuating circumstances

15.2.1. Passive and/or minor role

(318) General Quimica and Crompton have invoked attenuating circumstances for their minor and/or passive role in the cartel.

(319) In general, the Commission admits that an exclusively passive or "follow-my-leader" role played by an undertaking in the infringement may, if established, constitute an attenuating circumstance. A passive role implies that the undertaking will adopt a 'low profile', that is to say not actively participate in the creation of any anti-competitive agreements.³²⁴ 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,³²⁵ and also the existence of express declarations to that effect made by representatives of other undertakings which participated in the infringement.³²⁶ In any event, it is necessary to take account of all the relevant circumstances in each particular case.

General Quimica/Repsol Quimica/Repsol YPF

(320) It is clear from the facts described in recitals (166)-(168) that General Quimica's involvement in the cartel was not comparable to that of the active members Flexsys, Bayer and Crompton. There is no evidence that it actively participated in the creation of any anti-competitive agreements. Rather, the evidence shows that its involvement was limited to being informed about and accepting the agreements or decisions reached by the others. GQ did not participate in the significant multilateral meetings in which the idea of the coordinated price increase of January 2000 was developed between Flexsys, Bayer and Crompton/Uniroyal (recital (106)). Indeed, it may well be that

³²⁴ Case T-220/00 *Cheil Jedang v. Commission*, ECR 2003, p II-02473, paragraph 167.

³²⁵ Case T-311/94 *BPB de Eendracht v Commission* [1998] ECR II-1129, paragraph 343.

³²⁶ Case T-317/94 *Weig v Commission* [1998] ECR II-1235, paragraph 264.

GQ was invited to join the cartel because it was regarded as a nuisance in the market.³²⁷

- (321) It is equally apparent that GQ's participation in the collusive contacts was significantly more sporadic by comparison with the ordinary members of the cartel. Indeed, after 1996, the Commission is able to prove only a single occurrence in which General Quimica uncontestably participated in a collusive price increase with the other rubber chemicals producers, and the number of GQ's proven anticompetitive contacts is limited to two meetings.
- (322) In the case of GQ (and Repsol), the Commission will, because of its passive and minor role, reduce the amount of the fine that would otherwise have been imposed by 50%.

Crompton/Uniroyal

- (323) Crompton devoted a large part of its defence to minimising its own part in the cartel, shifting the primary responsibility onto Flexsys and Bayer as leaders. It further submits that its characterisation in the Statement of Objections as a "major producer" of rubber chemicals in the same category with Flexsys and Bayer is inappropriate in view of its significantly smaller scale of operations in Europe. With regard to its own role in the infringement, Crompton maintains essentially that its involvement in certain key aspects of the cartel was limited.
- (324) Crompton's attempts to portray itself as a minor player and a mere follower of Flexsys and Bayer in the cartel are, however, not convincing. Rather, the evidence in the Commission's file points to its having consistently been one of the ordinary, regular and active participants in the arrangements described in Part D of this Decision.
- (325) Indeed, Crompton's participation in the collusive contacts with the other producers cannot be considered significantly more sporadic compared to that of the other ordinary members of the cartel. The frequency of Crompton's contacts with the other producers throughout the entire period of the infringement, as described in recitals (73)-(75), (78), (82)-(88), (91)-(98), (101)-(102), (106), (109)-(111), (116)-(118), (123)-(124), (128), (130)-(131), and (140)-(142) is incompatible with any notion of a passive or minor role. Even if in connection with certain price increases Crompton had fewer preparatory and/or follow-up contacts with Bayer and Flexsys than the latter two between each other or that it was occasionally not involved in the preparation of a price increase attempt, this would not place it outside the mainstream of the unlawful scheme. The fact is that Crompton was to some extent involved in all collusive price

³²⁷ This is implicitly suggested in Flexsys oral statement of 11 July 2002, paragraph 19; and Bayer written statement of 24 October 2002, point 7 of section IV, p. 02456.

increases reported in Part D of this Decision, including the stages of preparation, implementation and follow-up.

- (326) As regards the price increases of 1999 and 2000, specifically, Crompton's contention that it played a minor role ignores the unchallenged facts described in recital (106) according to which Crompton participated in the crucial multilateral meetings contemplating the idea of raising prices, with planning of the timing, territorial scope, target amounts and leaders.³²⁸
- (327) It also remains undisputed that Crompton led the price increase of 1 July 2001 (recital (143)), which was the last in a series of three price increases undertaken between 1999 and 2001, led in turn by Bayer, Flexsys and Crompton.
- (328) Moreover, the active contribution of the senior Crompton executives to the overall scheme and the strategy of the cartel, as implemented in the EEA, is fully demonstrated. It is beyond dispute that Crompton was a full member of the cartel, and its participation had no particular distinguishing features in this respect. With regard to Crompton's argument that it was a minor player in Europe, compared to Bayer and Flexsys, the Commission also refers to the discussion in recitals (297)-(300) to conclude that regardless of its smaller market share and less significant presence in Europe, the Commission considers that Crompton's role in the EEA rubber chemicals market does not give rise to any specific reduction of fine.
- (329) Finally, 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 for an aggravating factor, the absence of such a factor does not constitute an attenuating circumstance.
- (330) Crompton's claim that its allegedly passive and/or minor role constitutes a mitigating factor must therefore be rejected.

15.2.2. Participation in few elements of the infringement

- (331) General Quimica claims that the fact that it did not participate in all the elements of the agreement constitutes a mitigating factor.
- (332) The fact that GQ's involvement was limited to being informed of and accepting an agreement to raise prices, without participation in the elaboration of the plan, is adequately rewarded by the reduction in the fine granted for passive involvement. No additional reduction will be applied for not having participated in all the elements of the agreement. Similarly, there is no reason to apply an additional

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See, in particular, Crompton's own statements, file p. 10777-10779, 10790-10791, as well as Flexsys's statements, file p. 10893-10894.

reducing for not having participated in all the collusive price increases, since this will be taken into account in relation to the shorter duration of the infringement.

15.2.3. Termination of the infringement

- (333) Crompton claims that the fact that the infringement was terminated immediately following the Commission's inspections should qualify as an attenuating circumstance. General Química, in turn, claims that termination of the behaviour in question long before any intervention by the Commission constitutes an attenuating circumstance.
- (334) First, with regard to Crompton's claim, the reduction of the fine on the grounds of mitigating factors for immediate termination of the infringement upon the Commission's intervention is particularly appropriate where the conduct in question is not manifestly anti-competitive. Conversely, its application will be less appropriate, as a general rule, where the conduct is clearly anti-competitive.³²⁹ As a general rule, the Commission cannot be required either to regard a continuation of the infringement as an aggravating circumstance or to regard the termination of an infringement as a mitigating circumstance, but a company's reaction to the opening of an investigation into its activities can be assessed only by taking account of the particular context of the case.³³⁰ Price fixing being by its very nature a hard-core antitrust violation, there can be no doubt in this case that the arrangements which are the subject of this Decision were anti-competitive. Crompton knew very well or could not have been unaware that it was engaged in illegal activities. The Commission considers therefore that the immediate cessation of the illegal behaviour by Crompton upon the Commission's intervention cannot be regarded as an attenuating circumstance in this manifest and deliberate infringement of Article 81.
- (335) As regards General Química's claim, the Court of First Instance has confirmed that the fact that an undertaking voluntarily puts an end to the infringement before the Commission has opened its investigation is sufficiently taken into account in the calculation of the duration of the infringement period and does not constitute an attenuating circumstance.³³¹ Hence, the fact that GQ terminated the infringement before any intervention of the Commission does not merit any particular reward other than that its period of infringement will be shorter than it would otherwise have been.

15.2.4. Non-implementation

³²⁹ Case T-44/2000, *Mannesmannröhren-Werke AG v. Commission*, ECR 2004, p. 0000, paragraph 281.

³³⁰ Case T-31/99, *Asea Brown Boveri v. Commission*, [2002] ECR II-018, at paragraph 213.

³³¹ Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-242/01, *Tokai Carbon Co. Ltd and Others v Commission*, not yet published, at paragraph 341.

- (336) Crompton submits that its basic amount of fine should be reduced because many of the price increases were either not applied or only partially followed. GQ makes a similar claim, arguing that it did not in practice follow the price increase as agreed for 1 January 2000.
- (337) In general, the Commission is not required to recognise non-implementation of a cartel as an attenuating 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 an attenuating circumstance when determining the amount of the fine to be imposed.³³² Indeed, the fact that a cartel agreement is not honoured does not mean that it does not exist.³³³ In this case, the infringement committed is not therefore cancelled out 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.³³⁴
- (338) The Commission's undisputed conclusion on this point is set out in recitals (235) and (236), where it is stated that the arrangements were at least partially implemented. This conclusion is not altered by the fact that such implementation may have been less than fully successful in achieving the intended impact on the market because of buyer resistance and/or remaining competition. Neither Crompton nor GQ has 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.³³⁵ A difference in the degree to which they implemented the agreements cannot be regarded as a real failure to implement them.³³⁶
- (339) It follows that Crompton and General Química have failed to show that non-implementation of the price agreements in practice constitutes a mitigating factor.

³³² Case T-44/2000, *Mannesmannröhren-Werke AG v. Commission*, ECR 2004, p. 0000, paragraph 277; Case T-327/94 *SCA Holding v Commission* [1998] ECR II-1373, paragraph 142.

³³³ Case T-141/94 *Thyssen Stahl v Commission* [1999] ECR II-347, paragraphs 233, 255, 256 and 341.

³³⁴ Case T-308/94 *Cascades v Commission* [1998] ECR II-925, paragraph 230, concerning the assessment of attenuating circumstances.

³³⁵ Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others v Commission* [2000] ECR II-491, paragraphs 4872 to 4874.

³³⁶ Case T-220/00 *Cheil Jedang v. Commission*, ECR 2003, p II-02473, paragraphs 194-199.

15.2.5. Absence of benefit

- (340) To the extent that General Quimica submits that its fine should be reduced because it did not gain any benefit from the arrangements, it suffices to note that for an undertaking to be classified as a perpetrator of an infringement it is not necessary for it to have derived any economic advantage from its participation in the cartel in question.³³⁷ The gravity of GQ's anti-competitive behaviour in no way is attenuated by the fact that the profits derived may have been negligible.
- (341) The Commission thus rejects GQ's claim regarding absence of benefit as a mitigating factor.

15.2.6. Absence of recidivism

- (342) General Quimica has pointed out that this is the first time that it has ever adhered to an anticompetitive agreement, which in its view should be taken into account as a mitigating factor.
- (343) The Commission does not consider that, in general, the lack of antecedents in the violation of competition rules constitutes an attenuating circumstance to be taken into account for the fixing of the fine. On the contrary, repeated infringements are included in a particular category of aggravating circumstances. The absence of an aggravating circumstance does not amount to an attenuating circumstance. GQ's claim is therefore rejected.

15.2.7. Disciplinary measures and compliance programme

- (344) Crompton argues that it should receive a reduction for having taken disciplinary measures against employees involved in the infringement and for having re-issued and re-instituted its antitrust compliance programme.
- (345) While the Commission welcomes measures taken by undertakings to avoid cartel infringements in the future, such measures cannot change the reality of the infringement and the need to sanction it in this Decision³³⁸. The mere fact that in certain of its previous decisions the Commission took such measures into consideration as attenuating circumstances does not mean that it is obliged to act in the same manner in every case.³³⁹ That is *a fortiori* so where, as here, the infringement constitutes a manifest breach of Article 81(1)(a). Furthermore, in so far as Crompton's internal investigation

³³⁷ Case T-304/94 *Europa Carton v Commission* [1998] ECR II-869, paragraph 141.

³³⁸ See Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-242/01, *Tokai Carbon Co. Ltd and Others v Commission*, at paragraph 343.

³³⁹ Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, paragraph 357, and Case T-352/94 *Mo och Domsjö v Commission* [1998] ECR II-1989, paragraphs 417 and 419.

encouraged its cooperation with the Commission, that is taken into account in the application of the Leniency Notice.

15.2.8. Cooperation outside of the 2002 Leniency Notice

(346) Crompton claims that its cooperation during the course of the investigation in this case goes beyond the level of cooperation that is required to benefit from a maximum reduction in fines under the Leniency Notice and urges the Commission to consider this further cooperation as an additional mitigating factor.

(347) The Commission rejects Crompton's claim. The level of Crompton's cooperation is appropriately taken into account in the reduction granted under the Leniency Notice. The maximum reduction within each band requires the highest level of cooperation, and the Commission has no reason in this case to apply any additional reduction to Crompton for its cooperation.

15.3. Conclusion on aggravating and attenuating circumstances

(348) As a result of attenuating circumstances, the basic amount of the fine to be imposed on General Quimica is reduced by 50 % to EUR 3.75 million.

15.4 Application of the 10% turnover limit

(349) The amount of the fine calculated by taking account of any attenuating or aggravating circumstances may not exceed 10% of the worldwide turnover of the undertaking concerned. According to settled case law, the Commission does not have to limit the maximum amount of the fine to 10% of the turnover in the relevant product and geographical market, but turnover is to be understood as meaning the total turnover of the undertaking concerned.³⁴⁰

(350) In this case, the basic amount of the fine to be imposed on Flexsys (EUR 60.8 million) prior to the application of the Leniency Notice exceeds the 10% limit of its total turnover, (EUR 42.5 million). The basic amount of the fine to be imposed on Flexsys should therefore be reduced to EUR 42.5 million.

16. APPLICATION OF THE 2002 LENIENCY NOTICE

(351) Flexsys, Crompton, Bayer and General Quimica co-operated with the Commission at different stages of the investigation with a view to

³⁴⁰ Case T-220/00, *Cheil Jedang Corp., vs. Commission*, paragraph 60; joined cases 100 to 103/80 *Musique diffusion française and Others v Commission*, [1983] ECR 1825, paragraph 119, *Case T-43/92 Dunlop Slazenger v Commission* [1994] ECR II-441, paragraph 160, and *Case T-144/89 Cockerill Sambre v Commission* [1995] ECR II-947, paragraph 98.

receiving the favourable treatment provided for in the Leniency Notice.

16.1. FLEXSYS

- (352) Flexsys was the first to submit evidence which enabled the Commission to adopt a decision to carry out an investigation in the sense of Article 14(3) of Regulation No 17 in connection with the alleged cartel in the rubber chemicals industry. Prior to Flexsys' application, the Commission did not have sufficient evidence to adopt a decision to conduct such an investigation. Accordingly, Flexsys' application satisfied the conditions set out in points 8 (a) and 9 of the Leniency Notice and Flexsys was granted conditional immunity from fines.
- (353) Crompton maintains that the Commission's decision to grant Flexsys conditional immunity was illfounded and that Flexsys has failed to fulfil the conditions on which its immunity was granted. The first argument is based on the assertion that the quality of the evidence Flexsys provided was seriously deficient and that Flexsys did not submit all the evidence available to it at the time of its application. Crompton points out, in particular, that Flexsys did not provide any documentary evidence until 10 July 2002, while the conditional immunity was granted already on 14 June 2002. Crompton's second argument is that Flexsys has failed to fulfil the conditions of immunity under point 11 of the Leniency Notice, by not having terminated its infringement by the time of its application for immunity, by not providing full cooperation and by coercing the other parties to participate in the cartel. Flexsys has presented its observations on these allegations.
- (354) With regard to the validity of the Commission's decision granting conditional immunity to Flexsys, submission of documentary evidence is not mentioned anywhere as a requisite for obtaining such immunity. The Commission received the information it needed from Flexsys in order to conduct inspections of the undertakings concerned and to locate the evidence, including in particular the names and locations of the participating companies and individuals, as well as a description of certain essential events, such as when collusive price increases took place. It was then up to the Commission to investigate the full picture of the infringement to the extent it found it appropriate. The schedule and the procedure for the subsequent submissions of documentary evidence and further details were agreed with the Commission. If the Commission accepted that some evidence could be submitted at a later stage without jeopardising the immunity, this cannot affect the validity of the conditional immunity granted to Flexsys. Crompton is ill-placed to judge whether the timing and the manner in which the evidence was submitted was appropriate or not.

- (355) The fact is that without the cooperation of Flexsys, the rubber chemicals cartel could have remained undiscovered much longer. Crompton itself took no steps to inform the Commission about the existence of the cartel until its disclosure had become obvious in the successful inspections to Crompton's premises. There is thus no reason for the Commission to compare the quality of the evidence provided by these two undertakings, since their situations are simply not comparable: the information provided by Flexsys uncontestedly allowed the Commission to carry out the needed inspections and to uncover the cartel, whereas Crompton's evidence strengthened the Commission's ability to prove the infringement. If there were no weaknesses or uncertainties in the case after the immunity applicant's submissions and the inspections, there would have been no scope for Crompton to provide significant added value to the evidence in the Commission's possession at the time of its application.
- (356) In so far as Crompton alleges that Flexsys breached its obligation of cooperation by not submitting all the evidence available to it and coerced other parties to participate in the cartel, the Commission observes that these assertions are not supported by any evidence. No finding critical to the establishment of the essential facts of the infringement can be based on the unsupported assertions of a participant during the procedure. In general, recriminations by other undertakings against their fellow cartel members must be treated with caution as they are often intended to be self-serving and attempted to damage the other members. These allegations do not serve to exculpate or exonerate Crompton itself, nor do they affect Crompton's position with regard to its own treatment under the Leniency Notice (see recital (366) below), but if proven, they could lead to the withdrawal of any favourable treatment granted to Flexsys under the leniency policy. In this case, both of Crompton's allegations remain unproven.
- (357) With regard to the allegation concerning the continuation by Flexsys of the infringement after the conditional immunity had been granted, Crompton has provided proof of a telephone call on 2 September 2002 by Mr. [...] of Crompton to Mr. [...] of Flexsys. The contents of this contact, which occurred after Flexsys had announced a non-collusive price increase, is reported in an internal e-mail of Crompton as follows:³⁴¹

"They have decided to test the water.

They believe material may be a little tight, as evidenced by Geon's difficulty to source material during their shutdown. Also feel that Bayer may not yet be able to get the full nameplate out of the new Q plant, so they are trying this. – NB all their world-wide TMQ production is coming out of the Ruabon plant in UK, which is now only

³⁴¹ File p. 10054 (document GG/Crompton submission of 14 October 2002); context explained in Crompton oral statement of 14 October 2002, p. 10823, as well as transcript p. 10799

producing 3 products (Q, PVI and DPG), so the allocated fixed costs are probably quite high, despite a heavy cutback of staff on site.

The majority of their business at major accounts is contracted to year end anyway, and as this has only just been announced, the real effective date for others is more likely to be OCT 1, but they will apply the new pricing to tender offers immediately.

There is no indication that other pricing will move. They feel that accelerator margins are also horrendous, but are not showing any sign of doing anything about this.

I also heard that a big shakeup in the Flexsys organisation is expected in mid-Sept, so nothing more is likely before that has happened.”

- (358) According to Crompton, this e-mail shows that the Flexsys employee signalled concern about accelerator margins, disclosed issues relating to production capacities and costs, disclosed information concerning Flexsys’ contractual arrangements with its customers and confirmed Flexsys’ likely future pricing strategy with regard to other products. Flexsys, in turn, strongly disputes Crompton’s assertions, pointing out that virtually all of the information contained in the e-mail was either already in the public domain or was an inference that could readily be drawn from publicly available information or from other sources. Flexsys has further specified that Mr. [...] was a relatively low-level employee who had no responsibility for future pricing policy, nor was he involved or implicated in the relevant antitrust proceedings.
- (359) It is not entirely clear to the Commission which parts of the information reported in the e-mail were obtained directly from the Flexsys employee and which parts were based on the author’s own speculation or other sources. The information under the remark “NB” concerning the production capacity of Flexsys Ruabon plant was, according to Flexsys, common knowledge.³⁴² It does not, indeed, appear from the e-mail that this information would necessarily have been derived from the conversation with Mr. [...]. The reference to “probably” high production costs clearly contains some degree of speculation and does not indicate disclosure of this information by the Flexsys employee. As regards pricing intentions, the sentence that “*there is no indication that other pricing will move*” also suggests that Mr. [...] did not provide such information, and not necessarily that he would have confirmed Flexsys’ likely future pricing strategy with regard to other products, like Crompton maintains.
- (360) As regards the profit margins, in the price increase announcement on Flexsys website³⁴³ Flexsys had already expressed concerns over profit margins and indicated deferred application of the new prices, quoting Mr. [...] statements that “*We see this global price increase as an*

³⁴² Flexsys has submitted a press release from Rubber News for 3 July 2000, available at <http://www.rubbernews.com/subscriber/screen1.phtml?goto=/subscriber/arcshow.html?id=000703004048&query1=flexsys&maxfiles=25&start=0&year=2000>.

³⁴³ Available at: <http://www.flexsys.com/internet/pages/newsdetail.jps?gtDocNumber=2002-031>.

essential step towards moving TMQ sustainable profitable business” and that “a decline in selling prices coupled with increases in the prices of some raw materials has put increased pressure on the profitability of this business”. Similarly, the deferred timing of the price increase was expressed as follows: “The new prices will be introduced for spot customers from 1st September and as contracts allow for other customers”.

- (361) The Commission considers that the continuation of an infringement after applying for immunity is a very serious matter that may lead to withdrawal of any favourable treatment under the Leniency Notice. The Commission does not intend to let such practices pass without consequences. On the other hand, withdrawal of immunity is a very serious matter for the undertaking in question, which cannot be based on assertions and evidence leaving scope for any doubt. The evidence also has to be evaluated in its proper context. An applicant for immunity has to be careful in its relations with the other cartel members in order not to raise suspicions about the immunity application and thereby about the Commission’s investigations. The fact that Flexsys raised its prices without prior concertation with the other cartel members in 2002, although all the previous price increases since 1995 were preceded by contacts with competitors, as such is also an indication that Flexsys indeed terminated its involvement in the cartel.
- (362) Whilst in this case the Commission considers that there is a certain degree of ambiguity surrounding the contact between Mr. [...] of Crompton and Mr. [...] of Flexsys, the Commission concludes that there is not sufficient proof that Flexsys did not terminate its infringement by the time it applied for immunity or that it continued it thereafter.
- (363) Based on the evidence in the Commission’s possession, Flexsys has co-operated fully, on a continuous basis and expeditiously throughout the Commission’s administrative procedure and provided the Commission with all evidence available to it relating to the suspected infringement. Flexsys ended its involvement in the suspected infringement no later than the time at which it submitted evidence under point 8(a) of the Leniency Notice, i.e. 22 April 2002 and did not take steps to coerce other undertakings to participate in the infringement. Hence, Flexsys qualifies for full immunity from fines.

16.2. CROMPTON/UNIROYAL

- (364) Crompton was the first undertaking to meet the requirements of point 21 of the Leniency Notice, as it provided the Commission with evidence which represents significant added value with respect to the evidence already in the Commission’s possession at the time of its submission and, to the Commission’s knowledge, Crompton terminated its involvement in the infringement no later than the time

at which it submitted the evidence and its involvement has remained terminated. It qualifies, therefore, under point 23 (b), first indent of the Leniency Notice, for a reduction of 30-50 % of the fine that would otherwise have been imposed.

- (365) Crompton submits that its fine should be reduced by 50%, or alternatively, if the conditional immunity of Flexsys is withdrawn, it claims it should qualify for full immunity under point 8b of the Leniency Notice as the first company to provide the Commission with evidence to find an infringement. In addition, Crompton claims immunity, under point 23 of the Leniency Notice, for the period of the infringement prior to 1998, as it allegedly submitted virtually all of the information concerning competitor contacts in 1997, bridging thus a gap to an otherwise time-barred period of infringement.
- (366) The Commission rejects Crompton's claim concerning immunity from fines under point 8(b) of the Leniency Notice. Contrary to Crompton's belief and contention, the possible withdrawal of Flexsys' conditional immunity would in no way affect Crompton's position under the Leniency Notice. Crompton was not the first to provide evidence which, in the Commission's view, enabled it to find an infringement, since the Commission already possessed, prior to Crompton's application for leniency, a solid body of evidence as a result of the submissions of the immunity applicant and the Commission's subsequent inspections (see also the reasoning in recital (355)).³⁴⁴ The documents found at Crompton Europe's premises alone include an impressive amount of clear evidence of the cartel. Based on the explanation of the basic scheme by Flexsys, the Commission was able to connect various notes and other documents, many of which were self explanatory, to specific cartel events. Hence, Crompton does not meet either of the cumulative conditions set forth in point 10 of the Leniency Notice to qualify for immunity under point 8(b) of that Notice, as the Commission had, at the time of Crompton's submission, sufficient evidence to find an infringement of Article 81 and Flexsys had already been granted conditional immunity under point 8(a) of the Leniency Notice.
- (367) Crompton's claim concerning immunity from fines for the period prior to 1998 under point 23 of the Leniency Notice is equally unfounded. In so far as the facts have a direct bearing on the duration or gravity of the cartel, those concerning the infringement in 1997 and prior to that year were not unknown to the Commission at the time of Crompton's submission. Flexsys had already disclosed, with contemporaneous documents, exchanges of confidential information with Bayer (recital (89)) and with Crompton (recitals (91) and (95))

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File p. 00014-00084; 10878-10905; 04377-05160; 10578-10673; 03959-04076; 02786-03445.

that occurred in 1997. In relation to 1996, Flexsys had already disclosed the collusive price increase of 1996. Admittedly, Crompton has provided corroborating evidence and revealed further details concerning contacts between the competitors during this period, but the Commission already knew about the existence of the anticompetitive activities of the rubber chemicals producers in the period 1996-2001. The evidence provided by Crompton does not, therefore, relate to facts previously unknown to the Commission with regard to the duration of the infringement. Crompton does not, accordingly, meet the conditions for application of point 23 of the Leniency Notice.

- (368) On the other hand, the Commission recognizes the value of Crompton's cooperation in the investigation. It has provided the Commission with evidence which represents significant added value with respect to the evidence already in the Commission's possession, as by its very nature and level of detail this evidence strengthens the Commission's ability to prove the facts in question (see also the reasoning in recital (355)).
- (369) In the assessment of the level of reduction within the band of 30-50%, the Commission takes into account the time at which the evidence of significant added value was submitted and the extent to which it represents such value. It may also take into account the extent and continuity of any cooperation after the submission. Based on these criteria, Crompton qualifies for the maximum 50 % reduction. First, Crompton fulfilled the condition of significant added value very early in the proceedings, in the month following the Commission's inspections in its premises. Second, the extent to which its submissions represent such value is indeed substantial. Crompton's statement largely corroborates that of Flexsys and completes the latter by providing further details concerning a number of anticompetitive contacts between the rubber chemicals producers and new information on additional cartel events. It also explains the context of several documents already collected during the Commission's inspections. Significantly, Crompton has submitted contemporaneous documents which clearly spell out the outcome of certain cartel meetings and other contacts, thereby allowing the Commission to add solid elements to the previously known overall duration of the infringement. Third, the Commission takes into account that Crompton's cooperation during the administrative procedure has been extensive and continuous. In this regard, it is noteworthy that Crompton again submitted valuable evidence in May 2004, adding further value to the evidence in the Commission's file after it had been informed that its earlier submissions already represented significant added value.
- (370) Based on the foregoing, the Commission considers it appropriate to grant Crompton the maximum reduction of 50% within the band provided for in the first indent of point 23(b) of the Leniency Notice.

16.3. BAYER

- (371) Bayer was the second undertaking to meet the requirements of point 21 of the Leniency Notice, as it provided the Commission with evidence which represents significant added value with respect to the evidence already in the Commission's possession at the time of its submission and, to the Commission's knowledge, Bayer terminated its involvement in the infringement no later than the time at which it submitted the evidence and its involvement has remained terminated. It qualifies, therefore, under point 23 (b), second indent, for a reduction of 20-30 % of the fine that would otherwise have been imposed. In the assessment of the level of reduction within the band of 20-30%, the Commission takes into account the time at which the evidence of significant added value was submitted and the extent to which it represents such value. It may also take into account the extent and continuity of any cooperation after the submission.
- (372) Based on those criteria, the Commission considers that Bayer qualifies for the very minimum reduction within the relevant band. Although Bayer applied for leniency relatively early in the proceedings, in the month following the inspections, it was only after Bayer's subsequent submissions in December 2002 and January 2004 that the Commission concluded that Bayer qualified, albeit barely, for leniency in view of the nature and level of detail of this evidence, which strengthened the Commission's ability to prove the facts in question. More importantly, even if Bayer had passed muster with its first submission and the time factor had been in its favor, the extent to which it added value to the Commission's case has remained limited throughout the proceedings. Indeed, while Bayer's statements largely corroborate those of Flexsys and Crompton with regard to the period 1998-2001, the Commission already had a clear picture of the cartel from two separate sources, supported by abundant documentary evidence even before Bayer's first submission. The contemporaneous documentary evidence Bayer provided is also very limited compared to that submitted by Crompton, consisting essentially of travel expense records and documents already found at the inspection. Admittedly, however, Bayer added value to the case by providing further details on the overall functioning of the cartel, disclosing new events and confirming its participation in a number of bilateral contacts with the other producers.
- (373) Significantly, even after receiving the Statement of Objections, Bayer has admitted the infringement only for the period 1998-2001, which confirms that the extent to which Bayer's cooperation represents added value has remained limited. Bayer therefore deserves the minimum reduction within the band of 20-30%. In this regard, the Commission considers that where an individual within an undertaking is not forthcoming, as in the case of Mr. [...] of Bayer, effective cooperation under the Leniency Notice supposes that the undertaking in question assumes its responsibility and does not hide behind its

individual employees. Quite apart from the question of what Bayer's executives in charge of the rubber chemicals business at that time can recall, Bayer's apparent strategy is to attempt to weaken the Commission's case with regard to each piece of evidence and each event before 1998 . By attempting to weaken the Commission's ability to prove the infringement, where, taken together, there is a consistent body of indicia and evidence showing the existence of the cartel and Bayer's involvement in it, Bayer also puts the extent and continuity of its cooperation into serious doubt.

- (374) Based on the foregoing, the Commission considers that Bayer is entitled to a 20 % reduction of the fine that would otherwise have been imposed.

16.4. GENERAL QUIMICA/REPSOL QUIMICA/REPSOL YPF

- (375) General Quimica was the third undertaking to meet the requirements of point 21 of the Leniency Notice, as it provided the Commission with evidence which represents significant added value with respect to the evidence already in the Commission's possession at the time of its submission and, to the Commission's knowledge, terminated its involvement in the infringement no later than the time at which it submitted the evidence and its involvement has remained terminated. GQ qualifies, therefore, under point 23 (b), third indent of the Leniency Notice, for a reduction of up to 20 % of the fine. In its assessment of the level of reduction within the said band, the Commission takes into account the time at which the evidence of significant added value was submitted and the extent to which it represents such value. It may also take into account the extent and continuity of any cooperation after the submission.
- (376) General Quimica claims that its cooperation would justify application of the maximum reduction of 20 % within the relevant band.
- (377) The Commission observes that while GQ's submission by its nature and level of detail strengthens the Commission's ability to prove the facts in question, it does not qualify for the maximum reduction within the band of up to 20 %. First, GQ fulfilled the condition of significant added value relatively late in the proceedings, over a year and a half after the Commission's inspections of its premises. Second, the extent to which GQ's submissions represent such value is limited to further details and explanation of the context of a number of documents found during the Commission's inspections with regard to the period prior to 1997, and disclosure in its corporate statement of further details and contacts concerning its participation in the January 2000 price increase, as well as certain other contacts with its competitors. The contemporaneous written evidence provided by GQ is limited to a fax concerning the travel arrangements for the crucial meeting of 28 October 1999 in which GQ adhered to the agreement on the January 2000 price increase. However, GQ being a fringe

player whose involvement in the cartel was sporadic in nature, the evidence in the file prior to GQ's leniency application regarding specifically GQ's participation was limited essentially to the other parties' unilateral statements, apart from the period prior to 1997 for which documentary evidence existed. In such circumstances, corroboration and admission of the infringement by the company itself is of significant value.

(378) Based on the foregoing, the Commission considers that General Quimica (and Repsol) is entitled to a 10 % reduction of the fine that would otherwise have been imposed.

16.5. Conclusion on the application of the 2002 Leniency Notice

(379) In conclusion, Flexsys, Crompton, Bayer and General Quimica should be granted the following reductions of the fines that would otherwise have been imposed on them:

- Flexsys immunity from fines;
- Chemtura, Crompton Manufacturing and Crompton Europe a reduction of 50 %;
- Bayer a reduction of 20 %;
- General Quimica, Repsol Quimica and Repsol YPF a reduction of 10 %.

17. THE AMOUNTS OF THE FINES IMPOSED IN THIS PROCEEDING

(380) The fines to be imposed pursuant to Article 15(2) of Regulation No 17 and Article 23(2) of Regulation (EC) No 1/2003 should therefore be as follows:

- Flexsys EUR 0
- Crompton Manufacturing, jointly and severally with Crompton Europe: EUR 13.6 million,
of which jointly and severally with Chemtura EUR 12.75 million
- Bayer EUR 58.88 million
- General Quimica, jointly and severally with Repsol Quimica and Repsol YPF: EUR 3.38 million

HAS ADOPTED THIS DECISION:

Article 1

The following undertakings have infringed Article 81(1) of the Treaty and Article 53 of the EEA Agreement by participating, for the periods indicated, in a complex of agreements and concerted practices consisting of price fixing and the exchange of confidential information in the rubber chemicals sector in the EEA:

- (a) Bayer AG, from 1 January 1996 until 31 December 2001;
- (b) Crompton Manufacturing Company Inc., from 1 January 1996 until 31 December 2001;
- (c) Crompton Europe Ltd., from 1 January 1996 until 31 December 2001;
- (d) Chemtura Corporation, from 21 August 1996 until 31 December 2001;
- (e) Flexsys N.V., from 1 January 1996 until 31 December 2001;
- (f) General Química SA, from 31 October 1999 until 30 June 2000;
- (g) Repsol Química SA, from 31 October 1999 until 30 June 2000;
- (h) Repsol YPF SA, from 31 October 1999 until 30 June 2000.

Article 2

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

- | | | |
|-----|---|---------------------------------------|
| (a) | Flexsys N.V | EUR 0 |
| (b) | Crompton Manufacturing Company, Inc.,
jointly and severally with Crompton Europe Ltd.
of which jointly and severally with Chemtura
Corporation | EUR 13.6 million
EUR 12.75 million |
| (c) | Bayer AG | EUR 58.88 million |
| (d) | General Química SA, jointly and severally
with Repsol Química SA and Repsol YPF SA | EUR 3.38 million. |

The fines shall be paid in euros, within three months of the date of the notification of this Decision to the following account:

Account N°

[001-3953713-69 of the European Commission with :

FORTIS Bank, Rue Montagne du Parc 3, 1000 Brussels

(Code SWIFT GEBABEBB – Code IBAN BE71 0013 9537 1369)]

After expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.50 percentage points, i.e. namely 5.59%.

Article 3

The undertakings listed in Article 1 shall immediately bring to an end the infringements referred to in that Article, insofar as they have not already done so.

They shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or similar object or effect.

Article 4

This Decision is addressed to:

- Bayer AG, Corporate Center, BAG LP Leitung, D-51368 Leverkusen, Germany
- Crompton Manufacturing Company Inc., 199 Benson Road, Middlebury, CT 06749, USA
- Crompton Europe Ltd, Kennet House, 4 Langley Quay, Slough, Berkshire, SL3 6EH, United Kingdom
- Chemtura Corporation, 199 Benson Road, Middlebury, CT 06749, USA
- Flexsys N.V., Woluwe Garden, Woluwedal 24/3, B-1932 Sint-Stevens-Woluwe, Belgium
- General Química SA, Zubillaga-Lantaron, Alava, Apartado 13, 09200 Miranda de Ebro, Spain
- Repsol Química SA, Paseo de la Castellana 278-280, 28046 Madrid, Spain
- Repsol YPF SA, Paseo de la Castellana 278-280, 28046 Madrid, Spain

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

Done at Brussels,

For the Commission
Neelie KROES
Member of the Commission