COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 30.XI.2005
C(2005)4634

COMMISSION DECISION

of 30.XI.2005

relating to a proceeding pursuant to Article 81 of the EC Treaty

(Case COMP/38354 – Industrial bags)

(Only the Dutch, English, French, German and Spanish versions are authentic)

To be notified to

-Armando Álvarez SA

-Bernay Film Plastique

-Bischof + Klein France SAS

-Bischof + Klein GmbH & Co. KG

-Bonar Technical Fabrics N.V.

-British Polythene Industries PLC

-Cofira-Sac SA

-Combipac B.V.

-JM Gesellschaft für industrielle Beteiligungen mbH & Co. KGaA

-Fardem Packaging BV

-FLSmidth & Co A/S

-FLS Plast A/S

-Groupe Gascogne

-Kendrion NV

-Koninklijke Verpakkingsindustrie Stempher C.V.

-Low & Bonar PLC

-Nordenia International AG

-Nordfolien GmbH

-Plásticos Españoles SA

-RKW AG Rheinische Kunststoffwerke

-Sachsa Verpackung GmbH

-Stempher BV

-Trioplast Industrier AB

-Trioplast Wittenheim SA

-UPM-Kymmene Oyj

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In the public version of this Decision, some pieces of information are deleted according to the Commission's practice or the companies' requests, these pieces of information are replaced by *[…]*.

COMMISSION DECISION

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relating to a proceeding pursuant to Article 81 of the EC Treaty

(Case COMP/38354 – Industrial bags)

(Only the Dutch, English, French, German and Spanish versions are authentic)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

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

Having regard to the Commission decision of 29 April 2004 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 19(1) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty[2], Article 27(1) of Regulation (EC) No 1/2003 and Articles 10 to 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty[3],

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

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

Whereas:

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

2 OJ 13, 21.2.1962, p. 204/62. Regulation as repealed by Regulation (EC) No 1/2003. Article 34(2) of Regulation (EC) No 1/2003 provides that procedural steps taken under Regulation No 17 continue to have effect for the purposes of applying Regulation (EC) No 1/2003.

3 OJ L 123, 27.4.2004, p. 18.

4 To be published in the OJ.

1. INTRODUCTION

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

- Combipac B.V. and British Polythene Industries PLC (hereinafter “BPI”);
- Bischof + Klein GmbH & Co. KG (hereinafter “Bischof + Klein” or “B+K”);
- Bischof + Klein France SAS (Sacherie de Pont-Audemer) ;
- RKW AG Rheinische Kunststoffwerke and JM Gesellschaft für industrielle Beteiligungen mbH & Co. KGaA (hereinafter “RKW”);
- Fardem Packaging BV and Kendrion NV (hereinafter “Fardem”);
- Nordenia International AG and Nordfolien GmbH;
- Trioplast Wittenheim SA and Trioplast Industrier AB ;
- FLS Plast A/S and FLSmidth & Co. A/S (hereinafter “FLS”);
- Cofira-Sac SA;
- Plásticos Españoles SA (hereinafter “Aspla”) and Armando Álvarez SA;
- Sachsa Verpackung GmbH (hereinafter “Sachsa”) and Groupe Gascogne;
- UPM-Kymmene Oyj (hereinafter “UPM-Kymmene”);
- Bernay Film Plastique, formerly Conditionnement et Industrie SA (hereinafter “Ceisa”);
- Bonar Technical Fabrics N.V. and Low & Bonar PLC;
- Stempher BV and Koninklijke Verpakkingsindustrie Stempher C.V. (hereinafter “Stempher”).

(2) The undertakings to which this Decision is addressed took part, in infringement of Article 81 of the Treaty, in anticompetitive agreements or concerted practices covering the territory of Belgium, the Netherlands and Luxembourg (hereafter designated by the term “Benelux”) and of Germany, France and Spain. The infringement chiefly consisted in the determination of sales quotas, the exchange of individualised information on market shares, the introduction of a system of coordination of key accounts, the fixing of prices, the development of common price calculation models, the apportionment of orders and concerted bidding in response to certain invitations to tender. The conduct constituting the infringement was organised at a global level around the Valveplast trade association and at a regional or functional level. The infringement took place from January 1982 until June 2002, the duration varying according to the undertaking.

2. THE INDUSTRIAL BAGS SECTOR

2.1. THE PRODUCT

2.1.1. The characteristics of the product

(3) The sector of plastic industrial bags[5], commonly referred to as "industrial bags", covers bags used for packaging basic commodities, and more generally raw materials, fertilisers, polymers, building materials, agricultural and horticultural products and animal feedingstuffs. In this Decision, the term "industrial bags" is to be understood as referring to plastic industrial bags.

(4) The sector forms part of the broader polyethylene film extrusion industry, in which it accounted for 8,1% of polyethylene consumption in Europe in 2000 (577 000 tonnes out of a total of 7 092 000 tonnes).

(5) The raw material commonly used in the manufacture of industrial bags is polyethylene, which exists in various forms[6]:

– LDPE (low density polyethylene), obtained in a high pressure production process which yields a ramified molecular structure;

– LLDPE (linear low density polyethylene), which is obtained in a low pressure production process but has a linear structure that is stronger than the ramified structure;

– HDPE (high density polyethylene), obtained in a low pressure production process that creates an even stronger linear structure. HDPE is more complicated to produce and more expensive.

(6) The price of the raw material is reflected in regularly published indicators (e.g. ICIS-LOR, Platts) which can be used as a reference in the price clauses of contracts with large customers.

(7) Plastic industrial bags can be divided into four categories:

– open mouth bags;

– valve bags;

– FFS (form, fill and seal) bags;

– block bags.

These four types of bag are all produced from the same raw material but using different processes.

(8) Traditional (non-FFS) bags are generally used for packaging relatively limited volumes of goods. The raw material is first made into film (extrusion phase), then the

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5 There are also industrial bags made of paper, but these do not fall within the scope of this case.

6 See information taken from the website on polymers www.psrc.usm.edu […].

film is usually printed (printing phase) before being converted into bags (conversion phase). The bags are then delivered to the customer, who can use them in automatic filling machines or fill them manually.

(9) Open mouth bags are large bags, open at the top and with a glued bottom. The customer fills the bag from the top, either manually or on an automated line, and then seals it, usually with the aid of a heating process.

(10) Valve bags are a more sophisticated version of open mouth bags and were first put on the market in the 1960s. An orifice, called a valve, is incorporated in the bag. The bag is filled through the valve and is self-closing. Sophisticated machinery is needed to produce valve bags, which makes them more costly than open mouth bags, although they can be filled more quickly.

(11) FFS bags are used for packaging large volumes of goods. The system, which was introduced in the 1970s, requires a special packaging machine to be installed at the customer's premises. The manufacturer extrudes a tube of film which is delivered to the customer in the form of a roll that is loaded into the packaging machine. The production process is shorter than for the other bag types since there is no conversion phase. At the customer's premises, filling is automated and the machine heat seals the top and bottom of the bag. The FFS system allows faster filling rates. It is gradually replacing traditional bags. It is used in particular in the petrochemicals and food industries.

(12) Block bags are sometimes regarded as a special type of FFS bag. Like FFS bags, they are delivered to the customer in rolls. They are nevertheless finished, pre-perforated bags. Block bags are filled with the aid of a special machine installed at the customer's premises and heat sealed. When filled, they take on a block shape and are thus easy to stack. They are sometimes designated by the name of their manufacturer (e.g. Waviblock, Asplablock). Sales of these products are currently declining somewhat.

(13) While it is not necessary to define precisely the relevant product markets it can be observed that, although they may display certain distinguishing features, these four products form a relatively homogeneous group and constitute the market of plastic industrial bags. Since the mid-1970s, FFS bags are gradually replacing the other types of industrial bag.

(14) Plastic industrial bags as described above are the relevant products for the purposes of this Decision.

2.1.2. Trends in the supply of industrial bags

(15) Since the beginning of the 1990s a trend towards supply-side concentration can be observed among manufacturers of plastic films and bags, and several acquisitions have taken place in recent years. This can be explained partly by the increasingly large investments needed by the extrusion industry, which, if they are to be profitable, require a presence on wider geographic markets in an environment in which margins are small. Nevertheless, alongside European players based in several Member States, smaller companies that have opted for a local development strategy are also present on this market.

(16) As far as the plastic industrial bags sector is concerned more specifically, the major development was the introduction in the mid-1970s of FFS bags, which are tending gradually to replace valve bags, for which the entry and production costs are higher. In valve bag production, there have been no new entrants to the European market since the end of the 1980s.

2.1.3. Trends in the demand for industrial bags

(17) Until the 1950s, industry used textile and paper bags for carrying commodities. With the development of bulk maritime transport, the textile bags industry went into decline. Demand for paper bags grew considerably, on the other hand, in particular with the introduction of automated palletisation systems.

(18) The introduction of the polyethylene bag in the 1950s triggered growing demand for this type of bag, which among other things met industry's needs for waterproof packaging. Plastic valve and open mouth bags rapidly gained favour, particularly in the chemical industry, and gradually replaced paper bags. Valve bags were in heavy demand until the 1970s, being simple to use and not requiring the user to carry out any closure process, since that role is played by the valve flap.

(19) Since the mid-1970s, FFS bags have gradually been replacing the other types of industrial bag. Their success is due notably to the automated filling process, which allows large volumes to be handled, and the limited need for labour. Changing over to the FFS system nevertheless requires the user to install specific filling machines replacing the old equipment used for valve and open mouth bags.

(20) Since the end of the 1980s there has therefore been a fall in demand for open mouth and valve bags estimated at around 5-7% a year and a concurrent rise in demand for FFS bags of around 7% a year. During this period demand for industrial bags as a whole has stagnated or even declined (despite the growth in demand for FFS bags), which can be explained among other things by a greater preference for bulk transport of raw materials in containers.

(21) Industrial bags are used in a wide variety of sectors, including chemical and petrochemical industries, polymers, agriculture and horticulture, fertilisers, building materials (e.g. cement) and animal feedingstuffs.

2.1.4. The parties' arguments in response to the Statement of Objections as regards the relevant products, and the Commission's findings

(22) In their replies to the Statement of Objections, Aspla and UPM-Kymmene challenge the Commission's product definition. They maintain in particular that there is no substitutability either on the demand side or on the supply side between the four categories of industrial bag. On the demand side, the automated bagging phase for certain types of bag (valve bags, FFS bags, block bags) calls for the acquisition of specific machinery and a certain volume of investment, unlike open mouth bags, which can be filled manually. The choice of a particular type of bag is also in their view determined by the nature of the products to be packaged. On the supply side, they claim that differences in manufacturing processes and levels of technology prevent manufacturers from switching in the short term from the production of one type of bag to another, in particular between FFS bags and the other types of bag.

(23) In cartel cases, undertakings, by concluding anticompetitive agreements, determine de facto the parameters within which they compete with one another. As the Court of First Instance of the European Communities has held in a long line of cases, " … for the purposes of applying Article 81 EC, the reason for defining the relevant market, if at all, is to determine whether an agreement is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market (Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraph 74, and 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, paragraph 1093). Consequently, there is an obligation on the Commission to define the relevant market in a decision applying Article 81 EC only where it is impossible, without such a definition, to determine whether the agreement, decision by an association of undertakings or concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market "[7].

(24) In *Mannesmannröhren-Werke AG* v *Commission* the Court of First Instance held in this connection that, assuming it is established "that the Commission defined the market affected by the infringement found in Article 1 of the contested decision insufficiently or incorrectly in the present case, that circumstance could not have an impact on the existence of that infringement"[8].

(25) In *Adriatica di Navigazione SpA* v *Commission* the Court of First Instance, after outlining the case law on the subject and finding that it had been established that the agreement in question distorted competition and was likely to affect trade between Member States to an appreciable extent, held that "the challenge to the definition of the relevant market failed in the case at issue as it had not served to show that the conditions of Article 85(1) of the Treaty were not satisfied"[9].

(26) "The Commission should, however, examine the relevant market or markets and identify it or them in the grounds of the decision finding an infringement of Article 85(1) of the Treaty sufficiently precisely for it to be possible to understand the operation of the market in which competition is being distorted while at the same time meeting the essential requirements of legal certainty"[10].

(27) Contrary to what Aspla suggests in the part of its reply to the Statement of Objections devoted to the industrial bags market, defining the market in a cartel case does not call for a degree of precision equal to that which is required when assessing infringements of Article 82 of the Treaty or in certain merger cases. It is merely the case that the product concerned must be sufficiently well defined to enable each undertaking involved to be correctly allotted its share of responsibility for the commission of the infringement, especially where the infringement is a collective, continuous one.

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7 See judgment in Case T-213/00 *CMA CGM and Others* v *Commission (FETTCSA)* [2003] ECR II-913, paragraph 206.

8 See judgment of 8 July 2004 in Case T-44/00, *Mannesmannröhren-Werke AG* not yet reported, paragraphs 132 and 133.

9 See judgment in Case T-61/99, *Adriatica di Navigazione Spa*, [2003] ECR II-5349, paragraph 29.

10 See judgment in Case T-61/99, cited above, paragraph 32.

(28) Moreover, as the Court of First Instance reaffirmed in the *Tokai Carbon*[11] case, the definition of the market is the result not of an arbitrary decision of the Commission but rather of the behaviour of the enterprises who are party to the agreement and who have "deliberately concentrated their anti-competitive conduct" on certain products, in this case on the four categories of industrial plastic bags described in subsection 2.1.1.

(29) The Commission will nevertheless answer in passing the arguments put forward by the parties.

(30) On the demand side, it should be pointed out first of all that almost all the parties confirm in their replies to the requests for information sent by the Commission during the course of the investigation or in their replies to the Statement of Objections that the outstanding trend in the sector is the switch in demand from traditional bags (valve bags and open mouth bags) to FFS bags following their appearance in the 1970s. UPM-Kymmene itself states in its letter of 12 March 2003 that "FFS film has become the preferred type of industrial sack, while demand for valves and open mouth sacks has declined". This phenomenon has been expressly observed by the members of the Valveplast association, inducing them to set up a working group in 1995 to look into the matter.

(31) As far as the use of bags is concerned, whilst it is true that certain specificities of the product to be packaged may guide the choice of one type of bag over another, generally speaking all types of industrial bag are used indiscriminately to package one product type, namely raw materials used in basic industries and the construction industry. In most of the parties' replies to the Commission's requests for information, mention is thus made, without any distinction being made according to type of bag used, of: granulates, fertilisers, plastics, chemicals and petrochemicals (RKW, B+K, Trioplast) and aggregates and animal feedingstuffs (BPI, Aspla).

(32) The advertising material issued by Aspla concerning block bags ("Asplablock") contradicts, moreover, the argument developed by that company in its reply to the Statement of Objections.

(33) The entire sales pitch seeks to show first of all that the investment needed by the customer to equip itself is not high, making it accessible to small firms, and is profitable in the light of the productivity gains generated. Secondly, it stresses the competitiveness of block bags compared with the other types of bag, and hence their substitutability.

(34) On the supply side, the various types of bag are in reality the result of successive innovations: from the open mouth bag, the most rudimentary type of bag, through the valve bag, where the improvement consisted in adding a valve which enabled faster, automated filling, to the FFS bag, a semi-finished product delivered to the customer in the form of a roll then transformed into a bag and filled using an automated process. Being pre-perforated bags delivered in roll form, block bags fall into a category somewhere between open mouth bags and FFS bags which companies treat as similar to one or other of these types of bag.

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[11] See the judgment of 15 June 2005 in Case T-71/03 and others, *Tokai Carbon v Commission*, not yet reported, paragraph 90.

(35) Whilst it is true that the switch to FFS bags requires investment by producers in new machinery, this does not seem to constitute a barrier to entry. Several undertakings point out on the contrary that the suppliers of FFS bags on the market are numerous owing to the particularly low level of the entry costs.

(36) Lastly, a certain type of open mouth bag and block bags were also included in the definitions of valve bags and FFS bags drawn up by the members of Valveplast. Even if, as pointed out by Trioplast, the open mouth bag in question was not a conventional open mouth bag, this nevertheless confirms that, beyond their respective manufacturing specificities, the four categories of bag (valve, open mouth, FFS and block bags) were regarded by the professionals themselves as forming part of one and the same family of products. This is also clear from the documents relating to a meeting between B+K, Fardem and Wavin held in March 1994 to discuss improved coordination in the heavy duty bags market, which comprised valve bags, open mouth bags and FFS bags (including block bags). The definitions proposed were manifestly taken up within the framework of Valveplast.

2.2. THE GEOGRAPHIC AREA AFFECTED BY THE CARTEL

(37) The evidence in the Commission's file demonstrates that the industrial bag producers concerned together adopted anticompetitive practices affecting the German, French, Spanish and Benelux markets. Although some evidence appears to show that arrangements occasionally concerned other countries, the Commission does not have any evidence in its possession suggesting that these were anything but isolated instances. On the basis of the evidence in the file, the Germany, French, Spanish and Benelux markets constitute the relevant territory for the purposes of this Decision.

(38) In its reply to the Statement of Objections, Aspla challenges this geographic definition on the ground that Spain constitutes a separate market in the light of the localisation of the petrochemical industry, the impact of transport costs, the entry barriers for FFS bags, the relationship of reciprocity between customers and suppliers in the petrochemical industry, the reference status of local suppliers and the limited trade flows between Spain and central Europe.

(39) Reference should be made first of all to the case law already cited. If the actual object of an agreement is to restrict competition by 'market sharing', it is not necessary to define the geographic markets in question precisely, provided that actual or potential competition on the territories concerned was necessarily restricted, whether or not those territories constitute 'markets' in the strict sense[12].

(40) It is significant that Aspla has been a member of the Valveplast association since 1986 and that the discussions (whether official or unofficial) held at meetings also covered the Spanish market. The documents in the file prove that the information exchanged concerned, among other things, the production of FFS bags and valve bags sold in Spain, the market shares of each undertaking and the price of raw materials *inter alia* in Spain. This finding alone suffices to establish that in members' minds competition

[12] See Court of First Instance judgment of 18 July 2005, not yet reported, in Case T-241/01, *SAS v Commission*, paragraph 99, judgement of 19 March 2003, Case T-213/00 *CMA CGM (FETTCSA)*, cited above, paragraph 206 and judgement of 14 May 1998, Case T-348/94 *Enso Española v Commission*, [1998] ECR II-1875, paragraph 232.

in Spain necessarily existed, without which the exchange of such information cannot be explained.

(41) The documents in the file also establish that there was effective competition in Spain between the cartel members. In the first place, the turnover figures for industrial bags communicated by the undertakings in response to the Commission's requests for information show that, since 1990, several of the undertakings concerned besides Aspla have generated part of their turnover in Spain.

(42) In an internal *[…]* email, an executive noted following a Valveplast meeting that: "The French producers are losing ground in their own country, but this is offset in the Benelux (+0.5%), Germany (+1.15%) and Spain (+1.4%)"[13]. The figures exchanged and the presentations made at Valveplast meetings as well as various documents in the file (letters, memos) confirm the existence of competition in Spain. Moreover, several notes and records of Valveplast meetings demonstrate that customers in Spain were discussed among participants.

(43) Moreover, contrary to what it maintains, Aspla was in direct competition with its competitors in the Germany, French and Benelux markets ("central Europe", according to the term used by Aspla). The tables on the volumes sold by and market shares of undertakings drawn up within Valveplast show that Aspla did business in the markets of "central Europe". This can also be seen from the turnover generated by Aspla and by the Armando Álvarez group in those countries since 1988 and communicated to the Commission in response to its request for information. The records of Valveplast meetings show that Aspla took part in discussions on a number of customers in the Germany, France and Benelux. In the internal *[…]* email referred to above, it is stated that: "The Spanish producer Aspla has increased its market shares in the Benelux by *[…]* % compared with 1998, which is largely due to Indupac's problems with *[Customer name]*"[14]. Aspla itself concedes in its reply to the Statement of Objections that there was trade between it and undertakings in the Benelux. The evidence held on file confirms that the group exports to France, the Benelux and even, on occasion, to Germany.

(44) Even supposing, as Aspla claims, that such trade were limited and attributable to exceptional circumstances, this evidence attests to the existence of effective, albeit limited, or at the very least potential, competition between Aspla and the other undertakings in the Benelux, French and German markets. In this connection, the fact that Aspla has set up two sales agencies in France, including one in the Lyon area, and that its advertising brochures include an English language version proves that its potential customers are located, not only in the Iberian peninsula, but also in the rest of "central Europe".

(45) It is therefore obvious that, contrary to what Aspla claims, there are trade flows in industrial bags between Spain and the other geographic areas taken into account in this Decision, a point which is further clarified in subsection 2.4.

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13 In the original Dutch: "De Franse producenten verliezen terrein in eigen land, wat gecompensereerd wordt in Benelux (+0,5%), Duitsland (+1.5%) en Spanje (+1.4%)".

14 In the original Dutch: "De Spaanse producent Aspla verhoogt tenslotte z'n marktaandeel in de Benelux t.o.v. 1998 met *[…]*, hetgeen hoofdzakelijk toe te schrijven is aan Indupac problemen naar *[customer name]"*.

2.3. ESTIMATE OF THE MARKET'S VALUE AND OF MARKET SHARES

(46) The undertakings involved in this case account for a substantial part of the European industrial bags market. In the territory defined above, industrial bag sales are as set out in Tables 1 and 2.

Table 1 - Turnover achieved in Germany, Benelux, France and Spain in 1996

Undertaking	**1996 turnover in industrial bags (open mouth+valve+FFS+ block bags) F, D, BNL, ES (EUR '000)**	**Market share**
Sacherie de Pont-Audemer	*[…]*	***[0-2]%***
Trioplast	*[…]*	***[1-3]%***
Cofira	*[…]*	***[1-3]%***
Rosenlew	*[…]*	***[3-5]%***
Ceisa	*[…]*	***[0-2]%***
B+K	*[…]*	***[10-12]%***
Nordenia	*[…]*	***[7-9]%***
RKW	*[…]*	***[3-5]%***
Sachsa	*[…]*	***[1-3]%***
Wavin/BPI Indupac	*[…]*	***[11-13]%***
Bonar Phormium	*[…]*	***[2-4]%***
Armando Álvarez	*[…]*	***[6-8]%***
Fardem	*[…]*	***[5-7]%***
Stempher	*[…]*	***[3-5]%***
Total	**165675**	**75%**
Others (estimate)	**55117**	**25%**

Total market	**220792**	**100%**

Table 2 - Turnover achieved in Germany, Benelux, France and Spain in 2001

Undertaking	**2001 turnover in industrial bags (open mouth+valve+FFS+ block bags) F, D, BNL, ES (EUR '000)**	**Market share**
Bischof + Klein (Sacherie de Pont-Audemer)	*[…]*	*[…]*
Trioplast	*[…]*	*[…]*
Cofira	*[…]*	*[…]*
Rosenlew	-	-
Ceisa	-	-
B+K	*[…]*	*[…]*
Nordenia	*[…]*	*[…]*
RKW	*[…]*	*[…]*
Sachsa	*[…]*	*[…]*
BPI (Combipac & Francepac)	*[…]*	*[…]*
Armando Álvarez	*[…]*	*[…]*
Fardem	*[…]*	*[…]*
Stempher	*[…]*	*[…]*
Total	*[…]*	*[…]*

Others (estimate)	*[…]*	*[…]*
Total Market	*[…]*	**100%**

Source: undertakings' replies to Commission's requests for information[15].

(47) The total turnover in industrial bags generated by these undertakings in the territory comprising Germany, Benelux, France and Spain is thus evaluated at around EUR 165 million in 1996 and around EUR *[…]* million in 2001.

(48) The estimates provided by the undertakings of the total value of the market in the geographic area under consideration vary widely and, for 2001, range between EUR 107 million (clearly an underestimate) and EUR 473 million.

(49) Calculating the average of these estimates gives a value of EUR 250-300 million. Taking that value as a basis, it can be considered that in 2001 the cartel members represented between 65% and 75% of the industrial bags market in the geographic area covered by Germany, Benelux, France and Spain.

(50) Using the same method, it can be calculated that the value of the industrial bags market in 1996 in the geographic area concerned was around EUR 220 million and that the cartel members represented between 70% and 80% of that market.

(51) In their replies to the Statement of Objections, several undertakings challenge the Commission's estimate of the market's value.

(52) Stempher maintains that the market has been underestimated in that several operators have been left out of account, as witness the 2001 AMI report on the polyethylene film industry. Stempher names a number of competitors the Commission should have taken into consideration. But against this it can be argued, firstly, that Stempher's estimates regarding those undertakings do not only concern industrial bags. Secondly, the Commission's estimate took account of the presence in the market of competitors outside the cartel, evaluated at 25% in 1996. As far as the AMI report is concerned, whilst it is a useful guide, it does not specify what was included under the heading of "Heavy duty sacks". Moreover, the figure of 8.1% which Stempher takes as a basis for its own assessment was calculated using the whole European market and not only the territory to which this Decision relates.

(53) Stempher maintains that the Commission should have taken account of polypropylene bags. But polypropylene bags were not excluded a priori from the scope of the investigation. The investigation simply led to a finding that the essential raw material used in the manufacture of plastic industrial bags was polyethylene. In their replies to the Commission's requests for information, most undertakings, including Stempher, did not mention polypropylene. It is therefore indicated in the Statement of Objections that the raw material commonly used is polyethylene.

[15] Concerning year 2001, the worldwide turnover for Bishof + Klein group (including Sacherie de Pont-Audemer, renamed Bischof + Klein France) amounts to EUR […].

(54) Fardem challenges the assessment of market shares based on turnover achieved and advocates an estimate based on sales volumes. However, no method stands out as being superior in principle. Inasmuch as FFS bag sales are traditionally expressed in tonnes whereas sales of the other categories of industrial bag are expressed in terms of units sold, it was considered that an estimate based on sales in value terms was the best way of representing the respective positions of the undertakings on the market.

(55) RKW challenges the taking into account, in estimating its 2001 market share, of the turnover from the operations of the Ville-le-Marclet and Pori plants, purchased from UPM in 2000. However, when it comes to assessing the operations of the entire RKW group in 2001 in the territory covered by the cartel, account should be taken of the operations of the above two plants (and in any case RKW provided the Commission with figures including the two plants which were reproduced unchanged in the Statement of Objections).

(56) Nordfolien maintains that some of the bags included in the estimate are in reality special products meeting particular specifications which ought not to have been taken into account. It should be pointed out, first of all, that the industrial bags referred to clearly belong to categories falling within the scope of the investigation (valve bags and FFS bags). The fact that Nordenia characterises them as special owing to particular characteristics is not enough to exclude them from the assessment of the industrial bags market.

(57) What is more, the discussions between cartel members and the exchanges of statistical information within Valveplast appear not to have been limited exclusively to standard bags. The price calculation model worked out within Valveplast allowed a number of specifications to be included and the proposals relating to Internet bidding were not confined to calls for tenders for standard bags. The call for tenders put out over the Internet by *[Customer name]* in December 2001, concerning which several undertakings came to an arrangement, contained particular specifications. Within the France subgroup, the regular exchanges of information on volumes and prices for open mouth bags also covered so-called "special" bags.

(58) "Special" bags are in fact products which have been adapted from the standard product. In so far as they belong to one of the four categories of industrial bag, their factoring in is justified in order to arrive at the most realistic estimation possible of the undertakings' relative positions and strengths on the plastic industrial bags market.

2.4. TRADE BETWEEN MEMBER STATES

(59) The five main manufacturers of industrial bags in 2001 in the territory concerned by this Decision, namely Bischof + Klein, RKW, Nordenia, BPI (Combipac and Francepac) and Armando Álvarez, are estimated together to account for between 42% and 60% of the total turnover achieved in the industrial bags sector in the territory covering France, Germany, Benelux and Spain[16].

(60) Furthermore, in 1996 and 2001, four of these five companies generated more than 30% of their turnover outside their geographic territory.

[16] See table, recital (46) above.

(61) It can be seen from the information on export market shares exchanged during meetings of the cartel by the undertakings concerned that a substantial proportion of their business was done outside their domestic market. To take an example, in September 1999 around 25% of the total volume of valve bags sold by the cartel members on the French and Benelux markets was imported. In the case of FFS bags, the proportions for those two markets were approximately 49% and 38% respectively. On the German market, the import figures were 28% for FFS bags and 13% for valve bags. On the Spanish market, they were 3% and 10% respectively (see also the analysis in subsection 2.2). A similar observation could be made in relation to the overall period of the infringement.

(62) This confirms that over the period concerned by this Decision, the industrial bags market was notable for a substantial volume of trade between several Member States.

2.5. THE UNDERTAKINGS INVOLVED IN THIS PROCEEDING

2.5.1. Aspla and Armando Álvarez SA

(63) Plásticos Españoles SA (business name "Aspla") was set up in 1964. It manufactures plastic bags and film. In the industrial bags sector, it produces open mouth, valve, FFS and block bags.

(64) The company has a production site at Torrelavega (Cantabria). It has two subsidiaries, Aspla France SARL and Aspla II-Portugal.

(65) From the beginning, Aspla's parent company has been Armando Álvarez SA, whose registered office is in Madrid. It held *[…]* of Aspla's capital in 2002.

(66) Armando Álvarez SA controls some twenty subsidiaries, including Macresac, acquired in October 1994.

2.5.2. Bischof + Klein

(67) Bischof + Klein GmbH & Co. KG was set up in 1892 and has its registered office in Lengerich. It has two production sites in Germany, at Konzell and Lengerich, and employed 1 763 people in 2003.

(68) It produces, among other things, valve bags, open mouth bags and FFS bags.

(69) Via its wholly owned subsidiary B+K Beteiligungen GmbH & Co. KG, it controls the following subsidiaries: Napiag in Austria (100%), B+K UK (100%), Werra Plastic until December 2002 (100%), Solem in Luxembourg (99.9%), B+K Poland (100%), B+K France (Sacherie de Pont-Audemer) (100%), Huecopack in Spain (75.99%) and B+K Belgium (100%).

2.5.3. Bischof + Klein France (Sacherie de Pont-Audemer)

(70) The company's origins date back to the mid-19th Century. From the early 20th Century onwards, it specialised in paper processing. It began producing plastic bags in 1965. In 1983 the plastic bags business was sold to the Dutch group Van Leer and took the name "Van Leer France et Cie". It was integrated into the industrial packaging division of the Van Leer group.

(71) In June 1988 the company took the name “Sacherie de Pont-Audemer”.

(72) In October 1999 the Van Leer group was bought by the Finnish group Huhtamaki, which became the Huhtamaki Van Leer group.

(73) On 12 July 2000 Sacherie de Pont-Audemer was bought by two of its directors.

(74) On 18 December 2000 the company was sold to the German group Bischof + Klein. It has since been wholly owned by Bischof + Klein Beteiligungen GmbH. In November 2002, the company changed its name to “Bischof + Klein France SAS”.

(75) Bischof + Klein France has been active in the plastic bags and films sector since 1960. Since the mid-1990s [*description of the Company's evolution in FFS*].

(76) The company has its registered office and its sole production site at Pont-Audemer in western France. It employed around 190 people in 2002.

2.5.4. Bonar Technical Fabrics and the Low & Bonar group

(77) From the late 1980s, Bonar Phormium Packaging was the packaging arm of Bonar Phormium NV, Zele, Belgium. On 28 November 1997, Bonar Phormium NV sold the business to the BPI group.

(78) In 1999 Bonar Phormium became a wholly owned subsidiary of Bonar International SARL, itself a wholly owned subsidiary of Bonar International Holdings, which in turn is a wholly owned subsidiary of Low & Bonar PLC.

(79) In May 2000 Bonar Phormium was merged with one of its own wholly owned subsidiaries, Bonar Technical Fabrics NV, with retroactive effect from 1 December 1999. Bonar Phormium NV ceased to exist legally on 1 December 1999.

2.5.5. The BPI group

(80) The ultimate parent company of the BPI group, British Polythene Industries PLC, based in the United Kingdom, took its current name in 1990 (it was previously called Scott & Robertson Plc). It began developing its industrial bags business in 1983 when it acquired Anaplast Limited.

(81) The industrial bags business is divided between the British part and the continental part. The business in the United Kingdom and Ireland are the responsibility of the subsidiary British Polythene Limited. That company developed through the acquisition of several other firms (Anaplast in 1983, Visqueen in 1988, Flexer Sacks in 1993 and CVP in Ireland in 1993).

(82) As far as continental operations are concerned, British Polythene Industries PLC acquired Wavin PFP BV on 25 April 1997 via Combipac BV, a subsidiary of BPI Europe BV, itself a joint subsidiary of British Polythene International Limited and British Polythene International (No 2) Limited, both subsidiaries of British Polythene Industries PLC. Combipac BV controls operations at the Hardenberg and Roeselare sites under the business name "bpi.indupac". Combipac BV also controls the operations of Formipac ("bpi.belgium") at Zele, which were bought in November 1997 from Bonar Phormium.

(83) On 25 April 1997 British Polythene Industries PLC also bought, via its subsidiary Francepac, the business of Wavin Emballage SA, a subsidiary of the Wavin group. Francepac SA is a direct subsidiary of British Polythene Industries PLC and markets output from the Hardenberg plant in France.

(84) Since 1990, the group's operations have been organised along functional division lines. The industrial bags business initially formed part of larger divisions and then gradually developed into an independent unit ("Heavy duty sacks and Ireland" in 1996, "Industrial products" in 1998, "bpi.industrial" and "bpi.belgium" in 2000). The operations of bpi.indupac (Hardenberg plant) and Francepac then came under the bpi.industrial division while Formipac (Zele plant) came under bpi.belgium. In April 2004, bpi.indupac and Francepac were transferred to the bpi.europe division.

(85) As far as internal organisation and the reporting chain are concerned, each division is run by a director, assisted by a board composed of the division's executive directors and representatives of the board of directors of British Polythene Industries PLC. Division boards meet quarterly.

(86) Within the divisions, each operation or site is under the responsibility of a managing director who takes charge of operational and commercial aspects and reports quarterly to the division director. According to the explanations given by BPI, decisions on prices and customers are taken by the managing directors and their commercial managers. BPI points out that these decisions are in principle taken at the local level by the commercial managers, who report monthly to the managing directors, except in the case of key accounts and large contracts, which are dealt with directly by the managing directors.

2.5.6. Cofira

(87) Cofira-Sepso is the result of the link-up of two independent companies, Charfa and Fardem SA, a French subsidiary of the Dutch group Fardem.

(88) Between 1982 and 1991, Charfa and Fardem SA were two independent companies. Charfa was specialised in the manufacture and sale of paper industrial bags. From 1980 onwards it also developed a plastic bags operation on its site at Rousset. Charfa also owned 90% of Cofira, a company specialised in shrink film and based at the Rousset site.

(89) Fardem SA was the wholly owned French subsidiary of Fardem Group BV, specialised in the manufacture and sale of flexible plastic packaging and itself wholly owned by the DSM group.

(90) In 1991 Fardem SA bought Charfa's plastic bags operation at the Rousset plant and its subsidiary Cofira.

(91) In October 1995, DSM having decided to hive off the entities in the Fardem group, the management of Fardem SA set up a new company, Cofira, that took over the assets of Fardem SA, which was wound up.

(92) In January 1999 Cofira bought Charfa's plastic films operation based at a site in Béthune and turned it into a subsidiary which took the name Cofinor in January 2001. Cofinor ceased trading in November 2001.

(93) In November 2001 Cofira bought Sepso, owned since 1996 by Cofira's shareholders and destroyed following the explosion at AZF in Toulouse.

(94) Since October 1995 Cofira-Sepso has been a privately owned limited company (74% of the shares are held by *[Name and position]*).

(95) Cofira-Sepso had its registered office and sole production site at Rousset in France and employed 83 people.

(96) Since October 1995 Cofira has shaped its commercial policy independently. According to its Chairman and Managing Director, *[Name]*, between 1991 and 1995 the strategy for industrial bags was decided at Fardem group level for all the subsidiaries.

(97) In 2003 the industrial bags business was transferred to the until-then inactive company Cofira-Sac SA. Cofira-Sepso was wound up and removed from the Commercial and Companies Register on 29 January 2004.

2.5.7. Ceisa

(98) Ceisa was bought in 1985 by the Perrier group via one of its subsidiaries, Société de Bouchages, Emballages et Conditionnements Modernes. In 1992 Ceisa became a subsidiary of Société Générale des Grandes Sources (Perrier group). The Perrier group was itself bought by Nestlé that year. Ceisa became part of Perrier Vittel France.

(99) In April 2000 Ceisa was sold by Perrier Vittel France to the Belgian company Fardis.

(100) Ceisa has been active in the plastic films and bags sector since 1982. As far as industrial bags are concerned, Ceisa has produced open mouth and FFS bags. However, these two activities being in steady decline, Ceisa sold its open mouth bags business in May 1993. It claims to have abandoned production of FFS bags in 1997, although the equipment was not disposed of until July and November 1998 and sales continued in 1998.

(101) Ceisa states that it withdrew permanently from the industrial bags business in 1997. The company was placed under receivership in February 2004 and made the subject of a sell-off plan on 11 June 2004. It has changed its name to Bernay Film Plastique[17].

[Ceisa must be distinguished from the company Ceisa Packaging, which is the beneficiary of the sell-off plan and which is not an addressee of the present proceeding].

[17] See website www.societe.com.

2.5.8. Fardem

(102) Fardem has always specialised in the manufacture of industrial bags (valve, open mouth, FFS and block bags).

(103) Until 1995, the Fardem group was controlled by DSM N.V.. On 8 June 1995 the assets and operations of the Fardem group were transferred to Schuttersveld N.V., today called Kendrion N.V., to form two companies, Fardem Packaging B.V. and Fardem Holding B.V., both controlled by Combattant Holding B.V., itself a wholly owned subsidiary of Kendrion N.V..

(104) In September 2001 the two companies were merged into a single entity under the name Fardem Packaging B.V., still controlled by Combattant Holding B.V.. The company is located in Edam.

(105) In 2003 the company was sold by its sole shareholder to its employees.

(106) Since 1995, according to *[Position and Name]*, Fardem Packaging B.V. has determined its commercial policy and taken its management decisions independently, the budget and general approach being approved annually by the management of Kendrion N.V., which, he claims, would have regarded Fardem as a mere investment. Feedback on the day-to-day running of the company is nevertheless provided to the parent company through monthly written reports and personal contacts. In its reply to the Statement of Objections, Kendrion N.V. specified, however, that the monthly reports were financial reports.

2.5.9. Nordenia

(107) Nordenia was set up in 1966. It produces chiefly shrink film for pallets and transport applications and industrial bags (valve, FFS, open mouth and block bags), as well as big bags and consumer packaging.

(108) The group was controlled by the ultimate parent company Nordenia International AG. The industrial bags business was turned into a subsidiary company in 1992 under the name Nordenia Verpackungswerke GmbH, which in May 2000 became Nordenia Deutschland Steinfeld GmbH.

(109) Nordenia Deutschland Steinfeld GmbH has a number of subsidiaries: *[…]*

(110) Nordenia Deutschland Steinfeld GmbH was under the sole control of Nordenia International AG since its formation. It did not have a board of directors. It belonged to the group's industrial bags division. *[…]*

2.5.10. RKW

(111) RKW produces several types of plastic film (for agricultural use, industrial packaging, household use and hygiene), pouches and industrial bags (valve, FFS and open mouth bags).

(112) Between 1982 and 1998, RKW GmbH was a wholly owned subsidiary of Renolit-Werke GmbH, which was set up in 1946, in 1999 becoming Renolit Holding GmbH then Renolit AG. In January 2003 Renolit AG took the name JM Gesellschaft

für industrielle Beteiligungen mbH & Co. KG and RKW GmbH that of RKW AG Rheinische Kunststoffwerke (hereinafter "RKW AG").

(113) The group's business activities are currently distributed between three independent entities that are wholly controlled by the parent company JM Gesellschaft für industrielle Beteiligung mbH & Co. KG: RKW AG (production of plastic bags and films), Renolit AG[18] (production of PVC-based films) and Kiefel AG (manufacture of machinery).

(114) RKW AG directly controls a number of plants in Germany (Worms, Echte, Petersaurach, Hersbruck, Wasserburg, Michelstadt and Nordhorn) and has ten wholly owned subsidiaries (RKW Gronau GmbH in Germany, Industrias Iter SA in Spain, Ace SA in Belgium, RKW Sweden AB in Sweden, Rosenlew RKW Finland Oy in Finland, RKW St. Frères Emballage SAS, Remy SA, Castelletta SA and RKW Guial SAS in France, and RKW US Inc. in the United States). It employs around 2 400 people.

2.5.11. Rosenlew and UPM-Kymmene

(115) Saint Frères Emballages was set up in 1989 and completely bought up in December of that year by the Finnish company W. Rosenlew Ab. In 1996 it took the name Rosenlew Saint Frères Emballage SA. At the end of 1996, W. Rosenlew Ab transferred its shares to UPM-Kymmene.

(116) Until 1991, the parent company W. Rosenlew Ab was wholly owned by Rauma-Repola Corporation. Between 1991 and 1995, W. Rosenlew Ab was jointly owned by Repola Corporation (75%) and Neste Oy (25%). In 1995 Repola Corporation bought all the remaining shares. In 1996, following the merger of Repola and Kymmene to form UPM-Kymmene, W. Rosenlew Ab was merged with UPM-Kymmene. The Rosenlew business unit has since then been directly controlled by UPM-Kymmene.

(117) Rosenlew Saint-Frères Emballage is a 99%-owned subsidiary of UPM Kymmene Groupe, a holding company without any commercial activity which is itself a 99%-owned subsidiary of UPM-Kymmene, the group's parent company.

(118) In December 2000 UPM-Kymmene sold Rosenlew's industrial bags business to RKW, including the site operated by Rosenlew Saint Frères Emballage SA at Ville-le-Marclet, France.

(119) Today, the Rosenlew group, which has no longer had independent legal personality since 1997, has six sites in Europe, two of which in France: Rosenlew Saint Frères Emballage SA at Beauval and Rosenlew SA at Montceau-les-Mines.

(120) The Rosenlew group was, until the end of the 1990s, active in the polyethylene industrial bags, polyethylene industrial films and covers, polyethylene packagings and polypropylene big bags sector. Since the end of 2000, Rosenlew produces and sells only big bags. Industrial bags accounted for around *[…]* of turnover at the end of the 1990s.

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[18] Set up in 1998 under the name Renolit Werk GmbH, it took the name Renolit AG in 2003.

(121) Rosenlew Saint Frères withdrew from the industrial bags business in 2000. It was wound up on 14 May 2004.

(122) Rosenlew Saint-Frères Emballage had its registered office in Paris and a single production site at Beauval in France. In 2003 it employed 160 people.

(123) Between 1990 and 1997, the commercial policy of Rosenlew Saint Frères Emballage was determined jointly by its Managing Director, *[Name]*, and the Chairman of Rosenlew Ab, *[Name]*. Following Rosenlew's merger with UPM-Kymmene, Rosenlew's operations were integrated into UPM-Kymmene's processing division, to which the Chairman of Rosenlew, *[Name]*, reported.

(124) From 1997 onwards, commercial strategy, particularly for industrial bags, was decided at Rosenlew group level under the responsibility of its Chairman, assisted by Rosenlew's Head of continental European operations, *[Name]* (who was also the Managing Director of Rosenlew Saint-Frères Emballage), the Head of operations in Scandinavia and the United Kingdom, *[Name]*, and the Commercial Manager for continental Europe, *[Name]*.

2.5.12. Sachsa and Groupe Gascogne

(125) Founded in 1927, Sachsa belonged to the Hannover Papier AG group from 1947 to 1993. The company was completely bought up by the French company Groupe Gascogne SA in 1994. It has a site at Wieda and employs *[…]* people (2002 figures). Sachsa produces paper bags and plastic bags (valve, open mouth and FFS bags).

(126) Sachsa Verpackung GmbH is 90% controlled by the holding company Gascogne Deutschland GmbH, itself wholly owned by the ultimate parent company, Groupe Gascogne. The remaining 10% is held directly by Groupe Gascogne.

2.5.13. Stempher

(127) Stempher manufactures and sells paper and polyethylene bags, including industrial bags.

(128) The structure of the company is as follows: Koninklijke Verpakkingsindustrie Stempher C.V. (hereinafter "K.V. Stempher C.V.") is the operational entity. Stempher B.V. is the management entity of K.V. Stempher C.V.. Stempher B.V. has no economic activity.

(129) The board of directors of K.V. Stempher C.V. meets together with the executive committee of Stempher B.V. once a month. Production and marketing is entirely carried out by K.V. Stempher C.V. at its site in Rijssen.

2.5.14. Trioplast Wittenheim, the Trioplast group and the FLS group

(130) The Wittenheim plant, in eastern France, was built in 1968.

(131) Between 1982 and 1988, the plant was one of the five production sites in France belonging to Silvallac SMS, a wholly owned subsidiary of Cellulose du Pin, itself a member of the Saint-Gobain group. In 1988 the plant was turned into a legally separate subsidiary company under the name Silvallac SA.

(132) In 1990, 60% of Silvallac SA was sold to the Danish company Nyborg Plast International A/S (subsequently renamed FLS Plast A/S), a member of the FLS group. The remaining 40% was bought by Nyborg in 1991.

(133) By a deed dated 19 January 1999 the Swedish group Trioplast (whose ultimate parent company is Trioplast Industrier AB), via its French subsidiary Trioplanex France SA, bought Silvallac SA with retroactive effect from 1 January 1999. Silvallac SA took the name Trioplast Wittenheim SA in July 1999.

(134) In addition to industrial bags, Trioplast Wittenheim produces films and hoods.

(135) From the late 1980s until 1997, the industrial bags business accounted for 30-40% of total sales. In 1997 the company stopped producing open mouth and valve bags because they were unprofitable.

(136) The company's registered office and sole production site are at Wittenheim in France. Its workforce declined from 120 in 1995 to 50 in 2002.

3. PROCEDURE

3.1. COMMISSION INVESTIGATION

(137) BPI contacted the Commission in November 2001. At a meeting held on 9 November 2001 BPI informed the Commission of the existence of what it described as a cartel with a European dimension in the industrial bags sector and expressed the wish to cooperate with the Commission under the Commission Notice on the non-imposition or reduction of fines in cartel cases[19] (hereinafter the "Leniency Notice") *[…]*.

(138) On 20 June 2002 the Commission ordered inspections at thirteen undertakings suspected of being involved in the cartel to be carried out pursuant to Article 14(3) of Regulation No 17, in the case of twelve of them, and pursuant to Article 14(2) of that Regulation, in the case of the thirteenth.

(139) The inspections took place simultaneously on 26 and 27 June 2002.

(140) During the inspection carried out at the premises of Bischof + Klein, *[an employee]* present removed and destroyed a document selected by the inspectors, despite repeated warnings by the latter. By letter dated 5 July 2002, the counsel acting for Bischof + Klein submitted a copy of a document which was presented as corresponding to the one destroyed during the inspection.

(141) *[Recitals (141) – (152) are deleted, including any cross references to these recitals and relevant footnotes. The recitals are summarised as follows:* Between 14 November 2002 and 4 August 2003, the Commission addressed various requests for information under Article 11 of Regulation No 17 to the companies involved throughout the entire administrative procedure and received a leniency application from Trioplast Wittenheim.]

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[19] OJ C 207, 18.7.1996, p.4.

(153) On 29 April 2004 the Commission initiated proceedings in this case and adopted a Statement of Objections against the undertakings to which this Decision is addressed.

(154) *[Recitals (154) – (156) are deleted, including any cross references to these recitals and relevant footnotes.]*

(157) Having replied in writing to the Statement of Objections, all the addressees of this Decision, with the exception of Ceisa, took part in or were represented at the hearing of the case, which was held on 26, 27 and 28 July 2004.

(158) *[Recitals (158) – (164) are deleted, including any cross references to these recitals and relevant footnotes.]*

4. THE FACTS

4.1. ORIGIN AND GENERAL DESCRIPTION OF THE CARTEL

(165) The oldest evidence found during the inspections that points to meetings held between a number of the undertakings in question dates from 1982. However, such contacts appear to date back to the 1970s.

(166) They were established under the auspices of the European plastic valve bag manufacturers association, whose initial statutes were registered in July 1970 in Luxembourg.

(167) The association's official object was, as for any trade association, to defend the interests of its members. Generally, its aim was to promote sales of valve bags and compile market data for the benefit of its membership.

(168) In 1984 a new association was set up to replace the earlier one, retaining a similar object but changing its title and adopting the abbreviated name “Valve-Plast” (European Association of Plastic Valve Bag Manufacturers, hereinafter “Valveplast”).

(169) The membership of Valveplast has changed little since 1984 and the structure has remained relatively stable up to the present day.

(170) Originally, the Association's sphere of activity was confined to valve bags. With the development of the FFS system in the 1980s, its scope was extended to cover that category of industrial bags. An attempt to set up an "FFS-Plast" organisation along the lines of Valveplast in 1995 appears to have come to nothing. The statutes of Valveplast were finally amended in 2000 to include FFS bags.

(171) Contacts in fact developed at two levels: within the European group and within the subgroups.

(172) At least five regional groups have been identified, within the Valveplast structure or outside it: the Benelux subgroup, the Germany subgroup, the France subgroup, the Belgium subgroup and the Teppema group.

(i) The Benelux subgroup

(173) This subgroup has been in existence at least since 1982, as witnessed by a record of a meeting held in Breda on 6 January 1982.

(174) The following undertakings were members at that date:

- Wavin, Fardem and Bates Cepro for the Benelux,
- Nordenia, RKW and Bischof + Klein for Germany,
- Sacherie de Pont-Audemer and Silvallac for France.

(175) The subgroup was initially concerned only with the valve bags market in Benelux. However, its activity was gradually extended to encompass block bags and FFS bags.

(ii) The Germany subgroup

(176) This subgroup appears to have existed at least since the end of the 1980s. It comprised the German producers that were members of Valveplast: Bischof + Klein, RKW, Nordenia, Sachsa, Dürbeck, Herkules and occasionally Wavin (now BPI Indupac), which, although non-German, was present on that market. Discussions related to valve bags, open mouth bags and FFS bags.

(177) The Germany subgroup merged with the Benelux subgroup in 1997/1998.

(iii) The France subgroup

(178) The France subgroup operated in a similar manner to the two already described. According to the information collected, it operated at least from 1985 onwards (and was probably set up in the course of the 1970s). Discussions related to open mouth bags and valve bags.

(179) The members of this group were: Sacherie de Pont-Audemer, Saint-Frères Emballage (subsequently Rosenlew Saint-Frères), Silvallac (subsequently Trioplast Wittenheim), Cofira, Wavin (subsequently BPI-Francepac) and probably Ceisa.

(iv) The Belgium subgroup

(180) This subgroup brought together the industrial bag producers operating in Belgium: Wavin (subsequently Indupac), Fardem, Bonar Phormium (subsequently Formipac / bpi.belgium), Bates Cepro (bought by Bischof + Klein in 1993) and Evipac (bought by Fardem).

(181) It dealt mainly with open mouth bags and appears to have existed since the early 1980s.

(v) Teppema

(182) Teppema is an official trade association independent of Valveplast. Within Teppema a subgroup of open mouth bag manufacturers operating on the Dutch market, composed of Fardem, Stempher, Wavin and Bonar Phormium, was set up in 1980.

(183) Teppema was taken over by *[…]* in 1999.

(vi) The block bags subgroup

(184) There was also a functional subgroup within Valveplast, dedicated exclusively to block bags.

(185) This subgroup usually met on the fringes of official Valveplast meetings and brought together the Valveplast members that produced block bags. Saint-Frères, Silvallac (Trioplast Wittenheim), Sacherie de Pont-Audemer, Nordenia, RKW, Wavin (BPI Indupac), Bischof + Klein, Aspla and Fardem generally attended meetings. These began in the early 1990s.

(186) Therefore, the cartel was basically organised on two levels:

- the overall level of Valveplast and the functional subgroups emanating from it;
- the level of the regional subgroups linked to or independent of Valveplast.

4.2. VALVEPLAST

4.2.1. Structure and operation

(187) Valveplast is an official association set up under Luxembourg law by the valve bag producers on 7 December 1984. It replaced a structure that had been in existence since 1970. Its registered office has since its inception been in Luxembourg.

(188) According to its statutes, its object was "to look after the common interests of plastic valve bag manufacturers, with special reference to the development of new uses, the creation of statistical databases, standardisation and the industry's public relations, and excluding any profit-making commercial activity"[20].

(189) Only manufacturers with their registered office and production facilities in the Community can join. Members pay an annual membership fee.

(190) In accordance with the statutes, a general meeting must be called each year and held in Luxembourg.

(191) An executive committee composed of a chairman, a vice-chairman and a treasurer is elected for a three-year term.

(192) A secretariat is also operated by an outside service provider. This task has been performed since the beginning by a firm of chartered accountants *[…]*, whose main role was to collect sales figures from members and redistribute them in aggregated, anonymous form and to prepare the annual general meetings.

(193) In March 2000, new statutes were adopted whose main thrust was to widen the object of the association to include FFS bags (tubular film), thereby acknowledging a de

[20] In the original French: "veiller aux intérêts communs des fabricants de sacs à valve brique en matières plastiques et en particulier en relation avec le développement de nouveaux domaines d'application, la création de bases statistiques, la normalisation ainsi que les relations publiques de l'industrie à l'exclusion de toute activité commerciale lucrative".

facto situation, since discussions concerning FFS bags had begun within the association in the mid-1980s.

(194) In practice, official meetings were held some three or four times a year: the annual general meeting in Luxembourg, a meeting followed by a social event generally at a venue with tourist attractions, and the other meetings in the country of the incumbent chairman.

(195) These meetings were attended by the undertakings' managing directors.

(196) They followed an agenda drawn up by the chairman and distributed in advance to all members. The agenda varied very little.

(197) A record of each meeting was systematically drawn up by the chairman and subsequently distributed to all members.

(198) Each month, the members of the association had to report their previous month's sales of valve bags and FFS bags to *[…]*. This information was provided in the form of tables (one for valve bags and another for FFS bags) that had to show the volumes supplied by the undertaking in each of the four geographic areas covered by the association (France, Benelux, Germany and Spain): in metres and kilograms for FFS and in numbers of bags for valve bags.

(199) *[…]* collected and processed all the replies and redistributed the information monthly to each member in anonymous, aggregated form. These data were presented in the form of a table setting out the total deliveries by all the members in each geographic area and the share of the undertaking concerned, both in the month in question and cumulatively from the beginning of the current year.

(200) Another table gave an overview of the total market: it showed the volume of deliveries made in the month in question and cumulatively over the current year, from each area and by area of destination, also giving the figures for year n-1.

(201) During the official part of the meeting the following topics were usually discussed: approval of the record of the previous meeting, statistics and figures concerning the FFS and valve bags market based on the data compiled by *[…]*, trends regarding raw materials, renewal of members of the executive committee, the association's financial situation, other business (e.g. electronic commerce, the changeover to the euro, European legislation, environmental issues).

(202) During a limited period, from November 1997 to March 1998, meetings were apparently divided into two parts: one devoted to FFS bags and the other to valve bags. This formal separation was later abandoned.

(203) Working groups were set up in certain periods to look into specific questions: block bags, the question of replacement of valve bags by FFS bags (in 1995), the changeover from a weight-based calculation system to a system based on FFS bag units, and Internet reverse auctions.

(204) Alongside this official part, which was minuted, non-official discussions took place. *[…]* was apparently not aware of them.

4.2.2. Members

(205) The founder members of Valveplast are Bates Cepro BV, Bischof + Klein, Wavin, Charfa, Ceisa, Fardem, Herkules, Nordenia, Dürbeck, Silvallac, Sacherie de Pont-Audemer and Van Leer France. Several of these companies were already members of the predecessor association (Bates Cepro, Bischof + Klein, Ceisa, Dürbeck, Sacherie de Pont-Audemer).

(206) Other companies joined Valveplast at a later stage: Aspla in 1986, Sachsa in 1988, RKW in 1990, Macresac in 1991, Rosenlew Saint Frères in 1997, and Bonar Phormium in 1997.

(207) BPI replaced Wavin in 1997, after taking over its operations in the Benelux and France.

4.2.3. Basic features of the cartel

(208) It is clear that, from the beginning, Valveplast was designed in order to provide legal cover for its members' anticompetitive practices, although, as we have seen, that was not its sole object.

(209) A document *[…]* illustrates perfectly well the thinking behind the creation of Valveplast. Dating from the early 1980s, it is entitled "Some basic points regarding an agreement to regulate the supply of valve bags in Western Europe"[21]. It begins by stating that there is excess capacity in Europe leading to a price war that could prove fatal to several producers and calling for an arrangement to be set in place to reduce output. It then lays the foundations for a system of quotas, rules for the exchange of information and a method for setting minimum prices and allocating major customers:

- "The quotas fixed per country for each of the three countries must be respected by each of the participants committing to them ... It is proposed that the quota for each participant be taken as the weighted average of its deliveries in 1979 and 1980."

- "Each month, the percentages for the previous month and the cumulative figures since the entry into operation of the system, for each of the participants, will be communicated to everyone. They will be established by communicating invoices for statistical purposes to a common trust company."

- "Participants will monthly fix the price level for valve bags, which will be based on a sound economical calculation. Nobody is allowed to deviate of these prices without prior consultation of the other participants."

- "The price leader for each of the main customers shall determine the fair price and make it known to the other participating suppliers. Each participant undertakes to refrain from canvassing customers it has not supplied hitherto. (Where appropriate, if approached, it will quote prices substantially higher than those of the price leader.)

[21] Title in original English.

The lists communicated for a number of large customers will make these consultations and exchanges of information possible."[22]

4.2.4. Operation

4.2.4.1. Determination of general quotas and exchange of information

4.2.4.1.1. The facts identified by the Commission

(210) Sales quotas were established for each large production area (France, Germany, Benelux). They date from the early 1980s, on the basis of the market shares observed at the time. The quotas related exclusively to valve bags.

(211) For each area in which the undertakings are established, a quota for sales to each of the other areas is determined. Between 1993 and 1996, the quotas were fixed as set out in Table 3:

Table 3

	Area of establishment France	Area of establishment Benelux	Area of establishment Germany	Total
French market	80.3%	9%	10.7%	100%
Benelux market	3.7%	69.9%	26.4%	100%
German market	1%	6.7%	92.3%	100%

(212) *[Recital (212) is deleted, including any cross references to this recital and relevant footnotes.]*

(213) It is clear that the quotas served as a reference for Valveplast members in their analysis of markets and influenced their decisions *[…]*.

(214) For FFS bags, initiatives were also with a view to setting in place quotas along the lines of those existing for valve bags *[…]*.

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[22] Paragraphs in the original French: "Les quotas fixés par pays pour chacun des trois pays doivent être respectés par chacun des participants qui s'y engage. (...) On propose de retenir comme quota pour chaque participant, la moyenne pondérée de ses livraisons 1979 + 1980"; "(...) Chaque mois, les pourcentages du dernier mois et des mois cumulés depuis l'entrée en service du système, de chacun des participants, sont communiqués à tous. Ils sont établis par communication des factures à des fins statistiques, à une Société Fiduciaire commune" and "(...) Le Price Leader pour chacun des clients principaux devra déterminer le prix raisonnable et le faire connaître aux autres Participants fournisseurs. Chaque Participant s'engage à s'abstenir de prospecter les clients qu'il n'a pas servi jusqu'à présent. (Eventuellement, en cas de consultation, il remettra des prix sensiblement supérieurs à ceux du Price Leader). Les listes communiquées pour un certain nombre de grands clients, permettront ces consultations et échanges d'informations".

(215) The quotas fixed for valve bags were to be found again at the level of the France and Benelux geographic subgroups, as witnessed by the tables of market shares exchanged within those subgroups. Quotas were allotted to each undertaking individually, while respecting the overall quota for the geographic area concerned. This confirms that there was a link between the European level of the cartel and the levels of the regional subgroups, which all together formed a structured, coherent whole.

(216) During the unofficial part of Valveplast meetings, data on the market shares of each undertaking in the different markets were exchanged. These data were noted on a standard table handed to participants.

(217) The figures entered in those tables correspond to the figures communicated individually by *[…]* to each undertaking for a given month.

(218) The tables in question thus indicated the market share in volume terms of each undertaking, in relation to total sales by Valveplast members, represented by its sales in each of the four geographic areas except its own. The figures therefore related to exports. They were calculated for valve bags and FFS bags.

(219) The circuit followed by the information can therefore be reconstructed. Each month, the Valveplast member companies individually and confidentially reported the volumes of their previous month's sales of valve and FFS bags to *[…]*.

(220) *[…]* then returned to each company, in tabular form, the figures for total sales of the two products, informing each company of its market share for each product and in each geographic area.

(221) At the subsequent Valveplast meeting, these figures were exchanged orally between the participants, who entered them by hand on the pre-established tables.

(222) These data enabled the participants to monitor the evolution of each other's market shares in valve and FFS bags and compare those shares with the quotas established (at least as far as valve bags were concerned).

(223) The introduction of these tables dates back at least to 1990.

(224) According to several executives of the undertakings concerned, the quotas were not strictly respected, no penalties having been laid down.

(225) It is clear, however, that they did influence the behaviour of the cartel members. Variations in market shares were a potential source of conflict, prompting members to refrain from reporting their real figures to *[…]*.

(226) It can be seen that actual sales were compared with the quotas set in the tables distributed within the France and Benelux subgroups and served as a reference in analyses of the market covered by Valveplast.

(227) Sales in excess of the quotas could furthermore lead to discussions between Valveplast members and, apparently, to upward or downward adjustments.

(228) Market shares and possible agreements were also discussed when a new member joined.

(229) More generally, the desire to organise and allocate markets appears to have been one of the Valveplast members' concerns *[…]*.

(230) Furthermore, meeting participants informed each other periodically, at least from 1995 onwards, of their installed production capacities for valve bags in France, Germany, Spain, Belgium and the Netherlands.

(231) *[…]* basic principles were formulated (probably at a meeting in April 1994) with a view to improving the existing system for coordinating competition. Several members of Valveplast (Fardem, Nyborg/Silvallac, Wavin, Nordenia) were involved. The involvement of Rosenlew (which was to become a member of Valveplast in 1997) would also appear to have been envisaged. The system as worked out extended beyond the Valveplast structure proper and was intended to cover the entire heavy duty bags sector (valve, FFS and open mouth bags) as well as films. The objectives that were set included establishing market leaders at national and international level and by product group, controlling imports more effectively and reducing the number of competitors, while the means proposed comprised holding regular meetings *[…]*, carrying out detailed work *[…]*, holding regional meetings by product group, reducing capacities and appointing account managers for key customers. In the heavy duty bags sector alone, the proposals put forward included the creation of an FFS-Plast association and improved coordination of local markets for open mouth bags.

(232) *[Recital (232) is deleted, including any cross references to this recital and relevant footnotes.]*

4.2.4.1.2. The parties' arguments in response to the Statement of Objections as regards the fixing of quotas and exchange of information, and the Commission's findings

(233) *[Recitals (233) – (250) are deleted, including any cross references to these recitals and relevant footnotes.]*

4.2.4.2. Allocation of customers

4.2.4.2.1. The facts identified by the Commission

(251) Discussions took place during the meetings on a list of major customers. For each key customer, an account manager/coordinator was appointed. This was the largest supplier of the customer in question. The account manager had the task of coordinating the offers made by the different suppliers to the customer concerned, in particular in response to calls for tenders. Its role does not appear to have extended to assigning sales quotas to Valveplast members.

(252) This system operated chiefly for FFS bags, for which the principle was adopted at the beginning of the 1990s. Several documents dating from the 1980s and 1990s show that customers were allocated also in the case of valve bags *[…]*.

(253) In 1997 *[…]*, the idea of organising specifically the market in FFS bags was taken up again. It was proposed, among other things, that a system be set in place for collecting information on deliveries of FFS bags (excluding block bags) to key customers and that account managers be appointed for such customers. In order to assess the FFS market and the main customers, it was decided that each member was to forward to *[…]*, on a standard table, the figures for its deliveries of FFS bags in 1997 and its

forecasts for 1998, for a list of major customers. *[…]* was subsequently to redistribute these data in anonymous, aggregated form to all members. During the meeting, the list of key customers was drawn up for each geographic area (France, Spain, Germany, Benelux).

(254) It is clear that, ahead of the Valveplast meetings of 27 January and 13 March 1998, most Valveplast members sent *[…]* the required data relating to FFS bags. Those tables indicated the volumes of FFS bags delivered in 1997 and the volumes forecast in the 1998 budget by key customer. *[…]* returned to each undertaking a "fair copy" of its own declaration and a table entitled "Total" reproducing, in anonymous, aggregated form and by key customer, all the figures communicated by the undertakings. These tables served as a basis, during the meetings, for discussions on the allocation of key customers and the appointment of account managers.

(255) At the meeting of 27 January 1998, account managers were thus appointed for coordinating price increases *[…]*.

(256) *[Recital (256) is deleted, including any cross references to this recital and relevant footnotes.]*.

(257) *[Recital (257) is deleted, including any cross references to this recital and relevant footnotes.]*.

(258) Thereafter, the system of account managers and price targets was maintained.

(259) *[Recitals (259) – (261) are deleted, including any cross references to these recitals and relevant footnotes.]*

(262) The system of account managers also operated for the allocation of certain tenders. When a contract was put up for tender, the account manager for the customer concerned had the task of approaching the other suppliers in order to try to harmonise the level of price bids.

(263) The system of account managers was also extended to Internet reverse auctions. *[…]*

(264) From the outset, the principle of coordinating bids was accepted *[…]*

(265) This principle was applied in late 2001 *[…]*.

(266) Occasional discussions concerning specific *[…]*.

4.2.4.2.2. The parties' arguments in response to the Statement of Objections as regards the allocation of customers, and the Commission's findings

(267) *[Recitals (267) – (278) are deleted, including any cross references to these recitals and relevant footnotes.]*

4.2.4.3. Price fixing

4.2.4.3.1. The facts identified by the Commission

(279) A calculation model enabling a common minimum price to be determined for valve bags in Europe was devised in 1987. The price of raw materials to be used for the purpose of the calculation seems to have been decided during the meetings. This model appears to have been used above all at the level of the Benelux subgroup.

(280) The desire to agree on specific price increases to be applied existed also at the overall level within Valveplast.

(281) Valveplast members thus consulted each other on the prices to be charged in certain specific deals or for certain customers. To put it simply, the price offered by a supplier was equal to the cost of the raw material plus the converting price (or value added).

(282) *[Recital (282) is deleted, including any cross references to this recital and relevant footnotes.]*

(283) With the introduction of the system of account managers and the adoption of a list of key customers for FFS bags, exchanges of information on FFS bag prices for those key customers were institutionalised.

(284) *[Recital (284) is deleted, including any cross references to this recital and relevant footnotes.]*

(285) *[...]* price targets were thus worked out for several key customers. These price targets in fact corresponded to the value added (or the concept of converting price). *[…]*

(286) *[Recital (286) is deleted, including any cross references to this recital and relevant footnotes.]*

(287) At the Valveplast meeting held on 15 September 2000, a working group was set up with the official remit of preparing a model for FFS bags allowing the changeover from a weight-based to a unit-based calculation system. *[…]* one of the items discussed was a detailed model for analysing costs and calculating the value added for FFS bags, *[…]*. This model makes it possible, once the qualitative and quantitative characteristics have been introduced, to obtain the total manufacturing costs per kilogram, per metre and per unit. It then calculates the gross value added per kilogram by deducting the cost of the raw material determined according to the Platt index. This model was used as a basis for developing a simplified price calculation matrix, which was communicated to all Valveplast members except Rosenlew and Trioplast Wittenheim in December 2000 and appears to have been well received. It was to enable calculation rules to be standardised and lead to a changeover from a price by weight to a price per unit, the ultimate objective being to make price comparisons between manufacturers more consistent and facilitate the determination of minimum added values*[…]*. The aim was also to enable a concerted price increase to be implemented.

(288) *[…]* In May 2001, *[…]* the working group on FFS drew up a draft petition to the other members of Valveplast. In substance, reference was made to the calculation model devised by the working group and members were asked to give their agreement and undertake to comply with a number of principles governing the calculation of FFS costs. *[…]* it was amended so that it referred only to the objective of ensuring

compliance with European packaging legislation. The petition was discussed and, apparently, accepted by the members of Valveplast at the meeting of 8 June 2001.

(289) Consultations also continued on specific deals.

(290) *[Recitals (290) – (293) are deleted, including any cross references to these recitals and relevant footnotes.]*

4.2.4.3.2. The parties' arguments in response to the Statement of Objections as regards price fixing, and the Commission's findings

(294) *[Recitals (294) – (308) are deleted, including any cross references to these recitals and relevant footnotes.]*

4.2.4.4. Details of meetings

(309) *[Recitals (309) – (312) are deleted, including any cross references to these recitals and relevant footnotes.]*

4.3. THE FRANCE SUBGROUP

4.3.1. Organisation, structure and principles

(313) This subgroup was in operation from the 1980s, if not the 1970s. It dealt with valve bags and open mouth bags. It brought together undertakings that were mostly Valveplast members and were operating on the French market: Fardem France/Charfa/Cofira, Saint-Frères Emballage, Sacherie de Pont-Audemer, Silvallac and Wavin/BPI-Francepac. Ceisa was apparently also involved. *[…]*

(314) The subgroup formed part of the general structure of Valveplast, as confirmed by several statements. The data concerning market shares for valve bags were the same as those collected and distributed within Valveplast.

(315) Meetings took place at commercial manager level on average once a month, usually in Paris but occasionally in Marseille or Lyon.

(316) Meetings were divided into two parts: valve bags in the morning and open mouth bags in the afternoon, with for each group a chairman appointed for one year. No official minutes were drawn up and each firm took its own notes.

(317) *[Recital (317) is deleted, including any cross references to this recital and relevant footnotes.]*

(318) The main objectives of the France subgroup were to:

- monitor quotas;
- allocate customers and determine price targets;
- allocate specific deals.

4.3.2. Operation

4.3.2.1. The facts identified by the Commission

4.3.2.1.1. Determination and monitoring of general quotas

(319) As far as valve bags are concerned, a table headed "AD" and showing the monthly quantities of bags delivered by the subgroup members and their quotas on the French market was periodically drawn up by one of the participants in turn and communicated to the others, at least from 1993 onwards and probably since the subgroup was set up in the 1980s. The undertakings are indicated on these tables by a figure: 1 = Silvallac/Trioplast Wittenheim, 2 = Sacherie de Pont-Audemer, 3 = Cofira, 7 = Wavin/BPI-Francepac, 6 = Bischof + Klein, 8 = RKW, 9 = Nordenia. These tables enabled the evolution of monthly deliveries to be monitored in relation to the quotas allocated. The system has continued to operate up to the present day.

(320) Detailed delivery volumes are given only for the three French undertakings[23] and for Wavin/Francepac (classed in the Benelux area). For the German undertakings, which did not attend the meetings, only the overall volume is mentioned.

(321) It can also be seen that the quotas for each geographic area of origin shown in these tables are the quotas decided within Valveplast. The volumes indicated on the tables correspond to those submitted by the undertakings for the Valveplast meetings at overall level. This confirms the link that existed between the "European" structure of Valveplast and the France subgroup: the quotas for each of the geographic areas were decided at the level of "Valveplast Europe", and these quotas were allocated between individual undertakings at subgroup level. The quotas seem to correspond to the market situation in a given year, probably in the early 1980s.

(322) In the case of open mouth bags, no reference quota appears to have been fixed. Nevertheless, at least since 1996, the cartel members informed each other monthly of the total volume expressed in tonnes of bags delivered and the average price in French francs per kilogram. Recapitulative tables were compiled on several occasions within the subgroup.

(323) Cofira argues that the quotas were purely indicative and that no penalty was incurred if they were not observed. However, the discussions during the meetings show that the quotas did serve as a reference for claiming additional market shares or for challenging those acquired by the other participants. It is clear, in any event, that members' respective market shares were regularly discussed, which confirms the principle that there was an agreed allocation.

4.3.2.1.2. Allocation of customers and price fixing

(324) As with Valveplast at European level, a system of account leaders/managers was set up for a number of major customers for valve bags, on the one hand, and for open mouth bags, on the other.

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[23] No volume is mentioned any longer for Silvallac/Trioplast after January 1998, it having stopped production of valve bags.

(325) According to statements by the undertakings, some 40 major customers were listed for open mouth bags and some 20 for valve bags. It appears that these lists were in fact longer. For each customer, an account leader/manager was appointed. Its role was to decide on the price to be quoted by members of the subgroup, which were supposed to contact it before making any offer. If any bid was made below the threshold, the account manager had to try to identify the "offender" and call him to order.

(326) For open mouth bags, a table listing all the major customers was filled in at the meeting by the participants. The relative importance (A, B or C) of each customer was mentioned and the main supplier appointed to act as account manager for that customer (the figure 1 appears to correspond to Silvallac/Trioplast Wittenheim, 3 to Cofira, 7 to Wavin/BPI-Francepac and 9 to Rosenlew Saint Frères, but opinions differ). The participants noted down by hand, for each customer discussed, the quantity of bags sold in the previous month and the average price in French francs per kilogram. This system operated at least from 1996 until 1999.

(327) In the case of valve bags, tables were drawn up by the participants before each meeting. These tables showed the volume of bags ordered and invoiced for each month in the current quarter and for each customer listed. It is clear that Cofira, Sacherie de Pont-Audemer, Silvallac (at least until the beginning of 1997) and Wavin/BPI-Francepac exchanged documents of this type at least from 1995 until the end of 2001. These tables were sent to one of the members appointed alternately to process the data and produce a table specific to the customer *[…]* which was redistributed and discussed at meetings. The latter table contained the volumes of valve bags ordered by *[…]* from each member for each month and delivery site.

(328) According to statements by the undertakings, these tables served as a basis for discussions on prices and the allocation among the members of deliveries to listed customers, as confirmed by notes taken during meetings. These discussions could lead among other things to arrangements on shielding bids. A firm responsible for each product group seems to have been appointed to coordinate the system (Rosenlew Saint Frères for open mouth bags and Sacherie de Pont-Audemer for valve bags).

(329) The cartel members also informed each other during meetings of the price they paid for raw materials in the current month. Since this was one of the components of the selling price to customers (the other being the converting price or value added), they then agreed on the basic amount to be charged by way of raw material.

(330) Specific meetings devoted to the customer *[…]* and bringing together the members of the subgroup and the German producers (Bischof + Klein, RKW, Nordenia) were held on several occasions *[…]*.

(331) Bilateral contacts concerning block bags took place on several occasions, often by telephone, from 1985 onwards between Sacherie de Pont-Audemer and BPI-Francepac for the purpose of fixing prices and allocating customers.

4.3.2.1.3. Details of meetings

(332) *[Recital (332) is deleted, including any cross references to this recital and relevant footnotes.]*

4.3.2.2. The parties' arguments in response to the Statement of Objections, and the Commission's findings

(333) *[Recitals (333) – (335) are deleted, including any cross references to these recitals and relevant footnotes.]*

4.4. THE GERMANY SUBGROUP

4.4.1. The facts identified by the Commission

(336) The existence of a subgroup bringing together the German valve bag producers is confirmed by a number of sources. Its link with Valveplast is also established. It appears to have been set up in the 1980s and to have merged with the Benelux subgroup in 1997/1998.

(337) The German undertakings Bischof + Klein, RKW, Nordenia, Herkules[24], Dürbeck[25] and Sachsa regularly took part in this subgroup.

(338) Meetings were held on average once a month and covered valve bags, FFS bags and open mouth bags. Wavin was invited by Bischof + Klein to several meetings on specific topics.

(339) According to Bischof + Klein, the following items were discussed at meetings:

- raw materials and volume estimates,
- communication of members' production backlogs,
- delivery figures with a comparison of each region's shares, and
- specific questions relating to potential buyers in the light of the demand situation.

(340) It is clear that a system for allocating customers was introduced for valve bags, with the establishment of a list of major customers and indication of the main suppliers, at least from 1993 onwards, and probably also for FFS bags. Discussions also took place on specific deals.

(341) Tables showing each member's monthly sales of both valve bags and FFS bags, along the lines of those distributed within Valveplast at European level, were regularly drawn up at least from 1987 and until the end of 2001. These tables gave the volume for the month in question and the previous month and the market shares of each participant (A = Bischof + Klein, B = Nordenia, C = Herkules, D = Dürbeck, E = RKW, F = Sachsa). A table dating from December 1987 comprises a column indicating the new quotas that had been negotiated and were to apply from 1988 onwards, which confirms that sales quotas on the German market were discussed and fixed for each member of the subgroup.

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[24] Herkules sold its valve bags business to Nordenia in 1993.

[25] Dürbeck was acquired by B+K in 1990.

(342) Bilateral or multilateral contacts also took place during that period:

– In February 1991, between Nordenia (*[Names])* and Wavin (*[Names]*), with special reference to the market in block bags and valve bags in Germany and the Benelux, Wavin complaining of the "excess" market shares in valve bags acquired by the Germany subgroup. The principle of regular contacts on decisions concerning strategic customers was asserted. Measures contributing to coordination between competitors on the block bags market were decided. *[...]*

(343) In 1997/1998 the Germany subgroup appears to have merged with the Benelux subgroup. Nevertheless, tables specific to the German market continued to be drawn up and distributed between the German suppliers.

(344) In July 2000 the German suppliers (RKW, Nordenia and Bischof + Klein) appear to have come to an arrangement between themselves on sharing orders from the customer *[Name]*.

(345) *[…]* closer cooperation between the two companies *[Bishof + Klein and RKW]* on the industrial bags market, with special reference to prices, was discussed and price information concerning the customer *[Name]* was exchanged. The conversation was probably prompted by tensions between the two undertakings within the Germany subgroup.

4.4.2. The parties' arguments in response to the Statement of Objections, and the Commission's findings

(346) *[Recitals (346) – (348) are deleted, including any cross references to these recitals and relevant footnotes.]*

4.5. THE BENELUX SUBGROUP

(349) The Benelux subgroup was directly linked to Valveplast[26]. It grouped together the industrial bag producers based in the Benelux, France and Germany that were Valveplast members and operated in the Benelux. The following undertakings were involved in its creation in 1982 and attended meetings: The following undertakings were involved in its creation in 1982 and attended meetings: Wavin/Combipac (BPI Indupac), Bates Cepro, Fardem, Nordenia, RKW, Bischof + Klein, Dürbeck, Herkules, Pont Audemer and Silvallac. It is clear from records of meetings that although Charfa/Cofira did not regularly attend meetings of the subgroup, it nevertheless took part in the collusive arrangements devised during those meetings, at least during the period between 1982 and the beginning of 1986.

(350) Meetings were held three to five times a year at different venues chiefly in the Netherlands, and especially at Ouderkerk a/d Amstel. The chairman, who was appointed each year from among the Benelux firms, was responsible for organising meetings and collating the figures communicated by members. No official minutes were drafted. The subgroup was chaired until 1996/1997 by *[Name]* of Fardem, then by *[Name]* of BPI Indupac until 2000. In 2001, *[Name]* of Fardem took over.

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[26] The subgroup was called "Valveplast Benelux".

(351) From 1998 onwards, the Germany and Benelux subgroups merged. Joint meetings were usually held at De Lutte in the Netherlands.

(352) Discussions related to valve, FFS and block bags. During meetings, the state of the market, the price of raw materials and delivery times were reviewed. Bag prices, calls for tenders and the allocation of customers were also discussed. Non-compliance with the agreements does not appear to have given rise to penalties, although it did prompt discussions at the meetings.

4.5.1. Fixing of general quotas

(353) The members of the subgroup transmitted their figures for sales volumes to the chairman by telephone or fax. These figures corresponded to those reported to *[…]* under the auspices of Valveplast. They were collated by the chairman of the subgroup, who drew up a summary table showing each member's market shares.

(354) The tables gave the volume of sales by each member over a given period with, for comparison, the figures for the same period in previous years and indicated the percentage of total sales (column "R %" or "Realization %") and the sales quotas allocated on the Benelux market (column "Q" or "Quota %" (Quotum %)). The Benelux suppliers were not differentiated *[…]*.

(355) The quotas were determined in the 1980s within Valveplast and then applied within the regional subgroups. Subsequently, they were not amended much. *[...]*, the Benelux was allocated a certain quota. This was then shared between the Benelux suppliers. Tables specific to the Benelux suppliers were drawn up in 1992/1993 by *[Name]* of Fardem, then chairman of the subgroup, giving the sales volumes by country (Belgium or Netherlands) of each undertaking (Wavin, Bates Cepro and Fardem), their percentage share and the comparison with their individual quota.

(356) After Bates Cepro withdrew from the market, it was no longer necessary to draw up and distribute specific tables for the remaining two Benelux suppliers since each one could deduce the other's figures from the general table. Fardem nevertheless continued to compile its own tables.

(357) These quotas appear not to have been strictly observed. Nevertheless, when an undertaking exceeded its quota, the problem was raised at a meeting. Readjustments were occasionally decided.

(358) The system of quotas continued to operate after the Benelux and Germany subgroups merged in 1998.

4.5.2. Allocation of customers

(359) At the first meeting of the subgroup, in January 1982, members were given details of how the France and Germany subgroups operated. It was decided that a list of Benelux customers with the corresponding account managers would be drawn up and distributed to the members of the Benelux subgroup. The account manager had to be contacted before any offer was made to the customer in question.

(360) In recent years this system appears to have mainly concerned FFS bags.

(361) The undertakings submitted to the subgroup the names of customers they regarded as strategic and qualifying for inclusion on the list after discussion at meetings. During the meetings, the allocation of customers, deliveries to those customers and the prices to be charged could be decided.

(362) The system of account managers continued to operate after the Benelux and Germany subgroups merged.

(363) Participants at meetings could also agree on other aspects of contractual relations with major customers, such as their duration.

(364) For certain calls for tenders, the successful bidder or bidders were designated in advance and the volumes shared between them. In some cases, special meetings were held between the suppliers concerned.

(365) Although there was no system of penalties, non-compliance with decisions was raised at meetings and compensatory measures were occasionally taken.

4.5.3. Price fixing

(366) From their first meeting in January 1982 onwards, the participants entered into discussions on prices charged or to be charged to certain customers in particular and fixed a general minimum price for the Netherlands and Belgium.

(367) In the case of valve bags, a common model for calculating minimum prices was devised by Fardem in 1997. Except for the price of the raw material, all the unit costs were determined (processing options, printing, conversion, extra charges for small quantities). The only variables to be introduced individually were therefore the volume of bags and the price of the raw material. This model was in fact merely an improved version of a previous model developed at the general Valveplast meetings in 1987 and embodying the principle of a minimum price for valve bags in Europe.

(368) Raw material prices were also discussed at meetings. With a view to calculating selling prices for valve bags, the participants periodically adopted a theoretical raw material price level to be used in the model. The only random variable in the pricing model was thus fixed, removing any uncertainty among the cartel members as regards pricing. A margin was usually applied to the price of raw materials.

(369) The common calculation model also served to prevent entry to the Benelux market by other competitors and, apparently, even other Valveplast members that did not belong to the Benelux subgroup.

(370) For certain calls for tenders, the prices of bids were coordinated between the suppliers wishing to take part in the consultation. Shielding bids were occasionally arranged.

(371) It has already been mentioned in recital (361) that, for strategic customers, the price could also be fixed at the same time as the allocation of orders was discussed. It was normally for the appointed account manager to determine the minimum price to be observed by the other members.

(372) After the merger of the Germany and Benelux subgroups, the agreement on prices continued to operate, albeit apparently with greater difficulties.

4.5.4. Details of meetings

(373) *[Recital (373) is deleted, including any cross references to this recital and relevant footnotes.]*.

4.6. THE BELGIUM SUBGROUP

(374) This subgroup brought together the Belgian suppliers of open mouth, valve and FFS bags. Meetings began in the 1980s and apparently lasted until 1997. They were held roughly once a month in a hotel somewhere in Belgium. According to BPI, the members were Wavin/BPI Indupac, Bonar Phormium, Fardem, Evipac, Bates Cepro, and Ravago (although there is no substantive proof in the file of the involvement of the latter two undertakings). The members took it in turns to organise the meetings.

(375) The participants informed each other of their market shares on the Belgian market and occasionally on the Dutch market. There were no official minutes of these meetings.

4.6.1. Fixing of general quotas

(376) Along the lines of what happened in the other subgroups, the sharing of the market was discussed at meetings at least from 1991 onwards, each member being allocated a quota for open mouth bags.

(377) At meetings the participants exchanged individual data on their monthly sales of open mouth bags and filled in tables showing, for each member and each month of the current year, the total volume of sales, the average price in Belgian francs and the supplier's market share. These tables also indicated the quota allocated to each supplier for the year. According to BPI, the aim was to stabilise the market shares over an extended period by controlling the prices offered to customers the firms had in common. The quotas were adjusted occasionally in order more accurately to reflect the reality of the market and compared at meetings with actual deliveries.

4.6.2. Exchanges of information and discussions on customers

(378) During meetings, participants might discuss specific customers and exchange information on prices and volumes delivered to those customers and on approaches made and prices offered by competitors outside the group. There does not, however, appear to have been a formal system of account leaders/managers for open mouth bags. According to BPI, disputes could arise when a member offered a lower price to a customer of another member.

(379) With regard to FFS bags, an attempt to introduce a system of account managers was discussed, but apparently without success. FFS bags were nevertheless discussed at meetings, with special reference to prices and allocation of the main customers.

4.6.3. Price fixing

(380) The members agreed on a common price calculation model that was similar to the one adopted by the other groups and was valid for open mouth, valve and FFS bags. Members had to enter volumes, the price of the raw material and printing work.

(381) As in the case of the other groups, the price of the raw material was also fixed by agreement for the purposes of the calculation model. It was adopted for a specified period (usually one month).

(382) Prices could be discussed independently of any reference to the calculation model, in particular for specific calls for tender. Other aspects, such as delivery volumes, could also be tackled. For example, members agreed in around 1993 on minimum quantities per order.

4.6.4. Details of meetings

(383) *[Recital (383) is deleted, including any cross references to this recital and relevant footnotes.]*

4.7. THE TEPPEMA GROUP

4.7.1. The facts identified by the Commission

(384) The exact name of this organisation is "Vereniging van Fabrikanten van Industriezakken". Set up in 1980 by the Dutch producers of open mouth bags, it dealt mainly with the Dutch market and occasionally with the Belgian market. Its members were Fardem, Wavin, Stempher and Bonar Phormium, which was taken over by BPI in 1997. Although Bonar was a Belgian producer, it operated on the Dutch market and was invited to attend the group's unofficial meetings.

(385) The group's aim was originally to develop a common approach to environmental issues. Discussions gradually shifted towards the market in general and eventually involved regulating the market through price fixing.

(386) The secretariat was provided by *[…]* (comparable to *[…]* in the case of Valveplast)[27], which was taken over in the late 1990s by *[…]*. The group appears to have been disbanded at the end of 2001. The contacts and discussions regarding collusive arrangements apparently continued until 2001. Both official and unofficial meetings were held.

(387) *[Name]*, Fardem's *[Position]*, chaired the group until 1997. Stempher and BPI Indupac also chaired it. The members sent their sales figures to *[…]*, and later to *[…]*, who returned them in collated form. Although these data were presented anonymously, the shares of the individual members could be easily recognised because of their limited number.

(388) The figures for sales volumes were also submitted to the group's chairman, who compiled a table of market shares for open mouth bags in the Netherlands and sent it to members at their home address. A specific version was sent to Bonar Phormium with figures that were altered with the aim of discouraging it from persevering on this market. *[…]*

[27] Hence the name Teppema.

4.7.1.1. Allocation of customers

(389) A system of lists of major customers with account managers was introduced formally in 1994, but appears to have already been in existence from an earlier date within the group.

(390) The account manager was normally the supplier who was allocated the largest share of deliveries to the customer in question. Another supplier could not serve that customer without the account manager's consent, the general rule being that the other supplier had to quote a price 0.20 cents per kilo higher than the account manager. For any call for tenders or request for a price quotation, the suppliers normally had to consult the account manager concerned.

(391) Customers were shared out between the different suppliers at meetings. An overview drawn up by the chairman could be amended before being adopted by the members. In the tables, the account manager was designated by the letters "AM", the other authorised suppliers by "X" and the suppliers claiming account manager status (on the grounds they were the biggest supplier to the customer concerned) by "**.**".

(392) A system of penalties in the form of compensatory measures appears to have existed for dealing with cases of "unauthorised" supply. According to BPI, penalties were usually demanded by the injured member, discussed and decided at a meeting: the supplier who had breached the agreements had to concede the injured supplier priority over the next order from the customer in question or from another customer.

(393) The subgroup also dealt with FFS bags. Although there was no system of lists of major customers and account managers, the members agreed to refrain from canvassing the customers of another member and to consult the main supplier of a major customer before submitting any bid to that customer.

4.7.1.2. Price fixing

(394) The members of the Teppema group used the same common calculation model for fixing and harmonising prices as the Belgium subgroup. The model concerned open mouth bags. The price components relating to weight, printing, conversion and surcharges were given. Only the cost of the raw material remained variable. But this was also dealt with at meetings: the published price of the raw material was discussed and a price for the purpose of the selling price calculation model was adopted.

4.7.1.3. Details of meetings

(395) *[Recital (395) is deleted, including any cross references to this recital and relevant footnotes.]*

4.7.2. The parties' arguments in response to the Statement of Objections, and the Commission's findings

(396) *[Recitals (396) – (398) are deleted, including any cross references to these recitals and relevant footnotes.]* The block bags subgroup.

4.7.3. The facts identified by the Commission

4.7.3.1. Operation of the subgroup

(399) Like the other subgroups analysed earlier (except for Teppema), the block bags subgroup operated under the auspices of Valveplast. It covered France, Germany, Belgium and the Netherlands and, marginally, Spain, the United Kingdom, Switzerland, Sweden and Italy.

(400) This subgroup brought together the Valveplast members that produced bags of this type: Nordenia, RKW, Wavin/BPI Indupac, Fardem, Silvallac, Sacherie de Pont-Audemer, Aspla and, at least from 1997 onwards, Bischof + Klein. Rosenlew (Saint-Frères Emballage) is cited as having usually attended meetings of the subgroup, it is clear, in.

(401) At the Valveplast meeting of 24 and 25 June 1994 in Athens, it was decided to hold a specific meeting on block bags, and this took place on 18 July that year. The aim was clearly to identify block bags as a specific segment of the FFS market in order to keep their prices high: *[…]*. Until then, block bags had been discussed within the regional subgroups.

(402) At the first meeting of the subgroup, *[Name]* of Wavin proposed a scenario similar to the one devised for Valveplast. The basic features were a system of account managers for major customers, the obligation to consult each other before making any offer and the final decision resting with the account manager. It was also decided that Wavin, the inventor of block bags ("Waviblock") and main producer, should take part in the organisation and administration of meetings.

(403) Meetings were normally held on the same date and at the same venue as meetings of Valveplast or of the Benelux subgroup. *[Name]* of Wavin/BPI Indupac chaired these meetings for a period of around seven years, succeeded in 1999 by *[Name]*. Meetings ceased in 2000. There were no official minutes.

(404) Members informed each other of their sales volumes and production capacities. They also exchanged their home addresses.

4.7.3.2. Determination of quotas and allocation of customers

(405) It is clear that the members wanted from the outset to introduce sales quotas, although there is no direct proof that such quotas were actually set in place.

(406) The system of account managers was decided at the first meeting. Having been successfully applied in the case of valve bags, it was thus extended to block bags. A list of major customers was drawn up in 1994 and revised on several occasions. It took the form of a table with the major customers on one side and the members of the subgroup on the other. The letter "O" meant account leader/manager and "X" meant that the undertaking in question could also supply the customer. The price quoted in any offering had normally to be discussed with the account manager. The major customers listed in this way are thought to have accounted for around 90% of sales of block bags.

(407) For certain customers or specific calls for tenders, the allocation between participants of orders and volumes to be supplied was discussed at meetings.

4.7.3.3. Price fixing

(408) The principle of a common model for calculating selling prices was discussed, but apparently did not come to fruition. The general level of prices was nevertheless discussed at the meetings. During the meetings the participants also informed each other of the prices they were charging to customers.

4.7.3.4. Details of meetings

(409) *[Recital (409) is deleted, including any cross references to this recital and relevant footnotes.]*

4.7.4. The parties' arguments in response to the Statement of Objections, and the Commission's findings

(410) *[Recitals (410) – (416) are deleted, including any cross references to these recitals and relevant footnotes.]*

5. APPLICATION OF ARTICLE 81 OF THE TREATY

5.1. THE TREATY AND THE COMMISSION'S POWERS

5.1.1. The Treaty

(417) The agreements described applied to the territory of certain Member States, namely France, Germany, the Netherlands, Belgium, Luxembourg and Spain.

(418) Since the agreements have affected competition within the common market and trade between Member States, Article 81 of the Treaty is applicable.

5.1.2. Powers

(419) In this case the Commission is the authority empowered to apply Article 81 of the Treaty since the cartel has significantly affected trade between Member States and competition within the common market.

5.2. THE APPLICATION OF ARTICLE 81 OF THE TREATY

5.2.1. Article 81 of the Treaty

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

5.2.2. Agreements and concerted practices

5.2.2.1. Principle

(421) Article 81 of the Treaty prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the common market.

(422) There is an agreement if the parties have concluded a joint project that limits, or is capable of limiting, the operations on the market of each of the parties by defining their mutual action on the market or their refraining from acting on the market. The agreement need not be drawn up in writing; no formality is necessary nor is it a requirement that there should be penalty clauses or implementing measures. The agreement may be express or implied by the behaviour of the parties. Moreover, it is not a condition for the existence of an infringement of Article 81 of the Treaty that the parties should have reached prior agreement on a general plan. The meaning of an agreement for the purposes of Article 81 of the Treaty can extend to vague understandings and to partial and conditional agreements forming part of the negotiation process resulting in the final agreement.

(423) In its *PVC II* judgment[28], the Court of First Instance found that "it is well established in the case-law that for there to be an agreement within the meaning of Article 81 of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way".

(424) Although Article 81 of the Treaty[29] distinguishes between "concerted practices", "agreements between undertakings" and "decisions by associations of undertakings", the object is to bring within the prohibition of that article a form of coordination between undertakings which, without having reached the stage where a contract properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition[30].

(425) The criteria of "coordination" and "cooperation" laid down in the case law of the Court of Justice of the European Communities, far from requiring the working-out 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 policy which he intends to adopt on the common market. Although it is correct to say that that requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does, however, strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to

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[28] Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and others* v *Commission* (*PVC II*) [1999] ECR II-931, paragraph 715; this point was upheld by the Court of Justice in Joined Cases C-238/99P etc. *Limburgse Vinyl Maatschappij NV and others* v *Commission (PVC II)* [2002] ECR I-08375.

[29] The case law of the Court of Justice and of the Court of First Instance on the interpretation of Article 81 of the Treaty also applies to Article 53 of the EEA Agreement. It follows that the references to Article 81 in this document also apply to Article 53.

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

influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market[31].

(426) This type of behaviour may be caught by Article 81 of the Treaty as constituting a "concerted practice", even if the parties have not reached prior agreement on a common plan specifying their operations on the market but have adopted or agreed on collusive arrangements facilitating the coordination of their marketing policies[32].

(427) Even though the concept of a "concerted practice", as it results from the actual terms of Article 81 of the Treaty, implies, besides undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two elements, subject to proof to the contrary, the presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on the market. This is all the more true where the undertakings concert together on a regular basis over a long period. Such a concerted practice is caught by Article 81 of the Treaty even in the absence of anticompetitive effects on the market[33].

(428) It is unnecessary, particularly in the case of complex and lengthy infringements, for the Commission to classify the conduct in question as one or other of those forms of unlawful behaviour. The concepts of "agreement" and "concerted practice" are fluid and sometimes overlapping. In fact, it may prove impossible in practice to draw such a distinction, because the infringement may simultaneously display characteristics of both types of prohibited behaviour although, taken individually, certain forms of behaviour may arguably be classified in one or other category. However, in examining such conduct it would be artificial to break down into several discontinuous forms of infringement actions which are clearly joint, having one and the same overall objective. A cartel may thus constitute both an agreement and a concerted practice. Article 81 of the Treaty lays down no specific category for a complex infringement of this type[34].

(429) The Court of First Instance, in its judgment in *PVC II*[35], ruled that "in the context of a complex infringement which involved many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both these forms of infringement are covered by Article 81 of the Treaty"[36].

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

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

33 Judgment of the Court of Justice in Case C-199/92 *Hüls* v *Commission* [1999] ECR I-4287, paragraphs 158-166.

34 See again the judgment of the Court of First Instance in Case T-7/89 *Hercules* v *Commission*, cited above, paragraph 264.

35 Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and others* v *Commission* (*PVC II*) [1999] ECR II-931; this point was upheld by the Court of Justice in its judgment in Joined Cases C-238/99P etc. *Limburgse Vinyl Maatschappij NV and others* v *Commission (PVC II)* [2002] ECR I-8375.

36 See paragraph 696 of the judgment of the Court of First Instance in *PVC II.*

(430) An "agreement" within the meaning of Article 81 of the Treaty does not require the same degree of certainty as a commercial contract in the field of civil law. Moreover, in the case of a complex cartel of long duration, the term "agreement" may be properly applied not only to an overall project or to expressly agreed terms but also to the implementation of what has been agreed on the basis of the same arrangements and in pursuit of the same common objective.

(431) As the Court of Justice has laid down (confirming a judgment of the Court of First Instance) in Case C-49/92 *Commission* v *Anic Partecipazioni SpA*[37], the provisions of Article 81 of the Treaty show that an agreement may result not only from an isolated act but also from a series of acts or from continuous conduct.

(432) In relation to participation in the meetings of a cartel, "where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs."[38] "The reason underlying that principle of law is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to believe that it subscribed to what was decided there and would comply with it". To establish that an undertaking has infringed Article 81 of the Treaty, it is of no importance that its participation was less active or even 'passive'. As the Court recalled in the *Ciment* judgment[39] "a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable in the context of a single agreement".

5.2.2.2. Application

(433) The facts set out in Section 4 show that, during the period in question, agreements and concerted practices within the meaning of Article 81 of the Treaty were implemented by the undertakings in question. Those agreements and practices concerned a group of products constituting the general category of plastic industrial bags, which includes valve bags, open mouth bags, FFS bags and block bags.

(434) Although those agreements and practices varied with the type of product in question and the group or subgroup of undertakings involved, this set of collusive arrangements constituted, in its practice, object and effects, a structured, coherent and coordinated whole, consisting of an overall level and regional and functional subgroups, whose object was to control the market in plastic industrial bags in the territory in question.

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37 See Court of Justice in Case C-49/92P *Commission* v *Anic Partecipazioni* [1999] ECR I-4325, paragraph 81.

38 See Court of Justice in Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P, C-219/00 P, *Aalborg v Commission*, paragraph 81. See also in Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4325, paragraph 96 and in 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

39 See judgment in *Aalborg v Commission*, cited above, paragraph 84.

(435) Those agreements and practices took the following forms: arrangements for the regular exchange of non-anonymous information on sales volumes and market shares of the members of each group and subgroup, a general system for determining and monitoring sales quotas by geographic zones and, within each geographic zone, by undertaking; common models for calculating selling prices to customers; the application at group and subgroup level of "leadership" arrangements for major customers; penalties for exceeding quotas or failure to observe fixed prices; consultation and agreement on prices and/or sales volumes for specific customers; the allocation of tenders and the submission of concerted bids coupled with shielding bids.

(436) It is settled case-law that, for the purpose of the application of Article 81(1) of the Treaty there is no need to take account of 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[40]. The same principle applies to concerted practices[41].

(437) The Commission considers that the collusive arrangements presented in Section 4 display all the characteristics of agreements and concerted practices within the meaning of Article 81 of the Treaty.

5.2.3. Single and continuous infringement

5.2.3.1. Principle

(438) A complex cartel may be considered a single and continuous infringement perpetrated for the entire existence of that cartel. As the Court of Justice has laid down in *Commission* v *Anic Partecipazioni*, the agreements and concerted practices referred to in Article 81 of the Treaty necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged. The cartel may, in certain circumstances, be modified or arrangements may be adapted or strengthened to take account of new facts. It follows that the infringement may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or more elements of the series of acts or of continuous behaviour in question could also in themselves constitute an infringement of Article 81 of the Treaty[42].

(439) Although a cartel is an agreement carried out jointly, each party to the agreement can play its own particular role. One or more parties may take on the dominant role of "leader". Despite the existence of quarrels and internecine rivalries or even cheating, the arrangements in question may constitute an agreement or concerted practice within

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40 See for example Case T-62/98, *Volkswagen AG v Commission*, [2002] ECR II-2707, para. 178 and the caselaw cited there.

41 See also the Court's judgement in *Huls v Commission*, cited above, paras. 158 to 166 and the judgment in Case T—9/99, HFB Holding and others v. Commission, [2002] ECR.II-1487, para.217

42 See Court of Justice in Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4325, paragraphs 78-81, 83-85 and 203.

the meaning of Article 81 of the Treaty, since there is a single common and continuous objective.

(440) In the case of a complex cartel, as in this instance, the concept of single infringement means that a particular link is established between an undertaking's participation in an agreement or practice that can in themselves be termed infringements and the existence of a broader cartel made up of a series of agreements and/or practices.

(441) The mere fact that each of the participants in a cartel may have played a specific part in it adapted to its situation does not rule out that it can be liable for the infringement as a whole, including the acts of other members, since those acts have the same unlawful object and the same anticompetitive effect. An undertaking that has participated in such a joint infringement through conduct contributing to attaining the common object is also liable, throughout the entire period of its participation therein, for the conduct of other undertakings in the context of the same infringement. That is the case where it is established that the undertaking in question was aware of the offending conduct of the other participants or that it could reasonably have foreseen it and that it was prepared to take the risk[43].

(442) Lastly, even if an undertaking can at any time join an agreement that has already been set up by other undertakings and other participants may withdraw from it in the course of its existence and yet others rejoin, it nevertheless remains a single and continuous agreement.

5.2.3.2. Application

(443) In this case, the Commission considers that the behaviour of all of the undertakings to which this Decision is addressed, other than Stempher, who have all taken part to varying degrees in the meetings of Valveplast and/or those of one or more subgroups, constitutes a single and continuous infringement.

(444) Although the cartel structure included an overall group (Valveplast) and subgroups of a regional or functional nature (the block bags subgroup) that were apparently distinct, the cartel as a whole formed a consistent and coordinated entity, as is established, *inter alia*, by the following factors:

- the members of Valveplast and of the subgroups were essentially the same;
- quotas fixed at Valveplast level were reflected at subgroup level;
- reference to Valveplast in the subgroups (for example, Valveplast Benelux);
- the statements by undertakings' representatives who attended the meetings.

(445) Taken as a whole, the activities of the cartel, despite the existence of separate groups and subgroups that were nevertheless mostly linked to Valveplast, form part of a general strategy that determined the cartel members' policies on the market and limited

[43] See Court of Justice in Case C-49/92 *Commission* v *Anic Partecipazioni* [1999] ECR I-4325, paragraph 83 and in Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P, C-219/00 P, *Aalborg v Commission* , cited above, paragraph 83.

their commercial freedom. This strategy was intended to pursue the same anticompetitive object and a single economic goal, namely to distort the normal development of prices and restrict competition on the market in plastic industrial bags. The Commission considers that it would be artificial to break down this continuous behaviour with a single object by considering that it consists of a number of separate infringements, while the relevant conduct in reality constituted a single infringement in the form of a series of anticompetitive practices throughout the entire period when the cartel operated.

(446) The Commission considers that, in the case of Bischof + Klein, Wavin/Combipac, Nordenia, Fardem, Cofira/Charfa, Silvallac/Trioplast Wittenheim and Sacherie de Pont-Audemer, the fact that they were the cartel members who set up Valveplast in 1984 and their regular attendance at Valveplast meetings since its establishment and at meetings of one or more regional subgroups at which the joint arrangements for the sharing of markets and customers and fixing prices described in Section 4 were established is evidence that they were directly, decisively and continuously involved in the overall cartel with a view to distorting normal competition.

(447) Although RKW, Aspla and Sachsa were not founder members of Valveplast, they regularly attended Valveplast meetings. In addition, Sachsa and RKW were members of the Germany subgroup while RKW was also a member of the Benelux and block bags subgroups. In addition, RKW attended a number of meetings of the France subgroup. It follows that those undertakings, like the Valveplast founder members, were parties to and participated actively in the overall collusive plan.

(448) Regarding the Rosenlew group/Rosenlew Saint-Frères Emballage, Ceisa and Bonar Phormium Packaging, it is settled case law that "an undertaking may also 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"[44].

(449) Ceisa was among the founder members of the association and attended several meetings in 1997 and 1998.

(450) Moreover, Trioplast and Cofira state that Ceisa attended the meetings of the France subgroup and the undertaking is mentioned in several notes taken at meetings held in 1996.

(451) The first evidence for its involvement in the cartel dates from August 1995. This takes the form of a table showing the shares of the market for valve bags and FFS bags for each of the undertakings and for each of the four geographic zones in question, which

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[44] See Court of First Instance in Cases T-295/94 Buchmann v Commission [1998] ECR II-813, paragraph 121, T-304/94, *Europa Carton* v *Commission* [1998] ECR II-869, paragraph 76, T-310/94 *Gruber + Weber* v *Commission* [1998] ECR II-1043, paragraph 140], T-311/94 *Kartonfabriek de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 237, T-334/94 *Sarrió* v *Commission* and *Enso Española* v *Commission* [1998] ECR II-1439, paragraph 169, T-348/94 *Enso Española* v *Commission,*cited above, paragraph 169..See also Court of First Instance in Case T-9/99, *HFB Holding and Isoplus Fernwärmetechnik* v *Commission* [1999] ECR II-2429, paragraph 231.

was drawn up at a Valveplast meeting. The figures for Ceisa are shown in that table. Since Ceisa provided those figures and helped to draw up the table, it could not be unaware that it was participating in reciprocal information, coordination and monitoring arrangements relating to the market shares of each undertaking that had as their object to prevent normal competition and formed part of a general plan to allocate markets.

(452) Regarding Bonar Phormium Packaging, it is established that it was a member of the cartel, because it was a regular member of the Belgium subgroup and the Teppema group and attended at least one Valveplast meeting, on 21 November 1997, at which collusive arrangements were made.

(453) The declarations of BPI Indupac show the existence of a link between the Belgium subgroup and Valveplast at European level. Two of the members of this subgroup (membership varied between three and six), namely Fardem and Wavin/BPI Indupac, were also active members of Valveplast. Consequently, since it regularly attended the meetings of the Belgium subgroup from 1991 onwards, at which collusive arrangements were made, Bonar Phormium could not have been unaware from that date onwards of the existence and scope of the overall cartel of which the subgroup formed part.

(454) It has been established that the Rosenlew group and Rosenlew Saint-Frères Emballage attended several Valveplast meetings in 1994, 1997 and 1998. *[Name and position]* of Rosenlew Saint-Frères Emballage who was in charge *[…]*, attended a Valveplast meeting in December 1994. *[Name]*, *[Name and position]* and *[Name and position]* for continental Europe, attended several Valveplast meetings in 1997 and 1998. In the course of those meetings collusive arrangements were made, which involved Rosenlew.

(455) Moreover, although Rosenlew Saint-Frères Emballage initially contended that it knew nothing of any regional subgroup, UPM-Kymmene acknowledged in its reply to the Statement of Objections that its subsidiary did regularly attend, from 1995 at least, the part of the France subgroup meetings concerning open mouth bags. It participated in the arrangements for allocating customers and fixing prices for open mouth bags and indeed it appears to have been responsible for coordination in the subgroup. It has also been established that it participated in the arrangements for the regular exchange of individual information on sales volumes and market shares of the members.

(456) Rosenlew was also involved in the block bags subgroup from July 1994.

(457) The fact that "Rosenlew/St. Frères" is included in the lists allocating customers that were drawn up for the various geographic markets for block bags during and after the meeting of 18 July 1994 proves that, as from that date, it was impossible for it not to have known the overall scope of the cartel of which the meeting, to which it had previously been invited, formed part, even if it was apparently unable to attend. Moreover, this is confirmed by the notes taken at the Valveplast meeting of 20 December 1994 at which Rosenlew/Saint-Frères agreed to join the cartel.

(458) The fact that the Rosenlew group/Rosenlew Saint-Frères Emballage, Ceisa and Bonar Phormium Packaging did not regularly attend Valveplast meetings at European level does not rule out their membership of the overall cartel. The evidence adduced shows

that they were parties, together with the other members of the cartel, to the agreements and restrictive practices and could not have been unaware that these formed part of a common overall plan to restrict competition, for which they thus demonstrated their support.

(459) Regarding Stempher, the investigation in the case has shown that it was a member only of the Teppema group, which was concerned solely with the Dutch market and, from time to time, the Belgian market. Since it was not a member of Valveplast or one of the regional subgroups and there is no evidence that it attended any of their meetings, although three other members of Valveplast also participated in the Teppema group, it may be properly considered that Stempher could have been unaware of the overall collusive plan. The Commission therefore considers that that company should not be deemed to have participated in the overall cartel, but only in the practices within the Teppema group.

5.2.4. The parties' replies regarding the legal assessment of the facts and the Commission's findings.

(460) *[Recitals (460) – (517) are deleted, including any cross references to these recitals and relevant footnotes.]*

5.2.5. Restriction of competition

(518) All the agreements in this case had as their object and effect the restriction of competition within the European Community. They are described in Section 4.

(519) Article 81 of the Treaty expressly classifies as restrictions of competition agreements and concerted practices which (in particular):

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

(520) These are the essential features of the agreements and concerted practices at issue in the present case. Since price is the principal instrument of competition, the producers, by resorting to various collusive arrangements and strategies, had as their ultimate object the sharing of markets to hinder competition and progressively increase the market price to a higher level than would have resulted from free competition. Fixing prices and sharing markets are of themselves restrictions of competition within the meaning of Article 81 of the Treaty.

(521) Moreover, as the Court of First Instance has laid down in *Thyssen Stahl AG v Commission*[45], a system for the exchange of individual data can of itself be anticompetitive if "the information distributed, relating to participants' orders and

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[45] See Case T-141/94 *Thyssen Stahl AG* v *Commission* [1999] ECR II-347, paragraphs 379-412, upheld by the judgment of the Court of Justice in Case C-194/99P *Thyssen Stahl AG* v *Commission* [2003] ECR I-10821, paragraphs 58-107.

deliveries on the main Community markets, was broken down by undertaking and Member State [and] thus made it possible to identify the position occupied by each undertaking in relation to the total sales by the participants on all of the geographical markets in question" and if, "since the information distributed was updated and sent out frequently, undertakings were in a position to follow closely each change in market share held by the participants on the markets in question". The Court of First Instance found that, "having regard to all the circumstances of the case, in particular the fact that the information distributed was up-to-date, broken down and intended only for producers, the product characteristics, and the degree of market concentration, the arrangements in question clearly affected the participants' decision-making independence" and that the systems substituted practical cooperation between the participants for the normal risks of competition.

(522) Within Valveplast, at overall level, and within the France, Germany, Benelux and Belgium subgroups and the Teppema group, participants regularly exchanged individual information on sales volumes in the geographic areas in question. This information was usually expressed as the quantity of a product sold by each undertaking over a specified period, usually one month (the France, Germany, Benelux and Belgium subgroups and the Teppema group), and/or market shares by geographic areas (Valveplast and the France, Germany, Benelux and Belgium subgroups and the Teppema group). In addition, the tables that were drawn up could also set out the figures for the preceding month (the France, Germany, Benelux and Belgium subgroups and the Teppema group) and the quotas allocated (the France, Benelux and Belgium subgroups). Within Valveplast (particularly for FFS bags) and the subgroups (in particular the France subgroup), information on sales volumes and prices charged to a list of main customers was also regularly exchanged. In addition, the participants regularly exchanged details of their production capacity and/or delivery times (Valveplast, the France, Benelux and Belgium subgroups and the Teppema group).

(523) All those information-exchange arrangements allowed the undertakings in question to compare actual market shares with the quotas applied and to use the individual data to monitor the performance of their competitors, on the one hand, and to adjust their behaviour in terms of the past figures of their competitors, on the other. In this way, the arrangements reduced the participants' decision-making independence and encouraged coordination of behaviour on the market in relation to both quantities and prices offered.

(524) Moreover, the precautions adopted in communicating this information (the use of codes to identify the undertakings within Valveplast and the France and Germany subgroups) and the nature of the discussions prompted by the exchange of that information in the meetings confirm that the information exchange was anticompetitive in its object and that the participants were fully aware of this.

(525) It is therefore difficult to understand how Sachsa can maintain that the exchange of information in which it participated “was wholly lawful, was among the objectives of any trade association and had neither as its object nor effect the prevention, restriction or distortion of competition”.

(526) Sachsa cites in support of its argument the judgment of the Court of First Instance in *Wirtschaftsvereinigung Stahl*[46]. However, in that judgment, which resulted in annulment of the Commission Decision because of an error of fact as to the substance of the agreement notified to the Commission, the Court of First Instance pointed out that the exchange of information was unlawful where it involved "certain characteristics relating, in particular, to the sensitive and accurate nature of recent data exchange at short intervals"[47].

(527) It is established that Sachsa took part in the information exchange system organised at Valveplast level involving tables setting out the market shares of the undertakings outside their national market for valve bags and FFS bags, in an individualised and non-anonymous manner, by geographic market, from 1990 to 2000 at least. Sachsa was included on these tables, and annotated tables dating from 1995, 1996 and 2000 were found on the premises of Sachsa itself. The information exchanges were carried out at regular intervals (two to three times a year on average).

(528) It is also established that Sachsa took part in information exchanges on production volumes for valve bags and FFS bags, broken down by company, within the Germany subgroup from 1988 to 2001, carried out at least once a year up to the end of 1999, then once a month as from 2000.

(529) Sachsa, like the other members of the Germany subgroup, thus had extensive and precise knowledge of the market for FFS bags and valve bags on the territory covered by the cartel, with the tables on export market shares drawn up at Valveplast level being usefully supplemented by the data on the details of the breakdown of the German market exchanged within the Germany subgroup.

(530) Because of the up-to-date character, regularity and confidential nature of this information, Sachsa had precise knowledge of the market shares of each of its competitors and was able to monitor trends in those positions overall and on each geographic market. The information thus obtained was such as to have a significant impact on Sachsa's behaviour, and on that of the other members of the cartel, restricting the degree of uncertainty required for normal competition.

(531) The cartel must be considered as a whole and in the light of the overall circumstances. In this case the main aspects of the agreements and arrangements as a whole that can be considered to restrict competition are the following:

- the allocation of market shares and quotas for market shares;
- the establishment of common models for calculating selling prices to customers;
- the concerted fixing of selling prices (or elements of those prices), minimum prices, increases in prices or price targets;
- the joint and concerted refusal to negotiate lower prices with customers;

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[46] Case T-16/98 *Wirtschaftsvereinigung Stahl and others v Commission* [2001] ECR II-1217.

[47] *Wirtschaftsvereinigung Stahl and others v Commission,* cited above, paragraph 44.

- the conclusion of agreements to allocate customers or orders;

- the application of systems of account leaders/managers for a list of major customers in order to allocate customers or orders;

- the submission of concerted bids, sometimes with shielding bids;

- the application of arrangements for compensation for failure to comply with agreements.

- the regular exchange of individual information on sales volumes and market shares, customers and prices, production capacities of plants and delivery times, making it possible to monitor and coordinate supply and to check each other's market shares;

(532) It is settled case law that, for the purpose of the application of Article 81 of the Treaty, there is no need to take account of 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 unnecessary to demonstrate the actual anticompetitive effects since the anticompetitive object of the behaviour at issue has been established.

(533) However, in this case the Commission considers that it has also proved, on the basis of the facts set out in this Decision, that the cartel's anticompetitive decisions were implemented and the collusive arrangements consequently produced actual effects.

(534) In general, the fixing of quotas and actual application of joint arrangements for the regular monitoring and surveillance of sales volumes, the market shares of each member and the prices charged necessarily influenced the commercial decisions and behaviour on the market of the members of the cartel.

(535) The fact that the participants provided wrong information on volumes and market shares or cheated in applying the price objectives set at the meetings, as Combipac points out in its reply to the Statement of Objections, far from proving the absence of any actual effect, on the contrary confirms that the information exchanged influenced the conduct of the cartel members on the market.

(536) In addition, the coordination of bids and the submission of shielding bids constitute effective application of anticompetitive arrangements.

(537) Although the anticompetitive object of the arrangements is sufficient to justify the conclusion that Article 81 of the Treaty is applicable, the anticompetitive effects of those arrangements have also been established and they point to the same conclusion.

5.2.6. Effects on trade between Member States

(538) The continuous cartel between producers has had an appreciable effect on trade between Member States.

(539) Article 81 of the Treaty covers agreements liable to prejudice the completion of the single market between Member States either by partitioning national markets or by affecting the structure of competition within the common market.

(540) 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 of the Treaty "does not require that agreements referred to in that provision have actually affected trade between Member States, it does require that it be established that the agreements are capable of having that effect"[48].

(541) As has been explained in Section 2.4, it is a feature of the market in industrial bags that there is a substantial volume of trade between Member States.

(542) Nevertheless, the application of Article 81 of the Treaty to a cartel is not restricted to the part of sales of participants in the cartel actually involving a physical transfer of goods from one Member State to another. Likewise it is unnecessary, for the application of that provision, to demonstrate that the individual participation of each of the members, as opposed to the cartel as a whole, affected trade between Member States[49.]

(543) In this case the cartel arrangements covered a major part of trade in a substantial part of the Community in the sector in question. The existence of arrangements for price-fixing, market sharing and allocation of customers and orders must have had the effect, or were capable of having the effect, of distorting trade from patterns it would otherwise have had[50.]

(544) Stempher maintains that the agreements and practices initiated within the Teppema group could not have any effect on trade between Member States, since they were limited to the Dutch market.

(545) The agreements and practices developed within the Teppema group formed part of an overall cartel arrangement covering a substantial part of the common market and going beyond the strict context of the Dutch territory. The Commission therefore considers that, even if it appears that Stempher was not aware of the overall scheme, the agreements and practices initiated within the Teppema group are none the less elements of the overall cartel which has to be assessed as a whole.

(546) Furthermore, it is settled case law that “the fact that a cartel relates only to the marketing of products in a single Member State is not sufficient to exclude the possibility that trade between Member States might be affected”[51] and that “practices restricting competition which extend over the whole territory of a Member State have, by their very nature, the effect of reinforcing compartmentalisation of national

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48 See Court of Justice in Joined Cases C-215/96 and C- 216/96 *Bagnasco* [1999] ECR I-135, paragraphs 47 and 48. See also the judgment of the Court of Justice in Case C-306/96 *Javico* [1998] ECR I-1983, paragraphs 16 and 17; see also the judgment of the Court of First Instance in Case T-374/94 *European Night Services* [1998] ECR II-3141, paragraph 136.

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

50 See Court of Justice in Joined Cases 209-215 and 218/78 *Van Landewyck and others* v *Commission* [1980] ECR 3125, paragraph 170.

51 See Court of Justice in Case C-246/86 *SC Belasco and others* v *Commission* [1989] ECR 2117, paragraph 33.

markets, thereby holding up the economic interpenetration which the Treaty is intended to bring about"[52].

(547) In this instance, it is apparent that the members of the Teppema group, including Stempher, market a part of their production of open mouth bags outside the Netherlands and, moreover, that other members of the overall cartel market a not inconsiderable part of their production of open mouth bags to the Netherlands. Consequently, the practices noted within the Teppema group, even if limited to Dutch territory, are clearly such as to have significantly affected trade between Member States.

(548) Aspla maintains that it has not been established that Aspla's participation in Valveplast had a significant effect on trade between Member States, in particular because of the isolation of the Spanish market. In actual fact it has been shown that there was competition between the cartel members and that Aspla was active on the German, French and Benelux markets. In any case it is not necessary that Aspla's conduct, looked at in isolation, should have affected trade between Member States for Article 81 of the Treaty to apply.

5.2.7. Duration of the infringement

5.2.7.1. Start of the infringement

(549) The facts described in Section 4 establish that the cartel between industrial bag producers has existed since the beginning of the 1980s:

the principles of the cartel's organisation and operation were expressly set out in a document dating from the beginning of the 1980s and were actually applied by the members of the cartel;

the statements made by several undertakings that are members of the cartel and several documents confirm the existence of quotas and lists allocating customers at least from the beginning of the 1980s;

Valveplast's official structure merely replaced, in 1984, a structure with a similar object that had existed since the 1970s;

most of the cartel's regional and functional subgroups had been set up and were operational since the beginning of the 1980s;

the first known meeting of one of those subgroups, that of the Benelux subgroup, which formed the framework for collusive arrangements, dates back to 6 January 1982. The meeting was attended by Bates Cepro[53], Bischof + Klein, RKW, Fardem, Nordenia, Sacherie de Pont-Audemer, Silvallac and Wavin. In addition, the existence of the France and Germany subgroups was confirmed at that meeting.

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[52] See Court of First Instance in Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 179.

[53] Taken over by B+K in 1993.

(550) Consequently, in the absence of any evidence of an earlier date, the Commission will take 6 January 1982 as the date when the following began to participate in the cartel: Bischof + Klein, RKW, Fardem Packaging, Nordenia, Sacherie de Pont-Audemer, Trioplast Wittenheim (Silvallac) and Combipac (formerly Wavin PFP).

(551) RKW contends that it did not take part in the meetings of the cartel before the beginning of the 1990s. It is true that RKW began attending Valveplast meetings in October 1990, but it took part in the discussions, arrangements and practices developed in the Benelux subgroup from January 1982 onward, and in the Germany subgroup from 1987 at the latest *[…]* In any case, even if some divergences appear to have existed between RKW and the other participants during this period, it does not appear that RKW clearly and unequivocally distanced itself from the cartel. In its case, therefore, the date on which the infringement began must be considered to be 6 January 1982.

(552) BPI contends that Combipac BV and Francepac SA should not be held responsible for the infringement before 26 April 1997.

(553) Combipac BV acquired the shares in Wavin PFP BV on 25 April 1997. Wavin PFP BV controlled operations at the Hardenberg location, and was represented from the outset at the meetings of Valveplast, the Benelux subgroup, the Teppema group and the block bags subgroup. Wavin PFP BV also played a direct part in the activities of the France and Belgium subgroups. Wavin PFP BV entered into a full merger with Combipac BV on 22 August 1997, and its liability for the infringement was thereby transferred to Combipac BV. In the case of Combipac BV, therefore, the infringement must be considered to have begun on 6 January 1982.

(554) Francepac SA took over the business of Wavin Emballage SA by transfer of assets on 25 April 1997. In Francepac's case, therefore, the duration of the infringement begins to run on 25 April 1997.

(555) The participation in the cartel by Cofira (Charfa), whose industrial bag activities have been transferred to Cofira-Sac SA, must be considered to extend back to 24 March 1982, the date of the first evidence of its participation in the cartel in the Benelux subgroup.

(556) In the case of Aspla, the Commission considers that the infringement began on 8 March 1991, which is the date of the first meeting of Valveplast known to have been attended by Aspla at which collusive arrangements were made.

(557) Sachsa's participation in the cartel must be considered to extend back to 9 February 1988, the date of the first evidence of its involvement in the cartel, in the Germany subgroup in which it participated.

(558) Rosenlew (including Rosenlew Saint-Frères Emballage SA) contests the date of 18 July 1994 *[…]* as the starting point for the infringement, arguing that it did not take part in the meeting of the block bags subgroup in question. But it has been shown above that although Rosenlew was not present at the meeting. *[...]* In the case of Rosenlew, therefore, the infringement must be considered to have begun on 18 July 1994.

(559) The participation in the cartel of Bonar Phormium Packaging must be considered to extend back to 13 September 1991, the date of the first known meeting of the Belgium subgroup, at which collusive arrangements were made and which it attended.

(560) Bonar Technical Fabrics contends that the duration of the infringement should be regarded as different in the case of its participation in the Belgium subgroup and the Teppema group, on the one hand, and its participation in the general cartel, on the other. The point of departure for its participation in the general cartel should be taken to be the date on which it attended the Valveplast meeting on 21 November 1997.

(561) The Commission rejects Bonar Technical Fabrics' argument that there were separate infringements and takes the view that Bonar Phormium Packaging's participation in the cartel has to be looked at as a whole, and constitutes a single and continuous infringement. In its case, therefore, the infringement must be considered to have begun on 13 September 1991.

(562) Ceisa was one of the founder members of Valveplast and of the structure that preceded it. However, the first evidence for its involvement in the cartel dates from August 1995. Since it is impossible to determine the exact date, Ceisa's participation in the cartel must be considered to extend back to 31 August 1995.

(563) Stempher's involvement is restricted to its participation in the Teppema group. The earliest evidence of Stempher's involvement in the anticompetitive practices associated with the Teppema group dates from 25 October 1993. The point of departure of the infringement in Stempher's case should therefore be considered to be 25 October 1995.

5.2.7.2. End of the infringement

(564) The Valveplast association formed the official structure that acted as the main vehicle for the anticompetitive agreements and practices described in Section 4. At the last known Valveplast meeting, held on 11 December 2001, an agreement was concluded on the application of minimum prices to one particular customer. The Commission therefore considers that the cartel continued to produce its effects after 11 December 2001[54].

(565) The BPI group began cooperating with the Commission on 9 November 2001 and stopped participating in Valveplast and Teppema immediately. The Commission therefore considers that 9 November 2001 is the date terminating the period of the infringement as far as Combipac BV and Francepac SA are concerned.

(566) The Commission carried out inspections at the premises of the undertakings in question, under Article 14(2) and (3) of Regulation No 17, on 26 and 27 June 2002. The Commission consequently takes 26 June 2002 as the date for determining the duration of the infringement as regards Bischof + Klein, Bischof + Klein France (Sacherie de Pont-Audemer), Aspla, RKW, Nordenia/Nordfolien, Fardem Packaging, Sachsa, Trioplast Wittenheim (Silvallac) and Cofira (whose industrial bags activities were transferred to Cofira-Sac SA).

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[54] See Court of First Instance in Case T-14/89 *Montedipe* v *Commission* [1992] ECR II-1155, paragraph 231, and Case T-243/83 *Binon* [1985] ECR 2015, paragraph 17.

(567) Nordfolien contends that it left Valveplast in the autumn of 2001. *[…]*

(568) Nordfolien has not produced any formal evidence of its withdrawal. *[…]* In its case, therefore, the infringement must be considered to have come to an end on 26 June 2002.

(569) Trioplast denies having been involved in the anticompetitive arrangements, practices and discussions which took place during the Valveplast meetings of 27 March 2001 and 8 June 2001 and the meeting related to the internet bids of 12 July 2001. *[…]* It should be remembered that even passive participation in a meeting of the cartel is sufficient to establish the involvement of the undertaking in question unless it can prove that it publicly denounced or distanced itself from the discussions and arrangements, which Trioplast did not do. Trioplast has shown no evidence that it signalled its withdrawal from Valveplast after the 12 July 2001 meeting. *[…]* It is therefore appropriate to take the date of the inspection as the date when the infringement ended, that is to say, 26 June 2002, as far as Trioplast is concerned.

(570) Bonar Phormium (subsequently Bonar Technical Fabrics) transferred Formipac's business to Combipac on 28 November 1997. The Commission must therefore take 28 November 1997 as the date for determining the duration of the infringement in Bonar Phormium's case.

(571) Regarding Rosenlew (including Rosenlew Saint-Frères Emballage), the last evidence of its participation in contacts concerning collusive arrangements relates to information on prices and orders in January 1999. Since it is impossible to establish the exact date for those contacts, which, however, could not have been earlier than the end of January 1999, the Commission will take 31 January 1999 as the date for determining the duration of the infringement in the case of Rosenlew (including Rosenlew Saint-Frères Emballage).

(572) UPM-Kymmene contends that the last evidence of Rosenlew's involvement in the cartel is the Valveplast meeting of 26 November 1998. However, there is later evidence showing that it was involved in the collusive exchanges in the France subgroup. The infringement being a single and continuous one, account should be taken of a table indicating exchanges of sensitive information in the France subgroup relating to January 1999, so that 31 January 1999 must be regarded as the date on which Rosenlew ceased the infringement.

(573) The latest evidence of Ceisa's involvement in collusive arrangements applicable to the future dates from the Valveplast meeting held on 26 June 1998. Moreover, Ceisa definitively terminated its industrial bag activities and disposed of its remaining plant for producing FFS bags on 9 November 1998. The Commission will therefore take 9 November 1998 as the date for determining the duration of the infringement in the case of Ceisa.

(574) The latest evidence of Stempher's participation in contacts concerning the collusive arrangements within the Teppema group consists of information on sales of open mouth bags from January to October 1997. Since it is impossible to establish the exact date of those contacts, which, however, cannot be earlier than the end of October 1997, the Commission will take 31 October 1997 as the date for determining the duration of the infringement in the case of Stempher.

(575) Stempher denies receiving that document or being aware of it. Consequently, Stempher argues, the document cannot be used in evidence against it. However, this type of table was circulated regularly to all the members of the Teppema group, including Stempher. *[…]* If these tables were not to be sent to Stempher, that would have been mentioned in the document headers, as was done in Bonar Phormium's case. *[…]* It must be considered, therefore, that the table was indeed addressed to Stempher.

(576) In any event, even supposing that the table was not sent to Stempher, it could not have been drawn up without Stempher supplying its figures to *[Name]*. *[…]* In its case, therefore, the date on which the infringement ended must be considered to be 31 October 1997.

5.2.8. Addressees of the Decision

5.2.8.1. Applicable principles

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

(578) 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. 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"[55]. 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.

(579) It is settled case law that the fact that a subsidiary has separate legal personality is not sufficient to prevent its conduct being imputed the parent company[56].

(580) It is likewise settled case law that "the Commission can legitimately assume that a wholly owned subsidiary carries out, in all material respects, the instructions given to it by the parent company, and need not verify whether the parent company has in fact exercised that power"[57]. The parent company can reverse the presumption by producing evidence to the contrary.

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

56 See judgment in *ICI* v *Commission*, cited above.

57 See Court of First Instance in Joined Cases T-71/03 etc. *Tokai Carbon* v *Commission*, cited above, paragraph 60; Court of First Instance in Case T-354/94 *Stora Kopparbergs Bergslags* v *Commission*

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

(582) When an undertaking that has committed an infringement of Article 81 of the Treaty subsequently disposes of the assets it used to commit that infringement and withdraws from the market in question, it continues to be answerable for the infringement if it has not ceased to exist[58].

(583) However, the Court of Justice considers that, if the legal person initially answerable for the infringement ceases to exist and loses its legal personality, being purely and simply absorbed by another legal entity, that entity must be held answerable for the whole period of the infringement and thus liable for the activity of the entity that was absorbed[59]. The mere disappearance of the person responsible for the operation of the undertaking when the infringement was committed does not allow it to evade liability[60].

5.2.8.2. Addressees

(584) The approach outlined in subsection 5.2.8.1 is applied on a case-by-case basis to each of the undertakings concerned in this subsection. A distinction can be drawn between companies whose participation in the infringement is clear and those which are addressees of this Decision because they have also been identified as forming part of an economic entity responsible for the infringement.

(585) The Statement of Objections in this case was addressed to a number of companies that proved to be intermediate holding companies with no commercial activity of their own. The Commission takes the view that in such situations the ultimate parent and the operating subsidiary or subsidiaries involved in the infringement are, in principle, proper representatives of the undertaking which is responsible for the purposes of Community law, and that it is not necessary for any intermediate holding companies to also be held liable. This Decision will therefore not be addressed to intermediate holding companies.

(586) It has been established by the facts set out in this Decision that Bischof + Klein France (Sacherie de Pont-Audemer), Trioplast Wittenheim SA, Cofira, Ceisa

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[1998] ECR II-2111, paragraph 80, upheld by Court of Justice in Case C-286/98P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraphs 27-29; and Court of Justice in Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 50.

58 Case T-6/89 *Enichem Anic* v *Commission (Polypropylene)* [1991] ECR II-1623; judgment in *Commission* v *Anic Partecipazioni* , cited above, paragraphs 47-49.

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

60 See Court of First Instance in *PVC II* , cited above, paragraph 953. This point was confirmed by the Court of Justice in its PVCII judgment, cited above .

(subsequently Bernay Film Plastique), Bischof + Klein GmbH & Co. KG, Nordenia Deutschland Steinfeld GmbH (subsequently Nordfolien GmbH), RKW AG Rheinische Kunststoffwerke, SachsaVerpackung GmbH, Combipac BV, Bonar Phormium NV (subsequently Bonar Technical Fabrics NV), Fardem Packaging BV, Plásticos Españoles SA (Aspla) and Koninklijke Verpakkingsindustrie Stempher CV participated in the cartel for the respective periods determined for each of those undertakings. They are therefore liable for the infringement.

Fardem

(587) Fardem does not deny that it took part in the cartel. It contends, however, that until May 1995 it was entirely controlled by DSM N.V., which was its main supplier of raw material and its main customer. Fardem says that that control was in fact exercised, and that it was not in a position to determine its own conduct independently. It asks that DSM be held primarily responsible for the acts of Fardem.

(588) In law, the fact that it has been shown that a parent company is responsible for the conduct of its subsidiary does not in any way exonerate the subsidiary of its own responsibility. The subsidiary continues to be individually accountable for the anticompetitive practices in which it took part. Any responsibility on the part of the parent company, by reason of the influence and control it exercises over its subsidiary, is additional.

(589) In the present case the Commission decided not to address the Statement of Objections to DSM. DSM would have been covered by Article 1 of Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition[61], which applies to the facts of this case. This is because between 8 June 1995, the date on which Fardem was transferred to Kendrion NV, and 26 June 2002, the date of notification of the decision ordering an inspection by Commission staff on Fardem's premises, which was the first action taken for the purpose of the investigation in this case, a period of more than five years had elapsed.

(590) It has been established that from 8 June 1995 onward Fardem Packaging BV was controlled by Kendrion NV (formerly Schuttersveld NV). Fardem Packaging BV was a wholly owned subsidiary of Combattant Holding BV, which was itself a subsidiary of Kendrion NV. Although Fardem has stated that it operated independently, there was regular reporting to Kendrion NV. The Commission accordingly addressed the Statement of Objections to Kendrion NV and to Combattant Holding BV.

(591) In their reply to the Statement of Objections, Kendrion NV and Combattant Holding BV deny exercising decisive influence or control over Fardem. They contend that Fardem decided its conduct on the market independently, without taking instructions from them, and that they never interfered with or influenced decisions in questions of an administrative or commercial nature such as management, the development of the business or staff matters.

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[61] OJ .L 319, 29.11.1974, p.1. Regulation as amended by Regulation (EC) No 1/2003.

(592) None of the evidence produced by Kendrion NV and Combattant Holding BV in support of their claim is sufficient to contradict the Commission's initial conclusions. They cite Kendrion's annual reports for 2001, 2002 and 2003 to show Fardem's marginal position in the group. This does not prove that the parent company exercised no influence over the running of its subsidiary between 1995 and 2002. Furthermore, the sale of Fardem, in 2003, and the observations in the 2003 annual report, came after the beginning of the Commission's investigations.

(593) Kendrion NV and Combattant BV indicate that until 2001 Fardem formed part of the group's industrial services division. From Kendrion's presentational leaflet it is clear that activities related to plastics were indeed at the core of its business.

(594) In addition, in reply to the arguments put forward by Kendrion NV and Combattant BV in their reply to the Statement of Objections to the effect that they had no influence over Fardem, it must be observed that these arguments are contradicted by the evidence in the file. In fact it is clear from the evidence in the file that representatives of Kendrion did play a part in decisions on the day-to-day management of Fardem, and that contact was not confined to mere financial reporting.

(595) *[Recitals (595) – (597) are deleted, including any cross references to these recitals and relevant footnotes.]*

(598) The Commission therefore takes the view that Kendrion NV should be held liable for the infringement from 8 June 1995 until it ended, jointly and severally with Fardem Packaging BV.

(599) This Decision should accordingly be addressed to Fardem Packaging BV and Kendrion NV.

Cofira

(600) It has been established that in 1990 Charfa intended to divest itself of part of its plastics business. In 1991, after its subsidiary Cofira had taken over Charfa's plastic bags operations, it transferred Cofira to Fardem SA, the French subsidiary of the Fardem group. In 1992 Cofira was merged into Fardem SA. In October 1995 a new company, Cofira (which became Cofira-Sepso in September 2001), was set up to take over the business of Fardem SA, which was wound up in December of the same year.

(601) It has also been established that, throughout that period, *[Name and position]*, consistently represented Charfa, and then Fardem SA and finally Cofira, at Valveplast meetings.

(602) In November/December 2003, Cofira-Sepso's industrial bags business was transferred to a company that had been inactive until that time, Cofira-Sac SA. Cofira-Sepso ceased trading, and was dissolved and removed from the French commercial register.

(603) Cofira-Sac SA denies that it has any liability, as has been suggested, for conduct engaged in by Charfa and then Fardem SA in the period 1982-1995.

(604) Cofira-Sac SA does not deny that there was functional and economic continuity between Charfa and Fardem SA, and that those two were one and the same undertaking. However, it denies that there was similar continuity in October 1995, when the business of Fardem SA was taken over by the new company Cofira, and Fardem was subsequently wound up, on the ground that Fardem SA was not in any way independent of its then parent company, Fardem Group BV, and consequently cannot be made to bear the responsibility for anticompetitive practices engaged in between 1991 and 1995.

(605) It should be borne in mind that the fact that it has been shown that a parent company is responsible for the conduct of its subsidiary does not in any way exonerate the subsidiary of its own responsibility.

(606) Between 1991 and 1995, Fardem SA continued to take part in the meetings and arrangements set up as part of the cartel, represented by its own officer *[Name]*. It is thereby liable for the infringement. This liability was passed on to Cofira-Sepso in October 1995 as the business of Fardem SA was taken over by Cofira-Sepso.

(607) As Cofira-Sac SA has ensured the economic continuity of Cofira Sepso's industrial bags business since 2003, and as Cofira-Sepso has been dissolved, Cofira-Sac SA should be held liable for the infringement for the period prior to 1995.

(608) Cofira-Sac SA should accordingly be held liable for the successive participation of Charfa, Fardem SA and Cofira (subsequently Cofira-Sepso) in the cartel throughout the entire period in question, that is to say, from 1982 until 2002.

(609) This Decision should accordingly be addressed to Cofira-Sac SA.

UPM-Kymmene

(610) It has been established that Rosenlew Saint-Frères Emballage SA has been a member of the Rosenlew group since December 1989 and that the parent company, W. Rosenlew AB, which owned 100% of its capital, merged with UPM-Kymmene in 1997.

(611) Since 25 November 1996, Rosenlew Saint-Frères Emballage has been a 99%-owned subsidiary of UPM-Kymmene Groupe, a French holding company, which does not itself engage in commercial activities and is a 99%-owned subsidiary of UPM-Kymmene Oyj, the group's parent company.

(612) Moreover, it has been established that since 1997 the Rosenlew group entity has no longer had its own legal personality and has been directly integrated into the UPM-Kymmene group, W. Rosenlew Ab having merged with UPM-Kymmene. It forms a business unit of the group, that up to December 2000 included industrial bags, of which Rosenlew Saint-Frères Emballage was a part.

(613) UPM-Kymmene denies that the Rosenlew group lost its legal personality when it was absorbed into UPM-Kymmene in 1997.

(614) It is clear that the Rosenlew group's operating subsidiaries, including Rosenlew Saint-Frères Emballage, have not disappeared, and have preserved their existing legal form, UPM-Kymmene simply taking control of the shareholdings held by the parent

company of the Rosenlew group, W. Rosenlew AB. However, W. Rosenlew AB was indeed absorbed into and merged with the parent company of the UPM-Kymmene group in 1997. The liabilities of W. Rosenlew AB, including its liability for its anticompetitive conduct, consequently passed to UPM-Kymmene.

(615) UPM-Kymmene argues that it should not be made to bear any liability for the conduct of Rosenlew and its subsidiary Rosenlew Saint-Frères Emballage.

(616) The Rosenlew group's commercial strategy, insofar as industrial bags were concerned was directed by the chairman of the mother company W. Rosenlew Ab, *[…X]*, assisted in particular by the director of operations in Europe, *[…Y]*. It cannot be denied therefore that the parent company exercised a decisive influence on the subsidiary.

(617) In addition, it has been shown that before it was absorbed by UPM-Kymmene the Rosenlew group was involved in the anticompetitive practices in question, on the one hand because of the participation of its 99% subsidiary, Rosenlew Saint-Frere Emballage, in the France subgroup from at least 1995 and, on the other hand, because of the participation of *[…Y]*, *[Position]* of Rosenlew Saint-Freres Emballage but also *[Position]* in continental Europe for the wider Rosenlew group, in a meeting of the cartel at the Valveplast level in December 1994[62]. It appears, moreover, that the Rosenlew entity was involved in the agreements of the block bags subgroup from July1994.

(618) It can therefore be considered that the undertaking responsible for the infringement up until the merger with UPM-Kymmene in 1997, is the Rosenlew group as a whole, the representative legal entities of which, for the purposes of that responsibility, were W. Rosenlew Ab and its subsidiary Rosenlew Saint-Freres Emballage.

(619) Because it was taken over by UPM-Kymmene Oyj, the Rosenlew group has, since 1997, constituted a business unit without legal personality in UPM-Kymmene's processing division and has been reporting to it. According to the case law, UPM-Kymmene Oyj must consequently be held directly liable for the infringement committed by its entity, Rosenlew, from the outset, that is to say, from 18 July 1994.

(620) After W. Rosenlew Ab was absorbed by UPM-Kymmene, the Rosenlew group managers continued to perform their duties in UPM's processing division, to which the Rosenlew entity was attached. UPM-Kymmene states that within the Rosenlew business unit the former Chairman of W. Rosenlew Ab, *[…X]*, assisted by his operations manager for continental Europe, *[…Y]*, continued to be primarily responsible for sales strategy for industrial bags. Since Rosenlew Ab had disappeared as a legal person, from the merger onward they acted on behalf of UPM-Kymmene directly.

(621) It has been established that the same people also kept their management positions in the subsidiary Rosenlew Saint-Frères Emballage, which was wholly owned by UPM-Kymmene from 25 November 1996 onward. They did not put an end to participation in the cartel meetings by Rosenlew Saint-Frères Emballage, and they

[62] Valveplast meeting of 20 December 1994.

themselves continued to attend several meetings. In those circumstances, it must be held that UPM's processing division played a part in the commission of the infringement, or in any event could not have been unaware of it, so that UPM-Kymmene is liable for the infringement.

(622) UPM-Kymmene Oyjshould therefore be held liable for the infringement from 18 July 1994 onward.

(623) This Decision should consequently be addressed to UPM-Kymmene Oyj.

Bischof + Klein

(624) It has been established that, with effect from 18 December 2000, Sacherie de Pont-Audemer has been a subsidiary of the Bischof + Klein group. From that date it has therefore been a wholly owned subsidiary of the holding company Bischof + Klein Beteiligungen GmbH, which is itself a wholly controlled subsidiary of the group's parent company, Bischof + Klein GmbH & Co. KG.

(625) Before this date, these two companies were independent of each other and therefore did not belong to the same undertaking. They participated in the cartel in an autonomous manner from the outset until 18 December 2000. They should therefore be held liable separately as regards that period of the infringement.

(626) Since January 2001, Bischof + Klein France SAS (previously Sacherie de Pont-Audemer) has been submitting a very detailed monthly report to its parent company. Moreover, it is clear that the strategy of overall group activities is coordinated and centralised by the parent company, Bischof + Klein GmbH & Co. KG, which organises regular meetings of lead staff of the group and its subsidiaries.

(627) Finally, and above all, the representatives of the Bischof + Klein group on the board of Bischof + Klein France SAS, *[…X]* and *[…Y]*, have executive duties in the industrial bags sector at the level of the parent company, and *[…Y]* attended several meetings held by Valveplast and its subgroups at which collusive arrangements were made.

(628) Consequently, the Commission considers that, in this case, the liability of Bischof + Klein France overlaps with that of its parent company, Bischof + Klein GmbH & Co. KG, for the period of the infringement from 18 December 2000 onwards.

(629) This Decision should therefore be addressed to Bischof + Klein GmbH & Co. KG and Bischof + Klein France SAS.

Nordenia and Nordfolien

(630) It has been established that Nordenia was an active member of the cartel from the outset and participated in Valveplast and the Germany, Benelux and block bags subgroups and, from time to time, in the France subgroup.

(631) It has also been established that its industrial bags business was made into a subsidiary in November 1992, under the name Nordenia Verpackungswerke GmbH, which in May 2000 became Nordenia Deutschland Steinfeld GmbH, a wholly owned subsidiary of the group's parent company, Nordenia International AG, and that before

1992 the industrial bags business was managed directly by the current parent company.

(632) It has also been established that Nordenia Deutschland Steinfeld GmbH, which became Nordfolien GmbH, formed part of the industrial bags division of the Nordenia group and that it submitted monthly reports to its parent company, though in its reply to the Statement of Objections Nordenia International contests the scope of this monthly reporting.

(633) It is clear, however, that there is only one undertaking which has undergone successive legal changes, which is the economic unit handling the industrial bags business. From November 1992 Nordenia Verpackungswerke GmbH, subsequently renamed Nordenia Deutschland Steinfeld GmbH, purely and simply continued the participation in the cartel of the undertaking Nordenia, understood in its economic sense. There was no break in Nordenia's involvement.

(634) Until October 1992 *[…X]* and *[…Y]*, the representatives of Nordenia International AG (at that time named Nordenia Verpackungswerke AG) attended Valveplast meetings regularly.

(635) Contrary to the claims made by Nordenia International AG in its reply to the Statement of Objections, after its industrial bags business was spun off to a subsidiary in November 1992, the representatives of Nordenia International AG continued to attend the meetings of the cartel. *[…]*

(636) Furthermore, in the Benelux subgroup, the same representatives *[Name]* and *[Name]* continued to attend the meetings after the restructuring in November 1992.

(637) For the whole of 1993 at least it is impossible to distinguish which of the legal entities in the Nordenia group, Nordenia International AG or Nordenia Deutschland Steinfeld was represented at the meetings of the cartel, or to say that one was actually participating in the cartel and the other was not. It has to be held, rather, that the undertaking Nordenia was involved, and accordingly that both the parent company and its subsidiary dealing with the industrial bags business must be held responsible for the infringement at least until the end of 1993.

(638) *[Recital (638) is deleted, including any cross references to this recital and relevant footnotes.]*

(639) Nordenia International AG contends that until the end of 2001 it was not aware that Nordfolien (that is to say Nordenia Deutschland Steinfeld) had been taking part in the meetings of Valveplast and its subgroups. This assertion is not credible. *[…]* He was thus aware of the undertaking Nordenia's participation in the cartel, and approved it. *[…]* However, it has not been shown that any internal measure was taken or instruction given to Nordenia Deutschland Steinfeld at the time to put an end to its participation in the cartel. Quite the reverse, by deliberately allowing its subsidiary to continue playing an active part in the cartel that it had itself initiated, and knowingly failing to exert the power it had to end the infringement; Nordenia International AG marked its agreement to the continuation of the infringement by Nordenia Deutschland Steinfeld.

(640) This is especially relevant in that Nordenia International AG claims to have put an end to Nordfolien's participation in the meetings of Valveplast and its subgroups as soon as it says it became aware of them, at the end of 2001, thus itself acknowledging that it had the power to do so.

(641) It is clear, therefore, that throughout the duration of the infringement Nordenia International AG and Nordfolien GmbH constituted an economic unit.

(642) Nordenia International AG should therefore be held liable for the infringement from its beginning, on 6 January 1982.

(643) Nordfolien GmbH should be held liable for the infringement from 24 November 1992, jointly and severally with Nordenia International AG.

(644) This Decision should therefore be addressed to Nordenia International AG and Nordfolien GmbH.

RKW

(645) It has been established that, since 1982, Rheinische Kunststoffwerke GmbH, which became RKW AG Rheinische Kunststoffwerke on 1 January 2003, was a wholly owned subsidiary of Renolit-Werke GmbH, which became Renolit Holding GmbH and then Renolit AG in 1999 and finally took the name JM Gesellschaft für industrielle Beteiligungen mbH & Co. KGaA.

(646) RKW AG is now a wholly owned subsidiary of JM Gesellschaft für industrielle Beteiligungen mbH & Co. KGaA.

(647) RKW states that the RKW GmbH board decided on its strategy and took operational decisions independently up to 2003, while the shareholders' meeting or the parent company intervened only in certain important decisions like the budget or investments. Nevertheless, the parent company was kept informed and was able to exercise control regularly, since monthly reports were submitted to it and a meeting between the directors of the two companies was held twice a year.

(648) In its reply to the Statement of Objections, JM Gesellschaft für industrielle Beteiligungen states that it had no influence over its subsidiary, which conducted its affairs independently.

(649) JM Gesellschaft für industrielle Beteiligungen offers no evidence in support of its claims.

(650) In accordance with the case law[63], when a subsidiary is wholly owned by its parent company there is a presumption that the parent exercises a decisive influence over the subsidiary's conduct. The parent company can reverse the presumption by producing evidence to the contrary, but JM Gesellschaft für industrielle Beteiligungen has not done so in its reply.

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63 See Court of Justice in *Stora Kopparbergs Bergslags* v *Commission* , cited above, paragraph 29, and *AEG* v *Commission*, cited above, paragraph 50. See also Court of First Instance in Joined Cases T-71/03 etc. *Tokai Carbon* v *Commission,* cited above, paragraph 60.

(651) JM Gesellschaft für industrielle Beteiligungen mbH & Co. KGaA should consequently be held liable for the infringement, from the outset, jointly and severally with RKW AG Rheinische Kunststoffwerke.

(652) This Decision should therefore be addressed to RKW AG Rheinische Kunststoffwerke and JM Gesellschaft für industrielle Beteiligungen mbH & Co. KGaA.

Sachsa and the Gascogne group

(653) It has been established that *[…]*.

(654) Moreover, Groupe Gascogne was kept regularly informed by Sachsa, and officers of Groupe Gascogne were among Sachsa's directors. The ultimate parent company therefore exercised control and decisive influence over the running of Sachsa.

(655) According to the explanations given by Sachsa, *[…]*.

(656) In its reply to the Statement of Objections the Gascogne group contends that the control it exercised was ex post only, and was confined to the financial aspects of its subsidiary Sachsa. It says that the Beirat, the supervisory body with representation from the parent company, has never in fact exercised any control over the management of Sachsa.

(657) In reply to these arguments it should be pointed out first of all that, contrary to what the Gascogne group suggests, its interest in its subsidiary is not purely financial, and the subsidiary's commercial performance is highlighted in the 2001 annual report.

(658) In German law the supervisory committee (*Beirat*) is an optional body that may be set up in a private limited company (*GmbH*). It is governed by Article 52 of the law governing private limited companies, which makes reference to a number of provisions of the law governing public limited companies. When a Beirat is set up in a GmbH, these provisions are supplementary only, and apply only if not otherwise provided in the company's own constitution. They concern, in particular, a duty of control and direction of the company, for which purpose the Beirat has extensive powers of access to the company's books and papers, a right to information from the governing bodies of the company, and an obligation to report annually in writing to the general meeting of shareholders on the results of the supervision process and the way supervision has been exercised[64].

(659) Sachsa's constitution provides for *[…]*

(660) Although it was not obliged to do so, the Gascogne group maintained the presence of a Beirat in its subsidiary after its acquisition, and what is more, although the rules did not require it to do so, appointed two officers of the parent company to that committee, including the manager of the group's flexible packagings division, when it could have appointed persons from outside the group.

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64 See Section 52 of the Law on private limited companies (*GmbH-Gesetz*) and Sections 90, 111 and 171 of the Law on public limited companies (*AG-Gesetz*).

(661) It is clear, therefore, that by appointing officers of the group to sit on Sachsa's supervisory body the Gascogne group intended to exercise regular supervision of the management of its subsidiary.

(662) In addition, several points in the Gascogne group's reply confirm that *[…]*.

(663) Groupe Gascogne should accordingly be held responsible for the infringement from 1 January 1994, jointly and severally with Sachsa Verpackung GmbH.

(664) This Decision should therefore be addressed to Sachsa Verpackung GmbH and Groupe Gascogne.

Stempher

(665) It has been established that Koninklijke Verpakkingsindustrie Stempher C.V. is the operational entity. Stempher BV is the managing entity and employs the managers responsible for executive management of K.V. Stempher C.V.

(666) In terms of capital the two companies overlap only to a limited extent. However, in view of the involvement of Stempher BV in the operational management of K.V. Stempher C.V., they must be considered to form a single undertaking.

(667) In those circumstances, Stempher BV must be considered liable for the infringement, from the outset, jointly and severally with K.V. Stempher C.V..

(668) This Decision should therefore be addressed to K.V. Stempher C.V. and Stempher BV.

Aspla and the Armando Álvarez group

(669) It has been established that Plásticos Españoles SA (Aspla) has from the outset been a *[…]*-owned subsidiary of Armando Álvarez SA.

(670) *[…]*

(671) It is clear, however, that the parent company is very closely involved in the operational management of Aspla.

(672) Since 1987 at least *[…]*.

(673) The Chairman of both companies since they were formed, *[…]*, chairs the meetings of the board of directors of the group.

(674) In its reply to the Statement of Objections Armando Álvarez SA denies having had any influence over the operational management of its subsidiary. It claims, without presenting any evidence to that effect, that the operational management functions were delegated to persons from outside the board of directors of the parent company, and that Armando Álvarez SA was not a member of Valveplast and did take any direct part in its meetings.

(675) In answer to these arguments it may be pointed out that the *[Position]* of Aspla, *[Name]*, attended at least 22 Valveplast meetings as *[Position]* of Aspla between

1988 and 1997, and was *[Position]* in 1991 and 1996. He was also *[Position]* of Armando Álvarez SA. The *[Position]* of Aspla, who was also *[Position]* of Armando Álvarez SA, *[Name]*, represented Aspla at a Valveplast meeting on at least one occasion, on 4 December 1990. The reports on Valveplast meetings drawn up by *[Name]* between 1995 and 2001 were sent to the *[Position]* of Armando Álvarez SA.

(676) It is undeniable, therefore, that the officers of the parent company Armando Álvarez acted on behalf of and for the account of Aspla, and as a result it must be concluded that the parent company has necessarily influenced the management of the subsidiary. In addition, contrary to what Armando Álvarez SA suggests in its reply, it was fully aware of its subsidiary's anticompetitive conduct, which expressly or tacitly it allowed to progress, making it clear that that conduct had its unreserved support.

(677) In those circumstances, Armando Álvarez SA should be held liable for the infringement, from the outset, jointly and severally with Plásticos Españoles SA (Aspla).

(678) This Decision should therefore be addressed to Armando Álvarez SA and Plásticos Españoles SA.

The BPI group

(679) As regards Combipac BV and Francepac SA, it has been established that the BPI group acquired Wavin PFP BV and the business of Wavin Emballage SA from the Wavin group on 25 April 1997, and acquired Formipac from Bonar Phormium NV on 28 November 1997.

(680) On 22 August 1997 Wavin PFP was merged into Combipac BV. The new entity kept the name Combipac BV

(681) In its reply to the Statement of Objections, BPI denies that Combipac BV and Francepac SA can be held liable for the infringement in the period before 26 April 1997.

(682) Combipac BV acquired the shares in Wavin PFP BV on 25 April 1997. Wavin PFP BV controlled the operations at the Hardenberg location, and was represented from the outset at the meetings of Valveplast, the Benelux subgroup, the Teppema group and the block bags subgroup.

(683) Wavin PFP BV was also directly involved in the activities of the France and Belgium subgroups, since its *[Position]* since 1991, *[…X]*, took part in several meetings of the Belgium subgroup and at least one meeting of the France subgroup. *[…Y]*, who was employed by Wavin Emballage SA and later by Francepac, and who regularly attended the meetings of the France subgroup, states that it was at the behest and with the assent of his superior, *[…Z]*, that he took part in the cartel from his arrival in 1985. At that time *[…Z]* was *[Position]* of Wavin PFP. It is clear, too, that in practice Wavin PFP BV directed the activities of Wavin Emballage SA, whose only business was the marketing in France of Wavin PFP's products: *[…]*. *[…Y]* was in direct contact with *[…X]* with regard to the meetings of the France group. It is clear, therefore, that Wavin Emballage SA, now Francepac, had no managerial autonomy,

and took part in the France subgroup with the agreement and at the behest of Wavin PFP, which thereby rendered itself liable for the conduct of its subsidiary before 26 April 1997.

(684) When Wavin PFP BV merged with Combipac BV on 22 August 1997, its liability for the infringement was transferred to Combipac BV. The point of departure for the infringement in Combipac BV's case must therefore be 6 January 1982.

(685) Francepac SA, however, like Wavin Emballage SA before it, was in reality only an instrument of Combipac BV handling sales of its products in France, and the Commission takes the view that it had no separate liability for its participation in the France subgroup, which is indistinguishable from Combipac BV's liability for its participation in the cartel.

(686) As regards the liability of the ultimate parent company, British Polythene Industries PLC, BPI Indupac (formerly Wavin PFP) and BPI Belgium (Formipac) do not have legal personality and are directly controlled by Combipac BV, a wholly owned subsidiary of the intermediate holding company, BPI Europe BV, which is itself jointly owned by two companies in the group, BPI International Limited and BPI International (No 2) Limited, both in turn wholly controlled by the ultimate parent company, British Polythene Industries PLC.

(687) Francepac SA is directly controlled by British Polythene Industries PLC.

(688) Francepac SA perpetuated the infringement that had been begun by Wavin Emballage SA, in particular through its *[Position] […Y]*, who continued to take part in the collusive arrangements that went on in the France group, which he had previously attended as an employee of Wavin.

(689) Moreover, the industrial bags business as a whole is directly controlled at parent company level, since the group is organised by sectoral divisions, each division being represented by a board which includes members of BPI plc's board of directors and meets quarterly.

(690) In its reply to the Statement of Objections BPI does not contest this fact. However, it says that the operational structure of the group is quite different from its legal structure. In 1998 a group Management Board was set up, consisting of the managing directors of each division and the group's main executive directors. The Management Board is the real management body running the BPI group.

(691) According to BPI, the Management Board does not concern itself with day-to-day operational management or with questions of pricing, which are a matter for the commercial and sales managers.

(692) However, BPI also indicates that its commercial managers send a monthly report to the managing director they work under, who then sends a quarterly report to the Management Board and to the CEO. The detailed explanation given in the reply to the request for information shows without any doubt that the upward movement of information in the group is highly structured and effective, and that the organisation of operations in large divisions has enabled the Management Board constantly to channel and guide the activities of the group's subsidiaries.

(693) Several senior officers of the group, who were *[Position]* of the parent company British Polythene Industries PLC, were also operational managers of subsidiaries directly involved in the cartel. *[…]*

(694) Lastly, several managing directors of the group have personally played varying parts in the meetings of the cartel *[…]*.

(695) In those circumstances, British Polythene Industries PLC should therefore be held responsible for the infringement from 25 April 1997, jointly and severally with Combipac BV.

(696) This Decision should accordingly be addressed to Combipac BV and British Polythene Industries PLC.

Bonar Technical Fabrics

(697) In its reply to the Statement of Objections, Bonar Technical Fabrics contends that it should not have been an addressee of the Statement of Objections, on the ground that Bonar Phormium Packaging, though it was not a subsidiary, was nonetheless an autonomous economic entity that operated in full independence of Bonar Phormium NV, the legal entity into which it was incorporated.

(698) It should be pointed out that it is not contested that since the end of the 1980s Bonar Phormium Packaging was one of the two divisions of the company Bonar Phormium NV. The business of the two divisions was the subject of a single balance sheet. Bonar Phormium Packaging had no legal personality. The name was merely a way of distinguishing the industrial bags division from the textiles division. All legal transactions were concluded in the name of Bonar Phormium NV, and the legal liability for them rested with Bonar Phormium NV. This is confirmed by the fact that on invoices, below the name "Bonar Phormium Packaging" invoices gave the company name Bonar Phormium N.V./S.A., which was the legal person that was bound with respect to third parties.

(699) It was Bonar Phormium NV that transferred its packaging activities to Combipac BV (BPI group) on 28 November 1997.

(700) It is settled case law that when an activity or branch of activity is transferred the responsibility for an infringement of the competition rules by that branch of activity remains with the transferring legal entity[65]. There can be a transfer of responsibility to the transferee only in exceptional circumstances, which the case law interprets strictly (for example where the transferor has ceased to exist in law after the commission of the infringement or where there are structural links between the transferor and the transferee[66]).

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65 See Court of First Instance in *Enichem Anic* v *Commission (Polypropylene)*, cited above and Court of Justice in *Commission* v *Anic Partecipazioni*, cited above, paragraphs 47-49.

66 See Court of Justice in *Aalborg Portland* v *Commission (Cement)* , cited above, paragraphs 344 and following.

(701) Consequently, Bonar Phormium NV is answerable for the infringement committed by its division Bonar Phormium Packaging until 28 November 1997, when Bonar Phormium Packaging was transferred to Combipac BV.

(702) Bonar Phormium was merged into and integrated with one of its own wholly owned subsidiaries, Bonar Technical Fabrics NV, in May 2000, with retroactive effect from 1 December 1999. Bonar Phormium NV ceased to exist in law on 1 December 1999.

(703) In accordance with the case law of the Court, Bonar Phormium NV's liability for the infringement has thereby been transferred to Bonar Technical Fabrics NV, which should be held liable for the infringement, and to which this Decision should therefore be addressed.

Low & Bonar

(704) Since 1990, Bonar Phormium NV has always been controlled by the Low & Bonar group. Until October 1997 a stake of 27% at its highest, gradually falling to zero, was held by a joint venture set up by the Flemish Government. In 1999 Bonar Phormium became a wholly owned subsidiary of Bonar International SARL, itself a wholly owned subsidiary of Bonar International Holdings, which was in turn a wholly owned subsidiary of Low & Bonar PLC.

(705) In line with the settled case law the Commission made the assumption that Low & Bonar PLC was liable for the infringement, and addressed the Statement of Objections to it.

(706) In its reply to the Statement of Objections Low & Bonar PLC states that it had no decisive influence on the policy followed by Bonar Phormium Packaging, either directly or indirectly via Bonar Phormium NV. Bonar Phormium Packaging, it says, operated in complete independence within the group, and Low & Bonar did not interfere in the management of its subsidiary or give it any instructions regarding its activities.

(707) In response to those arguments, the Commission would point out that from the facts referred to by Low & Bonar it is clear that, in parallel with its legal structure, the Low & Bonar group was throughout the period of the infringement organised in broad divisions corresponding to the group's areas of business. Bonar Phormium Packaging was an economic entity which, alongside five other business units, formed part of the European packaging division. The European packaging division was directed by *[Name]* until 1993 and by *[Name]* thereafter.

(708) In the same period *[Name]* and *[Name]* were *[Position]* of Low & Bonar, which was clearly in charge of the operational management of the group.

(709) During the period of the infringement the successive managers of Bonar Phormium NV all occupied senior posts at group level *[…]*.

(710) The persons named minimise their role in Bonar Phormium NV and the business unit Bonar Phormium Packaging, but it is incontestable that the *[Position]* of Bonar Phormium NV were directly involved in determining the strategy of the group. By virtue of their position in the functional organisation of the group, they played a part

in the operational management of the division that included Bonar Phormium and its Bonar Phormium Packaging branch, and necessarily influenced the decisions the latter took at operational level.

(711) Low & Bonar has produced examples of records of meetings of the board of Low & Bonar for 1994. It can be seen that *[Position], [Name],* who was also *[Position]* of Bonar Phormium NV, himself reported on the activities of the European packaging division and of the business unit Bonar Phormium Packaging. It should be borne in mind that there was also a Group Executive Board for which Low & Bonar has not supplied minutes. Clearly, therefore, the management of the group was regularly informed of the activities and situation of Bonar Phormium NV. This is not contradicted by the statements of *[Name],* which show that the *[Position]* was kept regularly informed by the managing director of the business unit Bonar Phormium Packaging.

(712) Taken together the evidence produced by Low & Bonar confirms that Bonar Phormium NV and its business unit Bonar Phormium Packaging did not decide their conduct independently. The officers of the group, by reason of their operational functions and their position in the functional organisation of the group, necessarily exercised an influence on the strategy and management of Bonar Phormium NV and its business unit Bonar Phormium Packaging.

(713) Low & Bonar PLC, the ultimate parent company of the group, must therefore be held liable for the infringement until 28 November 1997, jointly and severally with its subsidiary Bonar Technical Fabrics NV.

(714) This Decision should accordingly also be addressed to Low & Bonar PLC.

FLS Plast

(715) It has been established that in 1990 the FLS group took control of Silvallac (Trioplast Wittenheim), acquiring 60% of the equity, increased to 100% in 1991, through Nyborg Plast International A/S (subsequently FLS Plast A/S).

(716) On 19 January 1999, the FLS group transferred Silvallac to Trioplanex France SA, a wholly owned subsidiary of the ultimate parent company of the Trioplast group, Trioplast Industrier AB.

(717) FLS Plast A/S is wholly owned by the group parent company, FLSmidth and Co. A/S (previously FLS Industries A/S).

(718) In its reply to the Statement of Objections FLS Plast contends that it did not exercise actual control of its subsidiary and therefore that it should not be held responsible for its subsidiary's actions. The FLS group's investment in Silvallac (later Trioplast Wittenheim), it says, was a purely financial one; it played no part in Silvallac's day-to-day policy, and Silvallac was completely independent in its management.

(719) In response to those arguments, the Commission would point out that during the period of the infringement the successive chairmen of Silvallac also held senior positions in the parent company *[…]*.

(720) FLS Plast contends that the position of Chairman of Silvallac held by *[…X]* and *[…Y]* was purely formal, and that they did not in fact exercise any authority. Their role was confined to occasional financial information regarding the business of the subsidiary. The general manager at the time, *[…Z]*, was left completely free to manage the company as he saw fit.

(721) As a general point, the Commission cannot agree with the purely formal view that FLS Plast puts forward of the company governing bodies established in accordance with the law. The board of directors and its chairman have a general duty to direct the affairs of the company, or at least to supervise the running of its affairs where that is delegated to others. To accept that the officers of the company may be appointed only in order to satisfy formal requirements of no legal significance would be to deprive those requirements of any purpose, and to negate the very principles of the representativeness and responsibility of the governing bodies of companies. The Commission would point out that in most cases the persons who sit on the board of directors of a company receive fees for their attendance.

(722) It is clear, therefore, that by appointing officers of the group to senior positions in Silvallac, FLS Plast set out to exercise regular supervision of its subsidiary.

(723) It is even clear from the response to the Statement of Objections that the management of FLS Plast knew, or could not have been unaware, that the subsidiary was engaging in anticompetitive conduct.*[…]*

(724) The Valveplast meeting on 21 December 1993, at which anticompetitive conduct was discussed, was attended by *[…X]* as a representative of Silvallac.

(725) *[…X]* is likewise mentioned in handwritten notes of 1994 found on the premises of Bischof + Klein, which also refer to Silvallac and Nyborg (later FLS Plast), and which are evidence of anticompetitive practices.

(726) Although in its reply to the Statement of Objections FLS Plast relies on a number of items of evidence in support of its claim that control was not in fact exercised, there is other evidence to show that FLS Plast had the means to exercise control and did act repeatedly to influence the management of its subsidiary.

(727) First, in the successive contracts of employment as *[Position]* concluded by *[…Z]* with Silvallac for the period 1992 to May 1996, which have been supplied by FLS Plast, it was expressly provided that *[…Z]* was required to obey the directives and instructions given by the chairman, *[…X]*, followed by *[…Y]*, and to report to the chairman on his activities.

(728) The fact that *[…Z]* was constrained to leave Silvallac temporarily, between September 1993 and April 1994, following a disagreement with *[…X]* concerning questions relating to the management of the company, shows that *[…X]* did play a part in decision-making.

(729) *[…Z]*, as *[Position]* of Silvallac, worked in close relation with FLS Plast. Every month he sent a report on the company's activities that went far beyond straightforward financial reporting, and contained such things as market assessments,

prices, figures for orders and sales by type of product, and certain measures envisaged. These reports were addressed to FLS Plast *([…Y]* in particular).

(730) With effect from April 1994 *[…Z]* was himself appointed *[Position]* of Silvallac, on which the representatives of FLS Plast also sat. With effect from May 1996 his contract of employment was replaced by a contract concluded directly between himself and FLS Plast, which gave him the position of "*[…]*". FLS Plast states that this contract was concluded solely in order to improve *[…Z]*'s social security position. The fact remains, however, that the contract established an incontestable hierarchical relationship between FLS Plast and *[…Z]*. It provided for wide independence of judgment and initiative, but this was within the framework of the obligations on *[…Z]*. In particular, *[…Z]* was to perform his duties in accordance with the instructions given by the chairman of FLS Plast and to report to the chairman on his activities, and was to be in regular contact with the other officers of FLS Plast. He was also required to coordinate relations between the subsidiaries and FLS Plast on a permanent basis, and to keep FLS regularly informed of market developments.

(731) In those circumstances, FLS Plast A/S could not have been unaware of the unlawful conduct of its subsidiary, and, in any event, exercised influence over the subsidiary's management. FLS Plast A/S should therefore be held liable for the infringement from 31 December 1990 to 19 January 1999, jointly and severally with Silvallac, later Trioplast Wittenheim.

(732) This Decision should be addressed to FLS Plast A/S and Trioplast Wittenheim SA.

FLSmidth & Co. A/S (FLS Industries)

(733) FLS Industries (renamed FLSmidth & Co. in January 2005) denies that liability for Silvallac's conduct should be imputed to it. It relies essentially on the structure and organisation of the group. From the group's strategic plans it is clear that the policy was to decentralise management, and generally speaking it was not one of the functions of the governing bodies of the ultimate parent company to involve itself in the day-to-day management of one or other subsidiary in isolation.

(734) In response to those arguments, it is necessary to consider the factual situation at Silvallac during the period of the infringement, and in particular the real character of the links with the ultimate parent company.

(735) *[…Y]* was *[Position]* of FLS Industries, and was a senior officer of the group from 1985 onward. *[…Y]* was part of the "group management" of the FLS group.

(736) *[…Y]* was *[Position]* of Silvallac from 1990 onward, and Chairman of Silvallac from 1994 to 1999.

(737) For the reasons already explained with respect to FLS Plast, it must be held that by appointing its *[Position]* to the board of directors of Silvallac, and then to the post of chairman of the board, FLS Industries deliberately ensured that it was in a position to exercise effective control over Silvallac.

(738) In those circumstances, it must therefore be held that FLSmidth & Co. A/S exercised influence over the management of its subsidiary. FLSmidth & Co. A/S should therefore be held liable for the infringement from 31 December 1990 to 19 January 1999, jointly and severally with Silvallac, subsequently Trioplast Wittenheim.

(739) This decision should be addressed to FLSmidth & Co A/S.

Trioplast Industrier AB

(740) It is clear that the management at group level was closely involved in the definition, application and supervision of Trioplast Wittenheim's commercial policy.

(741) Within the Trioplast group Trioplast Wittenheim has been integrated since 1999 into the industrial films department. According to the company's successive organisation charts, the commercial management of Trioplast Wittenheim reports directly to the commercial manager of the group's industrial films division, who holds the authority to make decisions on strategic and commercial matters. However, Trioplast Wittenheim contends that this arrangement did not operate in practice until very recently, and that the strategic and commercial decisions were in reality taken by the general manager and commercial manager of Trioplast Wittenheim.

(742) It should be pointed out, however, that from January 1999, when the company was acquired by the Trioplast group, to 2002, the Chairman of the board of directors of Trioplast Wittenheim, *[…X]*, was also the head of the Trioplast group's industrial film division. *[…Y]* and *[…Z]*, both members of the board of directors of Trioplast Wittenheim since 21 January 1999 (*[…Z]* replaced *[…X]* as Chairman in 2002), were also members of the board of directors of the parent company of the group, Trioplast Industrier AB.

(743) Documents gathered at Trioplast Wittenheim's premises show that commercial policy in respect of FFS bags was defined in 1999 in line with a group strategy, with special reference to the targeting of prospects, and that the information technology application relating to the commercial data base was integrated at group level and shared by Trioplast Wittenheim from October 1999 onward.

(744) Moreover, *[…X]*, Chairman of Trioplast Wittenheim's board of directors from 1999 to 2002, was also the manager responsible for the whole group's industrial film division, and attended several Valveplast meetings during which collusive arrangements were made.

(745) In those circumstances, it must be considered that Trioplast Wittenheim's ultimate parent company, Trioplast Industrier AB, exercised decisive influence over the management of its subsidiary, and that Trioplast Wittenheim continued to be a member of the cartel after 21 January 1999 with the parent company's approval.

(746) In those circumstances, Trioplast Industrier AB should be held liable for the infringement from 21 January 1999, jointly and severally with Trioplast Wittenheim SA.

(747) This Decision should therefore also be addressed to Trioplast Industrier AB.

5.2.9. Application of Article 81(3) of the Treaty

(748) The parties have not presented any argument suggesting that the conditions of Article 81(3) of the Treaty are satisfied. In any event, however, the Commission takes the view that they are not.

6. REMEDIES

6.1. ARTICLE 3 OF REGULATION NO 17 AND ARTICLE 7 OF REGULATION (EC) NO 1/2003

(749) In accordance with Article 3 of Regulation No 17 and Article 7 of Regulation (EC) No 1/2003, when the Commission finds that there is an infringement of Article 81 of the Treaty, it may require the undertakings concerned to bring such infringement to an end.

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

6.2. ARTICLE 15(2) OF REGULATION NO 17 AND ARTICLE 23(2) OF REGULATION (EC) NO 1/2003

(751) Under Article 15(2) of Regulation No 17 and Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose fines on undertakings where, either intentionally or negligently, they infringe Article 81 of the Treaty.

(752) In accordance with Article 15(2) of Regulation No 17, which was in force when the infringement was committed, the fine imposed on each undertaking participating in the infringement may not exceed 10% of its total turnover in the preceding business year. Article 23(2) of Regulation (EC) No 1/2003 lays down a similar limit.

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

6.3. BASIC AMOUNT OF THE FINES

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

6.3.1. Gravity

(755) 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.

6.3.1.1. Nature of the infringement

(756) It is clear from Sections 4 and 5 that the infringement essentially took the form of secret collusion between the cartel members with a view to sharing markets in Germany, France, the Benelux countries and Spain, in particular through the allocation of sales quotas, the allocation of customers and deals and the submission of concerted bids in response to certain invitations to tender, fixing prices on those markets, in particular through the development of price calculation models, and regularly exchanging sensitive data on sales and individual market shares. By their very nature, horizontal restrictions of this type are among the most serious infringements of Article 81 of the Treaty.

6.3.1.2. Impact of the infringement

(757) It is not possible in this proceeding to measure precisely the practical impact on the territories concerned of all the arrangements and practices constituting the infringement. It can nevertheless be affirmed that the collusive arrangements were implemented and that they therefore necessarily had an impact on the market, even if it is not possible precisely to gauge the extent of that impact.

(758) Within Valveplast and the France and Benelux subgroups, it is significant that most of the major customers identified on the lists were almost systematically discussed at meetings. Records of meetings of the Benelux subgroup show that the prices to be charged by the companies winning orders could be very precisely determined.

(759) Similar discussions were held within Valveplast and led to concrete decisions on prices and the allocation of customers *[…]*.

(760) Within the France subgroup, precise arrangements concerning prices and the apportionment of orders from major customers were worked out and put into effect *[…]*.

(761) The same finding can be made with regard to meetings of the Benelux, block bags and Belgium subgroups and the Teppema group.

(762) The determination of quotas furthermore undoubtedly influenced the cartel members' market behaviour. Even if several parties claim that they did not observe the quotas, records of the discussions show that they were regularly referred to, in particular in order to influence the arrangements. Monitoring of the participants' market positions was also made possible through regular and frequent exchanges of individualised data on sales volumes. In any event, the Commission considers that the absence of

measures to monitor the implementation of the cartel cannot, in itself, limit the gravity of the infringement[67].

(763) The Commission concludes that the collusive agreements were implemented and had an impact on the market in the territory covered by the cartel for the product concerned, but that the impact cannot be measured with precision. The agreements were implemented in particular as regards the key aspects of prices, the allocation of customers and deals and monitoring of the cartel members' respective market shares.

6.3.1.3. Size of the geographic area concerned

(764) In assessing gravity, it should be borne in mind that the infringement covered the territories of Germany, the Benelux countries, Spain and France.

6.3.1.4. Commission conclusions on the gravity of the infringement

(765) In view of the nature of the infringement and the fact that it covered the entire territories of Germany, the Benelux countries, Spain and France, the Commission takes the view that it must be regarded as very serious within the meaning of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty[68] (hereinafter "the Guidelines on the method of setting fines") , regardless of whether or not its impact on the market can be measured. It is in any case clear that the cartel's anticompetitive agreements were implemented and did have an impact on the market, even if the impact cannot be measured with precision.

6.3.2. Differential treatment

(766) Within the category of very serious infringements, the scale of applicable fines makes it possible to apply differential treatment to the undertakings in order to take account of their effective economic capacity to cause significant damage to competition. Such differentiation is particularly necessary where, as in the case in point, there are considerable disparities in terms of importance on the market between the undertakings that took part in the infringement[69].

(767) To that end, the undertakings concerned can be subdivided into several categories according to their relative weight on the relevant market. In order to compare the relative size of the undertakings concerned, the Commission considers it appropriate in the case in point to take as a basis the market shares achieved by each undertaking in 1996, for the product concerned by this proceeding, on the territory defined in recital (764). The Commission has chosen 1996 because it is the most recent full year of the infringement in which all the undertakings to which this Decision is addressed were still present on the industrial bags market.

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67 See, by analogy, concerning mitigating circumstances, judgment of Court of First Instance in *Enso Española/Commission*, cited above, paragraph 318.

68 OJ C9, 14.1.1998, p.3.

69 The Court of First Instance has accepted this approach where the categories are justified: see judgment of 29 April 2004 in 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 reported, paragraph 217.

(768) Aspla maintains that the market share estimated by the Commission for the whole of the territory covered by the cartel does not correspond to the real impact of the practices imputed to Aspla, because the main part of its activity was concentrated in the Spanish market which, according to Aspla, is an isolated market on which Aspla had only a limited position, giving it no leeway to effectively implement any anticompetitive agreements.

(769) It has been shown that the Spanish territory was affected by the cartel and that there was in fact competition between the cartel members in relation to the Spanish market. It is therefore appropriate to include the Spanish market in the area covered by the cartel. It is of no consequence that the turnover of the Armando Alvarez group in relation to industrial bags was essentially realised in Spain; the fact remains that the Spanish market must be taken into account to adequately reflect the relative weight of this undertaking on the market covered by the cartel.

(770) With market shares estimated at *[11-13]* % and *[10-12]* % respectively, Wavin/BPI and Bischof + Klein are the largest producers and have therefore been placed in the first category.

(771) Nordenia, with a market share of *[7-9]* %, has been placed in the second category.

(772) Aspla (market share of *[6-8]* %) and Fardem (*[5-7]* %) have been placed in the third category.

(773) UPM-Kymmene (*[3-5]* %), RKW (*[3-5]* %) and Stempher (*[3-5]* %) have been placed in the fourth category.

(774) Bonar Phormium (*[2-4]* %), Cofira (*[1-3]* %) and Trioplast Wittenheim (*[1-3]* %) have been placed in the fifth category.

(775) Sachsa (*[…]* %), Bischof + Klein France SAS (*[0-2]* %) and Bernay Film Plastique (formerly Ceisa) (*[0-2]* %) have been placed in the sixth category.

(776) In the case of Stempher, the Commission intends to take account of the fact that the undertaking was solely a member of the Teppema group, which dealt only with the Dutch market and occasionally the Belgian market, and was not aware of the overall scheme of the illegal cartel. Although the anticompetitive practices imputed to Stempher were limited to these two markets, it should be noted that the main part of Stempher's industrial bags business is thus involved as that business is conducted on these two markets. Consequently a reduction of 25% should be applied to the basic amount of the fine calculated for that company.

(777) On that basis, the starting amounts deemed appropriate for the undertakings on which a fine has been imposed in this proceeding should be as follows:

– First category (Wavin/BPI (Combipac) and Bischof + Klein): EUR 35 million;

– Second category (Nordenia/Nordfolien): EUR 26 million;

– Third category (Aspla and Fardem): EUR 20 million;

– Fourth category (Rosenlew/UPM-Kymmene, RKW and Stempher): EUR 13 million for Rosenlew/UPM-Kymmene and RKW; EUR 9.75 million for Stempher.

– Fifth category (Bonar Phormium/Bonar Technical Fabrics, Trioplast Wittenheim and Cofira): EUR 8.5 million;

– Sixth category (Sachsa, Bischof + Klein France SAS (Sacherie de Pont-Audemer) and Bernay Film Plastique): EUR 5.5 million.

6.3.3. Sufficient deterrence

(778) In the category of very serious infringements, the scale of fines that can be imposed also makes it possible to set the amount of the fines at a level which ensures that they have sufficient deterrent effect, having regard to the size and economic power of each undertaking. The Commission notes that in 2004, the business year immediately preceding this Decision, the UPM-Kymmene group generated turnover of EUR 9.820 billion. The Commission therefore considers it appropriate, in order to set the amount of the fine at a level which ensures that it has sufficient deterrent effect, to apply a multiplication factor of 2 to the fine imposed on UPM-Kymmene. The application of this multiplication factor brings the amount of the fine imposed on UPM-Kymmene to EUR 26 million.

6.3.4. Duration of the infringement

(779) As explained in subsection 5.2.7. above, the companies concerned took part in the infringement at least during the following periods:

– Combipac BV: from 6 January 1982 until 9 November 2001, namely a period of 19 years and 10 months;

– Bischof + Klein GmbH & Co. KG: from 6 January 1982 until 26 June 2002, namely a period of 20 years and 5 months;

– Bischof + Klein France SAS (Sacherie de Pont-Audemer): from 6 January 1982 until 18 December 2000, namely a period of 18 years and 11 months;

– RKW AG Rheinische Kunststoffwerke and JM Gesellschaft für industrielle Beteiligungen: from 6 January 1982 until 26 June 2002, namely a period of 20 years and 5 months;

– Fardem Packaging: from 6 January 1982 until 26 June 2002, namely a period of 20 years and 5 months;

– Nordenia International AG: from 6 January 1982 until 26 June 2002, namely a period of 20 years and 5 months;

– Nordfolien: from 24 November 1992 until 26 June 2002, namely a period of 9 years and 7 months;

– Trioplast Wittenheim: from 6 January 1982 until 26 June 2002, namely a period of 20 years and 5 months;

– Cofira-Sac SA: from 24 March 1982 until 26 June 2002, namely a period of 20 years and 3 months;

– Aspla and Armando Álvarez SA: from 8 March 1991 until 26 June 2002, namely a period of 11 years and 3 months;

– Sachsa: from 9 February 1988 until 26 June 2002, namely a period of 14 years and 4 months;

– Rosenlew/UPM-Kymmene: from 18 July 1994 until 31 January 1999, namely a period of 4 years and 6 months;

– Bonar Technical Fabrics and Low & Bonar: from 13 September 1991 until 28 November 1997, namely a period of 6 years and 2 months;

– Bernay Film Plastique: from 31 August 1995 until 9 November 1998, namely a period of 3 years and 2 months;

– K.V. Stempher C.V. and Stempher BV: from 25 October 1993 until 31 October 1997, namely a period of 4 years.

(780) Combipac, Bischof + Klein Co. KG, Bischof + Klein France SAS, RKW AG and JM Gesellschaft für industrielle Beteiligungen, Fardem Packaging, Nordenia International AG, Nordfolien, Trioplast Wittenheim, CofiraSac, Aspla and Armando Álvarez SA, Sachsa, Bonar Technical Fabrics and Low & Bonar are responsible for an infringement of long duration. Rosenlew/UPM-Kymmene, Bernay Film Plastique, K.V. Stempher C.V. and Stempher BV are responsible for an infringement of medium duration. The starting amounts of the fines will consequently be increased by 10% per full year's duration; they will also be increased by 5% for any additional period of six months or more but less than one year.

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

– Combipac: 195%;

– Bischof + Klein Co. KG: 200%;

– Bischof + Klein France SAS 185%;

– RKW and JM Gesellschaft für industrielle Beteiligungen : 200%;

– Fardem Packaging: 200%;

– Nordenia International AG: 200%;

– Nordfolien: 95%;

– Trioplast Wittenheim: 200%;

– Cofira-Sac SA: 200%;

– Aspla and Armando Álvarez SA: 110%;

– Sachsa: 140%;

– UPM-Kymmene: 45%;

– Bernay Film Plastique: 30%;

– K.V. Stempher C.V. and Stempher BV: 40%;

– Bonar Technical Fabrics and Low & Bonar: 60%.

(782) For several companies held liable in their capacity as parent company, account has to be taken of the reduced duration of their liability as determined in subsection 5.2.8.2:

– Kendrion NV (with regard to Fardem Packaging): from 8 June 1995 until 26 June 2002, namely a period of 7 years;

– Groupe Gascogne (with regard to Sachsa): from 1 January 1994 until 26 June 2002, namely a period of 8 years and 5 months;

– British Polythene Industries PLC (with regard to Combipac): from 25 April 1997 until 9 November 2001, namely a period of 4 years and 6 months;

– FLS Plast et FLSmidth & Co (with regard to Trioplast Wittenheim): from 31 December 1990 until 19 January 1999, namely a period of 8 years;

– Trioplast Industrier AB (with regard to Trioplast Wittenheim): from 21 January 1999 until 26 June 2002, namely a period of 3 years and 5 months.

(783) For those companies, the following increases should be applied instead of the increases determined for their respective subsidiaries and listed in recital (781):

– Kendrion NV: 70% (instead of 200%);

– Groupe Gascogne: 80% (instead of 140%);

– British Polythene Industries PLC: 45% (instead of 195%);

– FLS Plast et FLSmidth & Co: 80% (instead of 200%);

– Trioplast Industrier AB: 30% (instead of 200%).

6.3.5. Conclusion on the basic amounts of the fines

(784) The basic amounts of the fines imposed on each company, either for its individual liability or its joint and several liability, should therefore be as follows:

– Combipac BV: EUR 103.25 million;

– British Polythene Industries PLC: EUR 50.75 million;

– Bischof + Klein GmbH & Co. KG: EUR 105 million;

– Bischof + Klein France SAS: EUR 15.68 million;

– RKW AG Rheinische Kunststoffwerke and JM Gesellschaft für industrielle Beteiligungen mbH & Co. KGaA: EUR 39 million;

– Fardem Packaging NV: EUR 60 million;

– Kendrion NV: EUR 34 million;

– Nordfolien GmbH: EUR 50.7 million;

– Nordenia International AG: EUR 78 million;

– Trioplast Wittenheim SA: EUR 25.50 million;

– Trioplast Industrier AB: EUR 11.05 million;

– FLS Plast A/S and FLSmidth & Co A/S: EUR 15.30 million;

– Cofira-Sac: EUR 25.50 million;

– Aspla and Armando Álvarez SA: EUR 42 million;

– Sachsa: EUR 13.20 million;

– Groupe Gascogne: EUR 9.90 million;

– UPM-Kymmene: EUR 37.70 million;

– Bernay Film Plastique: EUR 7.15 million;

– K.V. Stempher C.V. and Stempher BV: EUR 13.65 million;

– Bonar Technical Fabrics and Low & Bonar PLC: EUR 13.60 million.

6.4. AGGRAVATING AND MITIGATING CIRCUMSTANCES

6.4.1. Aggravating circumstances

6.4.1.1. Repeated infringement

(785) UPM-Kymmene argues that its involvement in the cartel in Case IV/C/33.833 – Cartonboard[70] should not be regarded as an aggravating circumstance.

[70] See Commission Decision 94/601/EC of 13 July 1994 in Case IV/C/33.833 - Cartonboard, OJ L 243, 19.9.1994, p. 1, and in particular Article 3(v) thereof. The Decision was upheld by the Court of First Instance in Joined Cases T-339/94 to T-342/94 *Metsä-Serla and Others* v *Commission* [1998] ECR II-1727 and then by the Court of Justice in Case C-294/98 *Metsä-Serla Oyj and Others* v *Commission* [2000] ECR I-10065.

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

(787) This Decision concerns the same type of infringement as the Cartonboard case, which related *inter alia* to price fixing, the determination of market share quotas and the exchange of information on prices and deliveries. It has been demonstrated that, in this case, UPM-Kymmene was involved in committing the infringement.

(788) The fact that UPM-Kymmene continued its infringement in the industrial bags sector after the adoption of the "Cartonboard" Decision ordering it to end its infringement in the cartonboard sector, clearly shows that the previous Decision did not have sufficient deterrent effect on UPM-Kymmene's market behaviour. Contrary to the argument put forward by UPM-Kymmene in its reply, the fact that the events covered by the Cartonboard Decision are more than 10 years old has no influence on the appraisal of the repetition of the infringement.

(789) Such behaviour constitutes in the Commission's view an aggravating circumstance that justifies an increase in the basic amount of the fine to be imposed on UPM-Kymmene of 50%.

6.4.1.2. Obstructing the Commission in carrying out its investigations

(790) Bischof + Klein does not dispute the fact that, during the inspection, one *[employee]* destroyed a document which had been selected by the inspectors, despite the latters' repeated warnings. This is tantamount to blatantly obstructing the Commission in carrying out its investigations.

(791) According to Bischof + Klein, only the fine provided for in Article 15(1)(c) of Regulation No 17, which penalises incomplete production of the required business records or refusal to submit to an investigation ordered by decision, can be applied to this behaviour.

(792) The Commission takes the view that that provision does not prevent it from applying the aggravating circumstance of "refusal to cooperate with or attempts to obstruct the Commission in carrying out its investigations" referred to in Section 2 of the Guidelines on the method of setting fines[71].

(793) According to Bischof + Klein, since a copy of the document in question was sent to the Commission shortly after the inspection and the Commission did not refer to it in the Statement of Objections, the behaviour at issue did not have any real impact on the course taken by the investigations and therefore cannot constitute an aggravating circumstance.

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[71] See Court of Justice in Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02P and C-213/02 P *Dansk Rorindustri A/S v Commission (Pre-insulated pipes)*, judgment of 28 June 2005, not yet reported, paragraph 348 and following and the judgment of the Court of First Instance *HFB Holdings and others v Commission*, cited above, paragraphs 555 and following.

(794) However, there is no guarantee that the document subsequently provided is indeed a copy of the one destroyed during the inspection. The aggravating circumstance is furthermore constituted by the deliberately obstructive attitude, irrespective of any effects it may have had on the course subsequently taken by the proceeding. Clearly, such behaviour necessarily disrupted the proper conduct of the investigation and hindered the Commission's inspectors in the exercise of their investigative powers.

(795) Such behaviour constitutes, in the Commission's view, an aggravating circumstance that justifies, in the case in point, an increase in the basic amount of the fine to be imposed on Bischof + Klein GmbH & Co. KG of 10%.

6.4.1.3. Role of leader in or instigator of the infringement

(796) Several parties claim that BPI acted as the leader or instigator of the cartel. The Commission takes the view that although Wavin/BPI played an important role in the cartel, it could not be deemed to have acted as leader or instigator. It is clear that the cartel was set up as a result of a collective initiative and that its membership remained extremely stable. Several participants were furthermore actively involved, according to the groups and subgroups concerned, and were responsible for collusive initiatives, although it is not possible to identify one undertaking as the leader.

6.4.2. Mitigating circumstances

6.4.2.1. Exclusively passive role in the infringement

(797) RKW, Bonar Technical Fabrics, Aspla and Nordfolien claim to have played only a passive role in the cartel. FLS Plast and FLSmidth & Co. (FLS Industrier), on the one hand, and UPM-Kymmene, on the other, make the same claim as regards the roles played by Silvallac/Trioplast Wittenheim and Rosenlew/Rosenlew Saint-Frères Emballage respectively. The Commission takes the view that Sections 4 and 5 demonstrate, on the contrary, that those undertakings did not play an exclusively passive role in the cartel.

(798) Among other things, RKW regularly attended meetings of Valveplast, from 1990, and several meetings of the Benelux subgroup (from 1982) and the block bags subgroup (in 1994 and 1995). It took part in one of the working groups set up to improve coordination on the market. It actively participated from at least 1987 in the systems for exchanging information on sales volumes and market shares and in the assignment of quotas. Several documents prove that RKW contributed to the discussions on prices and customers and that it benefited from the allocations decided for several deals. RKW also acted as coordinator for several customers.

(799) It has been demonstrated that Bonar Phormium actively participated at least once in a meeting of Valveplast and regularly in meetings of the Belgium subgroup and the Teppema group. Several documents show that it played an active part in the system for exchanging information on sales volumes and that it was involved in the determination of quotas and in discussions on prices within the Belgium subgroup. It also benefited from the customer coordination system within the Teppema group.

(800) There is plenty of evidence of Aspla's active involvement, particularly within Valveplast. The same applies to the role of Rosenlew/Rosenlew Saint Frères Emballage within Valveplast and the France subgroup.

(801) Nordfolien (previously called Nordenia Deutschland Steinfeld) regularly participated in the Valveplast meetings, in the Benelux subgroup, in the block bag subgroup and, on at least one occasion, in the France subgroup. It was, in particular, involved within Valveplast in the system for exchanging information on market shares and in the discussions relating to quotas, market sharing and price fixing, notably in relation to FFS. It took part in discussions relating to the allocation of certain specificcustomers and benefited from customer coordination system. Nordfolien was an active member of the Germany, Benelux and block bags subgroups.

(802) Silvallac/Trioplast attended meetings of Valveplast and the France subgroup regularly and those of the Benelux[72] and block bags subgroups on a more occasional basis. It was actively involved in the system for exchanging information on sales volumes and market shares and in the allocation of quotas. Several documents testify to its substantial participation in discussions within the France subgroup. It also took part in the arrangements concerning several deals from which it benefited, in the system of coordinators and in discussions on price calculation models.

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

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

(804) The fact that an undertaking which participated in an agreement with its competitors did not always behave on the market in the manner agreed with them is not necessarily a matter which must be taken into account as a mitigating circumstance when determining the amount of the fine to be imposed. An undertaking which, despite colluding with its competitors, follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit[73].

(805) Consequently, each individual undertaking would have to demonstrate that it systematically and explicitly refrained from applying the restrictive agreements[74]. The mere fact of cheating at the expense of the other cartel members cannot therefore be admitted as a mitigating circumstance. Even if certain decisions were not fully carried out, this did not affect the implementation of the cartel as a whole. In the case in point, none of the participants systematically refrained from applying the agreements and thus adopted really competitive behaviour.

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72 Until 1987, Silvallac nevertheless took part very regularly in meetings of the Benelux subgroup.

73 See Court of First Instance in Case T-308/94 *Cascades SA* v *Commission* [1998] ECR II-925, paragraph 230, Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon Co. Ltd and others* v *Commission*, cited above, paragraph 297, and *Mannesmannröhren-Werke AG* v *Commission*, cited above, paragraphs 291and following.

74 See Court of First Instance in *Mannesmannröhren-Werke AG* v *Commission*, cited above.

6.4.2.3. Early termination of the infringement

(806) Several parties consider that the Commission should take account of the fact that they stopped taking part in the cartel either before the investigations began or immediately after the inspections were carried out by the Commission.

(807) The Commission takes the view that the immediate termination of unlawful behaviour cannot normally be regarded as a mitigating circumstance in cartel cases where the infringements were committed deliberately. According to the Court of First Instance, "An undertaking's reaction to the opening of an investigation into its activities can be assessed only by taking account of the particular context of the case" and "the Commission cannot therefore be required, as a general rule, either to regard a continuation of the infringement as an aggravating circumstance or to regard the termination of an infringement as a mitigating circumstance"[75].

(808) In the Commission's view, in such cases of blatant violation of the competition rules, the fact that a company terminates the offending behaviour before any intervention by the Commission does not merit any particular reward. When excercising its power of assessment, the Commission has no obligation to award a reduction of a fine for the termination of a clear infringement, whether this termination occurred before or after the Commission's intervention[76]. 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 a mitigating circumstance[77].

6.4.2.4. Introduction of a compliance programme

(809) Several parties claim that account should be taken of the fact that they have set a compliance programme in place. 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 Decision, the more so as the infringement concerned is a manifest breach of Article 81 of the Treaty[78].

6.4.2.5. Crisis in the industrial bags sector

(810) Several parties argue that a reduction should be granted on the alleged ground that the industrial bags industry was in crisis. The Commission observes that in a free market economy, entrepreneurial risk includes the risk of occasional losses or even bankruptcy. The fact that an undertaking may not happen to make profits on a certain commercial activity is no licence for it to enter into secret collusion with competitors to cheat customers and other competitors.

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75 See Case T-31/99 *Asea Brown Boveri* v *Commission* [2002] ECR II-1881, paragraph 213.

76 See judgement in Case T-71/03 and others, *Tokai Carbon v Commission*, paragraphs 292 to 294 .

77 Joined Cases T-236/01, etc. *Tokai Carbon Co. Ltd and Others* v *Commission*, cited above, paragraph 341.

78 Joined Cases T-236/01, etc. *Tokai Carbon Co. Ltd and Others* v *Commission*, cited above, paragraph 343. See also Court of First Instance in Case T-65/99 *Strintzis Lines Shipping SA* v *Commission* ,[2003]ECR II-5433, paragraph 201, and Case T-224/00 *Archer Daniels Midland* v *Commission* [2003] ECR II-2597, paragraphs 280 and following.

(811) As a general rule, cartels risk coming into play not when undertakings make large profits but precisely when a sector encounters problems. Therefore, if the parties' reasoning were followed, fines in cartel cases would automatically have to be reduced in virtually all cases. In its judgment in *Graphite Electrodes*, the Court of First Instance confirmed that the Commission is not required to regard as a mitigating circumstance the poor financial state of the sector in question[79].

6.4.3. Conclusion on aggravating and mitigating circumstances

(812) As a result of the aggravating and mitigating circumstances taken into account, the basic amount of the fine to be imposed on UPM-Kymmene should be increased by EUR 18.85 million to EUR 56.55 million and the basic amount of the fine to be imposed on Bischof + Klein GmbH & Co. KG should be increased by EUR 10.50 million to EUR 115.50 million.

6.5. APPLICATION OF THE 10% OF TURNOVER CEILING

(813) Article 15 (2) of Regulation No 17 and Article 23(2) of Regulation (EC) No 1/2003 provide that the fine imposed on each undertaking is not to exceed 10% of its turnover.

(814) As regards the 10% ceiling, if "several addressees constitute the 'undertaking', that is the economic entity responsible for the infringement penalised, again at the date when the decision is adopted, (…) the ceiling can be calculated on the basis of the overall turnover of that undertaking, that is to say of all its constituent parts taken together. By contrast, if that economic unit has subsequently broken up, each addressee of the decision is entitled to have the ceiling in question applied individually to it."[80]

(815) The worldwide turnover of *[…]* in 2004, the last full year preceding this decision, was EUR *[…]*. The fine imposed on *[…]* must therefore not exceed EUR *[…]*.

(816) The latest annual turnover achieved by Bernay Film Plastique in 2004 was EUR 9 431 544. The fine imposed on Bernay Film Plastique must therefore not exceed EUR 0.94 million.

(817) The worldwide turnover of Nordenia International AG in 2004, the last full year preceding this decision, was EUR 391 073 540. The fine imposed on Nordenia International AG must therefore not exceed EUR 39.10 million.

(818) The worldwide turnover of Cofira-Sac SA in 2004, the last full year preceding this decision, was EUR 4 738 258. The fine imposed on Cofira-Sac SA must therefore not exceed EUR 0.47 million.

(819) Nordfolien GmbH left the Nordenia group, which was the economic entity responsible for the infringement, in 2003, after the end of theinfringement, following

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79 Joined Cases T-236/01, etc. *Tokai Carbon Co. Ltd and Others* v *Commission*, cited above, paragraph 345.

80 See judgment of Court of First Instance in Cases T-71/03, T-74/03, T-87/03 and T-91/03, *Tokai Carbon and Co Ltd and others v Commission*, cited above, paragraph 390.

its transfer to the *[…]* group. The worldwide turnover of Nordfolien GmbH should therefore be taken as the basis on which to calculate the limit of the fine to be imposed on Nordfolien GmbH. The worldwide turnover of Nordfolien GmbH in 2004, the last full year preceding this decision, was EUR 79 833 000. The fine imposed on Nordfolien GmbH must therefore not exceed EUR 7.98 million.

(820) Fardem Packaging BV left the Kendrion group, which formed the economic entity responsible for the infringement, in 2003. The worldwide turnover of Fardem Packaging BV should therefore be taken as the basis for calculating the limit of the fine to be imposed on Fardem Packaging BV.. The worldwide turnover of Fardem Packaging BV in 2004, the last full year preceding this decision was EUR 22 036 136. The fine imposed on Fardem Packaging BV must therefore not exceed EUR 2.20 million.

(821) The worldwide turnover of British Polythene Industries PLC in 2004, the last full year preceding this decision was EUR 529 572 982. The fine imposed on Combipac B.V. must therefore not exceed EUR 52.95 million.

(822) The latest worldwide turnover of the Bischof + Klein group in 2004, the last full year preceding this decision, was EUR 441 568 000. Since Bischof + Klein France SAS is part of the undertaking Bischof + Klein, the fine imposed on Bischof + Klein France in respect of its participation in the cartel from 1982 to 2000 should be taken into account in determining whether the ceiling of 10% of turnover is reached. For the purposes of that calculation, therefore, the total amount of the fine imposed on Bischof + Klein will be equal to the total of the fine imposed on Bischof + Klein GmbH & Co. KG, the ultimate parent company of the group, and that imposed on is subsidiary Bischof + Klein France. This total amount must not exceed 10% of the turnover achieved in 2004 by the Bischof + Klein group worldwide and must therefore not exceed EUR 44.15 million. A reduction in the basic amount of the fine imposed on each of these two companies must be applied proportionally in order to respect the 10% ceiling. The fine imposed on Bischof + Klein GmbH & Co. KG must therefore not exceed EUR 38.87 million and that imposed on Bischof + Klein France SAS must not exceed EUR 5.28 million.

6.6. APPLICATION OF THE LENIENCY NOTICE

(823) BPI, Trioplast and Sachsa expressly demonstrated, at different stages in the proceeding, their willingness to cooperate with a view to receiving the favourable treatment provided for in the Leniency Notice, which applies in this proceeding[81].

(824) In their reply to the Statement of Objections, Bonar Technical Fabrics, Bischof + Klein, CofiraSac SA, FLS Plast, FLSmidth &Co. A/S and Nordfolien also requested the benefit of the Leniency Notice.

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81 In accordance with point 28 of the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ C45, 19.2.2002, p.3), from 14 February 2002, the 2002 notice replaces the 1996 notice for all cases in which no undertaking has contacted the Commission in order to take advantage of the favourable treatment set out in that notice. As in this case BPI applied to the Commission for leniency before 14 February 2002, the 1996 Leniency Notice applies.

6.6.1. Application of Section B of the Leniency Notice

(825) BPI was the first of the undertakings involved to contact the Commission, in November 2001, and voluntarily to provide evidence of the infringement to which this proceeding relates. This evidence consisted in a number of statements by employees of the undertaking and documents dating from the time the infringement was committed.

(826) Thanks to the information thus provided, the Commission was able to organise the inspections carried out on 26 and 27 June 2002 on the premises of 13 undertakings.

(827) BPI maintained continuous cooperation throughout the investigation. It is clear to the Commission that BPI provided all the evidence available to it, thereby contributing substantially to the Commission's investigation. The Commission considers that it has accordingly fulfilled its obligation to cooperate and qualifies for treatment under Section B of the Leniency Notice.

(828) In their replies to the Statement of Objections and during the hearing, several undertakings claimed that BPI continued to take part in the infringement after reporting the cartel to the Commission, thereby contravening one of the conditions for obtaining the benefit of Section B.

(829) In view of the importance of the possible consequences of these allegations, the Commission considered it necessary to request additional detailed explanations from the parties concerned.

(830) Bischof + Klein, RKW and Nordfolien claimed that BPI took part in an arrangement for the award of a contract put out to tender by *[Customer name]* in the form of an Internet auction held on 19 December 2001.

(831) The call for tenders first went through a conventional phase in which *[Customer name]* sent out the tender specifications by letter dated *[…]*, requesting replies by *[…]*. The call for tenders covered two categories of FFS bags and block bags. After receiving the written bids, *[Customer name]* announced that it would hold an Internet auction in order to award the contract. All the parties involved agree that bilateral contacts took place shortly before the auction day and that Bischof + Klein was in contact with *[Name]* of BPI. This is not disputed by BPI, which furthermore took the initiative of spontaneously informing the Commission thereof among the initial statements by *[Name]* submitted to the Commission in March 2002. However, versions differ as to the content of the conversation(s), BPI claiming that *[Name]* declined Bischof + Klein's proposals. Even in Bischof + Klein's version, however, it is not clear that *[Name]* expressed willingness to take part in the arrangement. Bischof + Klein and Nordfolien claim that they telephoned *[Name]* during the auction in order to make sure of the outcome of the procedure. The explanations given by Nordfolien and by Bischof + Klein in this connection are not convincing, however. The evidence concerning the bids that were submitted appear to demonstrate that BPI competed actively in several of the categories that had not been earmarked for it according to the arrangements. Evidence in the file shows that, after the auction, BPI continued negotiating with *[Customer name]* and finally secured an increase in its orders.

(832) Concluding on this issue, although the allegations put forward by Bischof + Klein, Nordenia and RKW lead to the same general conclusion, they do not always coincide as regards the details of what happened during this auction, with Nordenia and RKW chiefly confining themselves to confirming Bischof + Klein's allegations. No material evidence of BPI's involvement in the arrangement has been adduced. Since most of the explanations were provided at the Commission's request after BPI's cooperation had been disclosed to the other parties, the Commission cannot accept allegations that concur only loosely as regards the details and are not backed up by convincing material evidence. Given the potential negative consequences of these accusations for BPI if they were upheld, the Commission considers that the standard of proof required must be high. In the absence of certainty on this matter, the Commission takes the view that BPI should be given the benefit of the doubt and will therefore dismiss the allegations levelled at the company.

(833) Several parties argue that BPI should not be allowed to benefit from Section B of the Leniency Notice on the ground that it acted as instigator of and leader in the cartel. The Commission is under no obligation to take account of arguments intended merely to devalue the cooperation of another undertaking[82]. BPI does not appear to have initiated the illicit behaviour, nor to have played a decisive part in it. It has, moreover, already dismissed this argument in its assessment of aggravating circumstances (see recital (796)).

(834) Having due regard to the facts mentioned in recitals (825) and following, the Commission considers that BPI (including its subsidiary Combipac BV) is entitled to benefit from a 100% reduction in the amount of the fine that would otherwise have been imposed.

6.6.2. Application of Section D of the Leniency Notice

(835) None of the undertakings Trioplast Wittenheim, Sachsa, Bischof + Klein, Sacherie de Pont-Audemer, Nordfolien, FLS Plast, FLSmidth & Co. A/S, Bonar Technical Fabrics or Cofira-Sac SA was the first to adduce decisive evidence of the cartel's existence. They cannot therefore qualify for treatment under Sections B or C of the Leniency Notice. Section D of the Notice provides for the possibility of granting reductions of 10% to 50% in the fine to undertakings that fulfil the conditions laid down therein.

6.6.2.1. Trioplast Wittenheim

(836) On 19 December 2002, after the inspections had taken place and after receiving the request for information which the Commission addressed to it pursuant to Article 11 of Regulation No 17, Trioplast Wittenheim submitted a statement with a view to obtaining leniency, accompanied by attachments and supplemented on 16 January 2003 by additional explanations.

(837) Most of the attached documents already featured among the documents previously copied during the inspections on the premises of the different undertakings. They

[82] See Joined Cases T-71/03, etc. *Tokai Carbon Co. Ltd* v *Commission*, cited above, paragraph 373.

therefore did not represent any genuine added value with respect to the evidence already in the Commission's possession at the time.

(838) In contrast, the explanations it gave concerning the operation of the cartel within Valveplast and the subgroups (in particular the France subgroup) and on the subject of the quotas, the mechanism for allocating customers and the meaning of the tables on market shares helped to confirm the existence of the infringement.

(839) In its reply dated 29 January 2003 to the Commission's request for information, Trioplast provided additional incriminating explanations concerning notes taken during cartel meetings and exchanges of numerical data. It also provided a large number of documents transmitted and exchanged within Valveplast, in response to the Commission's questions. However, these documents are mainly records of meetings and market information distributed officially within Valveplast and do not constitute evidence of the cartel.

(840) In its reply to the Statement of Objections, Trioplast contests certain facts as set out in the Statement of Objections.

(841) In view of the cooperation, the Commission considers that Trioplast Wittenheim and Trioplast Industrier are entitled to benefit from a 30% reduction in the amount of the fine that would otherwise have been imposed.

6.6.2.2. Sachsa

(842) On 16 July 2002 Sachsa sent the Commission a document chiefly consisting in a description of the official workings of Valveplast and the role played by Sachsa. Sachsa endeavours to demonstrate the lawfulness of its participation and mentions a single arrangement on prices with some of its competitors which it describes as an isolated event and on which it later partially retracted its statements in a letter dated 8 August 2002. Sachsa also provides a description of the documents copied during the inspection carried out on its premises. The explanations thus provided did not represent any added value with respect to the evidence already in the Commission's possession following the inspections and the information already transmitted by BPI.

(843) In its reply dated 18 March 2003 to the Commission's request for information and even more so in its reply to the Statement of Objections, Sachsa endeavoured to dispute the material truth of the facts establishing its involvement in the anticompetitive discussions and exchanges of information, although that involvement is attested by material evidence.

(844) The Commission considers that Sachsa's contribution was extremely limited. It chiefly amounts to explanations of documents already in the file, the significance of which it has attempted to minimise. The Commission accordingly takes the view that Sachsa is not entitled to benefit from a reduction in the fine.

6.6.2.3. Bischof + Klein GmbH & Co. KG and Bischof + Klein France SAS

(845) Bischof + Klein claims that the evidence which it and its subsidiary Bischof + Klein France SAS (Sacherie de Pont-Audemer) provided in their replies to the

Commission's requests for information constitute substantial contributions entitling them to a reduction in the fine.

(846) Bischof + Klein considers in particular that the replies should be regarded as voluntary cooperation.

(847) The Commission takes the view that most of the information provided by Bischof + Klein France SAS in its letter of 16 December 2002 did not extend beyond the scope of the request for information addressed to it by the Commission under Article 11 of Regulation No 17. In particular, most of the replies concerning Valveplast relate to the official part of the meetings and the workings of the association. Only some of the answers to question 45 contain information likely to contribute to establishing the infringement committed. However, their added value is extremely limited with respect to the evidence already in the Commission's possession at the time, in particular that provided by BPI. The answers given relate to a set of records of meetings found during the inspection, which subsequently proved to be those of the Benelux subgroup drawn up by Sacherie de Pont-Audemer between 1982 and 1989. However, Sacherie de Pont-Audemer remains extremely vague and does not mention the existence of that subgroup. Its existence was already clearly established by the evidence provided by BPI.

(848) The Commission takes the view that most of the information provided by Bischof + Klein in its letter of 12 February 2003 did not extend beyond the scope of the Commission's request for information addressed under Article 11 of Regulation No 17. *[…]*

(849) *[Recital (849) is deleted, including any cross references to this recital and relevant footnotes.]*

(850) Nevertheless, Bischof + Klein also forwarded to the Commission *[…]*. These documents are regarded by the Commission as having contributed to confirming the existence of the infringement committed.

(851) The Commission will also take account of the fact that Bischof + Klein indicated in its reply to the Statement of Objections that it does not contest the material truth of the facts as set out in the Statement of Objections both in relation to it and in relation to its subsidiary Sacherie de Pont-Audemer

(852) In view of the cooperation, the Commission considers that Bischof + Klein GmbH & Co. KG and Bischof and Klein France SAS are entitled to benefit from a 25% reduction in the amount of the fine that would otherwise have been imposed.

6.6.2.4. Nordfolien

(853) In its reply to the Statement of Objections, Nordfolien requests the benefit of Section D of the Leniency Notice on the ground that it does not contest the facts and on the basis of the additional evidence it claims to have adduced.

(854) The Commission will take account of the fact that Nordfolien has not contested the material truth of the facts as set out in the Statement of Objections, except for a few marginal corrections.

(855) On the other hand, the Commission takes the view that the evidence submitted by Nordfolien in its reply should not be taken into account for the purpose of applying Section D since it was provided after the Statement of Objections was sent and did not in any case constitute a contribution to the proof of the infringement.

(856) In view of the cooperation, the Commission considers that Nordfolien is entitled to benefit from a 10% reduction in the amount of the fine that would otherwise have been imposed.

(857) Since Nordfolien and Nordenia International AG have belonged to two different undertakings since 2003, the cooperation on which Nordfolien seeks to rely should be regarded as imputable solely to that company, and there are therefore no grounds for allowing Nordenia International AG to benefit from the reduction in the fine granted to Nordfolien.

6.6.2.5. Cofira-Sac

(858) In its reply to the Statement of Objections, Cofira-Sac SA requests the benefit of Section D of the Leniency Notice on the ground that it does not contest the facts and on account of the evidence it supplied to the Commission before the Statement of Objections was sent.

(859) The Commission takes the view that several features of Cofira's reply of 23 March 2003 extended beyond the scope of the request for information addressed to it by the Commission under Article 11 of Regulation No 17 and should be seen as a voluntary contribution qualifying for the benefit of Section D of the Leniency Notice. In particular, the detailed explanations concerning the France subgroup and the meaning of the tables exchanged contributed to the understanding of the operation of the subgroup and the documents copied during the inspections. The explanations concerning the tables of market shares completed during the cartel meetings within Valveplast and the establishment of a coordination system specific to FFS bags also supplemented and confirmed the evidence already in the Commission's possession. The information thus provided contributed to confirming the existence of the infringement committed.

(860) The Commission will also take account of the fact that Cofira-Sac SA has not contested the material truth of the facts as set out in the Statement of Objections.

(861) In view of the cooperation, the Commission considers that Cofira-Sac SA is entitled to benefit from a 25% reduction in the amount of the fine that would otherwise have been imposed.

6.6.2.6. FLS Plast, FLSmidth & Co and Bonar Technical Fabrics

(862) FLS Plast, FLSmidth & Co and Bonar Technical Fabrics request a reduction in the fine on the ground that they do not contest the facts.

(863) Insofar as FLS Plast and FLSmidth & Co are concerned, they merely state that they do not contest the facts on which the Commission bases its case. They do however qualify their non-contestation as they imply that they are not in a position to deny or confirm these facts and that they were neither involved in the cartel nor even had

knowledge of it. The Commission considers that the position taken by FLS Plast and FLSmidth & Co is purely formal and does not have any positive impact on the establishment of the facts[83].

(864) Furthermore it appears that FLS denies having exercised a decisive influence on its subsidiary Silvallac, and claims not to have been aware of its subsidiary's participation in the cartel, even though it has been shown that many Silvallac representatives at the cartel meetings were also *[Position]* of FLS or its employees *[…]*. Furthermore, FLS contests certain facts imputed to Silvallac.

(865) Consequently, the Commission considers that FLS Plast and FLSmidth & Co do not qualify for any reduction of their fine under Section D of the Leniency Notice.

(866) Bonar Technical Fabrics does not contest the facts as set out in the Statement of Objections. The Commission consequently considers that Bonar Technical Fabrics qualifies for a 10% reduction in the fine that would otherwise have been imposed, under Section D of the Leniency Notice. As Low & Bonar PLC forms a common undertaking with Bonar Technical Fabrics, it is also entitled to benefit from this reduction.

6.6.3 *Conclusion on the application of the Leniency Notice*

(867) The Commission should grant the following reductions in fines:

– BPI (including Combipac): EUR 52.95 million;

– Bischof + Klein GmbH & Co. KG: EUR 9.72 million;

– Bischof + Klein France SAS: EUR 1.32 million;

– Nordfolien: EUR 0.80 million;

– Trioplast Wittenheim EUR 7.65 million;

– Trioplast Industrier AB: EUR 3.32 million;

– Cofira-Sac SA: EUR 0.12 million;

– Bonar Technical Fabrics and Low and Bonar PLC: EUR 1.36 million;

6.7. ABILITY TO PAY

(868) *[Company X]* put forward arguments concerning its financial situation and its ability to pay a possible fine.

(869) *[Recital (869) is deleted, including any cross references to this recital and relevant footnotes.]*

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83 See judgments of Court of First Intance of 25 October 2005 in Case T-38/02, *Danone*, not yet reported, paragraph 505 and of 8 July 2004 in Case T-48/00, *Corus UK v Commission*, not yet reported, paragraph 193.

(870) *[Recital (870) is deleted, including any cross references to this recital and relevant footnotes.]*

(871) *[Recital (871) is deleted, including any cross references to this recital and relevant footnotes.]*

(872) *[Recital (872) is deleted, including any cross references to this recital and relevant footnotes.]*

(873) The Commission accordingly takes the view that the arguments relating to *[Company X]*'s ability to pay should be dismissed.

(874) *[Recital (874) is deleted, including any cross references to this recital and relevant footnotes.]*

(875) *[Recital (875) is deleted, including any cross references to this recital and relevant footnotes.]*

(876) *[Recital (876) is deleted, including any cross references to this recital and relevant footnotes.]*

(877) *[Recital (877) is deleted, including any cross references to this recital and relevant footnotes.]*

(878) *[Recital (878) is deleted, including any cross references to this recital and relevant footnotes.]*.

6.8. FINAL AMOUNTS OF THE FINES IMPOSED IN THIS PROCEEDING

(879) In conclusion, 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 be as follows:

- Combipac BV: EUR 0. Of this amount, British Polythene Industries PLC is held jointly and severally liable for the sum of EUR 0;
- Bischof + Klein GmbH & Co. KG: EUR 29.15 million and Bischof + Klein France SAS : EUR 3.96 million;
- RKW AG Rheinische Kunststoffwerke and JM Gesellschaft für industrielle Beteiligungen mbH & Co. KGaA, jointly and severally: EUR 39 million;
- Kendrion N.V.: EUR 34 million. Of this amount, Fardem Packaging B.V. is held jointly and severally liable for the sum of EUR 2.20 million;
- Nordenia International AG: EUR 39.10 million. Of this amount, Nordfolien GmbH is held jointly and severally liable for the sum of EUR 7.18 million;
- Trioplast Wittenheim SA: EUR 17.85 million. Of this amount, FLSmidth & Co. A/S (FLS Industries A/S) and FLS Plast A/S are held jointly and severally liable for the sum of EUR 15.30 million and Trioplast Industrier AB is held jointly and severally liable for the sum of EUR 7.73 million;

– Cofira-Sac SA: EUR 350 000;

– Plásticos Españoles SA and Armando Álvarez SA, jointly and severally: EUR 42 million;

– Sachsa Verpackung GmbH: EUR 13.20 million. Of this amount, Groupe Gascogne is held jointly and severally liable for the sum of EUR 9.90 million;

– UPM-Kymmene Oyj: EUR 56.55 million.

– Bernay Film Plastique: EUR 940 000;

– Bonar Technical Fabrics NV and Low & Bonar PLC, jointly and severally: EUR 12.24 million;

– Stempher BV and K.V. Stempher C.V., jointly and severally: EUR 2.37 million,

HAS ADOPTED THIS DECISION:

Article 1

1. The following undertakings have infringed Article 81 of the Treaty by participating, during the periods indicated, in a complex of agreements and concerted practices in the plastic industrial bags sector in Belgium, Germany, Spain, France, Luxembourg and the Netherlands, consisting in the fixing of prices and the establishment of common price calculation models, the sharing of markets and the allocation of sales quotas, the assignment of customers, deals and orders, the submission of concerted bids in response to certain invitations to tender and the exchange of individualised information:

   (a) Combipac B.V., from 6 January 1982 until 9 November 2001, and British Polythene Industries PLC, from 25 April 1997 until 9 November 2001;

   (b) Bischof + Klein GmbH & Co. KG, from 6 January 1982 until 26 June 2002, and Bischof + Klein France SAS, from 6 January 1982 until 18 December 2000;

   (c) RKW AG Rheinische Kunststoffwerke and JM Gesellschaft für industrielle Beteiligungen mbH & Co. KGaA, from 6 January 1982 until 26 June 2002;

   (d) Fardem Packaging B.V., from 6 January 1982 until 26 June 2002, and Kendrion N.V., from 8 June 1995 until 26 June 2002;

   (e) Nordenia International AG, from 6 January 1982 until 26 June 2002;

   (f) Nordfolien GmbH, from 24 November 1992 until 26 June 2002;

   (g) Trioplast Wittenheim SA, from 6 January 1982 until 26 June 2002, and Trioplast Industrier AB, from 21 January 1999 until 26 June 2002;

   (h) FLS Plast A/S and FLSmidth & Co A/S from 31 December 1990 until 19 January 1999;

   (i) Cofira-Sac SA , from 24 March 1982 until 26 June 2002;

   (j) Plásticos Españoles SA and Armando Álvarez SA, from 8 March 1991 until 26 June 2002;

   (k) Sachsa Verpackung GmbH, from 9 February 1988 until 26 June 2002, and Groupe Gascogne, from 1 January 1994 until 26 June 2002;

   (l) UPM-Kymmene Oyj, from 18 July 1994 until 31 January 1999;

   (m) Bernay Film Plastique, from 31 August 1995 until 9 November 1998;

   (n) Bonar Technical Fabrics NV and Low & Bonar PLC, from 13 September 1991 until 28 November 1997.

2. Stempher BV and Koninklijke Verpakkingsindustrie Stempher C.V. have infringed Article 81 of the Treaty by participating, from 25 October 1993 until 31 October 1997, in a complex of agreements and concerted practices in the plastic industrial bags sector in the Netherlands and, occasionally, in Belgium, consisting in the fixing of prices and the establishment of common price calculation models, the sharing of markets, the assignment of customers, deals and orders and the exchange of individualised information.

Article 2

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

(a) Combipac BV: EUR 0. Of this amount, British Polythene Industries PLC shall be jointly and severally liable for the sum of EUR 0;

(b) Bischof + Klein GmbH & Co. KG: EUR 29.15 million and Bischof + Klein France SAS: EUR 3.96 million;

(c) RKW AG Rheinische Kunststoffwerke and JM Gesellschaft für industrielle Beteiligungen mbH & Co. KGaA, jointly and severally: EUR 39 million;

(d) Kendrion N.V.: EUR 34 million. Of this amount, Fardem Packaging B.V. shall be jointly and severally liable for the sum of EUR 2.20 million;

(e) Nordenia International AG: EUR 39.10 million. Of this amount, Nordfolien GmbH shall be jointly and severally liable for the sum of EUR 7.18 million;

(f) Trioplast Wittenheim SA: EUR 17.85 million. Of this amount, FLSmidth & Co. A/S and FLS Plast A/S shall be jointly and severally liable for the sum of EUR 15.30 million and Trioplast Industrier AB shall be jointly and severally liable for the sum of EUR 7.73 million;

(g) Cofira-Sac SA: EUR 350 000;

(h) Plásticos Españoles SA and Armando Álvarez SA, jointly and severally: EUR 42 million;

(i) Sachsa Verpackung GmbH: EUR 13.20 million. Of this amount, Groupe Gascogne shall be jointly and severally liable for the sum of EUR 9.90 million;

(j) UPM-Kymmene Oyj: EUR 56.55 million;

(k) Bernay Film Plastique: EUR 940 000;

(l) Bonar Technical Fabrics NV and Low & Bonar PLC, jointly and severally: EUR 12.24 million;

(m) Stempher BV and Koninklijke Verpakkingsindustrie Stempher C.V., jointly and severally: EUR 2.37 million.

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

Account No

001-3953713-69 of the European Commission with
Fortis Bank, Rue Montagne du Parc 3, 1000 Brussels
(SWIFT code GEBABEBB – IBAN code 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 3.5 percentage points, namely 5.56%.

Article 3

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

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

Article 4

This Decision is addressed to:

1. Armando Álvarez SA
   C/Don Ramòn de la Cruz 1-2°
   ES-28001 Madrid
   España

2. Bernay Film Plastique
   Zone Industrielle
   Route de Broglie
   FR-27300 Bernay
   France
   Represented by Maître Béatrice PASCUAL, Administrateur Judiciaire, acting as Mandataire Ad'Hoc de la société Bernay Film Plastique
   6, rue Dupleix
   FR-76600 Le Havre
   France

3. Bischof + Klein France SAS
   15, rue des Papetiers
   FR-27502 Pont-Audemer
   France

4. Bischof+Klein GmbH & Co. KG
Rahestrasse 47
DE-49525 Lengerich
Deutschland

5. Bonar Technical Fabrics N.V.
Industriestraat 39
BE-9240 Zele
België

6. British Polythene Industries PLC
10 Foster Lane
London
UK-EC2V 6HR
United Kingdom

7. Cofira-Sac SA
Z.I. Avenue Georges Vacher
FR-13106 Rousset Cedex
France

8. Combipac B.V.
Bruchterweg 88
NL-7772 BJ Hardenberg
Nederland

9. Fardem Packaging B.V.
Nijverheidstraat 55
NL-1135 KZ Edam
Nederland

10. FLSmidth & Co. A/S
Vigerslev Allé 77
DK – 2500 Valby
Denmark

11. FLS Plast A/S
Vigerslev Allé 77
DK – 2500 Valby
Denmark

12. Groupe Gascogne
650 avenue Pierre Benoit
FR-40990 Saint-Paul-les-Dax
France

13. JM Gesellschaft für industrielle Beteiligungen mbH & Co. KGaA
Horchheimer Strasse 50
DE-67547 Worms
Deutschland

14. Kendrion N.V.
Utrechtseweg 33
NL-3704 HA Zeist

15. Koninklijke Verpakkingsindustrie Stempher C.V.
Morsweg 22
NL-7461 AG Rijssen
Nederland

16. Low & Bonar PLC
50 Castle Street
Dundee
Scotland
UK-DD1 3RU
United Kingdom

17. Nordenia International AG
Airport Center am FMO
Hüttruper Heide 71-81
DE-48268 Greven
Deutschland

18. Nordfolien GmbH
Am Tannenkamp 21
DE-49439 Steinfeld
Deutschland

19. Plásticos Españoles S.A.
Avenida Pablo Guernica, 20
ES-39300 Torrelavega (Cantabria)
España

20. RKW AG Rheinische Kunststoffwerke
Horchheimer Strasse 50
DE-67547 Worms
Deutschland

21. Sachsa Verpackung GmbH
Südstrasse 4-6
DE-37447 Wieda
Deutschland

22. Stempher B.V.
Morsweg 22
NL-7461 AG Rijssen
Nederland

23. Trioplast Industrier AB
Box 143

SE-333 23 Smålandsstenar
Sweden

24. Trioplast Wittenheim SA
5, rue de Lorraine
FR-68271 Wittenheim cedex
France

25. UPM-Kymmene Oyj
Eteläesplanadi 2
FI-00130 Helsinki
Finland

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

Done at Brussels, 30.XI.2005

For the Commission,

Neelie KROES
Member of the Commission