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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 10 December 2003

**COMMISSION DECISION**

**of 10 December 2003**

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

**Case COMP/E-2/37.857– Organic Peroxides**

**(notified under document number C(2003)4570)**

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

**(Text with EEA relevance)**

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty<sup>1</sup>, and in particular Article 3 and Article 15 (2) thereof,

Having regard to the Commission decision of 27 March 2003 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 Regulation No 17 and Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty<sup>2</sup>,

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

Having regard to the final report of the Hearing Officer in this case<sup>3</sup>,

WHEREAS:

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Square brackets such as [...] denote information for which confidential treatment has been requested. At this stage, this information has been deleted from the text.

<sup>1</sup> OJ L3, 21.2.1962, p. 204/62. Regulation as last amended by Regulation (EC) No 1216/1999 (OJ L148, 15.6.1999, p. 5).

<sup>2</sup> OJ L 354, 30.12.1998, p. 18.

<sup>3</sup> OJ

## **Part I – FACTS**

### **A SUMMARY OF THE INFRINGEMENT**

- (1) This Decision is addressed to the following undertakings and/or associations of undertakings:
  - Akzo Nobel Chemicals International B.V.
  - Akzo Nobel Polymer Chemicals B.V.
  - Akzo Nobel N.V.
  - Atofina S.A.
  - Degussa UK Holdings Limited
  - Peroxid Chemie GmbH & Co. KG
  - Peroxidos Organicos S.A.
  - AC Treuhand AG
- (2) Beginning from 1971, the main producers of organic peroxides at that time (Akzo Nobel Chemicals International B.V. and Akzo Nobel Polymer Chemicals B.V., Luperox GmbH (which became part of the main German subsidiary of Atofina S.A.) and Peroxid Chemie GmbH & Co. KG) entered into and participated in a continuing agreement contrary to Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement covering at times all and at times most of the Community and the EEA, by which they fixed the prices of the product, agreed on and implemented a mechanism for price increases, allocated customers and set up a machinery to monitor and enforce their agreements. Peroxidos Organicos S.A. (1975-1999) took part in a specific arrangement within the overall agreement. AC Treuhand AG was involved as well.
- (3) Duration of the participation
  - (a) Akzo Nobel Chemicals International B.V., Akzo Nobel Polymer Chemicals B.V. and Akzo Nobel N.V. from 1 January 1971 to 31 December 1999;
  - (b) Atofina S.A. from 1 January 1971 to 31 December 1999;
  - (c) Peroxid Chemie GmbH & Co. KG from 1 January 1971 to 31 December 1999;
  - (d) Degussa UK Holdings Limited from 1 September 1992 to 31 December 1999;
  - (e) Peroxidos Organicos S.A. from 31 December 1975 to 31 December 1999;
  - (f) AC Treuhand from 28 December 1993 to 31 December 1999.

## B THE ORGANIC PEROXIDE INDUSTRY

### 1 THE ACTORS

- (4) The following undertakings were involved in an agreement on organic peroxides.

#### 1.1 Akzo

- (5) The Akzo Nobel group of companies is active in the areas of healthcare, coatings, chemicals, and, until the end of 1999, fibres. The ultimate holding company of this group is Akzo Nobel N.V. Arnhem. The organic peroxide activities in Member States except for The Netherlands fall under the responsibility of another holding company, Akzo Nobel Chemicals International B.V., which in turn owns a number of legal entities dealing with organic peroxides outside the Netherlands. The organic peroxides activities in The Netherlands are performed by Akzo Nobel Polymer Chemicals B.V., which belongs to the holding company Akzo Nobel Chemicals B.V., Amersfoort, which in turn belongs to the holding company Akzo Nobel Nederland B.V., which in turn belongs to the ultimate holding company Akzo Nobel N.V. Arnhem<sup>4</sup>.
- (6) For simplicity, ‘**Akzo**’ is the name used hereafter for the actions undertaken by Akzo Nobel N.V., Akzo Nobel Chemicals International B.V. and by Akzo Nobel Nederland B.V. It was not possible to split up the actions according to the various Akzo companies concerned, due to reorganisations over the past 30 years, overlapping responsibilities, changing of personnel between the companies etc.
- (7) The worldwide turnover of the group Akzo Nobel N.V. was EUR 14 000 million<sup>5</sup> in 2002.

#### 1.2 Atofina/Atochem

- (8) Atofina S.A. (hereinafter "Atochem"), was created in 1983 from the merger of Cloë Chimie, Atochimie and the biggest part of the chemical activity of the group Péchiney Ugine Kuhlmann, under the name Atochem S.A. Atochem S.A. changed its name into Elf Atochem S.A. in 1992 and into its present name, Atofina S.A., in April 2000<sup>6</sup>, after a takeover of Atochem's parent company Elf by TotalFina in 1999.
- (9) Atochem got involved in the organic peroxide business in 1989 via the acquisition of the US company Pennwalt by Atochem's parent company Elf.

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<sup>4</sup> Homepage: [www.akzo.com](http://www.akzo.com)

<sup>5</sup> When the figures refer to a date prior to 1.1.1999, "Euros" refer to ECUs. For the conversion in Euros, the exchange rates used for the calculation are the official yearly mean exchange rates as published by the European Commission for the calculation of turnovers.

<sup>6</sup> Hereafter it will be referred to Atochem, as most documents used in this Decision refer to Atofina's previous name Atochem.

At that time Pennwalt's subsidiary Luperox GmbH dealt with the European organic peroxide business. Luperox was integrated in Atofina Deutschland GmbH, part of the Atochem group, in 1990.

- (10) The worldwide turnover of Atochem was around EUR 19 800 million in 2002.

### **1.3 Peroxid Chemie and Degussa UK Holdings Limited**

- (11) Peroxid Chemie GmbH & Co. KG, Pullach (hereinafter "PC") is a limited liability company wholly owned by Laporte GmbH, Pullach, Germany. Laporte GmbH, Pullach is 99% owned by Laporte Holding GmbH, Pullach. The remaining 1% is owned by Laporte Nederland B.V., which also wholly owns Laporte Holding GmbH, Pullach. Laporte Nederland B.V. is wholly owned by Degussa UK Holdings Limited. Degussa UK Holdings Limited (formerly known as Laporte plc.) was bought in April 2001 by Degussa AG of Germany and renamed from Laporte plc. into Degussa UK Holdings Limited in June 2001<sup>7</sup>.
- (12) PC was, for the period 1970-1992, part of the Interlox-group, a joint venture without legal personality between Laporte plc. and Solvay S.A. Until 31 August 1992 66.6% of PC was owned by Kali Chemie AG and 33.3% by Laporte plc. via Laporte Holding GmbH. Solvay S.A. owned 96% of Kali Chemie AG and 25% of Laporte plc<sup>8</sup>. With the dissolution of the Interlox-group, PC came directly and indirectly under full ownership of Laporte plc. At that time, Solvay stopped having ownership ties to PC. The date for the legal transfer of ownership of PC was 1 September 1992.
- (13) Laporte plc, now Degussa UK Holdings Limited (hereinafter "Laporte") was, until its take-over by Degussa AG, an independent company listed on the stock exchange. For consistency, the Decision refers hereafter to Laporte, even if now the business is run under the name of Degussa. Laporte is directly and indirectly the 100% parent company of PC, see recital (11). It is also 50% owner of Peroxidos Organicos S.A. via its subsidiaries Laporte Nederland B.V. (25%) and Laporte Industries Ltd. (25%).
- (14) Laporte's worldwide turnover was approximately EUR [...] million in 2002.

### **1.4 [...]**

- (15) [...] <sup>9</sup>.

### **1.5 Perorsa and FMC Foret**

- (16) Peroxidos Organicos S.A., Spain (hereinafter "Perorsa") is involved in producing organic peroxides. Its owners are Laporte Nederland B.V. (25%), Laporte Industries Ltd. (25%) and FMC Foret S.A. (50%). Until 1992, Perorsa was part of the Interlox joint venture.

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<sup>7</sup> See the organisational chart PC [7685].

<sup>8</sup> See PC submission [7845-46].

<sup>9</sup> [...]



- (17) Perorsa's worldwide turnover was EUR 5.9 million in 2002, most of which in the EEA.
- (18) FMC Foret S.A., Barcelona, Spain (hereinafter "FMC") owns 50% of Perorsa [...]. FMC was an addressee of the Statement of Objections but is not an addressee of this Decision, as described in recital (78)

## **1.6 Andos**

- (19) Andos AB (hereinafter "Andos") is a company founded in 1972 and is fully owned by Norac Inc. of the United States since 1992. Andos produces amongst other things ketonperoxides. Andos was not an addressee of the Statement of Objections and is not an addressee of this Decision, as described in section 6.2.3.2.

## **1.7 AC Treuhand**

- (20) AC Treuhand AG<sup>10</sup> (hereinafter "AC Treuhand") is a Zurich based entity offering services to companies, associations and interest groups. It performs functions such as managing and administering professional organisations, the collection, processing and analysis of market data and the presentation and dissemination of market statistics. AC Treuhand is the result of a 1993 management-buyout of the division offering association-management within a company called Fides Trust AG. For consistency, this Decision refers to AC Treuhand, even though for most of the time in question, the business was run under the name of Fides and most documents refer to Fides and not to AC Treuhand.

# **2 THE PRODUCT**

## **2.1 The relevant product**

- (21) An organic peroxide is any organic molecule containing a "peroxy" or oxygen-oxygen bond (–O–O–). It is the double oxygen bond that makes organic peroxides both useful and hazardous. Organic peroxides (hereinafter "OP") are highly explosive and major accidents are not rare in the industry. They are available as solids (usually fine powders), liquids or pastes. OP and mixtures containing OP are used as accelerators, activators, catalysts, cross-linking agents, curing agents, hardeners, initiators and promoters. OP can be distinguished both by their three main 'applications' and by the seven 'classes'.
- (22) OP serve a critically important role in the plastics and rubber industries where they serve three main applications:
  - (a) the polymerisation of thermoplastic resins (so-called high polymer or "HP" applications)

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<sup>10</sup> Homepage: [www.actreu.ch](http://www.actreu.ch)

- (b) the curing of unsaturated polyester thermoset resins (so-called "UP" applications)
  - (c) cross-linking (so-called "XL" applications).
- (23) The main applications of OP are summarised in Table 1:

**Table 1 OP Applications**

Application	Organic peroxide(s)	Organic peroxide class
High polymer (HP) applications		For the polymerization PVC (polyvinyl chloride), percarbonates are usually employed. Diacyl peroxides and peroxyesters are also used.  For the polymerization of low-density polyethylene, peroxyesters are most common.
Unsaturated polyester thermoset resins (UP) applications	- methyl ethyl ketone peroxide  - benzoyl peroxide (BPO)	- ketone peroxides  - diacyl peroxides
Cross-linking (XL) applications	- dicumyl peroxide	- diacyl peroxides

#### 2.1.1 Classes of Organic Peroxides<sup>11</sup>

- (24) OP fall into seven major classes which provide a broad range of reactivity for various applications. The seven classes are diacyl peroxides, ketone peroxides, peroxyesters (peresters), peroxydicarbonates (percarbonates), dialkyl peroxides, hydroperoxides and peroxyketals.
- (25) *Diacyl peroxides* are free-radical initiators which can be decomposed to useful free-radicals when heated or when activated by various promoters. They are widely used as initiators for vinyl monomer polymerizations (HP applications), as curing agents for unsaturated polyester resins (UP applications), and as cross-linking agents for elastomers (XL applications). The most common diacyl peroxide is benzoyl peroxide used primarily in curing unsaturated polyester resins over a broad temperature range.

<sup>11</sup> The following information is based on information from [www.atofinachemicals.com](http://www.atofinachemicals.com).

- (26) *Ketone peroxides* are used almost exclusively for the cure of promoted unsaturated polyester resins and vinyl ester resins at ambient temperatures (UP applications). The most widely used product is methyl ethyl ketone peroxide.
- (27) *Peroxyesters* offer the widest range of activity among all the classes of OP available. They are used extensively as initiators in free radical polymerisation reactions (HP applications).
- (28) *Peroxydicarbonates* are efficient polymerization initiators (HP applications) and used in the curing of unsaturated polyester moulding resins (UP applications).
- (29) *Dialkyl Peroxides* are among the most stable of all the commercially available OP. The free radicals generated from dialkyl peroxide decomposition are efficient for cross-linking (XL applications), used as curing agents for polyester resins (UP applications) and as initiators in bulk, and suspension vinyl polymerizations (HP applications). The most common dialkyl peroxide is dicumyl peroxide.
- (30) *Hydroperoxides* are widely used as chemical intermediates and as free radical polymerization initiators (HP applications).
- (31) *Peroxyketals* are efficient free radical initiators for vinyl polymerizations (HP applications), hydrogen abstractors for cross-linking polyolefins (XL applications) and curing agents for unsaturated thermosetting resins (UP applications).

## 2.1.2 Applications of Organic Peroxides

### 2.1.2.1 High Polymer Initiators/HP

- (32) HP are specialty products used in the polymerization or copolymerization of vinyl monomers for the production of polymers such as polyethylene, polyvinylchloride (PVC), polyacrylates, low density polyethylene and polystyrene.

### 2.1.2.2 Thermoset/UP

- (33) UP curing agents are commodity products used for curing or hardening unsaturated polyester resins and vinyl ester resins called thermoset resins, used in the production of, for example, boat hulls, bathroom fixtures, automotive body parts, fishing rods, car repair kits etc. Within UP, a distinction can be made between **Ketons** (50% of UP) which are used to cure unsaturated polyesters (used in the polyester boat-building industry) and **Benzylperoxides** (25% of UP) used for car repairs. Other UPs include **Perester/perkatal**s and others, which account together for the remaining 25% of all UPs.

### 2.1.2.3 Cross-linking agents/XL

- (34) XL are mainly used to link rubber-chains (synthetic rubber) by the rubber-processing industry, which is divided into tyre and non-tyre, by the shoe-sole industry, by the automotive sector, by the building and construction industry

and in cable production. The main product groups are Bis Peroxides and Dicumylperoxides.

## **2.2 The relevant market**

- (35) In spite of certain particularities of the three applications and the seven classes for OP, the Commission sees the OP market as one relevant product market, for the purpose of this case. Firstly, for several of the OP there is some supply side substitutability. Also, different classes of OP may serve similar purposes from a demand side point of view, even if consumers may not be switched instantaneously between OP. Moreover, the overall organisation of the cartel indicates that OP have been seen as one overall market governed by one overall scheme, with several sub-markets and/or sub-schemes, for example for specific countries or for cases where not all producers were present. Some of these sub-arrangements were in place for shorter periods than the main agreements and have partly been integrated into the main agreement. Often the acting persons in the sub-arrangements and the main agreement were the same. In their reaction to the Statement of Objections and during the Hearing, the parties have not contested this view.
- (36) Although a precise definition of the product market is not necessary<sup>12</sup> for the purpose of this case, the relevant market is defined as ‘OP, including the sub-products HP, UP and XL, which are crucial chemical products used as accelerators, activators, catalysts, cross-linking agents, curing agents, hardeners, initiators or promoters, especially the plastics and rubber industries.’ This definition concerns this specific case and does not predetermine the market definition for other purposes in the future.
- (37) As will be seen, the evidence available points to the conclusion that European producers of OP adopted anti-competitive behaviour, together covering at some point in time the entire EEA market. The Spanish market (1975-1999), the French market (1971-1991) and the UK market (1971-1991) were subject to specific meetings within the broader framework of the European cartel. Arrangements concerning France and the United Kingdom were integrated in the broader arrangement from 1992 onwards, while separate meetings within the broader framework of the overall agreement continued to take place for Spain.
- (38) The relevant geographical market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas. In the present case the relevant geographical market is at least EEA wide. This is shown by trade flows, and by the fact that also a number of non-EEA countries were part of the agreement. While transport and security costs as well as national legislation served as certain obstacles to cross-border trade, especially

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<sup>12</sup> See Judgement of the Court of First Instance of 6 July 2000 in Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707, especially recitals 230-231 thereof and *European Night Services v Commission* in case T-384/94 at recital 136.

prior to the completion of the single market, the market for OP can nevertheless be seen as at least EEA wide. Another important element supporting this view is the fact that the cartel was organised for the entire EEA and a number of other countries, especially in Eastern Europe and the Middle East.

## **2.3 The Market Structure for Organic Peroxides**

### *2.3.1 The supply of Organic Peroxides*

- (39) Akzo and Atochem are the largest producers of OP in the world, each holding about 30% of the global market. They are followed by Laporte, which holds 15% of the market through its subsidiaries Aztec Peroxides in the US and Peroxid Chemie in Germany<sup>13</sup>. In the United States, CK Witco, Norac and Hercules are also important producers; the Japanese producer NOF (Nippon Oils and Fats) has a strong presence in Asia.
- (40) Major actors on the European Market are Akzo, Atochem and PC. In Europe, the OP market is estimated at EUR 250 million for the year 1999. In value terms, Akzo's share is around 43 %, Atochem has around 25 %, Laporte has around 20 % and others have 12 % of the market, see Table 2. This data can be split up further according to application.
- (41) Akzo holds 40-45% (range during the period of 1971-1999) of the market for HP, Atochem around 20% and PC around 30%. Other players together hold 10% of the market or less. For UP, Akzo accounts for almost 50% of the European market, Atochem has around 20% and PC has around 15%. Other players altogether account for 15-20%. For XL, Akzo has a share of around 40% of the European market, Atochem has 45-50% (30-35% at the beginning of the period) and PC has around 3%. Other players together account for slightly more than 10% (around 30% at the beginning of the period)<sup>14</sup>.
- (42) In its reaction to the SO, Atochem clarifies that its market shares of 20-25% throughout the period are misleading, as they include the captive consumption within the Atochem group. If Atochem's captive consumption were to be disregarded, and the market share calculated on the basis of the so called merchant market, Atochem's market share would be around 12% for the period 1991-1999.
- (43) The Commission does not consider that the captive use implies a lower market share of Atochem. Without its captive production, Atochem would have had to buy the OP on the market, and without its captive consumption, Atochem would have had to sell its production of OP on the market. By its captive consumption, Atochem gained an economic advantage in comparison with its competitors which had to buy OP on the cartelised market. Furthermore, Atochem was active as an important seller on the market for OP even without its captive consumption. And, during the seventies and eighties, prior to the acquisition of Luperox and Montefluos, Atochem's captive use was less

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<sup>13</sup> Akzo memorandum [8795].  
<sup>14</sup> Akzo memorandum [8795].

important. Therefore the captive use does not affect the Commission's assessment that the importance of an economic actor is measured by its production, even if some of this production is used inside the same group as captive use.

- (44) [...] Since 1995, Interchim has become a serious importer of products for HP applications from Romania. For UP, Andos has a market share of approximately 5 % (10 % for the most important segment of UP, keton peroxides, on which the arrangements in that category were focused). For Cross-linking applications (XL), the US company Hercules is an important player.
- (45) According to the data exchanged by some of the addressees of this decision and assembled by AC Treuhand, the market shares and turnover in OP of Akzo, PC, Atochem, Perorsa [...] in 1999 were as set out in Table 2:

Table 2: Estimated Community market share, turnover in OP-products and total turnover

	<b>Akzo</b>	<b>Atochem</b>	<b>PC</b>	<b>Perorsa</b>
Market share (in %), 1999	43	25	20	[<5]
Turnover in OP (in mio EUR, 1999)	108	63	50	6
Total Turnover (in mio EUR), 2002	14000	19820	117.8	5.9

Source: Commission estimate based on AC Treuhand figures and data provided by companies. The remaining market share is held by others. Including captive use from Atochem. [...].

- (46) Akzo's estimates of market shares for the biggest three producers Europe, in percent of the market value (1990)/1999 are as follows:

Table 3: Akzo's estimates of market share

	<b>Akzo</b>	<b>Atochem</b>	<b>PC</b>	<b>Others</b>
<b>Total OP</b>	(42)/43	(23)/25	(21)/20	(14)/11
of which (in percent of Total OP)				
<b>HP</b> (62% Total OP)	(40)/42	(21)/22	(29)/27	(10)/9
<b>UP</b> (25% Total OP)	(48)/47	(22)/21	(16)/14	(14)/18
<b>XL</b> (13% Total OP)	(39)/40	(32)/47	(0)/2	(29)/11

Source: Own calculations based on Akzo [8794f]. Differences due to rounding. Including captive use from Atochem.

- (47) In Spain, the 1988-1999 approximated market shares between the three main producers were for HP: Akzo [30-35]%, Perorsa ~[45-55]%, Atochem ~[10-15]%; and for UP: Akzo [50-55]%, Perorsa ~[20-30] %, Atochem [20-25]%<sup>15</sup>. These figures have not been contested by the parties after having received the SO, with the exception of Atochem's captive use (see recital (42)). PC did not contest these figures. In its company statement, it estimated the following 1993 market shares for OP: Akzo 51%; PC 29% and Atochem 17%<sup>16</sup>.

### 2.3.2 *The demand for Organic Peroxides*<sup>17</sup>

- (48) The purchasers of HP are large chemical companies. These products are to a significant extent sold directly to the end user. However, some distributors exist (such as Interchim).
- (49) Customers for XL applications are diverse. For Bis Peroxide there are a number of big clients such as [...] and [...]. In addition, there are many small customers. All are directly delivered. For Dicumylperoxide there are mainly large customers such as [...].
- (50) The customers for UP applications are mainly polyester and resin producers and processors. In the Community, there are about ten larger customers (up to 100 tons per year) and a number of larger distributors. Furthermore, there is a large number of smaller customers (as from up to 100 kg).

### 2.3.3 *The quantification of the market*

- (51) In 1999, the plastics industry consumed world wide about 120 000 tons of OP with a total value of approximately EUR 900 million. On a functional basis, about 50% of the market's volume is used in HP applications, about 30% in UP applications and about 20% in XL applications.
- (52) The European market for OP (HP, UP and XL) in 1999 was around 40 000 tons worth EUR 250 million.

<sup>15</sup> See Akzo [10214ff], [10217ff].

<sup>16</sup> See PC [11797].

<sup>17</sup> PC [7809-11], Akzo [8789ff].

- (53) HP is the most important application for all producers. It represents 50% of all OP in volume and a higher share in value. HP sales in Europe represented 21 000 tons for ECU 154 million in 1990 and 23 000 tons for EUR 157 million in 1999<sup>18</sup>.
- (54) UP sales in Europe represented 15 000 tons for ECU 68 million in 1990 and 15 000 tons for EUR 63 million in 1999<sup>19</sup>, of which about 50% Ketons and 25% Benzylperoxides.
- (55) XL sales in Europe represented 5 000 tons for ECU 39 million in 1990 and 8000 tons for EUR 34 million in 1999<sup>20</sup>.

## **C THE PROCEDURE**

### **3 CHRONOLOGY OF THE EVENTS**

- (56) On 7 April 2000, Akzo representatives met the Commission and informed it about an infringement relating to OP, involving Akzo and others. It said it would submit a complete document on this in the month of May. In this context, Akzo expressed its expectation to benefit from the Commission notice on the non-imposition or reduction of fines in cartel cases<sup>21</sup> ("the 1996 Leniency Notice"). The information submitted orally was confirmed in writing on 11 April 2000 with some background material<sup>22</sup>.
- (57) On 3 May 2000, the representatives of Atochem met the Commission and informed it about an infringement relating to OP, involving Atochem and others. It said it would submit a complete document on this at the end of May. In this context Atochem expressed its expectation to benefit from the 1996 Leniency Notice. The information submitted orally was confirmed in writing on 11 May 2000<sup>23</sup>.
- (58) On 15 May 2000, the lawyers of Akzo submitted an 'Interim Memorandum'<sup>24</sup> with numerous annexes, describing essential elements of the agreement as well as providing supporting documents.
- (59) On 9 June 2000, the lawyers of Atochem submitted a 'Synthesis Note' on the infringement with numerous annexes. One missing annex was submitted on 29 June 2000<sup>25</sup>.
- (60) On 27 June 2000, the lawyers of Akzo submitted the second memorandum<sup>26</sup> with about 2000 pages of annexes. An 'Additional Memorandum' was

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<sup>18</sup> Akzo memorandum [8794].

<sup>19</sup> Akzo memorandum [8794].

<sup>20</sup> Akzo memorandum [8794].

<sup>21</sup> 96/C207/04.

<sup>22</sup> See [8661].

<sup>23</sup> Letter from Atochem lawyers [6838-39].

<sup>24</sup> Submission [8863-8690] plus annexes.

<sup>25</sup> Atochem Submission [1375-1595] and letter of 29 June 2000 with annex 6 [6845-49].

<sup>26</sup> Submission [8691-8760] plus annexes.



submitted on 22 December 2000<sup>27</sup>, and a ‘Final Memorandum’<sup>28</sup>, a final version of the previous memoranda, was submitted on 18 July 2001.

- (61) On 31 January 2002, the Commission sent a request for information based on Article 11 of Regulation 17 to Laporte [...] and Andos concerning their turnover, their organisational structure and details on meetings with competitors.
- (62) Andos replied to the request for information on 14 March 2002. [...]
- (63) On 19 March 2002, representatives of Laporte/PC met Commission officials and handed over the original agreement from 1971 and travel documents<sup>29</sup> and said that they would submit company statements in mid-April. In this context PC and Laporte expressed their expectation to benefit from the 1996 Leniency Notice.
- (64) On 20 March 2002, the Commission sent a request for information based on Article 11 of Regulation 17 to Akzo and Atochem concerning the organisational structure and their company history.
- (65) [...]
- (66) From 26 March 2002 to 12 April 2002, the Commission received replies to the requests for information from [...] Atochem, Akzo and Laporte. [...] <sup>30</sup>.
- (67) [...] <sup>31</sup>
- (68) On 19 April 2002 PC submitted its company statement for the application of the 1996 Leniency Notice<sup>32</sup>.
- (69) On 26 April 2002, Akzo submitted further details on its corporate legal structure<sup>33</sup>, and on 14 May 2002 turnover and price data concerning OP.
- (70) On 16 May 2002, representatives of Atochem met with Commission officials and said they would submit further documents by mid-June. These documents arrived on 19 and 24 June 2002<sup>34</sup>.
- (71) Two clarifications were submitted on 25 June 2002, one by PC and one by Akzo<sup>35</sup>, concerning handwritten remarks on documents submitted previously (PC) and correction of names in a previous submission (Akzo). On 9 September 2002 Atochem submitted data on prices. On 27 November 2002, Akzo, Atochem, PC, Laporte [...] and Andos were requested to submit non-

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<sup>27</sup> Submission [8761-77].

<sup>28</sup> Akzo memorandum [8778-8866].

<sup>29</sup> Folder 23 [6952-7370] of the Commission file.

<sup>30</sup> [...]

<sup>31</sup> [...].

<sup>32</sup> Folder 25 [7799-8370] of the Commission file.

<sup>33</sup> Akzo [8381-8436].

<sup>34</sup> Atochem [8461-8514] and [8515-21].

<sup>35</sup> PC [8522-25] and Akzo [8526-32].

confidential versions of their submissions. Those parties replied between 19 December 2002 and mid-February 2003.

- (72) On 29 November, Perorsa and FMC received requests for information based on Article 11 of Regulation 17 concerning their company structure and their turnover, to which they replied on 9 January 2003.
- (73) On 3 February 2003, AC Treuhand received a request for information based on Article 11 of Regulation 17 concerning its company history, the services provided to producers of OP and its turnover, to which it responded on 5 March 2003. On 3 and 4 March 2003, Akzo submitted clarifications.
- (74) On 27 March 2003, the Commission initiated proceedings in this case and adopted a Statement of Objections (hereinafter "SO") to the addressees of this Decision and to [...] FMC.
- (75) The companies had access to the Commission's investigation file by means of a CD ROM which contained all accessible material in the file. This CD ROM was sent to them shortly after the SO had been issued. The Hearing Officer extended the deadline for replies to 17 June 2003 for all addressees of the SO.
- (76) Having replied in writing to the SO, all the addressees of this Decision attended the oral hearing on the case, which was held on 26 June 2003. During the oral hearing new documents regarding meetings in June and October 1992 were distributed among the participants by Atochem. The Hearing Officer invited the parties to comment on those documents and on other aspects of the hearing within two weeks. FMC, Perorsa, Atochem, Akzo, AC Treuhand, PC and Laporte sent comments on the documents and the hearing. A non-confidential version of those comments was sent to all addressees of the SO.
- (77) The essential elements of the parties' replies are taken up in specific recitals of this decision.
- (78) After having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission, the Commission decided to close the proceedings against [...] FMC. [...] For FMC, the Commission considered it did not have enough evidence to prove that FMC was responsible for the illicit activities of Perorsa.

#### **4 PROCEEDINGS IN OTHER JURISDICTIONS**

- (79) In the US, investigations on an infringement concerning OP are being conducted by the Department of Justice<sup>36</sup>.

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<sup>36</sup> See Press release of 14 March 2002 of the US Dept. of Justice.

## D THE INFRINGEMENT

### 5 THE ORIGINS OF THE INFRINGEMENT

#### 5.1 Overview of the infringement

- (80) A main agreement started in 1971, with initially three participating members (Akzo, PC and Atochem<sup>37</sup>). It consisted of sub-arrangements for HP and UP, and was also split up by regional criteria. Regional sub-arrangements concerned France, United Kingdom, Spain and the rest of Europe, following the main principles and rules of the overall agreement<sup>38</sup>. For XL, another sub-arrangement was made, covering as well most European countries. These sub-arrangements had a substantial overlap with the overall agreement, for example the period in question, the mechanisms of mutual control and compensation, the parties, the products, the clients or the acting persons concerned can be found in each of the sub-arrangements. Nevertheless, due to some particularities of these sub-arrangements, they will be described in separate sections.
- (81) The main agreement aimed at preserving market shares and co-ordinating price increases and is based on a written ‘contract’ from 1971. In order to achieve this objective, detailed sales data of the participating companies were closely monitored by an independent body, clients were allocated and, in case of deviations from the intended market share, compensations were applied or clients reallocated. Regular meetings took place in order to fine-tune the working of the agreement. The agreement contained numerous sub-arrangements on specific products or sub-products, or concerning regions. Some of those sub-arrangements only lasted for a limited period of time or have been integrated into other sub-arrangements. [...].
- (82) Although there were some indications, no company could be identified as being the leader of the agreement. Akzo, Atochem and PC have at times shown a more active role than the others, but the Commission considers that no company was the leader or instigator of the agreement.

#### 5.2 The main agreement

- (83) PC and Laporte provided in their submission the original of the initial main agreement<sup>39</sup> of 1971, which they obtained from AC Treuhand while preparing the leniency application. It was printed on pink paper, as were other confidential cartel documents which were not allowed to be taken out of the premises of AC Treuhand.
- (84) This main agreement is very explicit and defines in its preamble the background for the conclusion of the agreement, the products and the

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<sup>37</sup> At that time, Luperon which later became integrated into Atochem, was part of the agreement, see recital (9).

<sup>38</sup> The original of the founding contract is, on pink paper, [6959-68].

<sup>39</sup> See pages [6959-68].

geographical area concerned, the duration of the agreement, the quota system developed, the agreement on minimum prices, a compensation mechanism for deviations from the agreed quotas, a joint surveillance and potentially common reactions against competitors and an arbitration system.

- (85) The above is illustrated by the following quotations taken from the initial agreement:

[the parties] *'have all suffered as a result of price based competition' ... 'Now therefore agree together to collaborate in the future marketing of initiators and in strict accordance with the detailed agreement hereinafter described' ... 'this agreement becomes effective from 1<sup>st</sup> January 1971 and remains in force until any party decides to withdraw by giving 12 months of notice of such intention' ... 'all future sales of initiators in the geographical area will be shared between the parties in accordance with a quota system' ... 'the quota will be maintained by exchanging every quarter the uncertified sales figures of the past three months' ... 'If the exchange of figures shows that the sales of a party in any country have exceeded the quota for any category then that party will modify its sales policy in succeeding months with the object of arriving eventually at a tonnage for the whole of the calendar year which does not exceed his percentage quota' ... 'compensation may be made at the underseller's discretion by the purchase of product/s at prices which reflect the loss of profit suffered by the underseller' ... 'No party will give prices lower than any agreed minimum prices for any product to any new customer; or reduce prices for any product to existing customers without prior discussion with the other two parties' ... 'Any adjustment to marketing policy to combat external competition will be agreed amongst all three parties beforehand' ... 'In the event that a dispute ... shall arise between two parties the remaining party will do everything possible to arrive to a mutually acceptable compromise' ... 'The basis of this agreement will be the quotas established based on 1969/70 performance.'*

- (86) The initial main agreement of 1971 covered most of today's Member States (with special arrangements for Ireland, United Kingdom, France and Spain), as well as countries in Eastern Europe and the Middle East. For France and Spain a footnote specified: *'In view of the special circumstance prevailing in France and Spain, separate agreements will be made within the spirit of the agreement'*<sup>40</sup>.
- (87) According to the Akzo submission, PC, Akzo, and Atochem met and compiled market shares for HP and UP, for the period 1969 and 1970 for parts of Europe<sup>41</sup>. At that time, the organic peroxide business was partly run by independent companies including but not limited to Elektrochemische Werke München, which became part of PC, and Luperox, which became part of Atochem<sup>42</sup>. All participants promised they would send in their sales figures for HP and UP to Fides/AC Treuhand (see section 5.3). AC Treuhand then would check and calculate each of the participant's market shares.

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<sup>40</sup> See [6968].

<sup>41</sup> Akzo memorandum [8797ff].

<sup>42</sup> See the section 1 for details of the evolution of the companies.

- (88) Atochem, PC and Akzo confirm in their company statements the existence and the circumstances of the main agreement.
- (89) A revision of this agreement aiming to facilitate co-ordination and to reduce the number of meetings was made in 1975. Quotations from this 1975-refinement of the agreement, for illustration, are:

*‘The basic concepts of the agreement which was successfully operated since 1971 are still considered valid. This new agreement merely allows a more flexible approach to some of the issues involved, and is intended to lead to a marked reduction on the amount of detailed contact between the parties.’ [...]* *‘The overall percentage of quotas will be monitored and controlled by an exchange of information with Fides’ [...]* *‘The system described above is designed to avoid the necessity for regular meetings on detailed questions concerning customers and prices and related marketing topics’*<sup>43</sup>.

- (90) The agreement hence started on 1 January 1971 (see recital (85)) and ended on 31 December 1999.

### **5.3 The role of AC Treuhand**

#### *5.3.1 The other participants view*

- (91) As described in Section 1, AC Treuhand is a Zurich based entity providing, amongst other things, services such as collecting statistics to enterprises. Before a management buy-out in 1993, the activities under question were carried out by a company called Fides. AC Treuhand continued ‘with the same persons’<sup>44</sup> the services provided to Akzo, Atochem and PC. The parties cancelled their contractual relations with AC Treuhand in 1999 and 2000.
- (92) AC Treuhand :
- (a) organised meetings of the members of the agreement, often in Zurich<sup>45</sup>;
  - (b) produced, distributed and recollected the so called ‘pink’ and ‘red’ papers with the agreed market shares which were, because of their colour, easily distinguishable from other meeting documents and were not allowed to be taken outside the AC Treuhand premises (see details below)<sup>46</sup>;
  - (c) calculated the ‘pluses and minuses’, i.e. the deviations from the agreed market shares<sup>47</sup>, which were used for compensations;
  - (d) reimbursed the travel expenses of the participants, in order to avoid traces of these meetings in the companies’ accounts<sup>48</sup>;

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<sup>43</sup> See [6969-71].

<sup>44</sup> See the letter of AC Treuhand in Akzo memorandum [9190ff].

<sup>45</sup> For an example see minutes of a meeting written by AC Treuhand [10759ff].

<sup>46</sup> See the original contract on pink paper [6959-68].

<sup>47</sup> For an example, see the fax from AC Treuhand of 4 May 1995 [9472].

<sup>48</sup> Akzo [8825] and Laporte [7862], see also AC Treuhand bills [10558ff] and an example [10750ff].

- (e) collected data on OP sales and provided the participants with the relevant statistics<sup>49</sup>;
- (f) stored the original agreement from 1971 and other relevant documents concerning the agreement in its safe and handed them over to PC<sup>50</sup>;
- (g) acted as a moderator in case of tensions between the members of the agreement and encouraged the parties to find compromises. AC Treuhand would try to stimulate the parties to work together and reach an agreement. *‘The message from AC Treuhand was that it would get worse for the participants if they discontinued the discussions.’*<sup>51</sup>;
- (h) was actively involved in reshaping the arrangement among producers in 1998 during a bilateral meeting in Amersfoort between Akzo representatives and [...] of AC Treuhand<sup>52</sup>. During this bilateral meeting a solution aimed at meeting Atochem’s demand was developed. The solution consisted of a proposal of AC Treuhand for the new quotas<sup>53</sup>;
- (i) AC Treuhand advised the parties whether or not to allow other participants into the agreement<sup>54</sup>;
- (j) instructed all participants on the legal dangers of parts of these meetings and on what measures to take to avoid detection of these arrangements’ bearing on Europe<sup>55</sup>;
- (k) participated mainly the ‘summit’ meetings but at least at once instance in the nineties attended also a working group meeting<sup>56</sup>;
- (l) according to Akzo chaired at least some of the meetings<sup>57</sup>, (AC Treuhand sees itself his in its reply to the SO not as chairman but as moderator);
- (m) was aware of the Spanish sub arrangement<sup>58</sup> and was asked to calculate the deviation between agreed quotas and effective sales in Spain
- (n) organised the auditing of the data submitted by the parties

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<sup>49</sup> See Akzo [8826], PC [7860ff], and AC Treuhand bills [10558ff] and country and product codes on page [10666]. The parties claim that this market information system was not contrary to competition law, as they submitted their sales data to AC Treuhand and received in return their market share and information on the overall market, but not on individual competitors.

<sup>50</sup> See the original contract on pink paper [6959-68].

<sup>51</sup> Akzo memorandum [8825], PC [7862-63].

<sup>52</sup> See Akzo [8826] and [8833].

<sup>53</sup> See Akzo [10659] and as explanation: The abbreviation *Zr* means Zurich and ‘refers to a proposal made by AC Treuhand in an attempt to resolve the problems ...’ [11932]. AC Treuhand contests this.

<sup>54</sup> See Akzo [8826].

<sup>55</sup> See Akzo [8826], PC [7863].

<sup>56</sup> See Akzo [8825], PC [7862-63].

<sup>57</sup> See Akzo [8826].

<sup>58</sup> An internal document from Akzo [10246] regarding Spain shows that [...] of AC Treuhand was aware of the 1994 quota in Spain and of ‘deviations’ of these quotas. This document was from 1995 or later, as can be concluded from 1995 data on it.

- (o) calculated the new quotas after the acquisition and integration of competitors in the agreement.

- (93) The list in recital (92) concerns the role of AC Treuhand during the nineties. During the seventies, eighties and in the early nineties AC Treuhand's predecessor company Fides<sup>59</sup> performed similar tasks. The person involved since at least the eighties was the same, namely [...].

#### 5.3.2 *AC Treuhand's view*

- (94) AC Treuhand alleges that it attended only a limited number of meetings and provided some clarifications for Table 4 in the following section 5.4. AC Treuhand claims it did not propose the new quotas in 1998, it did not advise how to avoid detection by antitrust authorities, and that it did not chair, but acted as a moderator, in meetings. It confirms in its reply to the SO that its tasks went beyond those of a secretariat, even if it considers this 'unessentially' beyond the role of a secretariat'<sup>60</sup>. AC Treuhand sees its main role as having been that of an assistant, i.e. to organise the meetings and the statistical exchange. AC Treuhand confirms that, until 1993 and in particular during the seventies and eighties, the role of Fides might have been different. However, AC Treuhand does not accept responsibility for Fides' behaviour prior to the creation of AC Treuhand.

#### 5.3.3 *The Commission's view*

- (95) Given the written evidence in the form of tables, faxes, travel documents etc. it is proven that AC Treuhand played a crucial role in the organisation of the cartel. This task went beyond the mere collection and treatment of statistical data. AC Treuhand was aware and actively involved in cartel arrangements, as shown by the occasional presence and knowledge of the so called 'unofficial' part of the meetings, where the agreement was discussed. Also, the possibility for the parties to assess the founding documents and other documents printed on pink or red paper in the premises of AC Treuhand goes beyond the role of a secretariat. This also applies to the auditing of data and the calculation of the 'pluses and minuses', the deviations from the agreement, which was done by AC Treuhand and requires knowledge of both the figures and the agreed quotas. By auditing and calculating the deviations AC Treuhand had authority over the members of the agreement to require them to adapt their business behaviour, for example by 'handing' over clients in order to restore the agreed quotas. This information, with ample written evidence, is supplemented by the matching description of the three main parties to the agreement, about AC Treuhand's advisory role in hiding the cartel, its efforts as moderator to keep the cartel going.
- (96) AC Treuhand does not deny its knowledge of the cartel. That would be difficult given the fact that it kept the original of the agreement. Nor does AC

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<sup>59</sup> See recitals (332)ff.

<sup>60</sup> See recital 51 of AC Treuhand's reply to the SO.

Treuhand deny that it, respectively its predecessor Fides, calculated the deviations from agreed market shares in the seventies. However, AC Treuhand contests that it advised and helped the parties in preventing the detection of the cartel or that it calculated deviations in the eighties.

- (97) AC Treuhand contests that it proposed new quotas at the 1998 meeting with Akzo. The meeting as such is confirmed by AC Treuhand. The Commission, however, considers that AC Treuhand played a decisive role in 1998 by agreeing to meet with Akzo and by proposing a solution for a mutually acceptable system of quotas. Akzo provided contemporaneous evidence by submitting a table with the mark 'Zr'. Akzo clarified that Zr was the abbreviation for Zurich, the location where AC Treuhand is based.
- (98) Since the other parties also describe AC Treuhand as not being only the accountant and organiser of the meetings, the 1998-document is another element to show AC Treuhand's active involvement. The Commission considers that the column bearing the abbreviation Zr for Zurich shows, as stated by Akzo, the proposal made by AC Treuhand. The Commission does not consider that Akzo met [...] of AC Treuhand and wrote a column with new proposals for quotas under the heading 'Zr' on its own. On top of this written evidence, both Akzo and PC confirm that AC Treuhand tried to stimulate an agreement. The written evidence from the 1998 meeting is therefore another piece of evidence alongside other matching statements by the parties that AC Treuhand was involved in the agreement.
- (99) Furthermore, the Commission considers [...] of AC Treuhand acted as a chairman in at least one meeting<sup>61</sup>. In so doing he did not merely moderate the discussions between the other parties, as described by AC Treuhand in its reply to the SO. [...] insisted that the other parties reach a settlement and continue the co-operation based on the newly decided or existing quotas. [...] must have presented the deviations at that meeting, and the parties took these deviations as starting point for their negotiations. This behaviour goes far beyond that of a moderator. A moderator only supports the discussion itself. However, a moderator does not – contrary to what was claimed by [...] - focus on a particular outcome of that discussion. The fact that [...] did not chair all meetings or did not attend all unofficial meetings in which the cartel was discussed does not imply a lesser involvement. [...] (and AC Treuhand) was there when needed to keep the cartel going and he attended both summit meetings and working group meetings.
- (100) In addition, the Commission considers there to be sufficient evidence that AC Treuhand gave advice on how to avoid the detection of the cartel (see footnote 55). As both PC and Akzo confirm this fact independently, the Commission considers this to be true, even if AC Treuhand denies this behaviour. Similar reasoning applies to the advice which AC Treuhand gave as to whether to admit new participants (see footnote 54).

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<sup>61</sup> See Akzo [8826].



- (101) The Commission also considers the activity of calculating deviations from the agreed market shares by AC Treuhand as additional proof of AC Treuhand's active involvement.
- (102) AC Treuhand was absolutely aware of the anti-competitive nature of the agreement. AC Treuhand derived an economic advantage from the agreements via the services it provided to the parties to the agreement. It actively ensured the secrecy of the agreement and mediated between the members in order to reach compromises. These compromises were necessary for AC Treuhand to continue its role and to be paid by the other parties to the agreement. And, indeed, as the agreement ended in 1999, the other parties stopped exchanging data and also stopped paying AC Treuhand. AC Treuhand's tasks were the basis for the functioning of the agreement.
- (103) As regards the duration of AC Treuhand's involvement, the Commission concludes that it lasted from 28 December 1993 until 31 December 1999 and not, as alleged by AC Treuhand, only until 1995/1996. In particular, the Commission does not consider the fact that AC Treuhand may have been less active during the nineties as a sign that AC Treuhand's involvement was less serious. The Commission acknowledges that, during the nineties, AC Treuhand participated in fewer meetings than was the case for Fides in the eighties and seventies. Also, some meetings might have been organised without administrative or other support from AC Treuhand. Furthermore, there is no evidence that AC Treuhand knew about the sub-arrangement on Cross-linking products<sup>62</sup>. This, however, was not due to a lesser involvement of AC Treuhand, but because the organisation of cartel worked more smoothly. AC Treuhand administered the exchange of data and calculated the deviations and was paid until the end of the agreement for its services. As soon as the agreement ended, the parties stopped exchanging data and paying AC Treuhand.
- (104) In conclusion, the Commission considers that AC Treuhand enabled the agreement to function. The beginning of AC Treuhand's involvement is 28 December 1993, the day AC Treuhand became a registered undertaking after the management buyout of Fides. The other members of the agreement were able to change production or prices and to abandon or acquire a certain client. AC Treuhand played a different role, as it could not affect these parameters directly. Its role was that of protecting the agreement from detection, to be a guardian of the rules, and to encourage compromises within the agreement. It could achieve these compromises by its market knowledge and the trust the other participants had in it. It exercised its influence by mediating and chairing meetings between the parties and by proposing, at least on one occasion, new quotas.
- (105) As a result of its knowledge of the sector and its relative independence AC Treuhand also had a certain decisional power on the parties to the agreement. AC Treuhand's moral and institutional authority enabled it to exercise this decision power. It had concrete power in its auditing function, as figures needed to be approved by AC Treuhand before they could become the basis of

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<sup>62</sup> See section 7.1.

negotiations. Also, AC Treuhand's fax concerning how and when to integrate newly acquired companies in the quota system<sup>63</sup> formalised the new quotas accepted by all the parties<sup>64</sup>. The same applies to the so called AC Treuhand code, which made comparisons of similar products which had different names in each company possible. Furthermore, Akzo asked AC Treuhand to come up with a compromise quota. AC Treuhand also had the authority to invite the parties to meetings and mediated at and chaired some of these meetings. The Commission therefore concludes that the parties conferred some power to regulate their behaviour to AC Treuhand, in the interest of the smooth functioning of the agreement. AC Treuhand exercised these powers as described. In addition to the power conferred, AC Treuhand has taken initiatives on its own and invested effort to keep the agreement going and to prevent it from detection.

#### **5.4 Regular Meetings**

- (106) The agreement included regular meetings. A number of meetings were organised by AC Treuhand, some meetings took place without the involvement of AC Treuhand. In Table 4, the column 'Participants included' lists the participants where it is documented that they attended. Most of the meetings were trilateral. The third column 'additional information' sets out any specific information the Commission has about the meetings, for example 'Summit' for major discussions and decisions, 'Working group' for specific discussions and the source. However, the Commission is not in the position to give specific details regarding all of these meetings, as the companies involved did not provide relevant facts for the meetings which took place many years ago. Nevertheless the Commission does not consider that such details are necessary. No details are available for meetings before 1982. Nevertheless it is confirmed by Akzo, PC and Atochem that similar meetings took place on a regular basis ever since the founding agreement in was made in 1971 (see recital (83)).

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<sup>63</sup> See [9472ff].  
<sup>64</sup> See [8810].

**Table 4 - Meetings during the period 1982-1999**

Date & Place	Participants included	Additional information on meeting, if available: subjects discussed, participants and company source(s) on meeting ( <u>company</u> name underlined)
12.10.82 Zurich?	[...] (Atochem), maybe ACT if in Zurich	Summit. <u>Atochem</u>
26.10.83	[...] (Atochem), maybe ACT if in Zurich	Summit. <u>Atochem</u>
8.11.84	[...] (Atochem)	Working group. <u>Atochem</u>
14.1.86	[...] (Atochem), maybe ACT if in Zurich	Summit. <u>Atochem</u>
5.11.86 Oestrich	[...] (Laporte)	<u>Laporte</u>
18.11.86 Munich	[...] (Laporte)	<u>Laporte</u>
January 87 Würzburg	[...], [...] (Laporte)	<u>Laporte</u>
27.-28.1.87 Rotterdam	(Laporte)	<u>Laporte</u>
19.5.87 Vienna	[...] (Laporte)	<u>Laporte</u>
27.-28.10.87 Würzburg	[...] (Laporte)	<u>Laporte</u>
18.-21.10.88 Bad Homburg	[...] (Laporte)	<u>Laporte</u>
16.5.89 Venice	[...], [...] (Laporte)	<u>Laporte</u>
2.11.89 Cologne	[...] (Laporte)	<u>Laporte</u>
7.11.89 Munich	[...] (Laporte)	<u>Laporte</u>
May 1990 Florence	[...], [...] (Laporte)	<u>Laporte</u>
14.6.90	[...] (Atochem)	Summit. <u>Atochem</u>
19./20.11.90, Zurich	[...] (Akzo)	<u>Akzo</u>
19.-22.11.90 Augsburg/ Zurich	[...], [...] (Laporte), ACT only on 20.11 in Zurich	<u>Laporte, ACT</u>
End 90/ early 91, Germany	[...], [...], [...] (Akzo), [...] (Atochem)	<u>Akzo</u>

13.1.91 Zurich	[...], [...] (Laporte)	<u>ACT</u> (probably studying the documents stocked at ACT)
4.-5.2.91 Cologne	[...] (Laporte)	<u>Laporte</u>
13.-14.5.91 Staad	[...], [...], [...] (Laporte)	<u>Laporte</u>
16./17.4.91 Zurich	[...], [...] (Akzo), [...], [...] (Atochem), [...], [...] (Laporte), ACT only on 17.4 in Zurich	Summit. <u>Akzo</u> , <u>Atochem</u> , <u>ACT</u>
6.6.91 Düsseldorf?	[...] (Atochem)	Summit. Definition of UK shares. <u>Atochem</u>
6.11.91 Paris	?	Working group. <u>Atochem</u>
10./11.10.91 Augsburg	[...] (Laporte), [...] (Akzo)	<u>Akzo</u> , <u>Laporte</u>
14.1.92 Zurich	[...] (Akzo)	<i>Meeting planned, but probably has not taken place.</i> <u>Akzo</u>
28.2.92	[...] (Atochem) [...] [...] (Laporte).	Bilateral meeting. <u>Atochem</u>
5.3.92 Stuttgart	[...] (Akzo) Atochem, Laporte	<i>Meeting was planned, but meeting has probably not taken place.</i> <u>Akzo</u>
[...]	[...]	[...]
16.6.92 Zurich	[...] (Atochem), ACT, [...] (?) (Akzo), [...] (?) (Laporte)	Summit/Working group? Definition of UK and F market shares; <u>Atochem</u> , <u>ACT</u> .
22.10.92 Zurich	[...] (Akzo), [...], [...] (?) (Laporte), [...], [...] (Atochem)	Summit. <u>Atochem</u> , <u>PC</u>
3.11.92 Düsseldorf	[...] (Atochem)	<u>Atochem</u>
[...]	[...]	[...]
February 93 probably 26.- 27.2.93 Paris	Akzo, Atochem and PC	<u>Laporte</u> , <u>Akzo</u> . Reintensification of agreement
14.7.93 Zurich	[...] (Atochem)	Working group. <u>Atochem</u>
[...]	[...]	[...]
13.8.93 Zurich	[...] (Laporte)	<u>Laporte</u>
27.8.93 Stuttgart	[...] (Laporte)	<u>Laporte</u>
20.10.93 Zurich?	[...] (Atochem)	Summit, <u>Akzo</u>

21.-22.10.93 Starnberg	[...] (Laporte)	Working group. <u>Laporte, Atochem</u>
Spring 1994, Germany	[...], [...] (Akzo), [...] (Laporte), [...] (Atochem)	<u>Akzo</u>
22.-24.2.94 Landsberg	[...] (Laporte)	<u>Laporte</u>
24.-25.5.94 Wien	[...], [...] (Laporte)	<u>Laporte</u>
2.6.94 Würzburg	[...] (Laporte)	<u>Laporte</u>
22.7.94 Freising (D)	[...] (Laporte)	<u>Laporte</u>
Probably 17.5.94 or late summer 1994, Paris	[...], [...] (Akzo), [...] (Laporte), [...] (Atochem), [...] (ACT)	Working group? <u>Akzo, Laporte, ACT</u> . ACT does not exclude that there was a meeting but claims [...] did not attend, as nothing was noted in his agenda.
[...]	[...]	[...]
24.-27.10.94 Zurich	[...], [...], [...] [...] (Akzo), [...], [...], [...] (Laporte), [...], [...] (Atochem) [...] (Andos), ACT only on 25.10 in Zurich	<u>Andos, Laporte, Akzo, ACT</u>
[...]	[...]	[...]
[...]	[...]	[...]
20.1.95 München	[...] (Laporte)	<u>Laporte</u>
14.2.95 Augsburg	[...] (Akzo), [...], [...] (Atochem), [...] (Laporte) [...] (Andos)	<u>Akzo, Andos</u>
16.2.95, Zurich	[...] (Atochem) [...], [...], [...] (Akzo), ACT	Summit. <u>Akzo, Atochem, ACT</u> . Integration of newly acquired Berol, Aztec, Enichem in cartel.
15.3.95 Stockholm	[...], [...] (Akzo), [...] (Andos)	<u>Akzo, Andos</u>
10.4.95 Munich	[...] (Akzo), [...], [...] (Atochem), [...] (Laporte) [...] (Andos)	<u>Akzo, Andos, Laporte</u>
[...]	[...]	[...]
17.5.95	[...] (Akzo)	<u>Akzo</u> Meeting probably took place and concerned thermoset.
16.-18.5.95 Vienna	[...], [...] (Akzo), [...], [...] (Laporte), [...] (Atochem)	<u>Akzo, Laporte</u> Follow up to Zurich 24.10.94 meeting. Data on quantities, solid percarbonates.
[...]	[...]	[...]

12.6.95 Paris	[...] (Akzo), [...], [...] (Atochem), [...] (Laporte) [...] (Andos)	<u>Akzo, Andos</u>
22.8.95 Paris		<u>Akzo</u> (Non-Treuhand meeting)
15.9.95 Paris	[...], [...] (Akzo) [...], [...] (Atochem), [...], [...] (Laporte)	<u>Akzo</u>
11.-12.10.95 Zurich	[...], [...], [...] (Akzo)	<u>Akzo</u>
18.-19.10.95, Prague	[...], [...] (Akzo), [...] (Atochem), [...], [...] (Laporte)	Working group. <u>Akzo, Laporte</u> , high polymer, solid percarbonates.
[...]	[...]	[...]
16.1.96 Zurich	[...] (Akzo), partly ACT	<u>Akzo, ACT</u>
13.2.96 Amsterdam	[...] (Akzo), [...], [...] (Atochem), [...] (Laporte) [...] (Andos)	<u>Akzo, Andos</u>
20.2.96 Paris		<u>Akzo, Atochem, PC</u> (Non-Treuhand meeting)
7.3.96 Paris		<u>Akzo, Atochem, PC</u> (Non-Treuhand meeting)
[...]	[...]	[...]
19.4.96 Zurich	[...], [...], [...], [...] (Akzo), [...], [...] [...] (Laporte), [...], [...] (Atochem), [...] (ACT)	<u>Akzo, Atochem, ACT</u>
2.-3.5.96 Starnberg (D)	[...], [...] (Akzo) [...], [...] (Laporte)	<u>Akzo, Laporte</u>
14.5.96 Paris		<u>Akzo</u> (Non-Treuhand meeting)
[...]	[...]	[...]
20.9.96 Paris	[...] (Atochem), [...] (Akzo)	<u>Akzo</u> deviations from agreed market shares
28.-31.10.96 Malta	[...] [...] (Akzo) [...], [...] (Laporte)	<u>Akzo, Laporte</u>
[...]	[...]	[...]
15.12.96 Erding (D)	[...] (Laporte)	<u>Laporte</u>
9.12.96 Munich	[...] (Laporte)	<u>Akzo, Laporte</u>
18.12.96 Paris	[...], [...] (Akzo), Atochem	<u>Akzo</u>
12.-13.2.97 Vienna	[...], [...] (Akzo), [...], [...] (Laporte)	<u>Akzo</u>

18.2.97 Paris	[...] (Akzo)	<u>Akzo</u>
February/ March 97 Zurich	Akzo	<u>Akzo</u>
27.-28.5.97 Berlin	[...] (Laporte)	<u>Laporte</u>
27.8.97 Stockholm	[...] (Akzo)	<u>Akzo</u>
10.9.97 München	[...] (Laporte), [...] (Akzo)	<u>Akzo</u> (Non-Treuhand meeting)
23.10.97 Zurich	[...], [...], [...], [...] (Akzo), [...], [...], [...] (Laporte) [...], [...] (Atochem)	<u>Akzo, ACT</u>
27.-29.10.97 Salzburg	[...], [...] (Akzo), [...] (Laporte), [...] (Atochem).	<u>Akzo</u> ,
5.12.97 Düsseldorf	[...] (Laporte), [...] (Akzo)	<u>Akzo</u> (Non-Treuhand meeting)
12.-13.1.98 Munich	[...] (Akzo)	<u>Akzo</u>
4.2.98 Paris		<u>Akzo</u> (Non-Treuhand meeting)
25.2.98 Schiphol	[...] (Akzo)	<u>Akzo</u>
15.4.98 Paris	[...], [...] (Akzo)	<u>Akzo</u>
17.4.98 Zurich	[...] (Akzo)	<u>Akzo, ACT</u>
April/May 98 Paris	[...], [...], [...] (Akzo), [...] (Atochem), [...] (Laporte)	<u>Akzo</u> Increase of share for Atochem
July 98	Akzo, [...] (Atochem)	<u>Akzo, Atochem</u>
Oct./Nov. 98, Amersfoort	[...], [...] (Akzo), [...] (ACT)	<u>Akzo, ACT</u> Bilateral meeting Akzo/AC Treuhand aiming at finding a solution for Atochem's request for higher market shares. ACT claims the meeting took place upon specific request by Akzo
27.10.98 Zurich	?	<u>ACT</u>
23.-24.11.98 Zurich	?, ACT participated in parts of that meeting	<u>Akzo, ACT</u> Solids, prices, quantities by producer and client, revised agreement including Atochem's request for higher market share
13.1.99 Düsseldorf	[...], [...] (Akzo), [...] (Laporte),	<u>Akzo</u> (Non-Treuhand meeting)
28.-29.4.99 Amsterdam	[...] (Laporte)	<u>Laporte</u>
27.5.99	[...] (Akzo), [...] [...]	<u>Akzo, Atochem</u>

	(Atochem)	
24.8.99 Munich	[...], [...] (Akzo), [...] (Laporte),	<u>Akzo</u> (Non-Treuhand meeting)
23.-24.11.99 Schiphol	[...], [...] (Atochem), [...], [...], [...] (Laporte), [...], [...], [...] (Akzo)	<u>Akzo</u> Akzo confirms its decision to stop the arrangement

Source: Information provided by Akzo [8834ff, 8852f], PC [7837-38; 7843], [...] , Andos [7376-78], Atochem [1386-87, 8478-80] and AC Treuhand's (ACT) reply to the SO. 'Laporte' in this table refers to collaborators of PC or of the Laporte group or to information submitted by PC and/or Laporte. ACT claims that is only took part in a limited number of meetings, as shown in the second column above. ACT claims furthermore that it reserved meeting rooms, sent out invitations and wrote the minutes for the meetings on 19.-22 November 1990, 16-17 April 1991, 16 June 1992, 24.-27 October 1994, 16 February 1995, 19 April 1996, 23.-24 November 1998 and that it reserved the meeting room for the meetings on 16 January 1996, 17 April 1998 and 27 October 1998.

## 6 WORKING OF THE MAIN AGREEMENT

- (107) The objective of the main agreement was the stabilisation of the participants' market shares, accompanied by co-ordinated price increases. To that end large clients were allocated. The implementation of the agreement was monitored by audited statistics which were collected and redistributed by AC Treuhand. The participants organised regular meetings to discuss, verify and implement their agreement.

### 6.1 The period 1971-1991

- (108) The parties in the market for OP met in two different types of meetings. There were AC Treuhand meetings and meetings without involvement of AC Treuhand. The meetings without involvement of AC Treuhand were on minor issues or on the regional sub-arrangements or on XL. [...] AC Treuhand meetings were only attended by the three main members Akzo, PC and Atochem and often by [...] from AC Treuhand. This is confirmed by Akzo, Atochem and PC.
- (109) The AC Treuhand meetings had an official agenda (discussions on safety issues, global market shares, etc.), and an 'unofficial' part (detailed discussions and agreement on market shares, clients, prices etc). According to Akzo, there were meetings every quarter during the seventies. Those meetings took place all over Europe but outside the Community at that time. The evening before the meeting, the participants received an overview of the development of the market in general as well as the development of their own market share. At the meeting, the participants were also informed of the deviations from the agreed quantities (pluses and minuses) which were calculated by AC Treuhand<sup>65</sup>. This is confirmed by Atochem and PC in their submissions for leniency<sup>66</sup>.

<sup>65</sup> Akzo memorandum[8800].

<sup>66</sup> See [7799ff] and [1375ff].



- (110) Akzo states that at the end of the seventies, the frequency of meetings went down to two meetings per year<sup>67</sup>. Besides these meetings, there were also meetings without the involvement of AC Treuhand, for example on XL.
- (111) Atochem<sup>68</sup> confirms the periodicity of 1-2 summit meetings per year for HP since the early seventies. These summit meetings were, according to Atochem, accompanied by 3-4 working group meetings per year.
- (112) No company was able to provide exact dates, agendas, minutes or similar information on these first meetings which took place a long time ago.
- (113) According to Akzo, the frequency of AC Treuhand meetings was about two meetings per year during the eighties. During the eighties, a number of meetings where AC Treuhand was not involved took place, as the participants did not feel any need for the presence of AC Treuhand. These working group meetings took over the work that was previously done at the AC Treuhand meetings<sup>69</sup>. These meetings took place at least once but sometimes twice or even three times a year. Gradually, at the end of the eighties, detailed customer and price discussions no longer took place during AC Treuhand meetings but were increasingly left to separate working group discussions<sup>70</sup>. Atochem and PC are not as detailed as Akzo on the number of meeting during the eighties.

#### **Treuhand meetings/procedure**

- (114) According to Akzo<sup>71</sup>, AC Treuhand kept paper documents regarding the market share allocation. These documents were referred to as the 'pink papers' or the 'red papers' and were used at the unofficial part of the meeting. The colour was chosen in order to separate them from the official documents, which were in white. These pink and red papers were handed out during meetings and had to be returned after the meeting. The parties were not allowed to make copies of these papers. The pink papers contained the major agreements reached between the parties and any amendments thereto, while the red papers contained data. The pink papers were consulted only occasionally, when it was necessary to go back to the precise content of the basic agreements and amendments thereto. Consultation of these documents outside a meeting was possible, but the company concerned then needed to go to the AC Treuhand premises in Zurich and required approval of the other participants to the arrangements. At the meetings, the customer lists (which each participant had with him, but which were not exchanged during the seventies) and prices charged were discussed and co-ordinated. These meetings took two to three days.

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<sup>67</sup> Akzo memorandum [8801].

<sup>68</sup> Atochem memorandum [1384].

<sup>69</sup> Akzo submitted an empty table to be filled out with HP and UP data by Laporte, Akzo and Atochem, which it says was distributed by Laporte [4118]. A similar table filled out by Akzo can be found on page [9416].

<sup>70</sup> Akzo memorandum[8801ff].

<sup>71</sup> Akzo memorandum [8799ff].

- (115) *Atochem* confirms the existence of tables containing targets for market shares on ‘pink papers’, which remained with AC Treuhand<sup>72</sup>. PC confirmed this as well and provided the Commission with the original of the first pink paper, the 1971 main agreement<sup>73</sup>.

### High Polymer (HP)

- (116) According to *Akzo*, the information the participants received was split up by product groups and by country during the HP-meetings organised by AC Treuhand. The composition of the product groups changed over time, for example when new products had to be included. In the beginning, various corrections were made, for example the tonnages of certain products were multiplied by different factors<sup>74</sup>. *Atochem* did not provide specific HP-related information on top of its general description for the agreement during the seventies. PC confirmed *Akzo*’s description relating to HP and added details relating to solid percarbonates<sup>75</sup>.

### Thermosets (UP)

- (117) According to *Akzo*, there were not the type of detailed discussions for UP applications as occurred for HP applications. Only some larger customers and the overall prices per country were discussed. The parties often mentioned examples where they had been undercut by each other and which they did not appreciate. Because UP products were much more a commodity (compared to HP products) and regularly faced new competitors, it was, according to *Akzo*, much more difficult to have workable arrangements<sup>76</sup>. *Atochem* did not provide specific UP-related information on top of its general description of the agreement during the seventies. PC confirmed *Akzo*’s description relating to UP<sup>77</sup>.

### Area covered

- (118) According to *Akzo*, the initial agreement was based on the 1969-1970 market shares for the three ‘territories’ France, Spain and the rest of Western Europe. Eastern European countries were included possibly beginning in 1974/75, as a result of which the companies’ respective market shares were adapted to reflect the new situation. Market shares in each territory were to be maintained through agreements on customers and prices. Meetings were to take place on a regular basis to verify compliance with the agreement. The territories concerned were: Spain, France, Russia, ‘Greater Europe’<sup>78</sup>. This is confirmed by *Atochem* and PC.
- (119) Around 1983, a sub-arrangement of the main agreement started on Cross-linking between *Akzo* and *Atochem*. It is described in section 7.

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<sup>72</sup> *Atochem* memorandum [1381-82].

<sup>73</sup> PC submission [6959-68].

<sup>74</sup> *Akzo* memorandum [8800], confirmed by PC [8718-20].

<sup>75</sup> PC submission [7817-27].

<sup>76</sup> *Akzo* memorandum [8800].

<sup>77</sup> PC submission [7827-30].

<sup>78</sup> *Akzo* memorandum [8799].

- (120) [...] <sup>79</sup>
- (121) [...] <sup>80</sup>
- (122) [...] <sup>81</sup>
- (123) [...] <sup>82</sup>
- (124) Beyond the general description in its company statement, Atochem provided little specific information for the period 1971-1991. This is in part explained by the fact that Atochem acquired Pennwalt, including Pennwalt's subsidiary Luperox, only in 1989<sup>83</sup>. During the period up to 1989 Luperox and not Atochem was party to the agreement. Atochem stated it was not able to provide more information for the period before its acquisition of Luperox.
- (125) **Meetings:** According to Akzo, in addition to the working group meetings outside AC Treuhand which already started during the eighties, ad hoc, multilateral or bilateral meetings on specific topics took place increasingly, especially in the nineties. For UP, these meetings were organised when deemed appropriate (one to three times a year). During the meetings in the nineties, customer lists were - exchanged and prices charged were discussed - unlike during the seventies and eighties. During the nineties, the frequency of AC Treuhand meetings was about one meeting per year. These AC Treuhand meetings on HP and UP tended to be organised mainly in Zurich, unlike the meetings during the seventies which took place in several cities<sup>84</sup>. Atochem and PC did not go into detail on the frequency of meetings, but confirmed that regular meetings took place.
- (126) Atochem provided an internal table on HP with targeted market shares for the three members of the agreement split up by regions (France, Spain, and the rest of Europe) for the period 1990-1997<sup>85</sup>.

## 6.2 The period 1992-1999

- (127) According to Akzo<sup>86</sup>, AC Treuhand was, after the period of working groups without AC Treuhand's involvement during the eighties, again continuously involved in the yearly meetings during the nineties (for example when market shares needed to be adapted as AC Treuhand was the only party having the 'official' market shares). As far as the unofficial parts of the meetings were concerned, at least in the nineties, [...] of AC Treuhand would try to stimulate the parties to work together and reach an agreement, rather than initiate concrete proposals of his own. The message from AC Treuhand was that it would get worse for the participants if they discontinued the discussions.

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<sup>79</sup> [...].

<sup>80</sup> [...]

<sup>81</sup> [...]

<sup>82</sup> [...]

<sup>83</sup> Atochem memorandum [1379].

<sup>84</sup> Akzo memorandum [8800ff].

<sup>85</sup> Atochem memorandum [1468-69].

<sup>86</sup> Akzo memorandum [8825].

However, Akzo confirmed that AC Treuhand at least once proposed new quotas itself and provided documentary evidence<sup>87</sup>.

#### 6.2.1 Statistical exchange and secrecy

(128) Akzo described the AC Treuhand meetings as follows: *‘From approximately 1990, in order to try to make the arrangements on high polymer run more smoothly, an empty spreadsheet, on which all the countries, customers and products were mentioned, was prepared. Shortly before each quarterly meeting, one of the participants on a rotating basis would receive the data from the two other participants. The data was sent to the home fax of the participant in charge who would put all the data in the same listing. This listing then was handed out at the beginning of the meeting. This information formed the basis for discussions among the participants in working groups; these took place once or twice a year. On many occasions, shortly after the AC Treuhand meeting in Zurich, the participants would convene in order to make detailed arrangements on prices by product and by customer on a country-by-country basis. No documents could be retrieved as the participants had agreed to systematically destroy the spreadsheet after they had returned from the meeting and given the sales people their assignments. Furthermore, at least in the beginning of the nineties all the participants had to come to the meeting with another means of transport and all hotel expenses had to be paid in cash to prevent electronic traces. Telephone contacts were also made via cellular phone. [...] As described above, faxes were exchanged, generally via home faxes, between representatives of Akzo, Atochem and Laporte as of the nineties. Before that date no such exchanges seem to have occurred. These faxes were detailed with respect to customers, country, quantity sold and prices charged. A clear example of the sequence of faxes as applied after 1994 can be construed when combining annexes 25 through 27 (please note the fax line at the top of the page indicating the sender)’<sup>88</sup>.*

(129) Examples of similar faxes to those mentioned by Akzo can be found in the Atochem submission. They were sent by PC to Atochem<sup>89</sup> and by Akzo to Atochem<sup>90</sup> for 1997/1998 data.

(130) Examples of the exchange of data provided by Atochem are tables with 1995 data on clients and prices for HP for Akzo, PC and Atochem<sup>91</sup> and with 1998 data on clients and prices for HP for Akzo, PC and Atochem<sup>92</sup>.

#### 6.2.2 Tensions in the agreement around 1992

(131) The parties confirm that around 1992, tensions between the companies were rising, but their views vary and differ as to the timing, intensity and duration of the tensions. In particular they disagree as to whether the agreement was

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<sup>87</sup> See footnote 53.

<sup>88</sup> Akzo memorandum [8719ff].

<sup>89</sup> Atochem submission [1434-52].

<sup>90</sup> Atochem submission [1453-65]. The faxes were sent from the private fax of [...], Marketing Manager Organic Peroxides of Akzo.

<sup>91</sup> Atochem memorandum [1476-90].

<sup>92</sup> Atochem memorandum [1491-1511].

terminated and later replaced or only certain contacts at high level were suspended. PC and Akzo consider the period of tensions to mark the end of one cartel and the beginning of another. Atochem, in contrast, sees the period of tensions not as the end of the agreement but as a period when the agreement did not work well.

#### 6.2.2.1 Akzo's view of the tensions

- (132) After having stated that the parties had been involved in the arrangements “as from 1971 onwards”<sup>93</sup>, Akzo claimed that its peroxide division had interrupted the agreement following an internal note from of the division board asking for compliance with antitrust law, probably at a meeting in Stuttgart on 5 March 1992<sup>94</sup>. The evidence provided consists of that internal note.
- (133) According to Akzo, *‘The decision to end the participation was brought to [...],[...] and [...] by [...]. According to the persons present they informed [...]about the adverse financial consequences of this decision. [...]stated that the Board had made up its mind and that these practices had to stop. [...] thereafter informed the participants from the other producers that Akzo would no longer participate. Both Laporte and Elf Atochem complained bitterly about Akzo's decision. The arrangement was ended, but the exchange of the sales volumes with AC Treuhand continued*<sup>95</sup>.’
- (134) According to Akzo, the meetings restarted upon the initiative of the other members around 1992/1993. Akzo states:
- ‘During the period the arrangements were terminated, both Laporte and Elf Atochem signalled repeatedly to Akzo, via telephone calls to [...] and [...], their desire to restart the arrangements. Atochem gave the clearest indications, as it appeared to suffer most from the impact of the termination. Akzo declined all invitations to meet as the orders of the Division Vice President and Member of the Executive Committee of the Chemicals Division was clear. However, at the end of 1992 or the beginning of 1993 Akzo, through [confidential], in the light of the rapidly decreasing results of the business allowed Akzo employees to contact the competitors again*<sup>96</sup>.’
- (135) According to Akzo<sup>97</sup>, the meeting reviving the agreement probably took place in Zurich. As before, three parties were involved: Akzo, Atochem and PC. The arrangements for HP were again based upon an understanding on the need to keep the status quo of the division of market shares. However, Atochem demanded that their ‘minus’ (that is to say, their underselling compared to the quota) would be compensated. The participants agreed but no concrete measures were taken. More or less comparable arrangements were made for UP.

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<sup>93</sup> Akzo submission [8665].

<sup>94</sup> Akzo memorandum [8728].

<sup>95</sup> Akzo memorandum [8713].

<sup>96</sup> Akzo memorandum [8713].

<sup>97</sup> Akzo memorandum [8713ff, 8721ff].

- (136) According to Akzo, the system of exchanging information changed after 1993, at least concerning HP. There was a regular exchange of information among the participants on clients, prices etc. by means of home faxes but it appears that under the modified system every participant faxed the overview for his company to the others and that, subsequently, each of the participants had to compile his own spreadsheet. The arrangements worked similarly for UP and for HP<sup>98</sup>.
- (137) In its reply to the SO, Akzo reconfirms its view that two separate infringements took place. This view is also shared by Laporte. Laporte criticises lacking documentary evidence for the two meetings in June and October 1992, on which Atochem made indications. During the hearing, Atochem distributed two documents of meetings in June and October 1992. Akzo reacted to those meeting notes within the deadline for comments on these new documents and the Hearing, reconfirming that it terminated its involvement in the first agreement in October 1991. Akzo has not found any evidence of the meeting of 16 June 1992 and suspects that the notes are from a meeting in June 1991, as no figures from 1992 were discussed. Concerning the notes on a meeting of 22 October 1992, Akzo cannot add any evidence either. However, Akzo sees the note as reflecting some discussions on the general development in the market and Akzo's internal reorganisation. Akzo therefore confirms that the second agreement started at the end of 1992 or at the beginning of 1993.
- (138) Akzo replied to the documents presented by Atochem at the Hearing (see 6.2.2.2) that it had not found any trace on the June and October 1992 meetings, and that the date might be mixed up with 1991 meetings.

#### 6.2.2.2 Atochem's view of the tensions

- (139) In Atochem's first submission, which was provided shortly after Akzo's first detailed submission, the above mentioned period was not considered to mark the end of one infringement and the beginning of another. The main text of the submission does not particularly refer to the period at all. The 1992-1993 period however is mentioned as a period of 'price war' in one of the annexes containing the text of an interview with [...], one of Atochem's employees involved in the management of the infringement<sup>99</sup>.

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<sup>98</sup> Akzo memorandum [8720].

<sup>99</sup> Atochem submission, annex [1430] in French: 'Selon [...], l'entente [High polymer] a connu plusieurs periodes ... 1992-1993: l'entente est mise a mal par une guerre des prix et des nouveaux quotas sont convenus entre les participants.'

(140) In a later submission, Atochem specified the period of tensions as follows:<sup>100</sup>

*'In 1991, some discussions concerning the agreement (summit meetings) have been suspended. Towards the end of 1991 Akzo told the participants of the agreement that it would not wish anymore, after instructions of the Directorate general, that certain discussions would take place. In practice, this suspension was short (end 1991 / October 1992 and has not hindered the continuation of the agreement, in spite of numerous violations of the agreements principle by the different parties. According to[...], he would not exclude that this was a reaction to the changing market conditions after the acquisitions of Luperox by Atochem. Atochem thought that Akzo would maybe wish to take advantage of such a 'pause' in the meetings in order to proceed to some 'outside quote' sales, in order to better negotiate the quotas once the discussions start again. And, at the end of 1990, Akzo had an excess of 560 tonnes above its quota, already fixed higher than 50%. In spite of the short suspension of the summits, the meeting of the working groups continued, individual data continued to be exchanged, and telephone contacts between Akzo, Atochem and Peroxid Chemie have been maintained. The short period of suspension of the summit meetings took place between:*

*a summit on questions of quotas on 17 April 1991 in Zurich; another meeting (type working group) concerning the UK market on the 6 June 1991 at an unknown place*

*a new summit on 22 October 1992 in Zurich [...] This October 1992 meeting had as agenda a tour d'horizon on competitors [...] and discussions about deviation from the quotas*

*This short period of suspending certain discussions and the fluctuations which resulted from it have caused a price war in 1991, as well as strong*

<sup>100</sup>

Atochem [8465ff]. Original in French: 'En 1991, certaines discussions relatives à l'entente («summit meetings») ont été suspendues. Vers la fin de l'année 1991, AKZO a indiqué aux autres participants à l'entente que, sur ordre de sa direction générale, il ne souhaitait plus que certaines discussions aient lieu. En pratique, cette suspension des discussions a été courte (fin 1991 / octobre 1992), et n'a pas empêché l'entente de se poursuivre, en dépit de nombreuses violations de ses principes par les différentes parties. Selon [...], il n'est pas exclu qu'il s'agisse là d'une réaction à la modification des conditions du marché résultant de l'acquisition de LUPEROX par ATOCHEM. ATOCHEM a pensé qu'AKZO souhaitait peut-être profiter d'une telle « pause » dans la tenue des « Summits » pour procéder à diverses ventes 'hors quotas', afin de mieux renégocier ces quotas lorsque les discussions reprendraient. Ainsi, à la fin de 1990, AKZO avait un 'excédent' de 560 tonnes par rapport à son quota, déjà fixé à plus de 50 %. En dépit de la brève suspension des Summits, les réunions des Working Groups se sont poursuivies, des données individuelles ont continué à être échangées, et des contacts téléphoniques maintenus entre AKZO, ATOCHEM et PEROXID CHEMIE. Cette brève période de suspension des «summits meetings » a pris place entre: un « Summit » a eu lieu le 17 avril 1991 à Zurich, portant sur des questions de quotas; une autre réunion (de type «Working group») relative au marché UK s'est tenue le 6 juin 1991, en un lieu indéterminé; un nouveau « Summit » s'est tenu le 22 octobre 1992, à Zurich, [...]. Cette réunion d'octobre 1992 avait pour ordre du jour, notamment, un tour d'horizon des différents concurrents [...], et une discussion relative aux déviations par rapport aux quotas. Cette brève période de suspension de certaines discussions et le relatif flottement qui en a résulté dans le fonctionnement de l'entente a entraîné une guerre des prix en 1991, ainsi que de fortes actions commerciales d'AKZO contre ATOCHEM ; mais il faut aussi souligner que cette guerre des prix avait des causes exogènes, telles que par exemple une modification des politiques d'achat de gros clients ([...] et [...], notamment qui souhaitaient réduire le nombre de leurs fournisseurs de trois à deux), ainsi qu'une récession économique généralisée.

*commercial reactions from Akzo against Atochem; but it has to be underlined that this price war had exogenous causes, such as a change in the purchasing policy of large companies (especially [...]\*, [...]\*, which tried to reduce their number of suppliers to two), and a general economic recession.'*

- (141) In its reply to the SO and during the hearing, Atochem submitted copies of hand-written notes of[...] on the meetings of 16 June 1992 and 22 October 1992, which confirmed that the meetings mentioned by Atochem took place. [...]’ notes from 16 June 1992 concerned the United Kingdom, mentioned as base the 1989 figures, and concerned HP, UP. The ‘territory’, i.e. the sub arrangement covering most of continental Europe, is mentioned as well, as the meeting was about the full integration of the UK arrangement into the main agreement. The document of 22 October 1992 mentions the name [...] of PC, the urgent need for an audit in the United Kingdom and Spain, deviations between the three partners and corrective actions, and ‘*price 5% Discuss 15-20 customers*’.
- (142) The Hearing Officer invited the parties to react to these documents in writing within two weeks of the hearing.

#### 6.2.2.3 PC’s view of the tensions

- (143) PC argues that two distinct arrangements took place, before and after 1992. According to PC, Akzo announced in October 1991 the stopping of any form of co-ordination of the competitive behaviour, during a meeting in Augsburg, Germany<sup>101</sup>. A new agreement began after a meeting in late February 1993.
- (144) One argument put forward by PC to support the view of two distinct infringements is the evolution of prices. According to PC, prices dropped after the discontinuation of the agreement substantially between 1992 and 1993 for HP (minus 15%) and UP (minus 12%)<sup>102</sup>. For some products, the prices equalled the production costs. The drop in prices is confirmed by data from Akzo, although the drop in prices for UP is less pronounced.
- (145) According to PC, it started selling above its previous quota for HP of 29% and reached 36%<sup>103</sup>. This data is not confirmed by data from Akzo, which estimates, for PC, a constant share of 29% for 1992 and a drop to 26% in 1993<sup>104</sup>.
- (146) According to PC’s reply to the SO<sup>105</sup>, no more meetings between Akzo, Atochem and PC took place in the period November 1991 until March 1993. As a reaction to the evidence put forward by Atochem, PC confirms, in contradiction to its earlier statement, that a legitimate meeting took place in October 1992. PC neither confirms nor denies the meeting of 16 June 1992 and expresses doubts as to whether the date on the document, which it considers potentially falsified, really refers to June 1992. PC denies that the

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<sup>101</sup> See [7845], [7850].

<sup>102</sup> See [8089-98].

<sup>103</sup> PC submission [7851].

<sup>104</sup> Akzo memorandum [8795].

<sup>105</sup> PC submission [7851-53].



notes reproduce the content of the alleged meeting. PC stresses that it is not active on the UK market for OP. After the hearing, PC confirmed that [...] of PC/Laporte attended the meeting in October 1992. The meeting however was about testing the grey zone of the allowed, and the meeting ended in deep disagreement and clients were not discussed. The subject of the meeting was also how to continue the legal exchange of statistics via Treuhand after the dissolution of the Interlox joint venture.

- (147) In spring 1993, after a period of tensions, Akzo took, according to PC, the initiative to improve the co-operation with a meeting in February 1993. This meeting was attended by representatives of Akzo, PC and Atochem<sup>106</sup>.
- (148) PC also argues that the renewed arrangement was a distinct, new arrangement<sup>107</sup>. Differences are a new competitive situation in 1993, a simplified procedure of meetings, monitoring and control, different territories covered, and a different role of AC Treuhand.
- (149) In its reply to the SO and the reaction to the hearing, PC reconfirms the arguments already submitted during the procedure. PC furthermore argues that the Commission does not properly take into account the development of prices and market shares during the period of tensions. According to PC these developments show that the parties did not follow and in fact stopped the agreement.
- (150) Laporte replied in its reaction to the hearing that it was not aware of the meetings in 1992, and that it was at the time not full owner of PC.

#### 6.2.2.4 The Commission's view of the tensions

- (151) Based on the above information it can be concluded that during a short period from October 1991 until June 1992 and from June 1992 until March 1993 the intensity and the level of the meetings was somewhat reduced. On 16 June 1992, a meeting on the UK market took place<sup>108</sup>, to be followed by a summit on 22 October 1992. The meeting in June is confirmed by Atochem and by AC Treuhand, the meeting in October 1992 is confirmed by Atochem and PC.
- (152) The meeting on 16 June 1992 was, as can be seen from the written evidence, about the integration of the UK sub arrangement in the main agreement and had a clear anti-competitive agenda. The evidence from the October 1992 meeting shows that the parties met. The parties spoke about deviations and correcting the data for Spain and the United Kingdom, mentioned '*compete on technical performance*' and about the client '*EXXON go to(?)/60(%) to(?) Akzo*'. In the Commission's view this indicates that the meeting was also about the agreement, where statistics leading to the deviations were about to be improved (necessary for the monitoring of compliance), about a client to be allocated to Akzo and about competition on technical performance (and hence

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<sup>106</sup> PC submission [7855].

<sup>107</sup> PC submission [7855].

<sup>108</sup> Atochem [8479], Atochem's documents distributed during the hearing, and AC Treuhand's confirmation of a meeting on 16.6.92 which is part of AC Treuhand's reply to the SO.

not on prices). Two sources, AC Treuhand<sup>109</sup> and Atochem, confirm that this meeting took place, and documentary evidence of the meeting (notes and agenda of [...]) exists. It was handed over during the Hearing.

- (153) The meeting on 6 June 1991 might not have taken place, which is not of importance for the case, as it is the continuity of meetings during 1992 which is of relevance for the duration of the single and continuous infringement. The Commission does not consider, as alleged by PC, that the meeting dates of 6 June 1991 and 16 June 1992 were mixed up or falsified, given that two independent sources confirm the June 1992 meeting.
- (154) AC Treuhand confirms in its reaction to the hearing that it organised the meeting on 16 June 1992 and that it took place, but AC Treuhand could not give details as to the content of the meeting.
- (155) The Commission concludes that there are several arguments to consider the infringement as one long single and continuing infringement, as confirmed by Atochem. The Commission hence refuses the approach of two separate agreements, as seen by Akzo and PC. The Commission also concludes that, due to the short period of time involved, the reduced number of meetings in 1992 had no effect on the overall intensity of the agreement. Furthermore, two meetings with anti-competitive content took place in 1992, which is a strong counter argument to PC and Akzo's claim that the agreement ended during the period of tensions. The Commission's arguments are listed and elaborated in detail in recitals (393)ff.

### 6.2.3 *Involvement of other companies*

#### 6.2.3.1 [...]

(156) [...]

(157) [...] <sup>110</sup> <sup>111</sup> [...] <sup>112</sup> .

(158) [...] <sup>113</sup> [...] <sup>114</sup>

(159) [...] <sup>115</sup> [...] <sup>116</sup> [...] <sup>117</sup>

(160) [...]

(161) [...] <sup>118</sup> [...]

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<sup>109</sup> See page 22 of AC Treuhand's reply to the SO.

<sup>110</sup> [...]

<sup>111</sup> [...].

<sup>112</sup> [...]

<sup>113</sup> [...]

<sup>114</sup> [...]

<sup>115</sup> [...]

<sup>116</sup> [...].

<sup>117</sup> [...]

<sup>118</sup> [...]

- (162) [...]
- (163) [...]
- (164) [...]<sup>119</sup>
- (165) [...]
- (166) [...]
- (a) [...]<sup>120</sup>
- (b) [...]<sup>121</sup>[...]<sup>122</sup>
- (c) [...]<sup>123</sup>
- (d) [...]<sup>124125</sup>
- (167) [...]<sup>126</sup> [...]<sup>127</sup>
- (168) [...]
- [...] [...] <sup>128</sup> [...] <sup>129</sup>
- (169) [...]
- (170) [...]
- (171) [...]<sup>130</sup>
- (172) [...]<sup>131</sup> [...]<sup>132</sup>
- (173) [...]
- (174) [...]
- (175) [...]
- (176) [...]<sup>133</sup>

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119 [...]

120 [...]

121 [...]

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124 [...]

125 [...]

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128 [...].

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(177) [...] <sup>134</sup>

#### 6.2.3.2 Facts regarding Andos

(178) Andos is a Swedish company, producing only one kind of UP, namely ketonperoxides. According to Akzo, some time in/around 1994, Akzo, PC and Atochem determined that it would be good for the co-operation if Andos would join. Subsequently, [...] and [...] (Akzo) went to Andos to invite [...], the executive responsible for the company, to participate in their group. Andos participated in a number of meetings <sup>135</sup>. Akzo states that Andos left the meetings in the beginning of 1997. On 27 August 1997 [...] of Akzo met [...] of Andos. *'The purpose of that meeting was probably to try to convince Andos to participate again in the non-AC Treuhand meetings'* <sup>136</sup>.

(179) Atochem, too, confirmed the participation of Andos in UP-meetings and the exchange of information from mid-1994 until the end of 1996 and two UP meetings in 1995 <sup>137</sup>. A table submitted by Akzo shows sales data of Andos from the first quarter 1994 until the first quarter 1997 <sup>138</sup>.

(180) PC confirmed the 'neutral' involvement of Andos and that Andos provided its sales figures for 1992-1994. However, PC stated that Andos refused the suggestion of Akzo for minimum prices for some UP products <sup>139</sup>. PC stated furthermore:

*'Akzo, PC and Atochem tried therefore to include Andos in the planning of a new co-operation for organic peroxides for the period 1993-1996. On the initiative of Akzo several meetings with employees of Andos took place, at which possibilities for a future co-operation were discussed. Andos stayed neutral concerning Akzo's offer for a active co-operation' [...] 'Akzo tried furthermore, to implement an agreement during the discussion with Andos concerning minimum prices for ketonperoxides.'* [...] *'Akzo did not succeed to fix minimum prices'* <sup>140</sup>.

(181) Andos confirmed <sup>141</sup> meetings on 24 November 1994, 14 February 1995, 10 April 1995, 12 June 1995 and 13 February 1996. Andos stated that it became aware of Akzo's proposals for price levels at the June 1995-meeting, but that it did not agree on any co-ordinated action. At the February 1996 meeting when again prices and also sanctions were discussed, [...] (Andos) stated to [...] (Akzo) that Andos would no longer participate in those meetings. According to Andos, the other parties were not surprised by Andos' decision <sup>142</sup>. Andos states that, after it stopped meeting the other parties in February 1996, it met [...] by coincidence at a trade fair in Paris in April 1997

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<sup>133</sup> [...]

<sup>134</sup> [...]

<sup>135</sup> Akzo memorandum [8849].

<sup>136</sup> Akzo [8852].

<sup>137</sup> Atochem memorandum [1409].

<sup>138</sup> See pages [11009f].

<sup>139</sup> PC submission [7856].

<sup>140</sup> PC submission [7857].

<sup>141</sup> Andos [7376-79] and [8372ff].

<sup>142</sup> Andos [8378].

and agreed to another exchange of historical sales data. This exchange of data was finalised by Akzo sending the consolidated tables<sup>143</sup> on 30 June 1997.

- (182) On the basis of the evidence available, the Commission considers that Andos cannot be considered as having effectively entered into the agreement. Andos joined under the assumption that talks were initiated due to production problems of Akzo<sup>144</sup> and left the discussions as soon as it became fully aware that the discussions would be about prices. In addition to Andos' own description, the other participants confirm that Andos was never willing to join or active in the agreement. The only action undertaken by Andos was to provide historical data on sales volumes, without prices or client names. Therefore no SO was addressed to Andos.

#### 6.2.4 *The end of the agreement*

##### 6.2.4.1 The end of the UP-arrangement:

- (183) According to information provided by Akzo, Atochem left the co-operation on UP in 1997. This was due to a personal conflict between [...] (Akzo) and [...] (Atochem). Thereafter, the contacts became bilateral, between Akzo and PC<sup>145</sup>. Atochem confirms this personal conflict<sup>146</sup> but considers it left the UP agreement in February 1996<sup>147</sup>. According to Akzo, the remaining arrangement on UP between Akzo and PC came to an end in 1997,<sup>148</sup> and the managers of Akzo and of Atochem responsible for UP applications no longer attended the AC Treuhand meetings in 1998<sup>149</sup>.

- (184) On the basis of the evidence available, the Commission considers that a sub-arrangement on UP existed within the overall framework of the main agreement from 1 January 1971 until 28 February 1996 between Akzo, PC and Atochem and continued until 31 December 1997 between Akzo and PC. [...].

##### 6.2.4.2 The end of the HP arrangement

- (185) According to Atochem, the sub-arrangement covering HP ended in 1999 during a summit meeting in Amsterdam<sup>150</sup>. According to PC, the three companies decided in Zurich in autumn 1998 to stop the co-ordination of their behaviour and to stop sending market share data [...]. However, some general rules on emergency deliveries in case of accidents, careful patent- and personnel-policy, which were apparently not followed, should stay in place. These general rules are not seen by Atochem as anti-competitive. The last meeting between the three companies took place on 24 November 1999 and

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<sup>143</sup> Andos [7382].

<sup>144</sup> Andos [8376].

<sup>145</sup> Akzo memorandum [8849].

<sup>146</sup> Atochem memorandum [1424].

<sup>147</sup> Atochem [8468].

<sup>148</sup> Akzo memorandum [8811].

<sup>149</sup> Akzo memorandum [8814].

<sup>150</sup> Atochem memorandum [1386].

the participants agreed to give up any co-ordination between their companies<sup>151</sup>.

- (186) According to Akzo the last contact was in 1998 and the arrangement ended in 1999<sup>152</sup>. The co-operation already worsened, according to Akzo, from 1995 onwards due to increasingly higher deviations from the agreed market shares. According to Akzo, it became clear, during a meeting probably on 17 April 1998, that nobody, including the AC Treuhand representative, knew what the correct market shares were<sup>153</sup>.
- (187) On 11 May 2000, Akzo formally terminated its contractual relations with AC Treuhand by registered letter, after it had, according to its own statement, already done so by telephone in February 2000<sup>154</sup>. On 3 September 1999, Akzo communicated to its employees the termination of the arrangements. For HP and UP, Akzo attempted to contact both Atochem and PC on that same day but Akzo was successful only in reaching and conveying the message to PC that day. Two or three weeks later, Akzo was able to convey the same message to the representative of Atochem<sup>155</sup>.
- (188) On the basis of the evidence available, the Commission considers that an agreement on HP within the overall framework of the main agreement lasted from 1 January 1971 until 31 December 1999 between Akzo, PC and Atochem [...] The last meeting took place in November 1999, and the Commission considers that the effects of the agreement lasted beyond that date. In their reply to the SO, the parties did not contest the Commission's view that the agreement ended on 31 December 1999.

## **7 SUB-ARRANGEMENTS TO THE MAIN AGREEMENT**

### **7.1 The Sub-arrangement for Cross-linking**

- (189) Both Akzo<sup>156</sup> and Atochem<sup>157</sup> confirm the existence of a sub-arrangement on Cross-linking (XL), involving often the same persons who were in charge of the arrangement concerning HP and UP. The XL sub-arrangement covered -as did the main agreement- the EEA except for Spain, United Kingdom and France, where the regional sub-arrangements applied. [...].
- (190) According to Akzo, XL-products were never discussed in the AC Treuhand meetings and were not part of the arrangements concluded in the framework of AC Treuhand, as the competitive situation in that market was even more complicated (different competitors and a greater variety of customers). Nonetheless contacts did later occur regarding XL in the light of the under-

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<sup>151</sup> PC submission [7840-41].

<sup>152</sup> Akzo memorandum [8811].

<sup>153</sup> Akzo memorandum [8724].

<sup>154</sup> Akzo memorandum [8715].

<sup>155</sup> Akzo memorandum [8714].

<sup>156</sup> Akzo memorandum [8852ff].

<sup>157</sup> Atochem memorandum [1382].

standing of the companies involved and the fact that similar people were sometimes responsible for the HP and the UP and XL applications<sup>158</sup>.

- (191) Atochem confirmed the existence of this arrangement on XL. Atochem did not provide specific XL-related information beyond its general description of the agreement during the seventies. PC confirmed some talks outside AC Treuhand concerning the only XL product it produced and could not add anything about potential co-operation of the two other companies<sup>159</sup>. In its reply to the SO, PC considered that these talks with Akzo should not be seen as part of the sub arrangement on XL, but rather as a specific agreement which is time barred. PC claims to have stopped this co-operation in 1995, and that it had a too small market share of 2-3%.
- (192) XL data was also exchanged concerning the Spanish market, but discussed centrally and by the Spanish branches<sup>160</sup>.
- (193) The XL-sub-arrangement had even further sub-arrangements for Bis-Peroxides, Silicone, Dicumyl Peroxides and Perketals. As the XL-sub-arrangement is considered to be part of an overall scheme under the umbrella of the main agreement, only a brief description of the facts will be given. The main source of information is Akzo, while the other parties confirmed the existence of the sub-arrangement on XL and certain specific aspects. However, the other parties were not able to provide the Commission with the same level of detail as Akzo did.
- (194) The XL-sub-arrangement on Bis-Peroxides lasted from around 1983 to 1999 and involved Atochem and Akzo. According to Akzo, phone contacts were held with Laporte and Hercules.

*Akzo states: 'PX 14 - Bis Peroxide: Elf Atochem (and, at an earlier stage, its predecessor Montefluos) and Akzo Nobel have been the main producers in the European market for Bis peroxide for quite a long time. Hercules imported into the EU from the US. For approximately 15 years there have been more or less close contacts regarding the EU market between Elf Atochem, Akzo Nobel and Hercules concerning the Bis peroxide. More particularly, the meetings regarding Europe between Elf Atochem, Akzo Nobel and Hercules were multilateral until 1985. After 1985 the meetings changed into bilateral talks between Akzo Nobel and Elf Atochem as Hercules seems to have left the arrangements, although there appear to have been further contacts with Hercules afterwards. During a period of approximately 15 years they discussed volumes and proportional allocation by country for the European market. In the beginning of the eighties, the three participants determined the theoretical market shares of each party in Europe by country. Following this, they had meetings several times a year, where they discussed the developments with regard to the allocated market shares, volumes, customers and prices in the market in Europe. There were detailed exchanges of customer information between Akzo Nobel and Elf*

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<sup>158</sup> Akzo memorandum [8712].

<sup>159</sup> PC submission [7830-34].

<sup>160</sup> Akzo [10239ff].

*Atochem two or three times a year. [...]. The last exchanges were most likely in 1998, Two or three times a year the parties came together for official meetings with a set agenda. This was mostly the case when the participants discussed supply and purchase matters during the official part of the meeting. These non-official meetings were organised in locations where discovery was unlikely. Apart from the meetings, there appear to have been contacts by telephone between Elf Atochem and Akzo Nobel, as well as with Laporte and Hercules. This happened frequently (about once a month). These telephone calls were requested by both sides and in most cases the parties discussed prices for new customers, in the second half of the nineties, these contacts slowly decreased. When Montefluos and Pennwalt merged into Elf Atochem in 1990, the co-operation was consolidated and the agreements regarding market shares were re-established. From that time forward, meetings took place two or three times a year, either in the Netherlands (Amsterdam) or in France (Paris)<sup>161</sup>.*

- (195) Atochem confirmed this arrangement on Bis-Peroxides covering Western Europe between Akzo and Atochem (via Montefluos) which started at an unknown date but before 1990 and continued until 1999<sup>162</sup>. The objective, according to Atochem, was to keep the prices stable in the respective ‘influence zones’ of Akzo (Northern Europe) and Atochem (Southern Europe). During meetings<sup>163</sup> and phone calls, sales volumes by country and some price data for clients was exchanged, according to Atochem. The working of the arrangement worsened from 1997 when new competitors arrived<sup>164</sup>. PC denies phone contacts concerning Bis-Peroxides.

- (196) The XL-sub-arrangement on Silicone lasted from around 1985 to 1995 and involved Akzo and PC

*Akzo provided Silicone-customer lists from around 1995<sup>165</sup> to the Commission and stated: ‘Akzo Nobel and Laporte were the only producers in Europe of peroxide for silicone applications. During the period 1985-1995, Akzo Nobel and Laporte, the two players in this market, held discussions approximately once or twice a year. They discussed prices and exchanged customer information. [...] In between the meetings, the parties also had telephone contacts<sup>166</sup>.*

- (197) The XL-sub-arrangement on Dicumyl Peroxides lasted from 1983 to around 1990 and involved Akzo and Atochem.

*Akzo states: ‘Hercules was the leading player in Europe in the market for Dicumyl peroxide. Akzo Nobel bought products from Hercules. Elf Atochem and Akzo Nobel exchanged information in an effort to allocate their traditional customers. However, in respect of DCP [Dicumyl Peroxide],*

<sup>161</sup> Akzo memorandum [8853ff].

<sup>162</sup> Atochem memorandum [1382ff].

<sup>163</sup> Atochem enumerates five meetings from October 1997 until May 1999 with names of participants and venues on pages [1386-87].

<sup>164</sup> Atochem memorandum [1379-84].

<sup>165</sup> Akzo memorandum [6261-73].

<sup>166</sup> Akzo memorandum [8855].



*there were apparently no such detailed exchanges of information as for Bis peroxides. The discussions focussed more on important customers. The arrangement made in 1983 was identical to that for Bis peroxide. That arrangement was made in 1983. The talks on Dicumyl peroxide took place during the same meetings where Bis-peroxide was discussed. The motive for the arrangements, which related to Europe, was the fact that, at that time, both Hercules and Akzo Nobel were to open new plants for dicumyl peroxide in Europe. The theoretical market shares in Europe were fixed on the basis of the existing market shares and the new shares (due to the new plants)<sup>167</sup>.*

- (198) In its submission, Atochem did not explicitly mention an arrangement on Dicumyl Peroxides.
- (199) The XL-sub-arrangement on Perketals lasted from at least 1990 to around 1997 and involved Akzo and Atochem. Akzo states: *'TX29/17-Perketals: The arrangements in Europe for Perketals seem to originate from 1990 and are similar, if not identical, to those for Bis peroxide. However, in terms of volume they are much less important. The last exchanges of information seem to have taken place around 1996-1997. Annex 201 provides notes with comparisons of market shares and sales during the 1990s'*<sup>168</sup>.
- (200) Atochem confirmed this arrangement and claims that it ended in 1997. According to Atochem, the arrangement on Perketals took place together with the one on Bis Peroxides (see recital (194))<sup>169</sup>.
- (201) In its reaction to the hearing, Atochem clarified that the arrangement on XL was more a non-aggression pact and that there was no allocation of market shares as was the case in the main agreement. The objective was to stabilise XL prices in the influence zones of Atochem and Akzo by means of exchanging price and sales volume data.
- (202) On the basis of the evidence available, the Commission considers that a sub arrangement on XL within the overall framework of the main agreement lasted from at least 31 December 1983 until 31 December 1999 between Akzo and Atochem. PC, which had a small market share, was involved until 1995. The Commission has not found sufficient proof that PC was involved in the arrangement on Bis Peroxides. However, the Commission considers that PC was involved in other arrangements for other XL products, such as silicone, until 1995. [...]

## **7.2 Regional Sub-arrangements**

- (203) The main agreement covered the countries of today's European Economic Area since 1971 excluding the United Kingdom, Spain and France. In addition to this, Eastern Europe was covered for some of the time. France and Spain had specific sub-arrangements, which were partly different from the basic agreement. These specific arrangements for Spain and France have been

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<sup>167</sup> Akzo memorandum [8854].

<sup>168</sup> Akzo memorandum [8854].

<sup>169</sup> Atochem memorandum [1379-84].

confirmed by Atochem<sup>170</sup>, by PC<sup>171</sup> and by Akzo<sup>172</sup>. In addition, Akzo described separate meetings on the UK-market until 1991<sup>173</sup>. These regional meetings only concerned HP and UP but not XL<sup>174</sup>.

### 7.2.1 The French Sub-arrangement

- (204) Concerning **France**, Akzo stated: *‘France was excluded from the overall market share calculations for high polymer applications and was included in separate shares and discussions, because Laporte had a joint venture (which was later acquired entirely by Laporte and subsequently dissolved). Akzo Nobel has not been able to identify any documents regarding the discussions on the French market. The participants to the French arrangement were Akzo Nobel, Elf Atochem and a joint venture of Laporte called Chalonaise. The meetings regarding the French market were normally held in France. However, the meetings regarding the French market were sometimes held on the day after the producers met to discuss the more general European organic peroxide arrangements. Therefore, the meetings were occasionally also held abroad. The people attending the meetings were among others [...] and sometimes [...] and [...] for Akzo Nobel, the person responsible for the European market for Elf Atochem, a representative for Laporte, and a representative of the agent of Chalonaise for Chalonaise. To the company's knowledge, this local arrangement ended in 1991 as a result of Akzo Nobel's withdrawal in response to the September 1991 letter sent by the Divisional Board of the chemical group of Akzo Nobel (annex 15). In 1993 no new separate arrangements and meetings for France were concluded<sup>175</sup>.’*
- (205) Atochem confirmed the separate arrangement for France,<sup>176</sup> but did not provide any further details on it.
- (206) PC was involved in the arrangement on France via its participation in a joint venture called ‘La Chalonaise Peroxides Organique’ (hereinafter “La Chalonaise”). It claims it had no influence on the operational management due to its 40% participation in the joint venture and that the pre-1992 sub arrangement on France is not under the responsibility of PC. La Chalonaise stopped producing OP in 1997. According to PC, the sub-arrangement was not renewed after the tensions in 1991<sup>177</sup>. Instead the main agreement covered France from then on as well.
- (207) Due to the long time which has elapsed, none of the companies was able to provide detailed evidence on the French sub-arrangement until it became integrated in the main agreement. This, however, is not crucial, as none of the companies denies the fact of a French sub-arrangement. Furthermore, the sub-

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<sup>170</sup> Atochem memorandum [1379], [1385].

<sup>171</sup> PC submission [7841-42; 7858-59].

<sup>172</sup> Akzo memorandum [8815ff] for Spain and [8802] for France.

<sup>173</sup> Akzo memorandum [8803ff].

<sup>174</sup> Akzo memorandum [8809].

<sup>175</sup> Akzo memorandum [8802].

<sup>176</sup> Atochem memorandum [1379].

<sup>177</sup> PC submission [7841-42; 7858-59].

arrangement on France became part of the main agreement, as it was integrated into the main agreement after the period of tensions.

- (208) PC claims that the French sub arrangement ended in 1991 and is hence time barred from fines. It claims that the French market must be seen as a distinct market until it was covered by the main agreement. The reasons that PC gives for this are the completion of the single market, the mere fact of having a distinct sub arrangement with partly different players and high transport costs.
- (209) On the basis of the evidence available, the Commission considers that the French sub-arrangement on OP within the overall framework of the main agreement lasted from 1 January 1971 until 31 December 1991 between Akzo, La Chalonaise, PC and Atochem. The arrangement then became integrated into the main agreement. AC Treuhand, PC and Perorsa were involved in the sub-arrangement until 1991 as well, by their involvement in the main agreement and in the Spanish sub-arrangement, and by respecting the French market as part of the overall agreement. PC became more involved after the integration of the French sub-arrangement into the main agreement, especially as it attended the meetings of the main agreement and as it was, by means of exports or refraining from exports, an equal partner concerning France. PC was nevertheless already involved in the sub arrangement prior to 1991, as it knew or could have known about it and it must have taken the French sub-arrangement into account for its commercial policy regarding the French market.

#### 7.2.2 *The Spanish Sub-arrangement*

- (210) Perorsa was and is a major player on the Spanish market for OP<sup>178</sup>. It produces OP itself and sells products produced by PC.
- (211) A sub-arrangement for Spain was put in place in 1973, or at the latest at the end of 1975. Akzo states<sup>179</sup>: ‘...the discussions regarding the Spanish market started in the early seventies (around 1973). The separate meetings were put into effect in 1975 as in that year Akzo Nobel established a separate sales office in Barcelona. Before 1975 an agent took care of the sales in Spain, and the talks were held by Akzo Nobel’s European sales manager operating from the Netherlands. Participants: The participants in the arrangement were Akzo Nobel, Perorsa, Microquímica di Navarra and Luperox’. Microquímica di Navarra was acquired by Akzo Nobel in 1986. Elf Atochem became involved in Spain when it acquired Luperox in 1989. [...]’
- (212) A sub-arrangement on Spain is confirmed as well in the initial 1971 agreement, where a footnote reads<sup>180</sup>: ‘In view of the special circumstances prevailing in France and Spain, separate agreements will be made within the spirit of the agreement.’

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<sup>178</sup> See recital (215) for market shares.

<sup>179</sup> Akzo [8815-16].

<sup>180</sup> Laporte [6968].

- (213) Laporte confirms the existence of the Spanish sub-arrangement involving Perorsa<sup>181</sup>. At the time, Perorsa was part of the Interlox joint venture, which lasted until 1992. PC also belonged to that joint venture.
- (214) Atochem did not give details concerning the Spanish arrangement and did not distinguish the start of the main agreement in 1971 and the start of the Spanish sub-arrangement.
- (215) The Spanish data was also exchanged via AC Treuhand. Examples for agreed quotas and realised sales are in the Commission's file. For the period 1988-1999, the quotas HP/UP were Akzo (32.2%/52,2%), Perorsa ([45-55]%/[20-30]%), Atochem (13.9%/21%); the actual figures and deviations are to be found in the Commission file<sup>182</sup>.
- (216) The Spanish sub-arrangement continued to exist after the period of tension around 1991. Akzo states: *'In the beginning of 1992, the regular meetings were put to an end as a result of the letter originating from the Divisional Board of Akzo Nobel [...]*

*New arrangements from 1993 till 1999*

*After some time, probably in 1993, following the new 1992/1993 European arrangements, new meetings in Spain were organized. The new arrangements differed from those previously held in the following respect:*

- Compensations were no longer applied.*
- The frequency of the meetings was reduced to approximately one meeting per year.*
- [...]*
- Despite the separate talks, the participants had clear guidelines from the European meetings as their volumes and prices had to stick within the overall arrangements for (greater) Europe.*

*The participants in the meetings were the same as those mentioned under i). However, on two occasions the undertakings were represented by other people [...] In 1999, Akzo Nobel stopped its participation in the arrangements regarding Spain, as part of its withdrawal from arrangements with respect to all countries'*<sup>183</sup>.

- (217) Hence, after the period of tensions the influence of the main agreement on the Spanish sub-arrangement became stronger ('clear guidelines from the European meetings'). It is possible that these guidelines were issued by Akzo and Atochem to their respective salespersons in Spain. The Commission could not establish that guidelines were directly addressed to Perorsa. This does,

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<sup>181</sup> Laporte [7859].

<sup>182</sup> Akzo [10214ff], [10217ff].

<sup>183</sup> Akzo memorandum [8816ff].

however, not necessarily mean that Perorsa was unaware of the main agreement, as spelled out in recitals (320)ff.

(218) There is substantial internal Akzo-documentation on meetings concerning Spain for the period 1988-1999:

- (a) undated hand-written internal minutes of a meeting of Akzo collaborators concerning Spain which covered amongst others, ways of calculating market shares and how to consider captive use of OP<sup>184</sup>;
- (b) a meeting on 26 January 1991 concerning Spain, covering market share questions<sup>185</sup>;
- (c) a note on theoretical, real sales and deviations in Spain<sup>186</sup>;
- (d) meetings on 29 January 1990 and on 17 November 1989<sup>187</sup>;
- (e) documents from around 1979, distributed at a meeting of 23 October 1980 which show that the discussion on Spain took place already before and mention realised sales, deviations and accumulated deviations for the period 1978-1980<sup>188</sup>;
- (f) a list with agreed market shares and actual sales for the period 1990-98<sup>189</sup> in Spain;
- (g) a list with AC Treuhand data for Spain until the third quarter 1999<sup>190</sup>;
- (h) notes of a meeting in a hotel in Barcelona on 6 November 1997<sup>191</sup>;
- (i) tables and meeting documents for the period 1979-1999<sup>192</sup>.

(219) Atochem, while confirming the sub-arrangement related to Spain,<sup>193</sup> did not provide any further details on it.

#### 7.2.2.1 The involvement of Perorsa's parent and sister companies

(220) Laporte owns together with FMC (each company 50%) the Spanish subsidiary Perorsa. According to Perorsa, Laporte's ownership is via Laporte Nederland B.V. (25%) and Laporte Industries Ltd. (25%). PC describes that Laporte plc. owns 50% of Perorsa. Before 1992, the Laporte/Solvay joint venture Interlox controlled 50% of Perorsa. The chairmanship of the board rotated between the owners of Perorsa. During most of the time in the nineties either [...] of the

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<sup>184</sup> see pages [10102ff] and [10252ff].

<sup>185</sup> see pages [10107f].

<sup>186</sup> see page [10113].

<sup>187</sup> see pages [10124ff] and [10128f].

<sup>188</sup> see pages [10207ff].

<sup>189</sup> see pages [10214f].

<sup>190</sup> see page [10261].

<sup>191</sup> see pages [10283ff].

<sup>192</sup> See pages [10131ff]

<sup>193</sup> Atochem memorandum [1379], [1385].

Laporte group or [...] of FMC was chairman, while the other was board member. Other board members included [...] (PC), [...] (FMC) and [...] (FMC).

#### 7.2.2.1.1 FMC's view on Perorsa

- (221) FMC and Perorsa describe that Perorsa acted independently, and if not, that it was under control of PC/Laporte, and not under the influence of FMC.
- (222) In its written reaction on the hearing FMC provided a list of Perorsa's board members. The list shows that both [...] (1987-2001) and [...] (1992-1999), both employees of Laporte or one of its direct or indirect subsidiaries, were member of Perorsa's board. Both persons also participated in a number of meetings of the European cartel, as shown in Table 4.
- (223) FMC is further of the opinion that Perorsa, as a full-function joint venture, acts as an autonomous economic entity and that it is responsible for its own behaviour. Perorsa's commercial behaviour was, according to FMC, not exercised through its and Laporte's representation on the board. Instead, Laporte/PC exercised their influence in a pervasive manner through external, non-institutional means such as reporting obligations of [...] of Perorsa to [...] of PC/Laporte, joint customer visits of [...] of Perorsa with representatives of PC/Laporte, price setting of PC/Laporte products resold by Perorsa with a profit margin and world wide prices for key clients negotiated by Laporte's account managers since at least 1990. Perorsa hence acted autonomously. If anything, it was Laporte who was responsible for the behaviour of Perorsa, but not FMC.
- (224) [...]
- (225) [...]
- (226) [...]
- (227) FMC also stressed that both Akzo and Atochem perceived that Perorsa belonged to PC and Laporte.
- (228) [...]

#### 7.2.2.1.2 PC's and Laporte's view on Perorsa

- (229) [...] <sup>194</sup>.
- (230) [...]
- (231) PC furthermore stressed that neither it nor Degussa UK has direct ownership ties with Perorsa, but that 25% of Perorsa is owned by Laporte Nederland B.V. and another 25% by Laporte Industries Ltd. The remaining 50% is owned by FMC. PC also pointed out that Perorsa's Board of Directors was not informed on Perorsa's involvement in the agreement nor did it influence the operational business of Perorsa.

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<sup>194</sup>

PC [7859].

- (232) PC acknowledges the existence of two Pan-European contracts with key clients, one contract with[...]of [...], and one with[...]from [...]. The [...] contract also obliged[...]to accept deliveries from Perorsa. However, Perorsa was, according to PC's statement, not forced to deliver to[...]or[...], but it was invited to deliver to[...]or[...], an invitation which Perorsa could have refused, but did not. PC furthermore contests that these Pan-European contracts accounted for [...] % of Perorsa's sold quantities and estimates that they amounted to around [...] %.
- (233) PC contests that its salespersons visited and negotiated with Perorsa's Spanish clients. It acknowledges that sometimes persons from PC accompanied Perorsa's salespersons in order to improve customer relations. PC in no way acted on behalf of Perorsa, and did not negotiate contracts on behalf of Perorsa. Occasionally, PC's technicians visited Perorsa's clients on specific request, but never on their own initiative.
- (234) In the reply to the hearing, PC also contested that PC organised training for employees of Perorsa, claiming that it had safety meetings on technical issues, but no training was given to Perorsa's salespersons.
- (235) In its reply to the SO, PC also stated that it has no personnel or financial interlinkages and that the management of Perorsa acted in an absolutely autonomous manner, independently of directives or other influence from PC.
- (236) PC admits it exerted influence on Perorsa in order to prevent exports from Spain<sup>195</sup>, but any possible co-ordination concerning the Spanish market was, according to PC, organised by Perorsa, [...]. PC itself claims it had no indications of meetings between Akzo, Atofina and Perorsa<sup>196</sup>. PC claims that any potential co-ordination concerning the Spanish market took place without participation of PC.
- (237) PC received sales data from Perorsa and transferred it to AC Treuhand. PC sent the tables for Spanish sales data, which it received from AC Treuhand, back to Perorsa.
- (238) A number of key clients are covered by Pan-European contracts, which are directly negotiated by PC. PC states that these contracts are not binding for Perorsa.
- (239) Perorsa also claims it receives training and technical assistance from PC and close contacts with [...] of PC concerning commercial questions.

#### 7.2.2.2 Perorsa's view of the Spanish sub-arrangement

- (240) Perorsa says it was not aware of the main agreement nor was it aware of any European guidelines for the Spanish sub-arrangement. It therefore considers that the Spanish sub-arrangement must be considered as a separate agreement with a separate prescription period, which depends on the Commission's first request for information sent to a company involved in the Spanish cartel. This

<sup>195</sup>

[...].

<sup>196</sup>

PC submission [11806].

is the letters sent to Akzo and Atochem in May 2002. Perorsa confirms it sent its sales data to PC and received in return the Fides-statistics from PC. Perorsa claims it considered the exchange of data to be legitimate, as it only received total industry figures and not client data or the market shares of the competitors.

- (241) Perorsa claims it ended its involvement on 14 January 1997 when its representatives attended a last meeting. At the latest, Perorsa sees its involvement ended on 14 February 1997, [...].
- (242) In its reply to the SO, Perorsa confirms that its collaborators [...] and [...] participated in a number of meetings concerning the Spanish sub arrangement from 1980 to 1996. Perorsa furthermore confirms that [...] attended a meeting with competitors in mid January 1997. Perorsa categorically denies that its representative [...] attended a meeting with AC Treuhand.
- (243) The documents referred to in the SO<sup>197</sup> are not, in Perorsa's view, legal proof, as 1998 data are missing, 1999 data might be wrong or might be estimated. Estimations would be easy to make, given the limited number of clients and knowing data for 1997. It is also possible that the data originates from PC, who knew about key clients.
- (244) Perorsa also claims that it was not the leader in Spain, and points to the fact that no evidence was found on this for the time after 1993. It claims that [...] of Akzo had a leading role in the Spanish sub-arrangement. Perorsa does not rule out the possibility that [...] acted until 1992 as president of the meetings, but claims that there is no evidence for the time after 1991.
- (245) In its reply to the SO, Perorsa put into question some findings of Akzo on the evolution of sold quantities of a certain chemical product (isononanyl chloride).
- (246) Perorsa claims that the exchange of data from 1997 onwards with PC, the subsidiary of its 50% parent company Laporte, was fully legitimate and that Perorsa did not know that the data transmitted was used in the context of an anti-competitive agreement. In any case, Perorsa's involvement after stopping to attend meetings was of a different nature, not intentional and less severe than during the pre-1997 exchange of data.
- (247) Perorsa also stresses that an important part of its turnover was products bought from PC and resold on the Spanish market, and that Perorsa depended on a very limited number of large customers.
- (248) In its reply to the SO, Perorsa claimed that the Commission had failed to verify the allegations against Perorsa and that it had treated Perorsa differently from other parties. Perorsa also considered that the Commission had not precisely and sufficiently proved its involvement and that the Commission's conclusions were not founded. Perorsa nevertheless acknowledged some principal facts. It denied, however, knowing about the European main

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<sup>197</sup>

Annex 75 of Akzo [10222-29].



agreement, considered the Spanish cartel to be a cartel apart from the main agreement, and claimed that the involvement of Perorsa in that Spanish arrangement is time barred.

- (249) Perorsa sees the Spanish sub-arrangement as different from the main agreement as it started later than the main agreement. Also, Perorsa was not informed about the main agreement and there was no need for it to be informed, as its exports were negligible. The apparent similarity in both agreements could be caused by Akzo, which was the driving force behind both agreements. According to Perorsa, the alleged contacts by PC to prevent Perorsa from exporting would not have been necessary if the Spanish arrangement was been part of the main agreement. Then, both Akzo and Atochem could have given the message directly to their Spanish counterparts.

#### 7.2.2.3 The Commission's view of the Spanish sub-arrangement

- (250) The Commission considers that Perorsa was involved in the Spanish sub arrangement and knew about the main agreement for a number of reasons. Perorsa was in regular contact with employees from PC, Akzo and Atochem, who were involved in the main agreement. As regards the Pan-European contracts, Perorsa failed to explain how such contracts, which it claims were binding, could have been integrated in the Spanish sub-arrangement as they would have been exogenous, if the Spanish cartel had worked without the knowledge of the European cartel. Perorsa did not provide any documentation which showed that it was bound by the conditions of the Pan-European contracts of PC.
- (251) Given the detailed figures submitted by Akzo, the Commission does not consider that these are estimates by Akzo. Akzo states that the numbers have been “handed in by Elf Atochem and Perorsa”<sup>198</sup>. The Commission also rejects Perorsa's idea that these figures might come from PC. PC had no reason to inform its competitors Akzo and Atochem about Perorsa's sales, without informing its ‘sister’ company Perorsa itself. While the Commission considers that PC knew about the Spanish sub-arrangement, it has no indication that PC took over the data deliveries of Perorsa after the claimed interruption of meetings from February 1997 onwards. On the contrary, the Commission considers that the tables submitted by Akzo support the view that Perorsa was active in the Spanish sub-arrangement until the end of 1999, hence clearly beyond the claimed prescription periods of January and/or May 1997.
- (252) Also, the other participants involved in Spain gave the impression that Perorsa did know about the main agreement. The representatives of Akzo and Atochem knew about the existence of the Spanish sub-arrangement, and they were in frequent contact with persons from Perorsa [...]. Akzo and Atochem were active in both the Spanish side arrangement and the main agreement. Representatives from PC/Laporte were present on Perorsa's Board of Directors. Of these representatives, [...]and [...]were active in the main agreement on behalf of PC/Laporte and also attended AC Treuhand meetings, the latter at times as chairman. [...] So even if, as claimed by Perorsa and

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Akzo [10223]

contested by the Commission, its sales persons [...],and [...] did not know about the main agreement, Perorsa knew perfectly well about the agreement as members of its Board of Directors knew about the main agreement. The Commission also rejects the idea that there was a particular need for Akzo and Atochem to hide the existence of the Spanish sub-arrangement from PC's knowledge or to hide the existence of the main agreement from Perorsa's knowledge. Akzo and Atochem were perfectly aware that Perorsa and PC were sister companies with partly the same parent companies, with PC having representatives in Perorsa's board and giving at least technical advice.

- (253) The representatives of PC knew or could have known about the complementary sub-arrangement concerning Spain, even if they did not know its details. Representatives from Akzo and Atochem, who were PC's interlocutors in the main agreement, knew about the Spanish sub-arrangement. PC also served as link between Perorsa and AC Treuhand as regards the exchange of data, which was in the same format as the data exchanged in the main agreement. Furthermore, salespersons from PC who knew about the main agreement occasionally accompanied [...] to Spanish clients<sup>199</sup>.
- (254) Perorsa could have known and must have known that its restriction to exports would not only benefit its sister company PC, but also the other parties. By limiting its exports and hence not interfering with the main agreement Perorsa contributed to the overall functioning of the agreement. Perorsa knew that the data exchange via AC Treuhand must have involved the other big producers, even if it sent and received the data via PC. This data must have been the basis for the negotiations on the Spanish market.
- (255) PC claims that any possible co-ordination concerning the Spanish market was without participation of representatives of PC. PC however admits that it tried to prevent Perorsa from selling outside Spain, although it had no indications about meetings between. Akzo, Atochem and Perorsa.
- (256) The Commission notes that PC does not deny the existence of a Spanish sub-arrangement, even if it was not aware of possible details. PC neither confirms nor denies knowledge of the Spanish sub-arrangement. The Commission therefore considers that PC knew or could have known that its interlocutors from Akzo and Atochem in the HP, UP, and XL arrangements were involved in similar schemes concerning the Spanish market. By trying to prevent Perorsa from exporting, it became involved in the Spanish sub-arrangement. PC's interference is yet another link, on top of the direct involvement of Akzo and Atochem both in Spain and in the main agreement, between the Spanish arrangement and the main agreement.
- (257) The Commission is of the opinion that Perorsa's involvement lasted until the end of 1999, i.e. the end of the main agreement. In any case the effects of the alleged last meeting on 14 January 1997 lasted beyond May 1997, the moment

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<sup>199</sup> PC confirms in its reply to the SO the fact that PC employees accompanied Perorsa's salespersons to Spanish clients. PC stresses that its salespersons only attended meetings with two clients, whereas technical staff met more clients. This happened, according to PC, only on Perorsa's request.

Perorsa considers the point in time before which prescription from fines apply. Perorsa itself indirectly admitted that its involvement was at the latest until mid-February 1997, [...] <sup>200</sup>.

- (258) The Commission considers that Perorsa's involvement in the Spanish sub-arrangement lasted until 1999 and not, as claimed by Perorsa, until 14 January or at the latest February 1997. The main agreement including the Spanish arrangement might have suffered tensions, but both Akzo and Atochem consider the Spanish arrangement to have lasted until 1999. It is difficult to understand how the two other players on the Spanish market could think that the Spanish arrangement continued, if Perorsa with its large market share in Spain had already left, as Perorsa claims, in early 1997. In particular, it does not seem plausible that they would have calculated deviations between the theoretical and actual market shares until the third quarter 1999 <sup>201</sup> if Perorsa had left years before.
- (259) Perorsa's involvement is also confirmed by a table submitted by Akzo regarding the Spanish market, which compares actual sales with the quotas for Perorsa for 1997 <sup>202</sup> and also prices, volumes and clients of Perorsa until 1999 <sup>203</sup>. Perorsa's argument that these figures were estimated by PC or by the other parties is not convincing. If the Spanish arrangement ended in January 1997, as Perorsa claims, the available documents and the descriptions of the other parties in Spain, would show an indication of the end of the arrangement. This, however, is not the case. Perorsa failed to clearly cancel its involvement in the Spanish sub-arrangement. The other parties continued to consider Perorsa to be part of the agreement, and they received data via PC and AC Treuhand. As shown in Akzo's various documents <sup>204</sup>, Akzo was aware of Perorsa's intended prices for 1998, the current (1997) prices <sup>205</sup>, and Perorsa's current (1999) prices <sup>206</sup> and sales <sup>207</sup> from the third quarter of 1999
- (260) The Commission rejects Perorsa's claim that evidence is lacking, in particular with regard to Akzo's annexes 71 and 75, which provides table with prices, clients and sales volumes in Spain up to 1999. Perorsa claims it only keeps annual data, such that it could not verify the nine month figures in the tables. The Commission therefore notes that Perorsa does not contest the correctness of the figures as such, but that it cannot confirm the data. As regards Perorsa's claim that data from 1998 is missing, it should be noted that data for the first nine months of 1998 data are available, hence only figures for the last quarter of 1998 are missing. One table submitted by Akzo also shows data for the first nine months of 1999.

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<sup>200</sup> See Perorsa's reply to the SO in Spanish: 'La participación de Perorsa en los debates y reuniones terminó con la última participación de [...] el 14 de Enero 1997 y nunca después del 14 de febrero de 1997 cuando el [...]'; and: '1997 y nunca después del 14 de febrero' and 'y a mas tardar en febrero'.

<sup>201</sup> See e.g. page [10215]

<sup>202</sup> Akzo [10214].

<sup>203</sup> Akzo [10217ff, 10131ff].

<sup>204</sup> Akzo [10214ff, 10217ff, 10222ff, 10247ff].

<sup>205</sup> Akzo [10247ff].

<sup>206</sup> Akzo [10222ff].

<sup>207</sup> Akzo [10131ff].

- (261) The Commission hence considers the Spanish sub-arrangement to have lasted until 31 December 1999. In any case, the Spanish arrangement lasted beyond the claimed period of prescription of May 1997. Neither Akzo nor Atochem mentioned any rupture of the Spanish sub-arrangement prior to the end of the main agreement. Therefore, even if the alleged interruption of the yearly meetings with competitors after [February 1997]\* did take place, Perorsa did not inform the other parties about its decision. At least the other parties stuck to the arrangement with [...] and [...], so its effect lasted at least half a year beyond the last confirmed meeting in mid-January 1997. [...] <sup>208</sup> [...] especially as Atochem and Akzo consider the Spanish sub-arrangement to have continued.
- (262) The Commission is of the opinion that prescription from fines would only apply if the infringement had ended five years before the requests for information sent out on 31 January 2002, which is not the case. Firstly, as the Spanish sub-arrangement was part of the main agreement, the first request for information sent out to any member of the main agreement interrupted prescription. Secondly, the request for information was also sent to Laporte, which is indirectly a 50% owner of Perorsa. As the letter asked for any involvement of Laporte and its subsidiaries in an agreement on OP, that letter also covered the Spanish sub-arrangement. Thirdly, even if the Spanish sub-arrangement were to be considered to be an agreement in its own right (which the Commission contests), the first request for information sent to Laporte [...] interrupted prescription from fines for illicit activities which were not terminated before 31 January 1997.
- (263) The Commission notes that Perorsa itself, in its own submission (the reply to the SO), claims that its involvement was interrupted ‘at the latest’ [...] in mid-February 1997. Mid-February 1997, however, does not fall within the period of prescription from fines, as the requests for information were sent out on 31 January 2002. The Commission therefore concludes that prescription from fines does not apply to the Spanish sub-arrangement.
- (264) In conclusion and on the basis of the evidence available, the Commission considers that an agreement on OP within the overall framework of the main agreement lasted at the latest from 31 December 1975 until 31 December 1999 between Akzo, Perorsa and Atochem concerning the Spanish market. As Spain joined the Community on 1 January 1986, the involvement concerning the Spanish market prior to Spain’s accession will not be taken into account in this Decision. Perorsa, by refraining from exports and taking part in the exchange of data was nevertheless involved in the main agreement concerning the Community market from at least 31 December 1975.
- (265) Perorsa claims that the infringement did not affect trade between Member States prior to Spain’s accession to the Community in 1986. The Commission considers that the trade patterns inside the Community prior to Spain’s accession were affected, also by means of trade diversion. It is the Commission’s view that trade patterns from Spain to the Member States prior to 1986 and vice versa, and also trade patterns and prices within the

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<sup>208</sup>

See [...].

Community prior to 1986 would have been different without Perorsa's involvement.

- (266) The Commission considers that its level of proof is sufficient to show Perorsa's involvement in the Spanish sub-arrangement and the main agreement. Perorsa cannot claim discrimination, as it had the chance to defend its views after receiving the SO. Furthermore, Perorsa knew about an ongoing investigation prior to the sending of the SO, as it received requests for information. The Commission also considers the fact that Perorsa was dependent on a limited number of clients, and that it acted as a reseller for PC's products on the Spanish market as irrelevant for this case. It does not matter whether Perorsa sold own or traded products as long as it agreed or concerted with competitors on prices and/or quotas. The Commission also considers it irrelevant whether or not Perorsa was dependent on a limited number of clients.
- (267) As regards the control of Perorsa, the Commission concludes that Perorsa acted on its own. [...] However, even after the information obtained during the hearing, the Commission did not find any clear proof that either parent company was controlling Perorsa.

### 7.2.3 *The UK Sub-arrangement*

- (268) Concerning the **United Kingdom**, Akzo describes that separate meetings between Maprac/MontEdison, PC (previously Interrox), Atochem (previously Luperox) and Akzo took place until 1991. These talks involved the fixing of prices and price increases, exchange of data on sales volumes, allocation of market shares and/or clients<sup>209</sup>. After 1991, according to Akzo, there were no more similar meetings with competitors in the United Kingdom<sup>210</sup>. Atochem has not explicitly mentioned separate meetings prior to 1991 related to the United Kingdom. Atochem reports a specific United Kingdom meeting in June 1992<sup>211</sup>. After the period of tensions, the United Kingdom was included in the main agreement, but this time without Maprac, the local UK distributor of MontEdison products<sup>212</sup>.
- (269) PC denies that it was involved in the UK sub-arrangement until 1991. It claims that Laporte's plant in Warrington was involved in the UK-sub arrangement. According to PC, the sub-arrangement was not renewed after the tensions in 1991. Instead the main agreement also covered the United Kingdom from then. As the sub-arrangement on the United Kingdom ended in 1991, prescription from fines applies. PC claims that the UK market must be seen as a distinct market until it was covered by the main agreement. Reasons for this are trade barriers on the UK market, the mere fact of having a distinct sub

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<sup>209</sup> Akzo provides a substantial amount of mostly hand-written notes from meetings on the UK market [9202-9414]. According to these notes, meetings of the agreement related to the UK market have taken place among others on 3 November 1989 [9251ff], 13 October 1983 [9387ff], 11 October 1982 [9400], 27 July 1982 [9402].

<sup>210</sup> Akzo memorandum [8803ff].

<sup>211</sup> See page [8479].

<sup>212</sup> Akzo [8809].

arrangement with partly different players and high transport costs. PC itself was not part of that arrangement prior to 1991, but Laporte was.

#### 7.2.4 *The Commission's view on the sub arrangements*

- (270) On the basis of the evidence available, the Commission considers that a sub-arrangement on UP within the overall framework of the main agreement lasted from 1 January 1971 until 28 February 1996 between Akzo, PC and Atochem and continued until 31 December 1997 between Akzo and PC. [...] AC Treuhand continued the work of its predecessor Fides and was involved in the agreement from 28 December 1993 until 31 December 1999. Perorsa was a party to the UP-arrangement concerning Spain, and with regard to its integration in the main agreement by not exporting outside Spain, from at least 31 December 1975 until 31 December 1997.

### 7.3 Acquisition of non-participating competitors

- (271) According to Akzo, the participants made an additional arrangement around 1993. They agreed to buy competitors which threatened the existence of the main agreement. Akzo states:

*'It should be added that when Akzo rejoined the arrangements in 1992-1993, there was some serious competition from other players and new entrants in the market. The participants agreed that each of them would purchase such a (new) competitor. Akzo agreed to acquire the organic peroxide business of Nobel and Enichem. Laporte would purchase Aztec. Atochem would take over [...]. Only the latter did not occur'<sup>213</sup>.*

- (272) Akzo bought parts of Nobel and parts of Enichem in 1994. Laporte bought Aztec in 1994.
- (273) The Commission considers that the main agreement on OP also included an arrangement to buy competitors in order to reduce competition.

### 7.4 The leader of the infringement

- (274) Perorsa (in Spain), Akzo and Atochem are considered by some of their competitors to have had a 'role of leader in, or instigator of the infringement'<sup>214</sup>. The Commission considers the evidence not to be sufficient to determine that any party was leader of the infringement.

### 7.5 The nature and reliability of the evidence

- (275) In this case the three main participating undertakings have admitted their involvement in unlawful price fixing and market sharing arrangements contrary to Article 81(1) of the Treaty (and, implicitly, Article 53(1) of the EEA Agreement as well).

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<sup>213</sup> Akzo memorandum I [8676].

<sup>214</sup> Guidelines on the methods of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, OJ C9 of 14 January 1998, p. 3ff.

- (276) Detailed factual statements admitting the violation have been provided by several producers either before or after requests for information from the Commission.
- (277) In each case the providers of the statements have also incriminated other producers and in many instances have attributed the initiative and the prime responsibility in the illegal venture to one (or more) of the other producers. The role played by the various producers is spelled out in some considerable detail.
- (278) The statements made to the Commission by undertakings involved in a serious and covert violation of the competition rules have to be treated with some caution, particularly if they seek to put a gloss on the events related which is favourable to themselves, for example by diminishing their role in the violation.
- (279) However, in this case the Commission is not relying on the uncorroborated declarations of only one of a limited number of participants. In the first place, the different versions of the events in question provided by the different producers, including the principal actors, demonstrate a remarkable coherence and consistency with one another as regards the salient facts.
- (280) Furthermore, the relevant facts are not only detailed in the statements of the producers. They are also amply documented in the vast quantity of contemporaneous notes which the Commission has obtained from different producers.
- (281) It is not of course necessary for the proof of a violation once (i) the existence and operation of an agreement and (ii) the adherence to it of each of the alleged participants, is demonstrated, for there to be direct proof that every participant was involved in, or assented to, each and every manifestation of a cartel throughout its duration. Reasons of both substantive law and evidence militate against such a requirement.
- (282) Given the very secrecy of a cartel, and the special characteristics of an "agreement" in the context of antitrust law, the relevant facts in a cartel case may often have to be proved by indirect evidence or by a combination of direct and indirect evidence.
- (283) In this case it is hardly necessary to employ this method of proof given the quantity and probative value of the documentary evidence obtained. For the most part, direct evidence of the existence and implementation of the agreement has been obtained in the form of the Treuhand tables and the meeting notes.
- (284) There are naturally certain gaps in the documentary evidence. Insofar as it may be necessary to fill any such lacunae, it is permissible to infer the existence of facts from other proven facts.
- (285) For the most part, the contemporaneous documentation, beside itself constituting relevant evidence of the facts to which it relates, corroborates the

accounts given by the producers in their statements to the Commission and tends to confirm their reliability. In this connection, minor inconsistencies or lacunae, for example, as to the exact date, the product (HP, UP and/or XL) discussed, or the participants in a particular meeting, which are revealed on a close comparison of the statement of one producer with the statement or documents provided by another, do not undermine the essential credibility of the statement, in particular as the agreement covered a long period of around 30 years and none of the individuals involved at that time was available to supply detailed information.

- (286) The Commission considers that the agreement and the various arrangements had a practical impact on the market for OP, see recitals (437)ff.



## Part II – LEGAL ASSESSMENT

### 1 LEGAL ASSESSMENT

#### 1.1 The EC Treaty and the EEA Agreement

##### 1.1.1 *Relationship between the EC Treaty and the EEA Agreement*

- (287) The arrangements set out above applied to all countries in the EEA, i.e. all the present Member States together with Norway<sup>215</sup>. There were no clients for OP in Iceland and Liechtenstein. The arrangements in question extended to Austria, Sweden and Finland prior to their accession to the Community on 1 January 1995.
- (288) The EEA Agreement, which contains provisions on competition analogous to the Treaty, came into force on 1 January 1994. This Decision therefore includes the application as from that date of those rules, primarily Article 53(1), to the arrangements to which objection is taken.
- (289) Insofar as the arrangements affected competition and trade between Member States, Article 81 of the Treaty is applicable. The operation of the cartel in Norway and its effect upon trade between the Community and those EFTA states which were or are part of the EEA (“EFTA/EEA-states”) falls under Article 53 of the EEA Agreement.

##### 1.1.2 *Jurisdiction*

- (290) If an agreement or practice affects only trade between Member States, the Commission retains competence and applies Article 81(1) of the Treaty. On the other hand, if an agreement affects only trade between EFTA/EEA states, then the EFTA Surveillance Authority is alone competent and applies the EEA competition rules, in particular Article 53(1) of the EEA Agreement.
- (291) When, however, the effect on trade is “mixed”, i.e. affecting trade between the Community and the EFTA/EEA states, the Commission is the competent authority (and may apply both Article 81 of the Treaty and Article 53 of the EEA Agreement) where:
- (a) the agreement or practice has an appreciable effect on trade between Member States and on competition within the Community; or
  - (b) the combined turnover of the undertakings concerned in the territory of the EFTA states is less than 33 per cent of their turnover in the European Economic Area.
- (292) In this case the turnover of the parties achieved in the territory of the EFTA states is less than 33% of their turnover in the EEA, and the primary effects of

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<sup>215</sup> For client lists of Norway see [9513], [9576].

the arrangements in question are on trade between Member States and on competition in the Community.

- (293) The Commission is therefore competent in this case to apply both Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

## **1.2 Application of the Competition Rules**

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

- (294) Article 81(1) of the Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production and markets, or share markets or sources of supply.
- (295) Article 53(1) of the EEA Agreement (which is modelled on Article 81(1) of the Treaty) contains a similar prohibition. However, the reference in Article 81(1) of the Treaty to “trade between Member States” is replaced in the EEA Agreement by a reference to “trade between Contracting Parties” (in this context “contracting parties” means the Community and the individual (then) EFTA-States), and the reference to preventing, restricting or distorting “competition within the common market” is replaced by a reference to competition “within the territory covered by ... [the EEA] agreement”.
- (296) In this case, the fact that the evidence of Perorsa’s participation relates to the period before the accession of Spain to the Community does not mean that Article 81 of the Treaty does not apply. It may be that the Spanish sub-arrangement dealt mainly with the Spanish national market. However, by deviating and distorting trade patterns, the cartel affected competition within the Community, hence Community competition rules applied to Perorsa. Similar reasoning applies to the Spanish branches of Akzo and Atochem. However, the effects of the Spanish sub-arrangement within Spain prior to Spain’s accession are not subject to Article 81 of the Treaty. A similar reasoning applies to those countries which joined the Community in 1973, 1981 and 1986.

### *1.2.2 Agreements and Concerted Practices*

- (297) An *agreement* can be said to exist when the parties adhere to a common plan, which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing. No formalities are necessary, and no contractual sanctions or enforcement measures are required. The agreement may be explicit or implicit in the behaviour of the parties. Furthermore, it is not necessary, in order for there to be an infringement of Article 81(1) of the Treaty, for the participants to have agreed in advance upon a comprehensive common plan. The concept of *agreement* in Article 81(1) of

the Treaty would apply to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement.

- (298) In its judgement in the PVC II case<sup>216</sup>, the Court of First Instance of the European Communities stated that “*it is well established in the case law that for there to be an agreement within the meaning of Article 81(1) of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way*”.
- (299) Although Article 81(1) of the Treaty<sup>217</sup> distinguishes between “agreements between undertakings”, “concerted practices” and “decisions by associations of undertakings”, the object is to bring within the prohibition of that Article a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition<sup>218</sup>.
- (300) The criteria of co-ordination and co-operation laid down by the case law of the Court, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the commercial policy which it intends to adopt in the common market. Although that requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators. The object or effect thereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market<sup>219</sup>.
- (301) Thus conduct may fall under Article 81(1) of the Treaty as a “concerted practice” even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour<sup>220</sup>. Furthermore, the process of negotiation and preparation culminating effectively in the adoption of an overall plan to regulate the market may well also (depending on the circumstances) be correctly characterised as a concerted practice.

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<sup>216</sup> Judgement of the Court of First Instance of 20 April 1999, joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and others v Commission* (PVC II) [1999] ECR II-00931, at recital 715.

<sup>217</sup> The case law of the Court of Justice and Court of First Instance in relation to the interpretation of Article 81 of the Treaty applies equally to Article 53 of the EEA Agreement. References in this text to Article 81 therefore apply also to Article 53.

<sup>218</sup> Case 48/69 *Imperial Chemical Industries v Commission*, [1972] ECR 619 at recital 64.

<sup>219</sup> Joined Cases 40-48/73, etc. *Suiker Unie and others v Commission*, [1975] ECR 1663 at recital 174.

<sup>220</sup> See also judgement of the Court of First Instance in Case T 7/89 *Hercules v Commission*, [1991] II ECR 1711, at recital 256.

- (302) Although in terms of Article 81(1) of the Treaty the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period. Such a concerted practice is caught by Article 81(1) of the Treaty even in the absence of anti-competitive effects on the market<sup>221</sup>.
- (303) It is not necessary, particularly in the case of a complex infringement of long duration, for the Commission to characterise conduct as exclusively one or other of these forms of illegal behaviour. The concepts of agreement and concerted practice are fluid and may overlap. Indeed, it may not even be possible to make any such distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while considered in isolation some of its manifestations could accurately be described as one rather than the other. It would, however, be artificial analytically to subdivide what is clearly a continuing common enterprise having one and the same overall objective into several discrete forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time. Article 81 of the Treaty lays down no specific category for a complex infringement of the present type<sup>222</sup>.
- (304) In its PVC II judgement<sup>223</sup>, the Court of First Instance stated that “[i]n the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [81] of the Treaty”.
- (305) An “agreement” for the purposes of Article 81(1) of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract at civil law. Moreover, in the case of a complex cartel of long duration, the term “agreement” can properly be applied not only to any overall plan or to the terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose.
- (306) As the Court of Justice (upholding the judgement of the Court of First Instance) has pointed out<sup>224</sup>, it follows from the express terms of Article 81(1)

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<sup>221</sup> See also the judgement of the Court of Justice in Case C-199/92 *P Hüls v Commission*, [1999] ECR I-4287, at recitals 158-166.

<sup>222</sup> See judgement of the Court of First Instance in Case T-7/89 *Hercules v Commission*, [1991] ECR II 1711, at point 264.

<sup>223</sup> Judgement of the Court of First Instance of 20 April 1999, joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and others v Commission* (PVC II), ECR [1999] II-00931, at recital 696.

<sup>224</sup> Judgement of the Court of Justice in Case C-49/92P *Commission v Anic Partecipazioni SpA* [1999] ECR, I-4235, at recital 81.

of the Treaty that an agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.

### 1.2.3 *Single and continuous infringement*

- (307) A single infringement is a set of individual infringements interlinked by an objective identity (all the component features serve the same purpose) and a subjective identity (same parties, aware of participating in or supporting a common objective)<sup>225</sup>.
- (308) A complex cartel may thus properly be viewed as a *single and continuous infringement* for the time frame in which it existed. The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. The validity of this assessment is not affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute a violation of Article 81(1) of the Treaty.
- (309) Although a cartel is a joint enterprise, each participant in the agreement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries or cheating may occur, but that will not, however, prevent the arrangement from constituting an agreement/concerted practice for the purposes of Article 81(1) of the Treaty where there is a single common and continuing objective.
- (310) The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and the same anti-competitive effect. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible -for the whole period of its adherence to the common scheme- for the acts of the other participants pursuant to the same infringement. This is certainly the case where it is established that the undertaking or, in analogy, association of undertakings, in question was aware of the unlawful behaviour of the other participants or could have reasonably foreseen or been aware of them and was prepared to take the risk<sup>226</sup>.
- (311) In fact, as the Court of Justice stated in its judgement in *Commission v Anic Partecipazioni*, the agreements and concerted practices referred to in Article 81(1) of the Treaty necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged. It follows that infringement of that Article may result not only from an isolated act but also from a series of acts or from continuous conduct. That

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<sup>225</sup> Joined Cases T-25/95 etc. *Cimenteries CBR and others v Commission*, cited above, recitals 4025ff.

<sup>226</sup> See judgement of the Court of Justice in *Anic Partecipazioni*, (footnote 224), at recital 83.

interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves an infringement of Article 81 of the Treaty<sup>227</sup>.

#### 1.2.4 Associations of undertakings

- (312) Article 81(1) of the Treaty also prohibits as incompatible with the common market decisions by associations of undertakings which have as their object or effect the prevention, restriction or distortion of competition within the common market. In order to be able to apply sanctions to an association and its members for their involvement in the same infringement the Commission must demonstrate that the conduct of the association is separate from the conduct of its members<sup>228</sup>. It is not necessary that associations of undertakings engage in commercial or manufacturing activity for Article 81 of the Treaty to apply to them. The Court states: *'it is not necessary for trade associations to have a commercial or economic activity of their own for Article 85(1) of the Treaty to be applicable to them [...] Article 85(1) of the Treaty applies to associations in so far as their activities or those of the undertakings belonging to them are calculated to produce the results which it aims to suppress. To place any other interpretation on Article 85(1) of the Treaty would be to remove its substance [...] The Court points out in that regard that the wording of Article 85(1) of the Treaty does not exclude agreements between associations of undertakings and undertakings from the scope of the prohibitions which it lays down. In order to find that an association and its members have participated in one and the same infringement the Commission must establish conduct on the part of the association which is separate from that of its members'*<sup>229</sup>.

### 1.3 The nature of the infringement in this case

- (313) In this case, the behaviour of the parties constitutes a single and continuous infringement.
- (314) As stated in recital (303), it is not necessary for the participants to have agreed in advance upon a comprehensive common plan, in order to prove an infringement of Article 81(1) of the Treaty. The concept of "agreement" in Article 81(1) of the Treaty would apply to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement. Further, the process of negotiation and preparation culminating in the adoption of an overall plan to regulate the market may well also (depending on the circumstances) be correctly characterised as a concerted practice.
- (315) The agreement found to exist in this case was composed of several parts within an overall scheme which laid down the lines of the parties' action in the

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<sup>227</sup> See the judgement of the Court of Justice *Anic Partecipazioni*, (footnote 224), recitals 78-81, 83-85 and 203.

<sup>228</sup> Judgement of the Court of First Instance of 15 March 2000, in joined cases T-25/95, T-26/95, from T-30/95 to T-32/95, from T-34/95 to T-39/95, T-46/95, T-48/95, from T-50/95 to T-65/95, from T-68/95 to T-71/95, T-87/95, T-103/95 and T-104/95, *Cimenteries CBR SA and others v Commission* [2000], recital 1325, in ECR. II-848, hereafter Cement case.

<sup>229</sup> See recitals [1320] and [1325] of the Cement case mentioned above.

market and restricted their individual commercial conduct. This was done with the aim of pursuing an identical anti-competitive object and a single economic aim, namely to distort the normal movement of prices in the European market for OP by the allocation of volumes quotas and the fixing of prices. Moreover, it would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements.

- (316) The arrangement between AC Treuhand, Akzo, Atochem, Perorsa, Laporte and PC can be considered as a single and continuous infringement composed of a set of agreements based on the 1971 main agreement and including sub-arrangements.

### *1.3.1 The possible infringement with regard to Andos, Hercules [...]*

- (317) For the involvement of Andos, the Commission has not found any substantial evidence. Andos exchanged historical volume data, but no proof was found of the exchange of price or client data, nor was proof found that Andos agreed to or implemented prices or price increases. Furthermore, any fine for possible involvement of Andos in anti-competitive collusion is likely to be time-barred as the last meeting with competitors took place in February 1996. The meeting at the trade fair in Paris in April 1997 (inside the period for the fine to be time-barred) was, according to Andos, coincidental, and there is no proof to the contrary<sup>230</sup>. Therefore Andos was not an addressee of the SO.

- (318) For the involvement of Hercules, the Commission has not found any substantial evidence. Furthermore, any fine for possible involvement of Hercules in anti-competitive collusion would be time-barred. Therefore Hercules was not an addressee of the SO.

- (319) [...].

### *1.3.2 The nature of the infringement with regard to Perorsa*

- (320) As for Perorsa, although Article 81 (1) of the Treaty does not refer explicitly to the concept of a single and continuous infringement, it is settled case-law of the Courts that “an undertaking may be held responsible for an overall cartel even though it is shown that it participated directly only in one or some of the constituent elements of that cartel, if it is shown that it knew, or must have known, that the collusion in which it participated was part of an overall plan and that the overall plan included all the constituent elements of the cartel”<sup>231</sup>.

<sup>230</sup> See Section 6.2.3.2 Facts regarding Andos.

<sup>231</sup> See the judgements of the Court of First Instance of 14 May 1998 in Cases T-147/89, T-295/94, T-304/94, T-310/94, T-311/94, T-334/94, T-348/94, *Buchmann v Commission*, *Europa Carton v Commission*, *Gruber + Weber v Commission*, *Kartonfabrik de Eendracht v Commission*, *Sarrió v Commission* and *Enso Española v Commission*, ECR [1998] II-00813 at recitals 121, 76, 140, 237, 169 and 223, respectively. See also the judgement of the Court of First Instance of 20 March 2002, in case T-9/99, *HFB Holding and Isoplus Fernwärmetechnik v Commission*, ECR [2002] II-01487 at recital 231.

- (321) The fact that Perorsa did not participate directly in all the constituent elements of the overall cartel cannot relieve it of responsibility for the infringement of Article 81 (1) of the Treaty.
- (322) Such a conclusion is not at odds with the principle that responsibility for such infringements is personal in nature, nor does it neglect individual analysis of the evidence adduced, in disregard of the applicable rules of evidence, or infringe the rights of defence of the undertakings involved.
- (323) Perorsa was – not least due to its market share in Spain - a core member of the sub-arrangement in Spain, while PC was in charge of the regions other than Spain. For Akzo, Atochem and PC the Spanish market was part of the overall agreement. The division of work was that Perorsa implemented the agreement in Spain and PC dealt with the rest. Perorsa agreed not to export and implemented the Spanish sub-arrangement with representatives of Akzo and Atochem. Representatives from PC/Laporte on Perorsa's board of Directors ([...], [...]) were active participants in the main agreement on behalf of PC/Laporte and representatives from PC also sometimes accompanied Perorsa's salespersons during customer visits.
- (324) Perorsa claims that the Spanish agreement was not part of the main agreement, as it had its own specificities. Perorsa states that it did not know about the main agreement and was just a party to the Spanish arrangement. This differs from Akzo's and Atochem's description, which consider the Spanish sub-arrangement as part of the main agreement.
- (325) Perorsa confirms the broad facts on Spain described in Section 7.2.2, but considers its participation ended on 14 January 1997, and at the latest on 14 February 1997<sup>232</sup>.
- (326) As the Spanish sub-arrangement was, in Perorsa's view, a separate agreement, the relevant date for prescription would be, according to Perorsa, May 2002, when the first requests for information were sent to participants in the Spanish arrangement (Akzo and Atochem). The requests for information sent out at the end of January 2002 did not, in Perorsa's view, concern the Spanish market and did not stop prescription from fines. Furthermore, in Perorsa's view, even the requests for information of 31 January 2002 were sent more than 5 years after 14 January 1997, the last confirmed meeting. Alternatively, Perorsa considers that there was no or little impact on trade and that the infringement, if any, should be considered as 'serious' and not as 'very serious'.
- (327) As described in Section 7.2.2.3, the Commission considers Perorsa's involvement to have lasted until the end of the main agreement in December 1999. In any case, the Commission considers that the Spanish sub-arrangement was part of the main agreement, and Perorsa knew, should or at least could have known that. Akzo and Atochem clearly saw it as part of the main agreement, and collaborators of PC/Laporte, who were in frequent contact

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See Perorsa's reply to the SO in Spanish: 'La participación de Perorsa en los debates y reuniones terminó con la última participación de [...] el 14 de Enero 1997 y nunca después del 14 de febrero de 1997 cuando el [...] fue despedido'.



with Perorsa and who were also on Perorsa's Board of Directors, were participants in the main agreement. Also the tables<sup>233</sup> in Akzo's possession with precise quantities and price data until September 1999 concerning Perorsa demonstrate that the Spanish sub-arrangement lasted until 1999.

- (328) Even if the Spanish arrangement were to be considered as an agreement on its own, the request for information of 31 January 2002 to Laporte, one parent company of Perorsa, would have interrupted prescription for the allegedly separate agreement on Spain.. However, the Commission is of the opinion that the Spanish arrangement was part of the main agreement. In particular, Perorsa could have reasonably foreseen, as defined by the judgment in *Anic*<sup>234</sup>, that the main producers had a broader agreement beyond OP in Spain. This is obviously the case as both Akzo and Atochem would have taken Perorsa's exports into account, as this would have interfered with the main agreement. If Perorsa had not limited its exports, Akzo and Atochem would have both addressed Perorsa and PC in order to stop exports from Spain. Hence, the restriction of Perorsa to the Spanish market was part of the overall agreement. PC supported this as well by trying to convince FMC to limit or stop Perorsa's exports from Spain<sup>235</sup>.
- (329) In this case, it is clear that Perorsa knew, should or at least could have known, that its own unlawful conduct was part of an overall plan which also included, over and above the collusion on prices in which it actually participated, collusion on the market shares of the major producers in other regions<sup>236</sup>. Although Perorsa was directly only taking part in the Spanish sub-arrangement, it knew of the European dimension of the overall agreement. Members of Perorsa's Board of Directors participated in meetings of the main agreement. Its interlocutors were the representatives of Akzo and Atochem. Unlike PC/Laporte/FMC/Perorsa, these two companies did not have separate legal entities dealing with Spain and the rest of Europe. [...] <sup>237</sup>.
- (330) The Commission notes that Perorsa itself appears to accept that its involvement still had effects in mid-February 1997<sup>238</sup>, [...]. The Commission furthermore considers that the effects of the cartel were felt far beyond the day of the last meeting confirmed by Perorsa as having been in mid-January 1997. According to Akzo, the meetings took place on a yearly base. Perorsa does not claim that it has informed the other participants about its departure. Neither Akzo nor Atochem have given any indication at all that the Spanish arrangement stopped before the end of the main agreement. Therefore, prescription from fines does not apply to Perorsa, even if Perorsa contests the Commission's view that the Spanish arrangement lasted, with Perorsa's involvement, until the end of 1999.

<sup>233</sup> Akzo annexes 71 and 75 [10131, 10223-10229], see recital (251)

<sup>234</sup> See footnote 224.

<sup>235</sup> PC [7859].

<sup>236</sup> The Court stated in *Anic Partecipazioni* (see footnote 224) 'That is the case where it is proved that the undertaking in question was aware of the unlawful conduct of the other participants, **or could reasonably foreseen such conduct**, and was prepared to accept the risk.' **Bold** added.

<sup>237</sup> [...]

<sup>238</sup> In Spanish: '1997 y nunca después del 14 de febrero' and 'y a mas tardar en febrero'.

### 1.3.3 *The nature of the infringement with regard to AC Treuhand*

- (331) In its reply to the SO, AC Treuhand argued that it was not a member of the contested agreement but served as a secretary. It denied having played an active role and claimed that it only followed the contract with the other parties. AC Treuhand considers that it was not an actor but only an assistant to the cartel in question. AC Treuhand claims not to be responsible and liable for the behaviour of Fides Trust AG before 1993. AC Treuhand claims the agreement in question stopped functioning already in 1995/1996. Finally AC Treuhand considers itself to be involved neither as an association of undertakings nor as an undertaking.
- (332) The Commission considers that AC Treuhand's involvement took place at several levels. It was involved in the collusive arrangements by means of its decisions and actions for the purpose of restricting competition in the sector of OP, even though it does not produce OP itself. As spelled out in recitals (95)ff and especially in recital (105), the tasks of AC Treuhand went clearly beyond those of a secretariat. AC Treuhand committed involvement and stimulated the involvement, by its decisions on the modalities of implementation of the cartel (for example with regard to quotas). AC Treuhand had a certain authority over the members of the cartel to restrict their competitive behaviour, beyond what the members had agreed amongst themselves. AC Treuhand was aware that only the continued existence of the cartel<sup>239</sup> would enable it to continue its role in the agreement and acted in an independent way, different from the members.
- (333) AC Treuhand performed a number of supplementary and complementary tasks, some of which involved a certain power of discretion and independent decision making. AC Treuhand acted independently from the cartel members by undertaking and approving the auditing, which was an essential feature of the agreement. Furthermore, the AC Treuhand fax<sup>240</sup> on how to integrate newly acquired companies in the quota system can also be seen as a decision by AC Treuhand which implemented the decision of the other parties how to integrate the new companies in the quota system<sup>241</sup>.
- (334) The Commission accepts the consistent descriptions made independently by Akzo, PC and Atochem<sup>242</sup> as true. According to this, AC Treuhand acted as an organiser as well as a guardian of the successful implementation of the anti-competitive arrangements, which have been determined in the contested agreements. AC Treuhand kept the original agreements and only allowed consultation by the members during meetings or on its premises. It was aware that only the continued existence of the cartel<sup>243</sup> would enable it to maintain its role in the agreement and to gain its remuneration, and that its calculations of the deviations served as the basis for the implementation and continuation of

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<sup>239</sup> See Atochem [1381], Akzo [8826ff], PC [7860ff].

<sup>240</sup> See [9472ff].

<sup>241</sup> See [8810].

<sup>242</sup> See recitals (91) ff.

<sup>243</sup> See Atochem [1381], Akzo [8826ff], PC [7860ff].

the agreement. Members were also not allowed to take copies of the calculations.

- (335) As described in Section 5.3.3, the activities of AC Treuhand formed the basis to realise the cartel. Two parties confirm that AC Treuhand provided legal consultation including advice how to avoid the detection of the cartel by antitrust authorities (see footnote 55). Thus, AC Treuhand not only knew about the unlawful activities of the other parties, but it had a decisive role in the successful performance of the cartel over many years. [...], the same person was involved before and after 1993.
- (336) [...] was responsible for all actions undertaken by AC Treuhand with regard to the OP-cartel. [...] changed his employer in 1993 from Fides to AC Treuhand, but his task for the agreement remained essentially unchanged in the pre- and post Fides times. AC Treuhand also knowingly took over the infrastructure and working methods. Hence AC Treuhand knew about all the activities pursued by Fides and it took over the contractual obligations from Fides in relation to the producers of OP. It is therefore immaterial that AC Treuhand concluded new contracts with the OP-producers. In 1998, AC Treuhand proposed new quotas (see recital (97)), and [...] chaired at least one meeting (see recital (99)).
- (337) Contrary to the arguments of AC Treuhand, the dependency arising from the contract with the other companies did not prevent it from being involved in the infringement. Even if the service contract imposed obligations on AC Treuhand, it was not acting under instructions of any other person when it decided to conclude the service contract. Moreover, in its reply to the SO, AC Treuhand itself pointed out that the contract was rescindable at all times so that it was free at anytime to step back.
- (338) Likewise, AC Treuhand cannot assert successfully that it was bound by the Swiss law of obligations. Even if the Swiss law was applicable pursuant to the international law of conflicts, it did not oblige anyone to pursue unlawful activities.
- (339) Furthermore, it is immaterial that AC Treuhand was not a direct contracting party to the main arrangement of 1971 or one of the sub-arrangements concluded by the producers of OP. It is sufficient that AC Treuhand participated within parts, such as a framework agreement of a complex arrangement. The parties agreed that AC Treuhand would take part as the promoter and coordinator of the conclusion and implementation of the anti-competitive agreements as well as performing practical legal consultation regarding these agreements.
- (340) Consequently, this contract of services concluded between AC Treuhand on the one hand and the remaining undertakings concerned on the other hand was an essential part of the complex anti-competitive arrangement envisaged and performed by the parties. AC Treuhand added objectivity and transparency within the agreement and increased the stability of its functioning. The fact that the particular contract of services did not contain a restriction of competition between AC Treuhand and the producers of OP but solely the

restriction between the latter, does not prevent Article 81(1) of the Treaty from applying to AC Treuhand.

- (341) AC Treuhand claims that it should not be responsible for the activities of Fides. AC Treuhand claims it acquired legal personality on 28 December 1993 and would, if at all, only be responsible for the period from 1994 onwards. The Commission did not find specific circumstances<sup>244</sup> in this case allowing it to impose on AC Treuhand responsibility for Fides' behaviour prior to the management buyout. This decision is without precedent to other cases where such specific circumstances can be found.
- (342) AC Treuhand did not directly benefit from the successful implementation of certain price increases or customer allocation within the agreement, as it did not sell OP. AC Treuhand nevertheless directly benefited from the success of the agreement by being paid for continuing to fulfil its statistical and other tasks. According to the other parties to the agreement, AC Treuhand was chosen, amongst other things, because its location in Switzerland shielded it from Community-antitrust investigations, for example concerning travel reimbursements. And AC Treuhand knew that the success of the agreement was an integral part of its role and a prerequisite for continued payment for its services, as also shown by the fact that AC Treuhand's role and the payments to it ended when the agreement ended.
- (343) As a result, AC Treuhand was involved in several ways. Not all of those ways are contrary to Article 81 of the Treaty and Article 53 of the EEA Agreement. AC Treuhand acted independently from the cartel members by undertaking and approving the auditing, which was an essential feature of the agreement. Furthermore, AC Treuhand was also involved, as described in section 5.3, amongst others, by its advice to hide the existence of the agreement from competition authorities, its chairing, mediation and participation in meetings or its proposals of quotas at least once.
- (344) Therefore the Commission concludes that AC Treuhand infringed Article 81 of the Treaty and Article 53 of the EEA Agreement. AC Treuhand has, as spelled out in the SO, participated in the agreement as an undertaking and/or took decisions as an association of undertakings. In analogy with its approach to leave open whether an infringement was an agreement or a concerted practice, the Commission does not consider it necessary to specify in which role (undertaking or association of undertakings) these Articles were infringed.
- (345) In the present case, AC Treuhand claims that it is not an undertaking involved in the infringement and not an association of undertakings. It considers itself not to be an undertaking involved, as it is not active on the market concerned. The Commission considers that AC Treuhand is an undertaking within the meaning of Article 81(1) of the Treaty since it is a company which carries on an economic activity. The activity is complementary to those of the cartel member active in the OP market. AC Treuhand has and could have affected the market for OP by its proposals, mediation, statistics etc. A sudden

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<sup>244</sup> See Judgement of the Court of First Instance in of 11 March 1999 *NMH Stahlwerke GmbH v Commission*, Case T-134/94, ECR [1999] Page II-00239.

departure of AC Treuhand, would have, at least temporarily, disrupted the functioning of the agreement just as the departure of a producer of OP would have done. AC Treuhand's claim that it is not an association of undertakings should also be rejected, as its functions were to a certain extent the functions typically fulfilled by an association. Unlike most associations of undertakings, AC Treuhand maintained the ability to cancel its relations with its members independently of the members' will. However, for the time it was in contractual relations with the producers of OP, it also fulfilled the functions of an association of undertakings.

- (346) The Commission considers that it is not necessary to prove the exact role of hybrid entities such as AC Treuhand, which clearly have infringed Article 81 of the Treaty. AC Treuhand participated in the infringement directly for the purpose of restricting competition in the sector of OP, even it does not produce OP itself, and/or it took decisions with that purpose. Hence AC Treuhand infringed Article 81 of the Treaty and Article 53 of the EEA Agreement.
- (347) However, in this Decision the Commission considers that the evidence shows that AC Treuhand infringed Article 81 of the Treaty and Article 53 of the EEA Agreement both as an association of undertakings and as an undertaking in its own right.
- (348) The Commission's view that an undertaking or an association of undertakings which is not involved in production of the goods concerned is nevertheless subject to Article 81 of the Treaty or Article 53 of the EEA Agreement was first manifested in a Decision in 1980<sup>245</sup>. The decision concerned an undertaking called Fides (Milan), which has by coincidence the same name as Fides (Zurich), the 'predecessor' of AC Treuhand. The Commission stated: "[Fides Milan] which provides management and accountancy services and also specialises in supervisory and statistical research activities, was entrusted ... with the task of supervising the proper implementation of the agreement at issue ... [Fides Milan] is also an undertaking within the meaning of that Article, since it is a company which carries on an economic activity complementary to those of the companies which signed the memorandum ... and which, in doing so, effectively took part in a practice which restricted competition with the meaning of Article 85(1). [now Article 81] ... Consequently, if fines were to be imposed on the undertakings which concluded the agreements in question, Fides [Milan] also would have to be taken into consideration to the extent of its joint responsibility. In such a case, it would be necessary in assessing the gravity of the infringement, also to take into account the fact that until now, the Commission has never addressed a decision ... to undertakings in a position of joint responsibility of this kind."
- (349) In this Decision the role of AC Treuhand went beyond the tasks of Fides Milan, as it played the active role described in section 5.3. AC Treuhand has knowingly contributed to this objective of restricting competition in the sector of OP, by supporting the overall plan, although it does not produce OP. Without the need to clearly specify, the Commission considers that AC

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<sup>245</sup> See Commission Decision of 17 December 1980 relating to Italian cast glass, OJ L 383 of 31 December 1980, pp. 19-26.

Treuhand's role in this case contains both elements of decisions made as an association of undertakings and elements of AC Treuhand's involvement in the agreement and/or concerted practice as an undertaking. The difference to the case of Fides Milan, which was only considered as an undertaking, is justified by the different facts. The Commission therefore considers that AC Treuhand was party to the agreement and/or took decisions as an undertaking and/or as an association of undertakings<sup>246</sup>.

#### 1.4 Restriction of competition

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

(351) Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement contain a non-exhaustive list of agreements which are restrictive of competition. They include those which :

- (a) directly or indirectly fix selling prices or any other trading conditions;
- (b) limit or control production, markets or technical development;
- (c) share markets or sources of supply.

(352) These are the essential objectives of the horizontal arrangements under consideration in the present case. Prices being the main instrument of competition, the various collusive arrangements and mechanisms adopted by the producers were all ultimately aimed at an inflation of the price to their benefit and above the level which would be determined by conditions of free competition. Market sharing and price fixing by their very nature restrict competition within the meaning of both Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

(353) The effect upon competition of the cartel has to be considered as a whole and in the light of all the circumstances, but the principal aspects of the complex of agreements and arrangements, which can be characterised as restrictions of competition, are:

- (a) allocating markets and market share quotas;
- (b) agreeing concerted price increases;<sup>247</sup>
- (c) designating the producer which was to "lead" price increases in each national market;
- (d) circulating lists of current and future target market shares in order to co-ordinate price increases;<sup>248</sup>

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<sup>246</sup> In the Fides Milan case the Commission concluded that the two separate agreements of the producers amongst each other and the agreement of the producers with Fides Milan form in practice a single agreement.

<sup>247</sup> For an example of announced price increases see pages [10854f].

- (e) devising and applying a reporting and monitoring system to ensure the implementation of their restrictive agreements;<sup>249</sup>
  - (f) participating in regular meetings and having other contacts in order to agree to the above restrictions and to implement and/or modify them as required;
  - (g) elaborating a compensation mechanism for deviations from the agreed market shares;
  - (h) the co-ordinated acquisition of competing companies which were not part of the agreement.
- (354) This complex of agreements and/or concerted practices and/or decisions of associations has as its object the restriction of competition within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.
- (355) It is settled case-law that for the purposes of the application of Article 81(1) of the Treaty and Article 53 (1) of the EEA Agreement there is no need to take into account the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved<sup>250</sup>.
- (356) In this case, however, the Commission considers that, on the basis of the elements which are put forward in this Decision, it has also proved that the anti-competitive cartel decisions were implemented and that the cartel arrangements therefore actually had an anti-competitive effect.
- (357) The implementation of the cartel decisions was ensured by the monitoring scheme instituted by the conspirators. Moreover, they used it to compare sales results with the allocated volume quotas, so that they could monitor compliance with the market allocations.
- (358) Even if it is not necessary to show actual anti-competitive effects where the anti-competitive object of a conduct is proven, the anti-competitive effects of the cartel arrangements were established in “Part I” of this Decision. It is, in fact, proven that throughout the relevant period, target prices either raised actual prices or prevented actual prices from coming down and volume quotas prevented the companies from competing for market share<sup>251</sup>. Furthermore, the Commission is of the opinion that the parties have not shown any significant evidence or developed a coherent theory showing that, contrary to the evidence described before, the agreement was not implemented or had no effect. Occasional disputes and deviations from agreed targets in a cartel are frequent and must not be seen as failure to implement.

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<sup>248</sup> Examples are [9601-74] for exchange of prices and quantities of the three main members of the agreement.

<sup>249</sup> Amongst others, the different names Akzo, Atochem and Laporte gave internally for the various peroxides have been converted into an AC Treuhand code, example see [10048ff]. These figures were audited by AC Treuhand.

<sup>250</sup> Case T-62/98 *Volkswagen AG v Commission* [2000] ECR II-2707, recital 178.

<sup>251</sup> See also recitals (437)ff.

- (359) Whilst the competition-restricting object of the arrangements is sufficient to support the conclusion that Article 81(1) of the Treaty and Article 53 (1) of the EEA Agreement apply, the competition-restricting effects of those arrangements have nonetheless also been established and reinforce that conclusion.

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

- (360) Article 81(1) of the Treaty is aimed at agreements which might harm the attainment of a single market between the Member States, whether by partitioning national markets or by affecting the structure of competition within the common market. Similarly, Article 53 (1) of the EEA Agreement is directed at agreements that undermine the achievement of a homogeneous European Economic Area.
- (361) The market for OP is characterised by a substantial volume of trade between Member States. There is also a considerable volume of trade between the Community and EFTA/EEA states.
- (362) The application of Article 81(1) of the Treaty and Article 53(1) of EEA Agreement to a cartel is not, however, limited to that part of the members' sales that actually involve the transfer of goods from one State to another. Nor is it necessary, in order for those provisions to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States or Contracting Parties<sup>252</sup>.
- (363) In this case, the cartel arrangements covered a large part of the trade throughout the Community and EEA. The existence of a price-fixing mechanism and a quota allocation system must have resulted, or was likely to result, in the automatic diversion of trade patterns from the course they would otherwise have followed<sup>253</sup>.
- (364) Perorsa claims that the Spanish sub-arrangement, which it sees as a separate agreement, had no appreciable effect on trade and that the Commission has failed to prove this impact.
- (365) The Commission nevertheless considers that the agreement between the producers of OP had an appreciable effect upon trade between Member States and between Contracting Parties of the EEA.
- (366) Perorsa confirms itself that exports and imports took and take place, as do other participants. Examples are deliveries in case of accidents in production plants, which happen regularly in the sector, as well as the sales of PC's OP in Spain [...]. In any case, the existence of the cartel has prevented cross border trade compared to a situation of competition in the OP sector.

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<sup>252</sup> See the judgement of the Court of First Instance in Case T-13/89 *Imperial Chemical Industries v Commission* [1992] ECR II-1021, at recital 304.

<sup>253</sup> See the judgement of the Court of Justice in Joined Cases 209 to 215 and 218/78 *Van Landewyck and others v Commission* [1980] ECR 3125, at recital 170.



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

## **1.6 Provisions of competition rules applicable to Austria, Finland, Norway and Sweden and to previous enlargements**

- (368) The EEA Agreement entered into force on 1 January 1994. For the period prior to that date during which the cartel operated, the only provision relevant for the present proceedings is Article 81 of the Treaty. Insofar as the cartel arrangements covered Austria, Finland, Norway and Sweden (then EFTA Member States), they will not be considered as a violation of Article 81(1) of the Treaty.
- (369) In the period 1 January to 31 December 1994, the provisions of the EEA Agreement applied to the four EFTA Member States which had joined the EEA. The cartel thus constituted a violation of Article 53(1) of the EEA Agreement as well as of Article 81(1) of the Treaty, and the Commission is competent to apply both provisions. The operation of the cartel in those four EFTA states during that one year period falls under Article 53(1) of the EEA Agreement.
- (370) After the accession of Austria, Finland and Sweden to the Community on 1 January 1995, Article 81(1) of the Treaty became applicable to the cartel insofar as it affected those markets. The operation of the cartel in Norway remained in violation of Article 53(1) of the EEA Agreement.
- (371) In practice, insofar as the cartel affected the markets in Austria, Finland, Norway and Sweden, it constituted a violation of the EEA and/or Community competition rules as from 1 January 1994.
- (372) After the accession of the United Kingdom, Denmark and Ireland (1973), Greece (1981) and Spain and Portugal (1986) to the Community, Article 81(1) of the Treaty became applicable to the cartel insofar as it affected those markets.

## **1.7 Addressees of the decision**

### *1.7.1 Undertakings and associations of undertakings directly involved*

- (373) Akzo Nobel N.V., Akzo Nobel Chemicals International B.V., Akzo Nobel Nederland B.V., Atochem, Perorsa, PC and AC Treuhand are addressees of the Decision because of their direct proven participation in the infringement. Atochem absorbed the activities of Luperox, which ceased to exist. Therefore Atochem is responsible for Luperox activities<sup>254</sup>. There is a clear continuity in behaviour and overlap in the persons involved between Luperox and Atochem. AC Treuhand acted as an undertaking and/or association of undertakings and Akzo Nobel N.V., Akzo Nobel Chemicals International B.V., Akzo Nobel Nederland B.V., Atochem, Perorsa and PC acted as undertakings.

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<sup>254</sup> See Judgement of the Court in case C-279/98, *Cascades SA v Commission*, ECR [2000] I-9693 at recital 79.

### 1.7.2 *The responsibility of parent companies in this case*

- (374) The Commission considers Laporte and PC to be jointly and severally liable for the illicit activities of PC for the period from 1 September 1992 until 31 December 1999. For the purposes of this case the Commission considers that for the period before 1 September 1992, PC was alone liable for the infringement, as none of the parent companies of the Interlox Joint Venture (Solvay and Laporte) exercised decisive influence on PC. This is different to the approach chosen in 1984, when the Commission fined Laporte and Solvay for an infringement by the Interlox joint venture, which also involved PC at the time<sup>255</sup>. The different approach is justified by changes in case law since then and by differences in the cases.

#### 1.7.2.1 The responsibility of Laporte

- (375) The Commission considers Degussa UK Holdings Limited (formerly Laporte plc.) to be liable for the illicit activities of PC after 1 September 1992. It is established that Laporte controlled the entire capital of PC. Therefore, the Commission presumes that Laporte exercised full (100%) effective control over its subsidiary since the end of the Interlox joint venture on 31 August 1992. This presumption is not contradicted by any element, rather to the contrary.
- (376) In the context of Decision 85/74/EEC<sup>256</sup>, which concerned PC as part of the Interlox joint venture, the Commission considered that: ‘The Interlox companies do not determine their market behaviour autonomously but in essentials follow directives issued by the parent companies. Solvay and Laporte contend that Interlox is a separate undertaking constituting a merger falling outside Article 85 (1), but for the purpose of these proceedings have accepted that the parent companies are liable for any infringements referable to the Interlox operation.’ At the time PC was a major producer of Persulphates, and involved in violations of Article 85 (now Article 81) of the Treaty. Hence, at that time the parties initially argued that the Interlox joint venture was effectively controlling the Interlox companies, while the Commission saw the parent companies in control. However, nobody argued that the Interlox companies (such as PC) were acting independently. As stated by PC, Interlox was a joint venture without legal personality.
- (377) In this case Laporte and PC put forward the following arguments against the possible responsibility of Laporte for the action of its subsidiary PC:
- (a) It is claimed that none of the managers of Laporte were aware of the illicit activities of PC and that PC acted without approval of Laporte and without informing Laporte.
  - (b) Laporte claims that it issued a compliance programme<sup>257</sup> in order to avoid conflicts with competition law.

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<sup>255</sup> See Commission Decision 85/74 of 23 November 1984, OJ L 35 of 7 February 1985 p. 1ff.

<sup>256</sup> OJ L 035 of 7 February 1985 p. 1ff.

<sup>257</sup> PC [8317-39].

- (c) It is claimed that Laporte was not involved in the attempts to organise the continuation of the agreement in 1993<sup>258</sup>. PC furthermore submits minutes of Laporte's manager meetings from 1994 which should prove that Laporte was not involved in the operational business.
- (378) The Commission does not consider these arguments as sufficient evidence to absolve Laporte from any liability for the actions of its subsidiary. The Commission does not consider official minutes submitted by Laporte as 'adducing sufficient evidence', within the meaning of the case law of the Court, in order to reverse the presumption. Given the secrecy of discussions about the agreement, it is not to be expected that delicate issues such as cartel agreements were discussed with a broader audience and minutes made of those discussions.
- (379) The Commission considers furthermore that 'adducing sufficient evidence' for the responsibility of Laporte exists.
- (380) Laporte co-ordinated its various subsidiaries producing OP throughout the world. Laporte also followed the financial results of PC, and realised that during the period of tensions prices and financial performance of PC were not satisfactory. PC contacted its parent company on important issues. For example, a 1991 letter from PC to the Interlox joint venture clearly shows that PC asked 'for green light' concerning some decisions<sup>259</sup> of lesser importance than that of participating in a cartel. Hence, PC did not act independently. Laporte is clearly not a financial holding. Nevertheless, Laporte failed to explain in detail if and how Laporte influenced and co-ordinated the behaviour of its subsidiaries in several continents, all producing OP.
- (381) The same person, [...], fulfilled a number of functions within PC and Laporte over a span of time. [...] first worked with PC, then in the Laporte headquarter in London, followed by working for Laporte GmbH, the holding company owning PC<sup>260</sup>. [...] participated in cartel meetings from 1992 onwards and was still a member of a manager's meeting group in Laporte. [...] was also appointed by one of Laporte's holding companies owning Perorsa to be a representative on Perorsa's board of directors.
- (382) [...] <sup>261</sup>. PC claims it did that without telling Laporte, although FMC and Laporte jointly own Perorsa. PC has no direct ownership ties with Perorsa nor with FMC. However, PC, including its branch Peroxid Chemie Teesside/UK was, according to the organisational chart given by Laporte, not in charge of co-ordinating the other European subsidiaries of Laporte. Laporte itself was in charge of the European, Australian, US, Brazilian and South African subsidiaries and participations. Akzo also confirms that the Spanish agreement followed European guidelines (see recital (216)). Laporte failed to explain the organisational structure: How could Laporte's full subsidiary (PC) give orders

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<sup>258</sup> PC [7858].

<sup>259</sup> PC [8074], see also section 2.2.2.2 and recital (376).

<sup>260</sup> See also recital (509)ff for the career of [...].

<sup>261</sup> PC [7859] in German: 'In Gesprächen mit Mitarbeitern der FMC ist seitens der Peroxid Chemie lediglich versucht worden, Perorsa von Lieferungen außerhalb Spaniens abzuhalten.'

to FMC concerning the behaviour of Perorsa, while the owners of Perorsa were Laporte and FMC?

- (383) As described in recital (271)ff, the parties agreed to buy non-participating competitors. Indeed, in 1994, Laporte, and not PC, bought the US competitor Aztec. No party has contested the Commission's view on the arrangement to buy competitors. PC considered in its reply to the SO that a fine should not be imposed in respect of the agreement to buy competitors, as this would be the first case where such behaviour was taken into consideration. Hence, the Commission concludes that there was an arrangement to buy competitors and that Laporte (and not PC) implemented the decision to buy competitors as further evidence that Laporte was involved in the main agreement.
- (384) PC and Laporte acted jointly at the beginning of the administrative procedure. Laporte, to which the request for information was addressed, replied at the beginning on its own while asking for an extended deadline<sup>262</sup>. Then, there was a joint reply to the request for information<sup>263</sup>, and afterwards PC and Laporte announced jointly their willingness to co-operate<sup>264</sup>. The subsequent company statement<sup>265</sup> was made on behalf of PC alone, but it still states that the company statement is based on the announced intention of both companies to make a company statement<sup>266</sup>. The Commission considers, hence, the company statement, the application for leniency and the submission of evidence to be on behalf of Laporte and PC, as the companies have not made clear the distinction between their individual contributions to the leniency procedure. Hence PC and Laporte have acted jointly. In a clarification, PC/Laporte expressed their opinion<sup>267</sup> that PC could be the only addressee of the SO and the Decision.
- (385) Akzo refers in its company statement predominantly to 'Laporte' and not to PC as a participant in the agreement. Atochem refers to PC.
- (386) By its ownership, Laporte has via its holding companies, appointed and re-appointed the managers of PC.
- (387) Laporte claims that it cannot be held responsible for the behaviour of PC as it has no *direct* ownership ties with PC. Instead, Laporte owns and controls PC by intermediate holding companies. As the Commission failed to address the SO to these holding companies, it may not address a decision to the ultimate parent company without having established the whole chain of responsibility.
- (388) The Commission acknowledges that the SO was addressed to the ultimate subsidiary PC and the ultimate parent company Laporte. The intermediate companies Laporte GmbH, Laporte Holding GmbH, Laporte Nederland B.V.<sup>268</sup> did not receive the SO. At the beginning of the procedure, Laporte

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<sup>262</sup> PC [6891-92].

<sup>263</sup> PC [7551].

<sup>264</sup> PC [6952-53].

<sup>265</sup> PC [7799ff].

<sup>266</sup> PC [7802].

<sup>267</sup> PC [11926ff].

<sup>268</sup> See Section 1.3

received a request for information, concerning the ‘undertaking’ Laporte, i.e. Laporte and its subsidiaries. In its reply, Laporte stated that only employees of PC took part in the meetings mentioned in the request for information<sup>269</sup>. The functional organisational chart submitted by Laporte shows a direct line between Laporte and PC and does not mention intermediate holding companies. A second chart showing the legal ownership structure shows the details of the ownership structure, including Laporte GmbH, Laporte Holding GmbH, Laporte Nederland B.V.<sup>270</sup>. From that it can be seen that the intermediate holding companies do not fulfil any functional task. This is underlined by the fact that only Laporte and PC approached the Commission at the beginning of the procedure, and that on no occasion did the three intermediate companies contact the Commission, in particular after the request for information which included them as well.

- (389) It can also be noted that the members of the Board of Directors of Perorsa (Spain) were employees of PC, and not of any holding company with direct or indirect ownership ties to Perorsa. The co-owners of Perorsa, Laporte Nederland B.V. and Laporte Industries Ltd. have no direct ownership ties at all with PC. Therefore it can be concluded that the legal intermediate owners of PC do not play an operational role.
- (390) Therefore, the Commission rejects the argument that it did not address a SO to the holding companies, as neither PC nor Laporte have given any evidence of any serious operational involvement of those holding companies. Laporte is fully liable for the behaviour of PC since the end of the Interrox joint venture in September 1992, even if the intermediate holding companies have not received the SO.

#### 1.7.2.2 The responsibility of FMC and Laporte for Perorsa<sup>271</sup>

- (391) As described in section 7.2.2.3, the Commission concludes that Perorsa acted on its own and that neither of its parent companies exercised decisive influence on it individually. Therefore FMC and Laporte are not considered to be responsible for the behaviour of the joint venture Perorsa.

## 1.8 Duration of the infringement

- (392) Insofar as the cartel covered Austria, Finland, Norway and Sweden, it does not constitute an infringement of Community and EEA competition rules before 1 January 1994, when the EEA Agreement came into effect.

### 1.8.1 *The duration of the main infringement*

- (393) With effect from 1 January 1971, the major European producers of OP, PC, Akzo and Atochem (respectively companies acquired and absorbed by these later on) agreed on the basic principles by which they would cartellise the European market for HP, UP and XL.

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<sup>269</sup> Laporte [7560].

<sup>270</sup> Laporte [8683-84].

<sup>271</sup> See also section 7.2.2.

- (394) This plan, to which the three founding members subscribed, was implemented over a long period employing similar mechanisms and pursuing the same common purpose of eliminating competition, while more detailed mechanisms for specific regions or sub-products were applied.
- (395) The collusion between the three main producers of OP began in 1971 and lasted until 31 December 1999.
- (396) Some of the sub-arrangements might have ended earlier, but the Commission considers that the main infringement ended at the time when the ties with AC Treuhand were cancelled.
- (397) During that period of almost 30 years, the parties involved in the collusion experienced frictions concerning quotas, clients, regions, certain sub-products of OP and temporarily associated members. Frictions are frequent in cartel agreements, but they do not imply that a cartel ends each time the parties argue about a certain issue. In this case, the frictions which occurred in 1992 were of such a nature that they could not be seen as ending the cartel. The same applies to the evolving regional coverage of the cartel, its internal organisations and the parties involved in it.
- (398) Atochem supports the Commission's view of one single and continuous infringement in spite of the period of tensions around 1992. However, both Akzo and PC argue that they did not take part in any infringement in respect of the OP around 1992. Therefore Akzo and PC argue that there were two separate infringements. The companies claim that the meetings were restarted in February 1993.
- (399) The Commission does not rule out the possibility that 'official' summit cartel meetings may not have taken place under the umbrella of AC Treuhand during the relatively short period of tensions from October 1991 until June 1992. Nevertheless, as described in recitals (134) and (139), telephone conversations, bilateral meetings between PC/Atochem [...], data exchange and contractual relations with AC Treuhand continued during the period of tensions. This did not happen when parties terminated the infringement in 1999 and ceased contacts with AC Treuhand. The Commission considers that the period of tensions lasted only a few months and ended at the latest with the meeting on UK questions in June 1992 followed by the summit meeting of the persons in charge of OP in October 1992.
- (400) Although it may well be true that the cartel meetings during this period did not have the same degree of organisation and sophistication, the Commission rejects the argument that there was no infringement between October 1991 and June 1992 for the following reasons:
- (401) Firstly, no convincing proof of discontinuation was submitted by the parties. A lot of similarities of the agreement before and after the period of tensions were maintained. During the period of tensions, at least one meeting discussing the cartel, in particular the inclusion of the United Kingdom into the main agreement, took place. This meeting on 16 June 1992 is confirmed by two sources (AC Treuhand and Atochem) independently. Furthermore, there is no

clear-cut distinction between the two periods of the agreement as the arguments of Akzo and PC imply. On the contrary, there is a clear continuity of method and practice between the periods from 1993 onwards and the period before. If the agreed price levels broke down at the end of 1991, this was a result of a power struggle inside the cartel, the acquisition of competitors and the economic environment, and not of any desire to return to conditions of free competition. In any event, the European market was being discussed in the same forum and the regular meetings continued with the involvement of AC Treuhand, with the same undertakings and even with the same representatives of the respective undertakings.

- (402) Secondly, although Akzo's senior management expressed its wish to stop the cartel, no such wish was expressed by the two other parties. There is therefore no direct evidence indicating that the undertakings actually brought the cartel agreement to an end. The Akzo compliance note (see section 6.2.2.1) is a purely internal document which is not corroborated by evidence that it has been complied with (as Akzo claims). Taking into account the ingenious and sophisticated accomplishment and the dimensions of this cartel the Commission considers that some exchange of documents between the undertakings evidencing the termination, if it was meant to be serious, would exist and would have been submitted to the Commission.
- (403) Thirdly, the above is particularly true as both written agreements from 1971 and from 1975 set out a 12-months notice period before the agreement could be cancelled<sup>272</sup>. No official cancellation notice was ever sent. If one considers, however, this twelve month notice to have started in October 1991, it is to be noted that the Commission holds evidence that improper meetings were resumed as from June 1992 (meeting on United Kingdom) and continued in October 1992. The fact that none of the companies involved cancelled its contract with AC Treuhand is an indication of the expectation that that institution would again be used as a co-ordinator for the cartel after the power struggle. This indeed happened after the tensions stopped. After the agreement finally ended in 1999, the companies stopped their contacts with AC Treuhand and cancelled their contracts.
- (404) Fourthly, the 1971/1975 agreement(s) remained in force. Not only did the parties neither cancel the agreement nor end their contractual relations with AC Treuhand, but as from June 1992 they applied all the principles of the original 1971 agreement under some form (AC Treuhand meetings, papers distributed and recollected during meetings, travel reimbursements via AC Treuhand in order to avoid traces, exchange of client-, price- and volume-data). AC Treuhand continued to keep the original agreement to which the parties continued to have access in case of tensions. It follows from all this that the operation of the cartel as from June 1992 was based on the same original agreement as before, following very similar rules, referring to the same pink paper as before, and relying on AC Treuhand as the organiser and accountant of the cartel. The negligible changes that occurred in the functioning of the cartel before and after the period of tensions are less pronounced than the administrative changes between the seventies and

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See [6960] and [6969].

eighties, when the cartel continued to exist without apparent tensions. It is therefore clear that, at best, the degree of implementation of certain components of the agreement was somewhat reduced for a short period of 7 months.

- (405) Fifthly, it is not claimed nor is there any evidence that PC and Atochem formally stopped membership of the cartel vis-à-vis each other. A bilateral meeting took place on 28 February 1992. Hence the Commission considers that the agreement continued and that its intensity was not even reduced at least between those two companies. On the contrary, both companies tried to convince Akzo to accept a common solution.
- (406) Sixthly, the period under question is seen as a period of renegotiations and repositioning the status quo of the agreement after the new market conditions following the acquisition of Luperox. At that time, after the acquisitions of Luperox by Atochem, Atochem thought that Akzo would wish to take advantage of such a 'pause' in the meetings in order to proceed to some 'outside quote' sales, in order to better negotiate the quotas once the discussions start again. Also, the joint venture Interlox, to which PC belonged, was dissolved.
- (407) Furthermore, the Commission notes that the understanding of the three companies Akzo, PC and Atochem about this period varies to a great extent. Akzo considers the stop to have been after September 1991, probably in October 1991, and the restarting 'at the end of 1992 or the beginning of 1993', PC considers there to have been a break from November 1991 until February 1993, while Atochem does not consider there to have been an interruption of the cartel at all. Atochem and AC Treuhand confirm the meeting in June 1992.
- (408) The discussions over the almost 30-year period may have involved a shifting constellation of undertakings, their respective importance in the cartel may have varied and there was a period of tension including a return to more competitive prices. The price fall can, however, have been the result of the weak economy and the trial of strength inside the cartel and not of its abandonment<sup>273</sup>. Consequently the Commission sees this as a part of the developing process of understandings and partial agreements intended to fix prices, co-ordinate price increases and allocate markets and market shares. This view is strongly confirmed by Atochem. Therefore the argument of falling prices and changing market shares, especially put forward by PC, as proof of the end of the agreement must be dismissed.
- (409) Another supporting element is the ongoing attempts by the other members to convince Akzo to improve the functioning of the agreement during the period of tensions. Should the alleged cancellation of the agreement have been credible, the other participants would not have tried to improve the functioning of the agreement. However, the expectation that the period of tensions was a trial of strength and not an irreversible cancellation, was eventually met by the fact of the smooth functioning from the second half of 1992 onwards.

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See T-23/99 *Pre-Insulated Pipe Cartel*, recital 76.



- (410) The period of tensions could be considered to be a period of lesser intensity of the normal arrangements and relationships but the organic peroxide producers soon, only after less than a year, recognised that the power struggle was self-defeating and returned to the conference table. This view is supported by Atochem's view of the period of tensions, see recital (139): Atochem considered that the discontinuation of certain meetings did not '*hinder the continuation of the agreement*'. Atochem did not deny that Akzo wanted '*to take advantage of such a pause of meetings in order to proceed some outside quote sales, in order to better negotiate the quotas once the discussions start again*'.<sup>274</sup>
- (411) In view of their identical purpose, the various concerted practices followed and agreements concluded formed part of schemes of regular meetings, target-price fixing and quota fixing. Those schemes were part of a series of efforts made by the undertakings in question, in pursuit of a single economic aim, namely to distort the normal movement of prices on the OP-market. It would thus be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of two separate infringements. The fact is that the parties took part - over a period of years - in an integrated set of schemes constituting a single infringement, which progressively manifested itself in both unlawful agreements and unlawful concerted practices<sup>275</sup>.
- (412) The Commission recognises that while the infringement constituted a single and continuous infringement, its intensity and effectiveness varied over the duration of the time period covered. In the light of Sections 6.2.1ff, the argument according to which there was no continuation of the illegal scheme between the end of 1991 and the beginning of 1993 must be dismissed. Not only did the participants never make clear any intention to terminate the arrangements, but the operation of the cartel was in fact never discontinued.
- (413) On the basis of the principles set out above, the continuing anti-competitive arrangements from 1 January 1971 to 31 December 1999 can be taken as a whole to constitute a prohibited 'agreement' in terms of Article 81 of the Treaty. In any event, even if the concept of 'agreement' does not apply for the whole period of the infringement, the conduct in question during the power struggle still falls under the prohibition of Article 81 as a concerted practice.
- (414) Given the common design and common objective which the producers steadily pursued of eliminating competition in the organic peroxide industry, the Commission considers that the conduct in question constituted a single continuing infringement of Article 81(1) of the Treaty which each participant must bear its responsibility for the duration of its adherence to the common scheme.

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<sup>274</sup> See Atochem [1430] and [8466ff].

<sup>275</sup> T-13/89 *Imperial Chemical Industries*, (footnote 218) recitals 259-260

## *1.8.2 The duration of the parties' involvement*

### *1.8.2.1 Akzo*

- (415) The involvement of Akzo in the agreement is considered to be from 1 January 1971 until 31 December 1999.

### *1.8.2.2 Atochem*

- (416) The involvement of Atochem in the agreement is considered to be from 1 January 1971 until 31 December 1999.

### *1.8.2.3 PC and Laporte*

- (417) The involvement of PC in the agreement is considered to be from 1 January 1971 until 31 December 1999. The involvement of Laporte in the agreement is considered to be from 1 September 1992, the day of dissolution of the joint venture including PC, until 31 December 1999. The Commission considers PC and Laporte (now Degussa UK Holdings Limited) as jointly and severally liable for the infringement for the period from 1 September 1992 until 31 December 1999. From 1 January 1971 until 31 August 1992, PC acted on its own or as part of the Interlox joint venture.

### *1.8.2.4 Perorsa*

- (418) The argument of Perorsa that the Spanish sub-arrangement was an agreement in its own right, that Perorsa did not know about the main agreement and that the imposition of a fine in relation to the involvement is time barred is rejected. Hence, the end of the Spanish sub-arrangement, which was part of the main agreement, is the same as the end of the main agreement. The Commission rejects Perorsa's view that the Spanish arrangement ended earlier and is time barred. In addition to the documentary evidence, even Perorsa's employee did not deny that the agreement continued after 1997 (see footnote 208) while Akzo confirms that a Spanish sub-arrangement continued and ended with the main agreement.
- (419) Closely linked to this is the question of prescription from fines. The Commission rejects the argument of Perorsa, that the relevant time is May 1997, i.e. five years prior to the first requests for information being sent to Akzo and Atochem in May 2002. The Commission is of the opinion that the Spanish sub-arrangement was part of the main agreement and ended with the main agreement. In any case, the Commission sent out the first requests for information at the end of January 2002, less than five years after [...]February 1997. Perorsa itself confirms [February 1997] (see footnote 200) for the end of the Spanish sub-arrangement.
- (420) Spain joined the Community in 1986. Therefore the effects of the arrangement in as far as it concerns the Spanish market before 1986, cannot be subject to this Decision. The cartel constituted an overall plan, the object of which was, amongst other things, to restrict competition in the Community. Perorsa knowingly contributed to that objective, by supporting the overall plan,

although its direct contribution was limited to the Spanish market. Therefore, Perorsa is responsible for the entire period of its involvement for its effects on the Community at that time.

(421) The Commission considers that, like the main agreement, the Spanish sub-arrangement was not interrupted during the period of tensions. As for the main arrangement, some specific details changed, but the essential mechanisms remained in force.

(422) In conclusion, the involvement of Perorsa in the agreement is considered to be from the beginning of the Spanish sub-arrangement, at the latest on 31 December 1975, until 31 December 1999.

1.8.2.5 [...]

(423) [...]

1.8.2.6 AC Treuhand

(424) As described in Section 5.3.3, the involvement of AC Treuhand as an association of undertakings and/or as undertaking in the agreement is considered to be from 28 December 1993 until 31 December 1999.

## **2 REMEDIES**

### **2.1 Article 3 of Regulation No 17**

(425) Where the Commission finds there is an infringement of Article 81(1) of the Treaty or Article 53(1) of the EEA Agreement it may require the undertakings concerned to bring such infringement to an end in accordance with Article 3 of Regulation No. 17.

(426) Although the Commission considers that the parties brought the infringement to an end it is not possible to declare with absolute certainty that the infringement has ceased. It is therefore necessary for the Commission to require the undertakings to which the present Decision is addressed to bring the infringement to an end (if they have not already done so) and henceforth to refrain from any agreement, concerted practice or decision of an association which might have the same or a similar object or effect.

(427) The prohibition should apply not only to secret meetings and multilateral or bilateral contacts but also to the activities of the undertakings in so far as they involve, in particular, collecting and diffusing individualised sales statistics.

## 2.2 Article 15(2) of Regulation No 17

### 2.2.1 General considerations

- (428) Under Article 15(2) of Regulation No 17<sup>276</sup>, the Commission may by decision impose upon undertakings fines from one thousand to one million euro, or a sum in excess thereof not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 81(1) of the Treaty and/or Article 53(1) of the EEA Agreement.
- (429) The cartel was a deliberate infringement<sup>277</sup> of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement. The main producers were perfectly aware that their conduct was anticompetitive and illegal and they agreed to establish a covert institutionalised system to restrict competition in an important industrial sector.
- (430) In fixing the amount of any fine the Commission must have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in Article 15(2) of Regulation No. 17.

### 2.2.2 Amount of Fines

- (431) The amount of the fines is determined by calculating a basic amount and increasing it to take account of aggravating circumstances or reducing it to take account of attenuating circumstances.

#### 2.2.2.1 The basic amount

- (432) The basic amount is determined on the basis of the gravity and duration of the infringement.

##### 2.2.2.1.1 Gravity of the infringement

- (433) 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.

##### 2.2.2.1.1.1 Nature of the infringement

- (434) It can be seen from the facts described in Part I that this infringement took the form of a complex, continuous agreement aimed at restricting competition, consisting of various manifestations by which the competitors sought to

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<sup>276</sup> Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements of implementing the Agreement on the European Economic Area “the Community rules giving effect to the principles set out in Articles 85 and 86 [now Articles 81 and 82] of the EC Treaty [...] shall apply *mutatis mutandis*”. (OJ L 305/6 of 30 November 1994).

<sup>277</sup> See Case 96/82 *IAZ v Commission* [1983] ECR 3369, recital 45, and Joined Cases T-45/98 and T-47/98 *Krupp Thyssen v Commission* [2001] ECR II-3757, recital 200.

stabilise the market and carried out exchanges of confidential information between competitors on a long-term basis.

- (435) The arrangements constituting the cartel involved all the main operators in the EEA and were conceived, directed and encouraged at the senior levels of the hierarchy in each of the undertakings participating. By its very nature, the implementation of this type of cartel automatically generates a serious distortion of competition to the exclusive benefit of the participating producers and does great harm to their customers and, therefore, the final consumer.
- (436) The Commission therefore considers that this infringement by its nature constitutes a very serious infringement of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

#### *2.2.2.1.1.2 Practical impact of the infringement*

- (437) In its reply to the SO, Atochem stresses that the effects of the agreement were different over time, which should be reflected in the fine. The sub-arrangement on XL was less important, less effective and less implemented than the HP and UP agreements and had little or no effect on prices, especially as outside competition existed. Atochem also describes in its reaction to the SO that the market for OP is specific in several ways, such that the simple economic model of perfect competition is not applicable to the sector. The market is characterised by high fixed costs and persistent overcapacities in order to cope with security related accidents, by a limited number of producers, and by a low price elasticity of demand. Therefore the OP sector would be characterised as an oligopoly, in which the prices would not be those achieved under perfect competition. Atochem also considers that the effect of the agreement on HP was limited from 1992 onwards, as Chimopar, which imported HP from Romania, substantially increased its market share around 1995. Atochem argues that the cartel did not raise prices above the level they would have reached under unrestricted competition. Atochem also considers that it played a disturbing role in the agreement by not implementing the agreement.
- (438) PC considers that the impact of the agreement was little or none. It argues that the parties did not follow the agreement and that the effect was particularly small. PC argues that the development of prices and market shares, also during the period of tensions, show an absence of implementation.
- (439) The Commission notes that there is no need to quantify in detail the extent to which prices differed from those which might have been applied in the absence of these arrangements. Indeed, this cannot always be measured in a reliable manner, since a number of external factors may simultaneously have affected the price development of the product, thereby making it extremely difficult to draw conclusions on the relative importance of all possible causal factors.
- (440) The Commission is of the opinion that in this case the infringement had an actual impact on the OP market in the EEA<sup>278</sup>.

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See recitals (350)ff.

- (441) As it was established in Part I, the agreement was carefully implemented. In particular, deviations from the agreed quotas were monitored and compensations, for example the allocation of customers, were applied.
- (442) Volume quotas were allocated and closely monitored by the cartel members. The purpose of this quota system was to gradually increase the market price or to prevent it from falling, since each cartel member would sell its allocated volume at the highest possible price. The reporting and monitoring system of volume quotas instituted by the Parties ensured the effective implementation of the quotas.
- (443) Even if it is difficult to measure in a precise manner the actual impact in the market of the cartel, the infringement committed by the addressees of this Decision, which during its duration controlled directly or indirectly practically the entire or a large share of the EEA market for OP, had the effect of raising prices higher than they would otherwise have been, and therefore undoubtedly had an actual impact on the OP market in the EEA. In fact, the cartel's existence either raised actual prices or prevented actual prices from coming down.
- (444) As regards the effect the cartel had on sales volumes, it was clearly demonstrated in Part I that the volume quotas actually achieved were in line with or oscillating around what had been allocated to each of the participants under the volume quota agreements.
- (445) In the light of the foregoing and of the efforts put by each participant into the organisation of the cartel, there is no doubt that the anti-competitive agreements were implemented throughout the infringement period. Such continuous implementation must have had an impact on the OP market.
- (446) The fact that the parties claim to have not or not always followed the decisions within the agreement cannot be regarded as a sign that the agreement was not implemented. It is in fact a common feature of many cartel agreements that the parties deviate to a certain extent from agreed quotas, prices etc. As long as these deviations remain limited in time and in importance, corrective measures such as retaliatory deviations, compensations or subcontracting often restore the overall agreed quotas, prices etc.

#### *2.2.2.1.1.3 Extent of the relevant geographic market*

- (447) The cartel covered the entire Community and, following its creation, the whole of the EEA market, with sub-arrangements for certain countries or sub-products. The Commission considers thus the entirety of the EEA to have been affected by the cartel.

#### *2.2.2.1.1.4 Commission conclusion on the gravity of the infringement as a whole*

- (448) Given the nature of the conduct under examination, its actual impact on the market for OP and the fact that it targeted the entire OP market in the EEA, which had a total value of EUR 250 million in the last full year of the infringement, the Commission considers that the undertakings to which this

Decision is addressed committed a very serious infringement of Article 81(1) of the Treaty. This very serious infringement also includes the sub-arrangement for the Spanish market, which was part of the main agreement.

- (449) In the category of very serious infringements, the range of fines available enables undertakings to be treated differently depending on their real economic capacity to seriously harm competition, and fines can be set at a level that ensures an adequate deterrent effect.

#### *2.2.2.1.1.5 Classification of those involved in the cartel*

- (450) In the circumstances of this case, which involves several undertakings, the specific weight of each of the undertakings involved and the real effect of its unlawful behaviour on competition must be borne in mind in determining the basic amount of the fines. The undertakings concerned may basically be divided into three categories according to their respective importance on the relevant market, subject to adjustment in the light of other factors, if any, and of the need to ensure an adequate deterrent effect.
- (451) AC Treuhand is considered separately, given its specific role as an undertaking and/or association of undertakings, which performed different tasks and made different decisions from the parties to the agreement.
- (452) For the purpose of comparing the relative importance of the undertakings on the market affected by this agreement, the Commission considers it appropriate in this case to take as a starting point the market shares of the undertakings based on sales turnover for the three sub-products on the XL, HP and UP markets of the EEA. This approach is justified by the fact that the agreement concerned covered, at least for part of the period in question, each of the sub-products HP, UP and XL. The comparison is made on the basis of the sales turnover figures for the three sub-products together in those markets in 1999, the last full year of the infringement. The Commission also takes into account the large size of the market in question. The necessary data are contained in the table in recital (45).
- (453) With a share of around 43 % of the total of these markets, Akzo is the largest producer and should, therefore, be placed in the first category. Atochem and PC, with shares of around 25 % and 20 % of the market respectively, should be placed in the second category. Perorsa, with a market share of [45-55] % (HP) and [20-30] % (UP) in Spain but little market share outside Spain, which gives it around [<5] % share in Europe, should be in the third category.
- (454) AC Treuhand is considered apart. In principle every infringement of Article 81 of the Treaty and Article 53 of the EEA agreement should be penalised by a fine varying in accordance with its gravity and duration. However, the Commission acknowledges that addressing a decision to an undertaking and/or association of undertakings having a role of this kind in a cartel is to a certain extent a novelty (see section 1.3.3). In fact, the Commission addressed in 1980 a decision to an organiser/facilitator of the Italian cast glass cartel (see footnote 245) but a number of decisions between 1980 and today did not follow the same approach. This has to be taken into account when deciding on

the level of fines. In view of the foregoing the Commission considers it appropriate to impose a fine on AC Treuhand of EUR 1 000.

- (455) Laporte should be placed in the same category as PC, as it is jointly responsible with PC for the illicit activities of PC since 1 September 1992, when PC came under full ownership and control of Laporte.
- (456) The division of the responsibility of PC and Laporte with regard to the fine is as follows. PC was a member of the agreement from 1 January 1971 until 31 December 1999, and Laporte is jointly and severally responsible for the time when it fully owned PC, from 1 September 1992 until 31 December 1999.
- (457) The smaller market share due to captive production and consumption (see recital (43)) claimed by Atochem at a later stage of the procedure is not an attenuating circumstance nor does it affect the classification of the companies involved. Atochem benefited from the agreement in two ways. On the one hand, Atochem sold some of its OP on the market and received higher prices due to the agreement with its competitors. On the other hand, those products which needed OP as an input could be sold more cheaply by Atochem. Atochem's competitors, which did not have the advantage of captive production and consumption, had to buy the OP at higher prices on the cartelised market.
- (458) While adhering to the main agreement, a number of parties did not participate in all sub-arrangements. For example, the sub-arrangement on UP (see recital (184)) ended earlier for Atochem. The UP sub-arrangement ended earlier than the sub-arrangement on HP for PC and Akzo. The Spanish sub-arrangement only began on 31 December 1975 and not all parties were involved in all regional sub-arrangements during the whole period. This concerns for example the involvement of PC in the French and UK sub-arrangements prior to 1992, PC's smaller role in the XL sub-arrangements, which already ended in 1995, or the later start and earlier ending of some sub-arrangements to the XL sub arrangement. AC Treuhand was not involved in the XL arrangement. It also concerns the lack of any direct involvement of PC and Laporte in Spain and Perorsa's lack of direct involvement outside Spain, and PC's lack of direct involvement in France and the United Kingdom prior to 1992. As far as addressees do not produce or trade the sub product under question, they will not have any turnover or market share in this sub product. Hence, the absence of market activities on this sub product will be reflected in the companies' turnover and hence their classification in different groups. As far as addressees have joined a sub-arrangement later or left a sub-arrangement earlier, the Commission does not consider that this is a substantial element for the level of the sanction given the fact that all addressees were members of the main agreement and participated in the single and continuous infringement.
- (459) On this basis, the Commission has determined that the basic amounts of the fines should be as follows on the basis of gravity:

- |            |                  |
|------------|------------------|
| – Akzo:    | EUR 35 million   |
| – Atochem: | EUR 17.5 million |



– PC/Laporte:	EUR 17.5 million
– Perorsa	EUR 1.75 million
– AC Treuhand:	EUR 1000

#### 2.2.2.1.1.6 Adequate deterrent amount

- (460) To take into account the size and aggregate resources of the undertakings and ensure that the fine has an adequate deterrent effect, the Commission considers that this starting amount should be adjusted for two of the undertakings.
- (461) As the Court of First Instance held in its judgment in Case T-31/99<sup>279</sup>, ‘the fact that, in fixing such a multiplier, the Commission took into account the deterrent effect that fines must have, is wholly consistent with the established principle that the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, although no binding or exhaustive list of the criteria which must be applied has been drawn up. ... In that regard, the Commission's power to impose fines on undertakings which, intentionally or negligently, commit an infringement of the provisions of Article 85(1) of the Treaty is one of the means conferred on the Commission in order to enable it to carry out the task of supervision conferred on it by Community law. That task ... also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles’.
- (462) In these circumstances, the Commission considers that in the case of Akzo and Atochem the starting amount of the fine should be increased to take account of its size and aggregate resources. Atochem argues that its multiplying factor should take into account the fact that it became involved in the OP business only in 1989, after the acquisition of Luperox/Pennwalt. The Commission considers that the deterrent effect is best achieved by considering the size and aggregate resources of the undertakings concerned. As Atochem continued the agreement for 10 years after it acquired Luperox and has taken responsibility for the entire period of 29 years, the Commission does not see any reason to change its policy. Therefore, Atochem’s multiplying factor should be based on its size and aggregate resources.
- (463) On this basis, in order to ensure that the fine has adequate deterrent effect, the starting amount of the fine determined at recital (459) should be increased by 100 % to EUR 70 million in the case of Akzo, and by 100 % to EUR 35 million in the case of Atochem.

#### 2.2.2.1.2 Duration of the infringement

- (464) The Commission has established that, Akzo, Atochem, and PC infringed Article 81(1) of the Treaty from 1 January 1971 until 31 December 1999, Perorsa from at least 31 December 1975 until 31 December 1999 and Laporte

<sup>279</sup>

*ABB Asea Brown Boveri Ltd v Commission* ECR [2002] II-01881.

from 1 September 1992 until 31 December 1999, AC Treuhand acted as an undertaking and/or association of undertakings from 28 December 1993 until 31 December 1999.

- (465) For the purpose of calculating the fine, the Commission takes into account complete months and therefore fixes as the duration of the infringement by these undertakings a period of 29 years (Akzo, Atochem, and PC), a period of 6 years (AC Treuhand), a period of 7 years and 4 months (Laporte) and a period of 24 years (Perorsa). For PC the period is split up in two sub periods, when it was responsible alone (21 years 8 months) and when it was responsible together with its parent company Laporte (7 years and 4 months).
- (466) The Commission concludes that the infringement was of long duration (more than five years) for AC Treuhand, Akzo, Atochem, Laporte, PC and Perorsa. Accordingly increases of 245 % should be applied to the basic amounts of the fine imposed on Akzo and Atochem. Increases of 207.5 % should be applied to the basic amount of the fine imposed on PC. Increases of 70 % should be applied to the basic amounts of the fine imposed on PC/Laporte<sup>280</sup>. Increases of 220 % should be applied to the basic amount of the fine imposed on Perorsa. These percentages are derived from increase of 10 % per year for the last twenty years of the infringement (1980-1999), and an increase of 5 % per year for the part of the infringement which took place 21 to 29 years ago (1971-1979). This is justified by the less strict approach of the competition policy in the seventies, when companies were less aware that their behaviour infringed competition law and fines were lower.
- (467) The Commission has adopted the following methodology for determining the period when PC alone is responsible for the infringement and the period when PC and Laporte are jointly and severally responsible.
- (468) For PC and Laporte, the basic amount determined on the basis of gravity is divided by two and then increased according to the respective duration. In this case, that amount would have been EUR 17.5 million, if just one company had been involved. Hence the new amount for PC on the one hand and for PC and Laporte jointly and severally on the other hand is EUR 17.5/2 million. For PC's involvement during 21 years and 8 months, the amount is increased by 207.5 %. For the joint involvement of PC/Laporte during 7 years and 4 months the amount is increased by 70 %.
- (469) Conclusion as to the basic amount

The basic amounts of the fines should therefore be as follows:

– Akzo:	EUR 241.5 million
– Atochem:	EUR 120.75 million
– PC:	EUR 26.91 million
– PC/Laporte:	EUR 14.88 million

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See explanation in recital (467).

– Perorsa:

EUR 5.6 million

#### 2.2.2.2 Aggravating circumstance: repeat offence

- (470) Several of the addressees of this decision and their economic predecessors have already been subject to previous Commission measures in cartel cases:
- (a) Commission Decision 85/74/EEC of 23 November 1984 on Peroxygen Products<sup>281</sup>, addressed to Laporte Industries (Holdings) plc, London, Solvay et Cie Brussels, Degussa AG Frankfurt, L’Air Liquide SA, Paris, Atochem Paris (as successor of PCUK/Produit Chimiques Ugine Kuhlmann). In that infringement, the Interlox-joint venture between Solvay and Laporte was involved. At that time, PC was part of the Interlox joint venture and was involved in an infringement concerning Persulphates.
  - (b) Commission Decision of 23 April 1986 on Polypropylene Products addressed to Atochimie SA and Petrofina SA<sup>282</sup>.
  - (c) Commission Decision of 21 December 1988 on LdPE, involving amongst others Atochem SA<sup>283</sup>.
  - (d) Commission Decision of 21 December 1988 on PVC<sup>284</sup>, involving amongst others Atochem SA.
- (471) The list above shows that Atochem was involved in four other anti-competitive agreements from 1984 to 1988, one of which involved Ato Chimie S.A., which became Atochem. Atochem got involved in the agreement on OP by its purchase and absorption of Luperox (part of Pennwalt) around 1989 and continued, in spite of its experience with other cartel cases, the agreement on OP until 1999. Therefore, in accordance with the principle that the fine should be of such a level as to constitute an adequate deterrent, the fine to be imposed on Atochem should reflect the fact that this is a repeat offence.
- (472) PC was not an addressee of Decision 85/74/EEC. At that time, the infringement was committed by PC and other companies of the Interlox joint venture. PC continued its unlawful activity on OP, although its parent companies Solvay and Laporte from the Interlox joint venture were fined for anti-competitive behaviour of PC and other parts of Interlox.
- (473) Laporte was an addressee of Decision 85/74/EEC. PC continued the infringement on OP after 1 September 1992, when it became a fully owned and controlled subsidiary of Laporte. The first September 1992 is also the moment in time when Laporte became responsible for PC’s behaviour. This is therefore a repeat offence for Laporte.
- (474) The fine in relation to Peroxygen Products was paid by Laporte for the ‘undertaking’ and for the joint venture Interlox. Solvay, until 1992 equal

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<sup>281</sup> OJ L 035 of 7 February 1985 p. 1ff.

<sup>282</sup> OJ L 230 of 18 August 1986 p.1ff.

<sup>283</sup> OJ L 074 of 17 March 1989 p. 21ff

<sup>284</sup> OJ L 074 of 17 March 1989 p. 1ff and OJ L 239 of 14 September 1994 p.14ff.

partner of Laporte in the Interlox joint venture, paid a fine as well. The Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty<sup>285</sup> refer to the concept of undertaking. They refer to ‘repeated infringement of the same type by the same undertaking(s).’ Therefore the Commission considers that the concept of repeat offence applies to PC as belonging to the ‘undertaking’ which was fined, even if it was formally not an addressee of the decision<sup>286</sup>.

- (475) The facts presented in this Decision establish that three addressees of the Decision participated or continued to participate actively in a cartel in the OP sector after the Decisions mentioned in recital (470) had been notified to them or the undertaking to which they belonged. The fact that some addressees implemented a ‘repeated infringement of the same type by the same undertaking(s)’ shows that the first penalty did not prompt them to change their conduct and is therefore, for the Commission, an aggravating circumstance.
- (476) As regards Atochem, PC and Laporte, the fact that Decision 85/74/EEC was addressed to them in part for their responsibility for or involvement in the Interlox joint venture (which included PC) and in part for its economic predecessors, is not of such a character as to prevent the application of such an aggravating circumstance in this case.
- (477) The Commission accordingly considers that the basic amount of the fine to be imposed should be increased by 50 % in the case of Atochem to reflect the fact that it had already been an addressee of Commission decisions in a considerable number of previous cartel cases, and by 50 % in the cases of Laporte and PC, to reflect the fact that they had been the addressee of one previous Commission cartel decision, either directly (Laporte) or through the undertaking to which it belonged (PC).

#### 2.2.2.3 Attenuating circumstances

##### 2.2.2.3.1 Exclusively passive or follower role under pressure from another undertaking

- (478) PC states that it played an exclusively “follower” role in the development of the collusive practices. It claims that it was under economic pressure from Akzo and Atochem. The Commission does not consider PC to have played an exclusively passive role, given its considerable market share and its active participation in the agreement.
- (479) Atochem also considers that it played a less important role, as it sees Akzo as leader. The Commission does not consider Atochem to have played an exclusively passive role, given its considerable size and market share and its active participation in the agreement.

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<sup>285</sup> OJ C9, 14.1.1998, p. 3.

<sup>286</sup> See also case T-203/01 *Michelin v. Commission*, judgement of 30 September 2003, at recital 290. In the 1984 Decision on peroxygen products the ‘Commission could have, if it wished to,’ addressed the Decision to PC.

(480) Perorsa considers as attenuating circumstances the fact that it had a passive role and followed the initiatives of the other participants, its limitation to the Spanish market, and that its market knowledge was inferior to that of Akzo, which knew the overall picture. The Commission does not consider Perorsa to have played an exclusively passive role, given its large market share in Spain and its active participation in the sub-arrangement. The Spanish market was part of the main agreement. Perorsa's relatively small market share on European level (which is already taken into account for the relative importance of Perorsa) is therefore not an adequate indication of a role as "follower".

(481) In summary, the Commission does not consider a passive or follower role to be an attenuating circumstance for any of the addressees of this Decision.

#### 2.2.2.3.2 Termination of infringements before the Commission's first intervention

(482) The Commission considers that all parties put an end to the infringement before the Commission intervened. The agreement ended before Akzo approached the Commission in the context of the 1996 Leniency Notice and before the Commission sent out the first requests for information.

(483) Atochem considers that its ending of the XL and the UP arrangement before the end of the main arrangement should be considered an attenuating factor.

(484) The main agreement evolved over time. For example, the sub arrangement on XL ended earlier than the main agreement (see section 7.1), and the United Kingdom and the French market were subject to separate arrangements until around 1992 (see section 7.2). Atochem left the sub-arrangement for UP earlier than PC and Akzo, and the UP sub-arrangement ended earlier than the main agreement (see section 6.2.4.1). However, all the addressees of this decision continued their illicit behaviour until 31 December 1999, the date of the end of the HP sub-arrangement. As the behaviour under question is considered to be a single and continuous infringement (see section 1.3), the Commission does not consider that stopping some elements of co-operation while maintaining the overall involvement in the main agreement is to be considered as an attenuating circumstance.

(485) In more general terms, cartel infringements are by their very nature hard-core anti-trust violations. Participants in these infringements normally realise very well that they are engaged in illegal activities, as witnessed in this proceeding by the measures the participants took to hide the cartel. In the Commission's view, in such cases of deliberate illegal behaviour, the fact that a company terminates this behaviour before any intervention of the Commission does not merit any particular reward other than that the period of infringement of the company concerned will be shorter than it would otherwise have been. Indeed, if the infringement had continued after the intervention of the Commission, this would have constituted an aggravating circumstance.

#### 2.2.2.3.3 Non-implementation in practice of the offending agreements or practices

(486) AC Treuhand claims the agreement no longer functioned from 1996 onwards. Atochem and PC/Laporte claim that the agreed price increases were not or not

fully implemented and that the agreed market shares were not respected. As stated in recitals (439)ff, the Commission considers that the agreement was implemented. Consequently, in spite of some indications of a ‘disturbing role’ claimed by Atochem and confirmed for some products by documentary evidence<sup>287</sup>, the Commission does not consider that such frictions put the overall participation in the main agreement into question. As deviations from the agreement are a frequent feature of cartels (see recital (446)), occasional or temporary non-implementation of certain parts of the overall agreement must not be seen as attenuating circumstances. In this case, the Commission considers that all undertakings involved did implement the agreement effectively, in spite of occasional cheating.

- (487) Several parties claim that they did not implement or participate in a number of sub-arrangements. The Commission does not consider that limited involvement in certain sub-arrangements can be understood as non-implementation (see recital (458)).

#### 2.2.2.3.4 Other attenuating circumstances

- (488) Atochem claims that the small size of Luperon prior to the acquisition by Atochem as well as the smaller size of the market in the beginning of the agreement should be taken into account. The Commission refers to its practice with regard to the size and aggregate resources of the participants. The Commission does not see any reason to make an exception to that practice in this case.
- (489) Perorsa claims its involvement prior to Spain’s accession to the Community must not be taken into account. The Commission rejects this view<sup>288</sup> and does not consider this to be an attenuating circumstance. The Commission does not consider the effects of the sub-arrangement in Spain prior to 1986, but it does consider the effects of the arrangement on the Community prior to 1986. Perorsa also claims that the Spanish sub-arrangement could at most, if at all, be considered as ‘serious’, and not as ‘very serious’. The Commission considers that Perorsa was a member of the main agreement, which is considered as a very serious infringement.
- (490) Laporte stresses the importance of its compliance programmes. The Commission can only find that the first scheme set in place evidently did not achieve the desired result.
- (491) PC claims that the agreement to purchase competitors should not be sanctioned by a fine, or at least should only be sanctioned by a symbolic fine, as such behaviour has never before been the subject of a fine. The Commission considers the agreement to buy competitors to be part of the main agreement and does not sanction that specific aspect as such.

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<sup>287</sup> See e.g. [10645ff].  
<sup>288</sup> See recital (265).

- (492) AC Treuhand claims that the absence of a comparable case in which a company providing services to a cartel agreement but not producing the products has been fined, justifies the non-imposition of a fine.

#### 2.2.2.3.5 Effective co-operation outside the scope of the leniency notice

- (493) Atochem strengthened the Commission's arguments to prove the 29 year duration of the cartel. Without Atochem's voluntary information, the Commission could still have considered the continuation of the cartel during a period of cartel tension in 1992, but the evidence would have been more scarce. More likely however, the Commission would have dropped the period 1971-1993 from the duration, and the maximum increase for duration would have been around 65% for all participants for a cartel duration of 6½ years.
- (494) In line with a principle of fairness, it is proposed to apply a specific attenuating circumstance 'co-operation outside the Leniency notice' for Atochem. This attenuating circumstance will prevent that Atochem would pay a higher fine after its co-operation than it would have paid without co-operation.
- (495) This co-operation could not be covered by the leniency notice. Therefore a reduction for attenuating circumstances of EUR 94.19 million is applied on Atochem. This amount was chosen in order to match the hypothetical amount that Atochem would have paid (for a 6½ year infringement), if the Commission would not have been able to prove the long infringement.
- (496) In the light of the above, the Commission does consider it appropriate to grant a reduction of the basic amount of EUR 94.19 million for effective co-operation outside the scope of the leniency notice for Atochem.

#### 2.2.2.3.6 Conclusion on the amounts of the fines prior to application of the 1996 Leniency Notice

##### 2.2.2.3.6.1 *Fines excluding the upper limit to the fine*

- (497) Having taken account of the aggravating and attenuating circumstances, the amount of the fines prior to application of the criterion of Article 15(2) of Regulation 17/1962 (fine maximum 10% of turnover) are as follows:

– Akzo:	EUR 241.5 million
– Atochem:	EUR 86.94 million
– PC:	EUR 40.36 million
– PC/Laporte:	EUR 22.31 million
– Perorsa:	EUR 5.6 million

##### 2.2.2.3.6.2 *Fines including the upper limit to the fine*

- (498) Article 15(2) of Regulation No 17 provides that the final amount of the fine may not in any case exceed 10% of the worldwide turnover of the undertakings. In this decision this concerns Perorsa with an annual turnover of EUR 5.9 million and PC with an annual turnover of EUR [...], the year preceding this decision.
- (499) Therefore, the final amount of the fine to be imposed on PC and Perorsa should be reduced in order to fulfil the requirement of Article 15(2) of Regulation 17, whereas the final amounts for the other addressees should remain unchanged, as in these cases the proposed fines do not exceed 10% of the groups' turnover.
- (500) Having taken account of the aggravating and attenuating circumstances and the criterion on turnover, the amount of the fines, prior to application of the 1996 Leniency Notice, should be as follows:
- |               |                   |
|---------------|-------------------|
| – Akzo:       | EUR 241.5 million |
| – Atochem:    | EUR 86.94 million |
| – PC:         | EUR 11.78 million |
| – PC/Laporte: | EUR 22.31 million |
| – Perorsa     | EUR 0.59 million  |

#### 2.2.2.4 Application of the 1996 Leniency Notice

- (501) Certain of the addressees of this Decision have co-operated with the Commission, at different stages of the investigation and in conjunction with the different periods of the infringement under examination, in order to enjoy the favourable treatment referred to in the 1996 Leniency Notice. To meet the relevant undertakings' legitimate expectations as to immunity from fines or a reduction of fines in return for their co-operation, it is necessary to consider whether those parties meet the conditions set out in the 1996 Leniency Notice. In this case, it is the 1996 Leniency Notice which applies, as Akzo approached the Commission before 14 February 2002, the date from which Commission Notice on immunity from fines and reduction of fines in cartel cases <sup>289</sup> (“the 2002 Leniency Notice”) replaced the 1996 Leniency Notice.

##### 2.2.2.4.1 Non-Imposition of Fines

- (502) Akzo was the first member of the cartel to provide evidence in a company statement on the agreement on OP and added a number of annexes, which have been quoted throughout this Decision and which proved to be very useful documents to show the existence, functioning, duration and implementation of the agreement and the sub arrangements.
- (503) The Commission considers that Akzo informed the Commission about a secret cartel. The Commission had not at that time undertaken an investigation nor

<sup>289</sup>

OJ C 45 of 19 February 2002, p 3ff, especially recital 28.



did it have sufficient information to establish the existence of the alleged cartel.

- (504) Akzo was the first to adduce decisive evidence of the cartel's existence. It also put an end to its involvement in the illegal activity, provided the Commission with all relevant information and maintained complete and continuous co-operation throughout the investigation. Akzo did not oblige another enterprise to take part in the cartel and did not act as an instigator or play a determining role in the illegal activity.
- (505) The Commission accordingly considers that Akzo meets the conditions of point B of the 1996 Leniency Notice and is therefore eligible for a very substantial reduction of the fine, or the non-imposition of any fine. In accordance with Section B of the 1996 Leniency Notice, Akzo should be granted a 100 % reduction of the fine that would otherwise have been imposed had it not co-operated with the Commission.

#### 2.2.2.4.2 Very Substantial or Substantial reduction in a Fine

- (506) As Akzo was the first company to adduce decisive evidence of the cartel's existence (section B point (b) of the 1996 Leniency Notice), no other party meets the conditions of sections B or C of the 1996 Leniency Notice.

#### 2.2.2.4.3 Significant reduction in a fine

- (507) The Commission finds that Atochem materially contributed to establishing the existence of the infringement. Atochem applied for leniency and handed over a number of documents from meetings, statements from its employees and a company statement, just weeks after Akzo, and before the Commission prepared any investigative measures. Atochem's contribution allowed the Commission to send out requests for information, as an investigation was no longer necessary given the information provided by both Akzo and Atochem. On top of this valuable contribution, Atochem also provided information on the period of tensions in 1992, including documents on meetings, which enabled the Commission to establish the continuation of the agreement (see recital (495)).
- (508) The Commission finds that, after Laporte received a request for information, PC and Laporte provided evidence that helped to establish proof of the beginning of the infringement in 1971. The evidence they gave on the beginning of the main agreement (the founding contracts of 1971 and 1975) is the major contribution by PC and Laporte. PC's company statement and the documents submitted by PC (travel documents, minutes of meetings, tables) confirmed the Commission's knowledge regarding the main agreement from the eighties onwards, without adding significant new insights, given the quality and quantity of the previous submissions by Akzo and Atochem and the replies to the requests for information. PC nevertheless materially contributed to establishing the existence of the infringement. PC and Laporte do not contest the fact of having participated in meetings during the period of tensions in 1992 although they interpret this period as the end of an agreement and the beginning of a new agreement. PC submitted its information before the

Commission sent its SO and did not substantially contest the facts on which the Commission based its allegations.

- (509) However, the quality of PC's company statement is not beyond doubt. PC only confirmed [...] participation at the meeting in October 1992, after Atochem provided additional documents. In the company statement<sup>290</sup> and in the reply to the SO, the meeting of October 1992 is still put into question. PC confirmed that meeting only after Atochem's written evidence distributed during the hearing, while it still considered it not to be a cartel meeting. Although it is possible that PC initially could not confirm the evidence due to the long time that had elapsed, it is also possible that this was done intentionally in order to prevent the proof of a continuation of the cartel. In the reply to the SO, PC furthermore states that [...] recalls the October 1992 meeting as his 'first' meeting with competitors. This implies that other meetings followed, but PC remains silent on these meetings. PC has not reacted specifically to the other meetings in which [...] participated (see Table 4, recital (106)). Furthermore the positions held by [...] within the Laporte group are unclear. The reply to the request for information described [...] as managing director of PC since 1992<sup>291</sup>. The reply of Laporte to the SO described [...] as managing director of Laporte GmbH, the German holding company owning PC, and not as managing director of PC. In any case, [...] was also a member of the board of Directors of Laporte plc, as shown by the minutes of a meeting on 23 March 1992.
- (510) [...] <sup>292</sup> [...]
- (511) PC claims that it submitted original documents, which are of higher probative value than ex-post protocols, which provide substantial added value to the case. The 2002 Leniency Notice acknowledges the fact that originals have a higher value than documents written later, and PC claims that this element should also be applied in this case, where the 1996 Leniency Notice applies. The documents cited by PC are in particular the originals of the cartel agreement of 1971 and 1975 and the travel documents of PC's employees. The Commission acknowledges that PC submitted some originals and underlines, that the 1996 leniency notice applies. However, the matching information received prior to PC's submission was already of such quality, that the originals submitted by PC did not substantially improve the Commission's ability to prove the infringement.
- (512) In summary, the Commission still considers that PC's submission, in spite of these shortcomings, materially contributed to establishing the existence of the infringement, especially due to the evidence on the beginning of the main agreement in 1971 and 1975.
- (513) PC and Laporte acted jointly at the beginning of the procedure for reductions of fines by handing over the first set of documents. Laporte and PC replied

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<sup>290</sup> See [11788].

<sup>291</sup> See [7562].

<sup>292</sup> [...]

jointly to the request for information sent to Laporte<sup>293</sup>. Afterwards, PC alone submitted its company statement. Laporte considered that if it were to be responsible for the behaviour of PC, the evidence submitted by PC would also be considered for Laporte. The Commission agrees. Where a company submits evidence in order to benefit from a reduction of fines, any reduction granted will benefit the undertaking of which the company that submitted the evidence forms part. The same reduction should be granted for PC and for PC and Laporte jointly and severally.

- (514) Perorsa asked for the application of the 1996 Leniency Notice after it received the SO. It contributed little details on meetings and participants of the Spanish sub-arrangement which went beyond the Commission's knowledge. Perorsa did not provide details on the 1980 to early 1997-period of the arrangement, during which Perorsa admits having been involved in the Spanish sub-arrangement. Perorsa does not substantially contest the facts set out in the SO. However it does contest the Commission's interpretation of some essential facts, such as the duration of Perorsa's involvement and knowledge of the main agreement. In conclusion, the Commission considers that Perorsa has not contested the facts and has provided very little added value compared to the information already available to the Commission
- (515) After due consideration of Atochem's co-operation under the 1996 Leniency Notice, and in accordance with the first and second indent of Section D(2) of that Notice, Atochem should be granted a 50 % reduction of the fine that would have been imposed if it had not co-operated with the Commission.
- (516) After due consideration of PC's co-operation under the 1996 Leniency Notice, and in accordance with the first and second indent of Section D(2) of that Notice, PC should be granted a 25 % reduction of the fine that would have been imposed if it had not co-operated with the Commission.
- (517) The same reduction should be granted in respect of in the fine that would have been imposed on PC and Laporte jointly and severally for the period from 1 September 1992 until 31 December 1999. In accordance with the first and second indent of Section D(2) of the 1996 Leniency Notice, a 25 % reduction of the fine that would have been imposed if they had not co-operated with the Commission should be granted.
- (518) After due consideration of Perorsa's co-operation under the 1996 Leniency Notice, and in accordance with the first and second indent of Section D(2) of that Notice, Perorsa should be granted a 15 % reduction of the fine that would have been imposed if it had not co-operated with the Commission.

#### 2.2.2.5 Final amount of fines imposed in this proceeding

- (519) By way of conclusion, the amounts of the fines to be imposed in accordance with Article 15(2)(a) of Regulation No 17 should be set as follows:

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See [7551ff], [11749].

– Akzo Nobel Polymer Chemicals B.V., Akzo Nobel N.V., Akzo Nobel Chemicals International B.V., jointly and severally liable:

EUR 0

– Atofina S.A.: EUR 43.47 million

– Peroxid Chemie GmbH & Co. KG EUR 8.83 million

– Peroxid Chemie GmbH & Co. KG and Degussa UK Holdings Limited, jointly and severally liable EUR 16.73 million

– AC Treuhand AG: EUR 1000

– Peroxidos Organicos S.A. EUR 0.50 million,

HAS ADOPTED THIS DECISION:

#### *Article 1*

The following undertakings and/or associations of undertakings have infringed Article 81(1) of the Treaty and - from 1 January 1994 - Article 53 of the EEA Agreement, by participating, for the periods indicated, in a set of agreements and concerted practices in the sector of organic peroxides: AC Treuhand participated as an undertaking and/or association of undertakings.

- (a) Akzo Nobel Chemicals International B.V., Akzo Nobel Polymer Chemicals B.V. and Akzo Nobel N.V., from 1 January 1971 until 31 December 1999,
- (b) Atofina S.A., from 1 January 1971 until 31 December 1999,
- (c) Peroxid Chemie GmbH & Co. KG, from 1 January 1971 until 31 December 1999,
- (d) AC Treuhand AG, from 28 December 1993 until 31 December 1999,
- (e) Peroxidos Organicos S.A., from at least 31 December 1975 until 31 December 1999,
- (f) Degussa UK Holdings Limited (formerly Laporte plc.), from 1 September 1992 until 31 December 1999.

#### *Article 2*

In respect of the infringement referred to in Article 1, the following fines are imposed:

- (a) Akzo Nobel Polymer Chemicals B.V., Akzo Nobel N.V., Akzo Nobel Chemicals International B.V., jointly and severally liable, a fine of EUR 0
- (b) Atofina S.A., a fine of EUR 43.47 million
- (c) Peroxid Chemie GmbH & Co. KG, a fine of EUR 8.83 million
- (d) Peroxid Chemie GmbH & Co. KG and Degussa UK Holdings Limited, jointly and severally liable, a fine of EUR 16.73 million
- (e) AC Treuhand, a fine of EUR 1000
- (f) Peroxidos Organicos S.A., a fine of EUR 0.50 million

The fines shall be paid, within three months of the date of the notification of this Decision into bank account N° 001-3953713-69 of the European Commission with:

FORTIS Bank, rue Montagne du Parc 3, 1000 Bruxelles/Brussels

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

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3,5 percentage points, namely **5.5%**.

### *Article 3*

The undertakings and/or associations of undertakings listed in Article 1 shall immediately bring to an end the infringement referred to in that Article, if they have not already done so.

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

### *Article 4*

This Decision is addressed to:

**Akzo Nobel Polymer Chemicals B.V.**, Stationsplein 4, 3818 LE Amersfoort

**Akzo Nobel N.V.**, Velperweg 76, NL-6824 BM Arnhem

**Akzo Nobel Chemicals International B.V.**, Stationsplein 4, NL-3818 LE Amersfoort

**Atofina S.A.**, 4, cours Michelet, La Défense 10, F-92091 Paris La Defense cedex

**Peroxid Chemie GmbH & Co. KG**, Dr.-Gustav-Adolph-Strasse 3, D-82049 Pullach

**AC Treuhand AG**, Bleicherweg 62, CH-8027 Zürich

**Peroxidos Organicos S.A.**, Córcega 293, E-08008 Barcelona

**Degussa UK Holdings Limited**, 42 Brook Street, UK-London W1K 5DB

This Decision shall be enforceable pursuant to Article 256 of the Treaty.

Done at Brussels,

*For the Commission*  
*Mario Monti*  
*Member of the Commission*