

COMMISSION

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 final and corrigendum C(2004) 4)

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

(2005/349/EC)

On 10 December 2003, the Commission adopted a decision (C(2003) 4570 final) relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement. On 7 January 2004, the Commission approved by written procedure E/2/2004 (C(2004) 4) a corrigendum to the German and Spanish versions of Decision C(2003) 4570 final. In accordance with the provisions of Article 21 of Regulation 17⁽¹⁾, the Commission herewith publishes the names of the parties and the main content of the decision, having regard to the legitimate interest of undertakings in the protection of their business interests. A non-confidential version of the full text of the decision can be found in the authentic languages of the case and in the Commission's working languages at DG COMP's website at http://europa.eu.int/comm/competition/index_en.html

I. SUMMARY OF THE INFRINGEMENT

Addresses and nature of the infringement

(1) This Decision is addressed to the following undertakings and/or associations of undertakings:

— Akzo Nobel Chemicals International BV

— Akzo Nobel Polymer Chemicals BV

— Akzo Nobel NV

— Atofina SA

— Degussa UK Holdings Limited

— Peroxid-Chemie GmbH & Co KG

— Peroxidos Organicos SA

— AC Treuhand AG.

(2) Beginning from 1971, the main producers of organic peroxides at that time (Akzo Nobel Chemicals International BV and Akzo Nobel Polymer Chemicals BV, Luperox GmbH (which became part of the main German subsidiary of Atofina SA) hereinafter Akzo 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 agreed on market shares, 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 to 1999) took part in a specific arrangement within the overall agreement. AC Treuhand AG (1993 to 1999) was involved as well.

Duration of the infringement

(3) Duration of the participation

(a) Akzo Nobel Chemicals International BV, Akzo Nobel Polymer Chemicals BV and Akzo Nobel N.V. from 1 January 1971 to 31 December 1999;

(b) Atofina SA from 1 January 1971 to 31 December 1999;

⁽¹⁾ OJ L 13, 21.2.1962, p. 204/62. Regulation as last amended by Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p. 1).

- (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 SA from 31 December 1975 to 31 December 1999;
- (f) AC Treuhand from 28 December 1993 to 31 December 1999.

The market for Organic Peroxides

- (4) An organic peroxide is any organic molecule containing a 'peroxy' or oxygen-oxygen bond (-O-O-). 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'.
 - (a) the polymerisation of thermoplastic resins (so-called high polymer or HP applications)
 - (b) the curing of unsaturated polyester thermoset resins (so-called UP applications)
 - (c) cross-linking (so-called XL applications).
- (5) 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)
 - (b) the curing of unsaturated polyester thermoset resins (so-called UP applications)
 - (c) cross-linking (so-called XL applications).
- (6) The Commission has found that the geographic scope of this business is at least EEA-wide. In 1999, the last full year of the infringement, the cartel covered more than 90 % of the EEA market for the product concerned, this market having a total estimated value in that year of EUR 250 million.

Functioning of the cartel

- (7) A main agreement started in 1971, with initially three participating members (Akzo, Peroxid-Chemie and Atofina (at that time Luperox)). It consisted of subarrangements for high polymer and thermoset-OP, and was also split up by regional criteria. Regional subarrangements concerned France (until 1992), United Kingdom (until 1992), Spain (since the end of 1975) and the rest of Europe, following the main principles and rules of the overall agreement. For Cross-linking OP, another subarrangement was made in 1983, covering as well most European countries. These subarrangements had a substantial overlap with the overall agreement, e.g. the period under 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 subarrangements.

- (8) The main agreement aimed at preserving market shares and coordinating 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 (AC Treuhand since 1993), clients were allocated and, in case of deviation from the intended market share, compensations were applied or clients were reallocated. Regular meetings took place in order to fine-tune the working of the agreement. The agreement contained numerous subarrangements on specific products or subproducts, or concerning regions. These subarrangements have, in part, only lasted for a limited period of time or have been integrated in other subarrangements. Perorsa was involved in a Spanish subarrangement.
- (9) AC Treuhand was found to have violated Article 81 of the Treaty and Article 53 of the EEA Agreement by organising meetings, mediating conflicts, proposing market shares and hiding incriminating evidence. AC Treuhand acted as an association of undertakings and/or as an undertaking.
- (10) The cartel underwent frictions in 1992 and ended at the end of 1999, after the parties' attempts to agree on quotas failed. Some subarrangements ended earlier.

II. FINES

Basic amount

- (11) The Commission considers that the undertakings concerned have committed a very serious infringement. The nature of the infringement and its geographic scope are such that the infringement must qualify as very serious, irrespective of whether or not the impact of the infringement on the market can be measured.

Differential treatment

- (12) Within the category of very serious infringements, the scale of likely fines makes it possible to apply differential treatment to undertakings in order to take account of the effective economic capacity of the offenders to cause significant damage to competition, as well as to set the fine at a level which ensures that it has sufficient deterrent effect. With a share of more than 40 % of the total of these markets, Akzo is the largest producer and should, therefore, be placed in the first category. Atofina and Peroxid-Chemie, with shares of around 20 to 25 % of the market, should be placed in the second category. Perorsa, with a market share under 5 % in Europe, should be in the third category.

- (13) Degussa UK Holdings (formerly called Laporte plc) is, since 1 September 1992, the parent company of Peroxid-Chemie and should be placed in the same category as Peroxid-Chemie, as it is jointly responsible with Peroxid-Chemie for the illicit activities of Peroxid-Chemie.
- (14) The division of the responsibility of Peroxid-Chemie and Degussa UK Holdings with regard to the fine is as follows. Peroxid-Chemie was a member of the agreement from 1 January 1971 until 31 December 1999, and Degussa UK Holdings is jointly and severally responsible for the time when it fully owned Peroxid-Chemie, from 1 September 1992 until 31 December 1999.
- (15) AC Treuhand is considered apart. 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. 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.
- (16) 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 the starting amount should be adjusted for Akzo and Atofina.

Duration

- (17) The Commission has established that, Akzo, Atofina, and Peroxid-Chemie 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 Degussa UK Holdings 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.
- (18) 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, Atofina and Peroxid-Chemie), a period of 6 years (AC Treuhand), a period of 7 years and 4 months (Degussa UK Holdings) and a period of 24 years (Perorsa). For Peroxid-Chemie the period is split up in two subperiods, when it was responsible alone (21 years 8 months) and when it was responsible together with its parent company Degussa UK Holdings (7 years and 4 months).
- (19) The Commission concludes that the infringement was of long duration (more than five years) for AC Treuhand,

Akzo, Atofina, Degussa UK Holdings, Peroxid-Chemie and Perorsa. Accordingly increases of 245 % should be applied to the basic amounts of the fine imposed on Akzo and Atofina. Increases of 207,5 % should be applied to the basic amount of the fine imposed on Peroxid-Chemie. Increases of 70 % should be applied to the basic amounts of the fine imposed on Peroxid-Chemie/Degussa UK Holdings. 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 to 1999), and an increase of 5 % per year for the part of the infringement which took place 21 to 29 years ago (1971 to 1979).

Aggravating circumstances

- (20) Atofina has been fined previously for its involvement in four cartels, and Peroxid-Chemie/Degussa UK Holdings have been fined for their involvement in one cartel. Therefore repeat offence will be considered as aggravating circumstance.
- (21) The Commission accordingly considers that the basic amount of the fine to be imposed should be increased by 50 % in the case of Atofina 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 Degussa UK Holdings and Peroxid-Chemie, to reflect the fact that they had been the addressee of one previous Commission cartel decision, either directly (Degussa UK Holdings) or through the undertaking to which it belonged (Peroxid-Chemie).

Attenuating circumstances

- (22) Atofina strengthened the Commission's arguments to prove the 29 year duration of the cartel.
- (23) In line with a principle of fairness, it is proposed to apply a specific attenuating circumstance 'co-operation outside the Leniency notice' for Atofina. This attenuating circumstance will prevent that Atofina would pay a higher fine after its co-operation than it would have paid without co-operation.
- (24) 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 cooperation outside the scope of the leniency notice for Atofina.

Application of the 10 % turnover limit

- (25) The 10 % worldwide turnover limit mentioned in Article 15(2) of Regulation 17 applies to Perorsa and Peroxid-Chemie.

Application of the 1996 Leniency Notice**Ability to pay**

Non-imposition or a very substantial reduction in its amount (Section B: 75 to 100 % reduction)

(30) No company claimed inability to pay.

(26) Akzo is granted immunity from fines for having been the first undertaking to report the cartel to the Commission.

Decision

Significant reduction of a fine (Section D: reduction from 10 to 50 %)

1. The following fines are imposed:

(27) Atofina is granted a 50 % reduction for its cooperation in the Commission's investigation. Among the companies qualifying for a significant fine reduction, Atofina was the first company to co-operate with the Commission and provided the most useful contribution. Like the other companies that cooperated with the Commission, it also did not substantially contest the facts on which the Commission based its allegations.

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| (a) Akzo Nobel Polymer Chemicals BV, Akzo Nobel NV, Akzo Nobel Chemicals International BV, jointly and severally liable | EUR 0 |
| (b) Atofina SA | EUR 43,47 million |
| (c) Peroxid-Chemie GmbH & Co. KG | EUR 8,83 million |
| (d) Peroxid-Chemie GmbH & Co. KG and Degussa UK Holdings Limited, jointly and severally liable | EUR 16,73 million |
| (e) AC Treuhand AG | EUR 1 000 |
| (f) Peroxidos Organicos SA | EUR 0,50 million, |

(28) Peroxid-Chemie and Degussa UK Holdings are granted a 25 % reduction for their co-operation in the Commission's investigation. The evidence it provided arrived later and its co-operation was more limited than that of Akzo and Atofina.

(29) Perorsa, which was the last company to cooperate, is granted a 15 % reduction.

2. The undertakings and/or associations of undertakings listed shall immediately bring the infringements to an end, in so far as they have not already done so. They shall refrain from repeating any act or conduct as the infringement found in this case and from any act or conduct having the same or similar object or effect.