

Final report of the Hearing Officer in Case COMP/C.38.443 — Rubber Chemicals

(pursuant to Articles 15 and 16 of Commission Decision (2001/462/EC, ECSC of 23 May 2001 on the terms of reference of Hearing Officers in certain competition proceedings — OJ L 162, 19.6.2001, p. 21)

(Text with EEA relevance)

(2006/C 303/17)

The draft decision in the abovementioned case gives rise to the following observations:

The Commission's investigation of a potential infringement of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Treaty in the rubber chemicals sector was initiated following an application for immunity submitted pursuant to the Commission's 2002 Notice on Non-imposition or reduction of Fines in Cartel Cases ('Leniency Notice').

Written Procedure

A Statement of Objections ('SO') was adopted on 12 April 2005 and addressed to fourteen parties considered on a preliminary basis to have participated in the cartel or to bear liability thereof, namely:

- Bayer AG
- Crompton Corporation
- Crompton Europe Ltd. (former Uniroyal Chemical Ltd.)
- Uniroyal Chemical Company, Inc.
- Flexys NV
- Akzo Nobel NV
- Pharmacia Corporation (former Monsanto company)
- General Química SA
- Repsol Química SA
- Repsol YPF SA
- Duslo, A.S.
- Prezam, A.S.
- Vagus, A.S.
- Istrochem, A.S.

Access to the file was provided by CD-ROM. The CD-ROM gave the parties full access to most of the 10939 pages of documents obtained by the Commission during its investigation. It only excluded internal documents of the Commission and business secrets and other confidential information of the parties.

Duslo AS, Prezam AS, Vagus AS, and Istrochem AS requested respectively extensions of their deadlines to reply to the SO of 8 to 12 days. In support of their requests they argued that, as Slovakian companies, they were not familiar with antitrust proceedings and '*did not know what a Statement of Objections means and what the consequences could be*'. They stated that accordingly, they had sent the SO and the relevant information to prepare a response to their legal counsel only several weeks after receiving the SO.

I took the view that the SO was sufficiently explicit to raise the awareness of any of its addressees as to the serious consequences that the Commission's proceedings might entail. A company's decision to have recourse to legal assistance only belatedly falls as much into its own responsibility as the decision not to have recourse to legal assistance at all.

Nevertheless, I considered that the Commission's legitimate interest in avoiding delays in the proceedings would not be significantly impeded if a short prorogation of the deadline were granted in this case.

Accordingly, I agreed to a short extension of each respective deadline by two days. All parties replied within the time limit provided.

Specific request concerning access to file.

Duslo AS, Prezam AS, Vagus AS, and Istrochem AS requested to be granted access to the Commission's file with regard to the world-wide and EEA sales figures of Rubber Chemicals for 2001 of a number of the companies involved in the case. The reason for this request was that this information could be of importance for the calculation of any possible fine which might be imposed on them.

Upon verification, I took the view that the information requested was of a confidential nature. In view of that, I had to balance the need to safeguard the rights of the defence of the requesting companies against the information providers' legitimate interest in protecting their commercially sensitive data. ⁽¹⁾

In that context I concluded that the accuracy of the different parties' sales figures might in theory have an impact on the calculation of the fine that might be imposed on the requesting companies in the Commission's final decision. However, three considerations spoke against the relevance for the defence of the information requested:

- Firstly, the Commission enjoys a broad discretion in determining the appropriate amount of the fine. According to the guidelines on the method of setting fines, 'it might be necessary in some cases to apply weightings to the amount determined [...] to take account of the specific weight [...] of each undertaking' (emphasis added). It was therefore hypothetical at that stage of the procedure whether the exact amount of the sales figures of the other addressees of the SO would have any impact on a possible fine.
- Secondly, the sales figures of the members of the suspected cartel may constitute an objective factor playing a role in the calculation of the fine. But, they cannot constitute mitigating circumstances that the Commission would have to take into account in favour of a given company, as they are not listed under point 3 of the guidelines on the method of setting fines.
- Thirdly, the transmission of the requested figures to a given company would not have any impact on the possibility of it influencing the calculation of a potential fine by the Commission. In this respect, the only thing which counts is the accuracy of the figures. The companies concerned could not be expected to possess more reliable information on the sales figures of their competitors than the Commission which relies on audited figures provided by the parties themselves.

In the light of the above, I could not see the value of the requested information for the preparation of the requesting companies' defence. However, in view of the importance that they gave to these figures, I asked the relevant Commission service to provide them with estimated market shares for 2001 (ratios between the individual turnovers and the estimated total value of the market, the latter being available in the SO), expressed in ranges. These ranges were sufficiently wide as to ensure the confidential treatment of the actual figures in question. I rejected the rest of their request by means of a decision pursuant to Article 8 of the Hearing Officers Mandate.

Oral procedure

All parties except for Akzo Nobel NV, Pharmacia Corporation and Repsol (YPF SA and Química SA) participated in an oral hearing that took place on 18 September 2005. Duslo AS, Prezam AS, Vagus AS, Istrochem AS and General Química SA were particularly active at the hearing and were in a position to cast considerable doubt on the quality of the evidence retained against them in the SO.

Commission's final orientation

As a consequence of the reasoning and factual elements brought to it by the undertakings in their written replies and at the oral hearing, the draft decision proposed to the College profoundly modifies the preliminary assessments, as they stood in the SO, relative to 9 out of 14 companies ⁽²⁾.

In the first place, putting into application the general principle of law according to which doubt benefits to the accused, it is considered that there is not enough evidence against Duslo AS, Prezam AS, Vagus AS, Istrochem AS and Pharmacia Corporation to conclude that they infringed EU competition law. Therefore it is proposed to abandon the objections against these companies.

⁽¹⁾ Cf. Article 27(2) of Regulation 1/2003 and Article 15(3) of Regulation 773/2004. See also Communication from the Commission relating to the revision of the 1997 notice on the internal rules of procedure for processing requests for access to the file, Official Journal C 259, 21.10.2004, pages 8-18, paragraph 23.

⁽²⁾ Taking into account that the changes concerning General Química SA also affect Repsol YPF SA and Repsol Química SA.

Similarly, the Directorate General for Competition has found that the participation of General Química SA in the infringement, which could be established basically through its own confession, was considerably shorter and less important than the preliminarily indicated in the SO. The draft decision reflected this accordingly.

Moreover, a recent judgement of the Court of First Instance ⁽¹⁾ has emphasised the Commission's obligation to justify a legitimate interest in addressing a decision to an undertaking for a time-barred infringement. Accordingly, given that the SO was addressed to Akzo Nobel N.V for a very short infringement period, for which the Commission's power to impose fines was prescribed, in the absence of such a justification in this case, the draft decision proposes that an infringement is not established.

The draft decision submitted to the Commission only contains objections in respect of which the parties have been afforded the opportunity of making known their views.

I therefore consider that the rights of the parties to be heard have been respected in this case.

Brussels, 16 December 2005

Serge DURANDE

⁽¹⁾ Joined cases T-22/01 and T-23/02, *Sumitomo Chemicals Co Ltd et al.*, judgement of 6 October 2005, paragraphs 129-140.