

COMMISSION DECISION

of 3 May 2006

relating to a proceeding under Article 81 of the Treaty establishing the European Community and Article 53 of the EEA Agreement against Akzo Nobel NV, Akzo Nobel Chemicals Holding AB, EKA Chemicals AB, Degussa AG, Edison SpA, FMC Corporation, FMC Foret S.A., Kemira OYJ, L'Air Liquide SA, Chemoxal SA, Snia SpA, Caffaro Srl, Solvay SA/NV, Solvay Solexis SpA, Total SA, Elf Aquitaine SA and Arkema SA.

(Case COMP/F/C.38.620 — Hydrogen Peroxide and perborate)

(notified under document number C(2006) 1766)

(only the English, French and Italian versions are authentic)

(Text with EEA relevance)

(2006/903/EC)

1. SUMMARY OF THE INFRINGEMENT

1.1. Addressees

(1) The decision is addressed to the following undertakings:

- Akzo Nobel NV ('Akzo')
- Akzo Nobel Chemicals Holding AB ('ANCH')
- EKA Chemicals AB ('EKA')
- Degussa AG ('Degussa')
- Edison SpA ('Edison')
- FMC Corporation ('FMC')
- FMC Foret S.A. ('Foret')
- Kemira OYJ ('Kemira')
- L'Air Liquide SA ('Air Liquide')
- Chemoxal SA ('Chemoxal')
- Snia SpA ('Snia')
- Caffaro Srl ('Caffaro')
- Solvay SA/NV ('Solvay')
- Solvay Solexis SpA ('Solexis')
- Total SA ('Total')
- Elf Aquitaine SA ('Elf Aquitaine')
- Arkema SA ('Atofina').

(2) The addressees of the Decision participated in a single and continuous infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement regarding **hydrogen peroxide** ('HP') and its downstream product **sodium perborate** ('PBS'), covering the whole EEA territory ('the infringement'). The period of infringement retained in the decision is from 31 January 1994 to 31 December 2000. The infringement consisted mainly of competitors exchanging commercially important and confidential market- and/or company relevant information, limiting and/or controlling production as well as potential and actual capacities, allocating market shares and customers, and fixing and monitoring (target) prices.

1.2. The hydrogen peroxide and perborate sector

(3) HP is a strong oxidising agent which has several industrial applications. It is a clear, colourless liquid which is available commercially as an aqueous solution in concentrations mainly ranging from 30 % to 70 %. As a final product HP is used as a bleaching agent in the pulp and paper manufacturing industries, for the bleaching of textiles, for disinfection and for other environmental applications such as sewage treatment. HP is also used as a raw material for the production of other downstream peroxigen products, such as persalts (which include PBS) and peracetic acid.

(4) PBS is mainly used, as well as sodium percarbonate ('PCS'), as an active substance in synthetic detergents and washing powders. PBS and PCS have been both investigated in the current proceedings, however following the replies to the Statement of Objections and arguments presented at the Oral Hearing, it cannot be established that the infringing behaviour extended to PCS as well. The decision therefore only covers infringing behaviour as regards HP and PBS, not as regards PCS, despite to the Statement of Objections which also regarded PCS.

1.3. The supply

- (5) HP: in the EEA there were six main suppliers throughout the period of the infringement: the leading company was Solvay with an approximate market share of [20-30] %, followed by EKA. The other players were Atofina, Kemira, Degussa and Foret. Air Liquide and Ausimont sold HP until June 1998 and May 2002 respectively. Finally there were a small number of resellers importing HP from Eastern Europe and from outside Europe. There have been no new market entrants in recent years.
- (6) PBS: the undertakings active in the EEA during the whole of, or part of, the period of the infringement were: Degussa, Foret, Solvay, Caffaro (which however suspended its production in 1999), Atofina (which ceased production in 1999), Air Liquide (stopped in 1994) and Ausimont.

1.4. The demand

- (7) During the period of the infringement, in the EEA the main purchasers of HP were relatively small in number (six to eight) and mainly from the pulp and paper segment, which negotiated EEA-wide contracts at EEA-wide prices.
- (8) Major customers (such as Scandinavian and German pulp and paper manufacturers) negotiated contracts with a single price for multi-site supplies throughout the EEA. Transport costs were thus borne by the supplier, who may therefore have had an interest in obtaining HP from a source situated geographically close to the plants of the customers.
- (9) In the persalts domain during the period of the infringement, a very small number of large multinational companies existed on the demand side: 75-80 % of EEA purchases of persalts was concentrated in the hands of a small number of customers. They each had centralised European purchasing operations that negotiated purchases twice a year. They usually purchased persalts from more than one supplier, seeking to maintain a certain degree of competitive pressure.

1.5. Geographic scope

- (10) The infringement covered the whole of the EEA where demand of the products under investigation existed.

1.6. Functioning of the cartel

- (11) The period of infringement retained in the decision is 31 January 1994 until 31 December 2000.
- (12) The collusive practices can be categorised as follows: it concerned exchange of market related information (including prices and sales volumes), market sharing, limitation/control of production and sources of supply as well as price fixing for HP and PBS. The collusion regarding the two products is considered to be related and forms part of a single overall scheme and therefore constitutes a single infringement, even though the behaviour as regards HP and PBS separately would equally fall under the prohibition of Article 81(1) of the Treaty.

1.7. Procedure

- (13) In December 2002 Degussa informed the Commission of the existence of a cartel in the HP and PBS sector and expressed the wish to cooperate with the Commission under the 2002 Notice on immunity from fines and reduction of fines in cartel cases ('Leniency Notice')⁽¹⁾. Degussa provided the Commission with evidence that allowed carrying out inspections in March 2003 at the premises of three companies (the investigation against other companies was first conducted by requests for information).
- (14) After the inspections five other companies submitted an application for reduction of fines. Three of them were granted a reduction of fines, in accordance with point 23 and 26 of the Leniency Notice, namely EKA, Atofina and Solvay. The applications of Kemira and Solexis were rejected.

2. FINES

2.1. Basic Amount

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

2.1.1. Gravity

- (16) 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.

- (17) Taking into account the nature of the infringement committed, the fact that it must have had an impact and the fact that it covered the whole of the EEA, where the HP and PBS market taken together had a total value of around EUR 470 million in 1999, the last full year of the infringement, the Commission considers that the undertakings to which this Decision is addressed have committed a very serious infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement.

2.1.2. Differential treatment

- (18) 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, respectively, to cause significant damage to competition. This is appro-

⁽¹⁾ OJ C 45, 19.2.2002, p. 3.

appropriate where, as in this case, there are considerable disparities between the respective market shares of the undertakings participating in the infringement.

- (19) By assessing the turnover in the respective products for each undertaking and setting them off against the total turnover for HP and PBS for the purposes of determining the individual weight, the Commission has taken account of the fact that certain undertakings were only active on the market for one of the two products concerned. In doing so the Commission has taken account of the real impact of the unlawful conduct of each undertaking on competition. Because of the different varieties in which HP and PBS can be sold, sales based on the total value amount appear a more reliable indicator of operators' capacities. These figures show that Solvay was the largest market operator in the EEA, with a share of the combined sales of around [20-30] %. It is therefore placed in a first category. Degussa, with a market share of [10-20] %, is placed in a second category. Foret, EKA, Atofina, Kemira and Ausimont with shares of [5-15] % respectively, are placed in a third category. Finally, Caffaro, with a market share in PBS of around [5-10] % in its last full year, 1998, and a share of sales with regard to the combined HP and PBS market of [1-5] % is placed in a fourth category.
- (20) In the case of Caffaro, the Commission takes into account, despite the several links existing between the two products, that it has not been established that Caffaro was aware or could necessarily have had knowledge of the overall scheme of the anti-competitive arrangements. Consequently, given the circumstances of the case, a reduction of 25 % is applied to the starting amount of the fine calculated for Caffaro.

2.1.3. Sufficient deterrence

- (21) Within the category of very serious infringements, the scale of likely fines also makes it possible to set the fines at a level which ensures that they have sufficient deterrent effect, taking into account the size of each undertaking. In this respect, the Commission notes that in 2005, the most recent financial year preceding this Decision, the worldwide turnover of Total was EUR 143 billion, that of Elf Aquitaine EUR 120 billion, that of Akzo EUR 13,000 million, that of Degussa EUR 11,750 million, that of Solvay EUR 8,560 million and that of Edison EUR 6,650 million. Accordingly, the Commission considers it appropriate to

multiply the fine for Total by a factor of 3, that is based on the size of the parent companies, Elf Aquitaine and Total, which each have a turnover well above EUR 100 billion. Akzo and Degussa, with a turnover each of around 10 % of that of Total are still very large undertakings, with a turnover well exceeding EUR 10,000 million. It is therefore considered it appropriate to multiply the fine for these undertakings by a factor of 1,75. In view of the fact that Solvay had a turnover of EUR 8,560 million, the Commission considers it appropriate to multiply the fine for Solvay by a factor of 1,5. In view of the fact that Edison had a turnover of EUR 6,650 million, the Commission considers it appropriate to multiply the fine for this undertaking by a factor of 1,25. Given that Ausimont was transferred to a different undertaking, in the circumstances of the case, the multiplier applies to the fine to be attributed to Edison only.

2.1.4. Increase for duration

- (22) Degussa, Solvay and Kemira participated in the infringement from 31 January 1994 to 31 December 2000, a period of six years and eleven months. These undertakings committed an infringement of long duration. The starting amounts of the fines should consequently be increased by 10 % for each full year of infringement. They should be further increased by 5 % for any remaining period of 6 months or more but less than a year. This leads to a percentage increase of the starting amount for each undertaking of 65 %. EKA participated in the infringement from 31 January 1994 until 31 December 1999, a period of five years and eleven months, while Atofina and Ausimont participated in the infringement from 12 May 1995 until 31 December 2000, a period of five years and seven months. This leads to a percentage increase of the starting amount for each undertaking of 55 %⁽²⁾. Foret participated in the infringement from 29 May 1997 until 13 December 1999, a period of two years and seven months. This leads to a percentage increase of the starting amount of 25 %. Caffaro participated in the infringement from 29 May 1997 until 31 December 1998, a period of one year and seven months. This leads to a percentage increase of the starting amount of 15 %.

2.2. Aggravating circumstances

- (23) At the time the infringement took place, Atofina, Degussa, Edison and Solvay had already been addressees of previous

⁽²⁾ As EKA's evidence enabled the Commission to trace back the cartel to 31 January 1994, in accordance with point 23 of the Leniency Notice, these elements will not be taken into account when setting the fine, resulting in an increase for duration of 20 % instead of 55 % for this undertaking.

Commission decisions concerning cartel activities ⁽³⁾. The fact that the undertakings have repeated the same type of conduct either in the same industry or in different sectors from that in which they had previously incurred penalties, shows that the first penalties did not prompt these undertakings to change their conduct. This constitutes for the Commission an aggravating circumstance. This aggravating circumstance justifies an increase of 50 % in the basic amount of the fine to be imposed on the undertakings mentioned above ⁽⁴⁾.

2.3. Attenuating circumstances

- (24) In the case of Caffaro, it is appropriate to reduce its fine due to its passive and minor role in the infringement, as compared to the other participants in the cartel, by 50 %.

2.4. Application of the 10 % turnover limit

- (25) Article 23(2) of Regulation (EC) No 1/2003 provides that the fine imposed on each undertaking is not to exceed 10 % of its turnover. As regards the 10 % ceiling, if 'several addressees constitute the "undertaking", that is the economic entity responsible for the infringement penalised, [...] at the date when the decision is adopted, [...] the ceiling can be calculated on the basis of the overall turnover of that undertaking, that is to say, of all its constituent parts taken together. By contrast, if that economic unit has subsequently broken up, each addressee of the decision is entitled to have the ceiling in question applied individually to it' ⁽⁵⁾.

- (26) The world-wide annual turnover achieved by Solexis in 2005 was EUR 256 190 307. The fine imposed on Solexis must therefore not exceed EUR 25,619 million.

2.5. Application of the 2002 Leniency Notice

- (27) Degussa, EKA, Atofina, Solvay, Solexis and Kemira submitted applications under the Leniency Notice. They co-operated with the Commission at different stages of the investigation with a view to receiving the favourable treatment provided for in the Leniency Notice.

⁽³⁾ Such decisions include: As regards *Degussa*: Commission decision of 23 November 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.907 — *Peroxygen products*, OJ L 35 of 7.2.1985, p. 1), Commission decision of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — *Polypropylene*, OJ L 230 of 18.8.1986, p. 1). As regards *Edison*: Commission decision of 27 July 1994 relating to a proceeding under Art. 85 of the EEC Treaty (IV/31865 — *PVC II*, OJ L 239 of 14.9.1994, p. 14). As regards *Solvay*: Commission decision of 23 November 1984 quoted (*Peroxygen products*), Commission decision of 23 April 1986 quoted (*Polypropylene*), Commission decision of 27 July 1994 quoted (*PVC II*). As regards *Atofina/Arkema*: Commission decision of 23 November 1984 quoted (*Peroxygen products*), Commission decision of 27 July 1994 quoted (*PVC II*).

⁽⁴⁾ The increase for recidivism applies only to Atofina and not to its parent companies, Elf Aquitaine and Total, as the latter were not in control of Atofina at the time of the previous infringement. The multiplying factor applied to Total, namely 3 is not included in the calculation. Instead a multiplying factor of 1.25, which would have been applied had Atofina been the sole addressee of the Decision (given its worldwide turnover of 5.7 billion EUR in 2005), is used for the purposes of calculating recidivism. A separate fine is accordingly addressed to Atofina alone for this amount.

⁽⁵⁾ See the judgment of the Court of First Instance of 15 June 2005 in joined cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon Co. Ltd. and Others v Commission*, not yet reported (see OJ C 205 of 20.8.2005, p. 18), paragraph 390.

2.5.1. Point 8 (a) — Immunity

- (28) Degussa was the first European producer of HP and persalts to inform the Commission of the existence of a cartel in the HP market as well as in the HP-linked PBS market. Degussa has co-operated fully, on a continuous basis and expeditiously throughout the Commission's administrative procedure and provided the Commission with all evidence available to it relating to the suspected infringement, giving details of meetings between competitors as concerns both products and enabling the Commission to prove the existence of a cartel for both products. Degussa ended its involvement in the suspected infringement no later than the time at which it submitted evidence under point 8 (a) of the Leniency Notice and did not take steps to coerce other undertakings to participate in the infringement. Hence, Degussa qualifies for a full immunity from the fine that would otherwise have been imposed on it.

2.5.2. Point 23 (b), first indent (reduction of 30-50 %)

- (29) EKA was the second undertaking to approach the Commission under the Leniency Notice, on 29 March 2003, and the first undertaking to meet the requirements of point 21 thereof, as it provided the Commission with evidence which represents significant added value with respect to the evidence already in the Commission's possession at the time of its submission.

- (30) EKA terminated its involvement in the infringement no later than the time at which it submitted the evidence and its involvement has remained terminated. The Commission therefore will apply a reduction of fines in the band of 30-50 %. The Commission granted EKA a 40 % reduction of the fine.

- (31) EKA's evidence enabled the Commission to trace the existence of the cartel back to 31 January 1994. EKA's evidence for the period of the infringement before 14 October 1997 related to facts previously unknown to the Commission which had a direct bearing on the duration of the suspected cartel. In accordance with point 23 of the Leniency Notice, the Commission did not take these elements into account for the purposes of setting the amount of the fine to be imposed on EKA.

2.5.3. Point 23 (b), second indent (reduction of 20-30 %)

- (32) Atofina, (now Arkema), was the second undertaking to meet the requirements of point 21 of the Leniency Notice, as it provided the Commission with evidence which represents significant added value with respect to the evidence already in the Commission's possession at the time of its submission and, to the Commission's knowledge, Atofina terminated its involvement in the infringement no later than the time at which it submitted the evidence. It qualifies, therefore, under the second indent of point 23 (b) of the Leniency Notice, for a reduction of 20-30 % of the fine. In the assessment of the level of reduction within the band of 20-30 %, the Commission took into account the time at which the evidence of significant added value was submitted and the extent to which it represents such value. The Commission granted Atofina a 30 % reduction of the fine that would otherwise have been imposed on it.

2.5.4. Point 23 (b), third indent (reduction of up to 20 %)

- (33) Solvay was the third undertaking to meet the requirements of point 21 of the Leniency Notice. On 4 April 2003, also soon after its premises had been inspected under Article 14 of Regulation No 17, on 25 March 2003, Solvay submitted an application under the Leniency Notice. The submission on 4 April 2003 met the requirements of point 21 of the Leniency Notice, as Solvay provided the Commission with evidence representing significant added value with respect to the evidence already in the Commission's possession. To the Commission's knowledge, Solvay terminated its involvement in the infringement no later than the time at which it submitted the evidence.
- (34) Solvay submits that it contacted the Commission by telephone on the morning of 3 April 2003 to inform it that Solvay wished to make an application under the Leniency Notice. The application by Atofina, made on 3 April 2003 at 15:50hrs enclosed thirteen documents which, according to Solvay, were illegible and/or unintelligible without a transcript or other form of explanation, so that the Commission was unable to make use of any of these documents until a full explanation was provided, on 26 May 2003, in any case after Solvay's leniency application was made.
- (35) Solvay submits that a decisive factor in determining whether an application for leniency qualifies for a reduction under the Leniency Notice is the objective quality of the information submitted in terms of the extent to which it is useful to the Commission. Solvay submits that its application for leniency was properly made on the morning of 3 April 2003 and provided significant added value in relation to both HP and PBS. It therefore qualifies for the maximum reduction (50 %) of any fine imposed in relation to the two products.

- (36) The Commission considers that EKA's and Atofina's submissions represented significant added value in accordance with point 21 of the Leniency Notice prior to the first submission by Solvay, which only occurred on 4 April 2003. Therefore the Commission rejects Solvay's argument.
- (37) Solvay was granted a 10 % reduction of the fine that would otherwise have been imposed on it.

2.5.5. Other applications under the Leniency Notice

- (38) Solvay Solexis and Kemira also filed applications under section B of the Leniency Notice but no reduction was granted, due to lack of significant added value in their applications.

3. DECISION

- (39) The following undertakings have infringed Article 81(1) of the Treaty and Article 53 of the EEA Agreement by participating, for the periods indicated, in a single and continuous infringement regarding hydrogen peroxide and sodium perborate, covering the whole EEA territory, which consisted mainly of exchanges between competitors of information on prices and sales volumes, agreements on prices, agreements on reduction of production capacity in the EEA and monitoring of the anti-competitive arrangements:
- (a) Akzo Nobel NV, from 25 February 1994 until 31 December 1999;
 - (b) Akzo Nobel Chemicals Holding AB, from 31 January 1994 until 31 December 1999;
 - (c) EKA Chemicals AB, from 31 January 1994 until 31 December 1999;
 - (d) Degussa AG, from 31 January 1994 until 31 December 2000;
 - (e) Edison SpA, from 12 May 1995 until 31 December 2000;
 - (f) FMC Corporation, from 29 May 1997 until 13 December 1999;
 - (g) FMC Foret S.A., from 29 May 1997 until 13 December 1999;
 - (h) Kemira OYJ, from 31 January 1994 until 31 December 2000;
 - (i) L'Air Liquide SA, from 12 May 1995 until 31 December 1997;
 - (j) Chemoxal SA, from 12 May 1995 until 31 December 1997;
 - (k) Snia SpA, from 29 May 1997 until 31 December 1998;

- (l) Caffaro Srl, from 29 May 1997 until 31 December 1998;
- (m) Solvay SA/NV, from 31 January 1994 until 31 December 2000;
- (n) Solvay Solexis SpA, from 12 May 1995 until 31 December 2000;
- (o) Total SA, from 30 April 2000 until 31 December 2000;
- (p) Elf Aquitaine SA, from 12 May 1995 until 31 December 2000;
- (q) Arkema SA, from 12 May 1995 until 31 December 2000.
- (40) For the infringements referred to in previous recital, the following fines were imposed:
- (a) Akzo Nobel NV, Akzo Nobel Chemicals Holding AB and EKA Chemicals AB, jointly and severally: EUR 25,2 million;
- (b) Degussa AG: EUR 0;
- (c) Edison SpA: EUR 58,125 million, of which EUR 25,619 million jointly and severally with Solvay Solexis SpA;
- (d) FMC Corporation and FMC Foret S.A., jointly and severally: EUR 25 million;
- (e) Kemira OYJ: EUR 33 million;
- (f) L'Air Liquide SA and Chemoxal SA: EUR 0;
- (g) Snia SpA and Caffaro Srl, jointly and severally: EUR 1,078 million;
- (h) Solvay SA/NV: EUR 167,062 million;
- (i) Arkema SA: EUR 78,663 million, of which EUR 42 million jointly and severally with Total SA and EUR 65,1 million jointly and severally with Elf Aquitaine SA.
- (41) The undertakings listed above were ordered to bring to an end immediately the infringements referred to in that Article, in so far as they have not already done so and to refrain from repeating any act or conduct described in recital and from any act or conduct having the same or similar object or effect.
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