Final report of the Hearing Officer in Case COMP/C.38.620 — Hydrogen Peroxide and Perborate

(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)

(2006/C 303/20)

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 hydrogen peroxide and perborate 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 26 January 2005 and addressed to eighteen parties considered on a preliminary basis to have participated in the cartel or to bear liability thereof, namely:

Akzo Nobel NV, and its subsidiaries Akzo Nobel Chemicals Holding AB and EKA Chemicals AB; Degussa AG; Edison SpA; FMC Corporation and its subsidiary FMC Foret S.A.; Kemira OYJ; L'Air Liquide SA and its subsidiary: Chemoxal SA; Snia SpA, and its subsidiary Caffaro SpA; Solvay SA/NV and its subsidiary: Finnish Peroxides OY/AB; Solvay Solexis SpA (formerly Ausimont SpA); Total SA and its subsidiaries: Elf Aquitaine SA and Arkema SA.

Access to file was granted to the addressees of the SO by a CD-ROM. Oral statements made in the framework of the Leniency Notice were only accessible at the Commission's premises. No addressee was allowed to make copies of these documents, although they were entitled to take their own notes and/or to produce an unofficial transcript. They were also allowed to read the transcripts prepared by the Commission, but not to make copies of them.

Several parties applied for extensions of the deadline to reply to the Statement of Objections, and in some cases I granted extensions for legitimate reasons. All parties replied in due time.

Specific request concerning access to file:

Air Liquide/Chemoxal complained about the form of access at the Commission's premises to the Oral Statements and requested copies of the recorded statements and of the transcripts.

I took the view that this request was unfounded on the grounds that: (i) transcripts are Commission internal documents which, according to the case law, the Commission is not obliged to show to the parties, and (ii) recorded oral statements are accessible documents, but the Commission is not obliged to give access to them in any particular manner. Access provided at the Commission premises fully respects the parties' rights of defence while protecting the Commission's leniency program from interference with the procedures applicable in a number of countries, particularly non-EU.

A number of requests for further access to file were entered by different addressees. Indeed, some documents in the Commission's file had been unduly granted the status of confidential information although the disclosure of those documents could not have involved any serious and irreparable harm to their providers. The DG followed my advice to grant access and all the parties, except for Solvay and Solexis, found this solution satisfactory.

Solexis and Solvay requested access to a number of monthly market reports drafted by Degussa. These reports are contemporaneous to the infringement and contain Degussa's appreciation as to the market structure and developments, recent movements and reactions of competitors and its own short term strategies. Subsequent to my request, Solvay and Solexis had already been transmitted all reports from 1996 to 1999 (included), but they argued that all reports from 1 January 2000 to June 2001 should be also disclosed to them. In a decision taken under Article 8 of the Hearing Officers' Mandate, I took the view that they should be granted access to an edited version of these reports. Those reports were considered to be of a confidential nature, as a matter of principle, in reference to the Guidelines on access to file, but included some information which could be relevant to their defence. In particular, they depicted the companies' behaviour in the market and some instances in which they seemed to have disregarded the allegedly illegal agreements at stake. Therefore, they could be termed as exculpatory, although only to a limited extent. However I considered that the main part of the information in these second set of reports had very limited value for the requesting companies' rights of defence and, in view of its confidential nature, should not be disclosed.

Access to the replies to the SO

Solvay requested access to the replies of other parties to the SO. I considered that this request was unfounded. It is settled law (Judgement of the Court of First Instance of 15 March 2000 in joined cases T-25/95 and others, *Cimenteries* para 380 and subsequent) that the Commission is under no duty to provide the answers to the SO to all the parties. Nevertheless, it follows from the same case law that if incriminating evidence is found in one party's reply and the Commission makes use of it against another party, it must communicate the information in question and give an appropriate time for the other party to comment. Accordingly, this was done in this case, where part of the replies of Solvay and Degussa incriminating FMC Corp. and FMC Foret were sent to the latter for comments.

Oral procedure

All parties participated in the oral hearing, which took place on 28 and 29 June 2005, and was marked by a high level of confrontation, in particular among the parties.

Correlation between the draft Decision and the preliminary assessment in the Statement of Objections

As a result of taking into account the reasoning and factual elements brought to the Commission by the parties in their written replies and at the hearing, the scope of the infraction has been reduced to a noticeable extent.

Products concerned by the cartel

Sodium percarbonate (PCS) has been left out and the draft Decision only covers hydrogen peroxide and perborate.

Infractions committed and duration in relation to the quality of the proof

— Air Liquide and Chemoxal were considered to be able to benefit from the statute of limitations, as far as fines are concerned, since their participation in the cartel could only be proven until 31 December 1997, and fines could not be imposed if they had ceased prior to 25 March 1998.

— As a general rule, incriminating evidence which is based on a single accusation, contested by the company concerned and not corroborated by other evidence has not been retained, because the Commission has to carry the burden of proof. As a result, the duration of the infraction has been considerably shortened for FMC and FMC Foret, and shortened for Caffaro.

— Nevertheless, this draft Decision includes some facts which come out of single statements, because they have not been contested by the parties to which they refer, and they are credible in the general context in which they are utilized. In these specific circumstances I believe that this is acceptable in view of due process, although it implies that elements of incrimination result from a single accusation.

I consider that the draft Final Decision does not contain objections on which the parties were not in a position to make their views known, and that their rights to be heard have been respected.

Brussels, 20 April 2006

Serge DURANDE