Final Report (1) in case COMP/39.396 Calcium Carbide (et al.)

(2009/C 301/13)

The draft Decision gives rise to the following observations:

BACKGROUND

In November 2006, the Commission received an immunity application from a producer of calcium carbide powder and calcium carbide granulates. Subsequently, the Commission carried out on-site inspections. The inspections were followed by leniency applications in the course of 2007 and early 2008. On the basis of the collected information, the Commission came to the preliminary conclusion that seven groups of undertakings had participated in a single and continuous infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement for different periods between 7 April 2004 and 16 January 2007 by fixing prices and exchanging commercially sensitive information in relation to the supply of calcium carbide powder to the metallurgic industry, calcium carbide granulates to the gas industry and magnesium granulates to the metallurgic industry.

WRITTEN PROCEDURE

Statement of Objections

Following the above-mentioned leniency applications and a subsequent investigation, the Commission on 24 June 2008 issued a Statement of Objections (SO) to the following addressees concerning alleged infringements of Article 81 of the Treaty and Article 53 of the EEA agreement:

Carbide Sweden AB and its ultimate parent company Akzo Nobel NV (together ‘Akzo’); Almamet GmbH (‘Almamet’); Donau Chemie AG (Donau Chemie); non ferrum Metallpulver GmbH Co. KG and its ultimate parent company ECKA Granulate GmbH & Co. KG (together with non ferrum Ecka); Novácke chemické závody, a.s. (NCHZ) and its former parent company 1. garantovaná a.s. (garantovaná); SKW Stahl-Metallurgie GmbH (SKW), its parent company SKW Stahl-Metallurgie Holding AG (SKW Holding), its former ultimate parent company ARQUES Industries AG (ARQUES), its former parent company AlzChem Hart GmbH (AlzChem) and its former ultimate parent company Evonik Degussa GmbH (Degussa); and TDR-Metalurgija d.d. (TDR) and its former parent company Holding Slovenske elektrarne d.o.o. (HSE).

Access to file

The parties received access to the file through a DVD which was made available to them on request. The parties also received access to oral and written leniency statements at the Commission’s premises.

The parties did not address any issues concerning access to file to me.

Extensions to deadline for reply to SO

The addressees of the SO were originally granted a deadline of three months to reply to the SO, starting from the day after receipt of the DVD. Following reasoned requests submitted to me, I granted short extensions to ARQUES and NCHZ (five and four days, respectively). All parties replied in time except for TDR, which did not reply at all.

ORAL PROCEDURE

Oral Hearing

An Oral Hearing was held on 10 and 11 November 2008 and was attended by representatives of Akzo, Almamet, Donau Chemie, ECKA, NCHZ, SKW, SKW Holding, ARQUES, AlzChem, Degussa and HSE. TDR did not request an Oral Hearing.

Before the Oral Hearing one company requested an in camera session. Since that company acknowledged that the proposed in camera presentation might be relevant for the defence of another company, they proposed as a practical solution to reveal the content of the in camera presentation to the latter at a later stage of the proceedings.

I considered the request in light of the fundamental right to be heard (1) as it was not strictu sensu based on the need for protection of business secrets and other confidential information (2). On balance I rejected the request since an in camera session, if allowed, would deprive the other company of the opportunity to respond orally to allegations (at least indirectly) made against it in the presence of the Member States, the Hearing Officer, the Legal Service and other Commission Services.

Some months after the Oral Hearing had taken place, that company asked for an additional oral hearing to present the issue for which it previously had requested the in camera session. I rejected that request as the right to be heard orally is triggered by the issue of a statement of objections and is afforded on a single occasion (3). However, I allowed that company to submit within two weeks additional written comments on the issue.

On 11 November 2008, before that request but also after the Oral Hearing had taken place, garantovaná requested an oral hearing. By letter of 17 November 2008, I rejected the request since garantovaná had not requested an oral hearing either in its written reply or in the ensuing email exchange with the case team.

Inability to pay

Several parties in their written replies and/or during the Oral Hearing claimed their inability to pay a potential fine. In order to verify these claims, the Commission services addressed requests for information to these parties after the Oral Hearing.

THE DRAFT DECISION

Degussa provided evidence to the Commission substantiating that the date of transfer of ownership of SKW between Degussa and ARQUES took place not on 13 September 2004 as mentioned in the SO, but on 30 August 2004. The Commission verified this information with SKW and ARQUES and gave them the opportunity to comment. SKW and ARQUES confirmed the date in writing. The draft Decision contains the correct date (30 August 2004) as the starting date of ARQUES’ and SKW’s liability for the infringement.

In my opinion the draft Decision relates only to objections in respect of which the parties have been afforded the opportunity to make known their views.

I consider that the right to be heard of all participants to the proceedings has been respected in this case.


Karen WILLIAMS

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(1) See also Paragraph 19 of the Commission notice on access to file regarding a broad reading of the term 'confidential information' (OJ C 325, 22.12.2005, p. 7).