

COMMISSION

COMMISSION DECISION

of 1 October 2003

relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement against Chisso Corporation, Daicel Chemical Industries Ltd, Hoechst AG, The Nippon Synthetic Chemical Industry Co. Ltd and Ueno Fine Chemicals Industry Ltd

(Case No C.37.370 — Sorbates)

(notified under document number C(2003) 3426)

(Only the English and German texts are authentic)

(Text with EEA relevance)

(2005/493/EC)

On 1 October 2003, the Commission adopted a Decision relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement. In accordance with the provisions of Article 30 of Council Regulation (EC) No 1/2003 ⁽¹⁾, the Commission herewith publishes the names of the parties and the main content of the Decision, as well as the penalties imposed, 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 the Directorate-General for Competition's website at http://europa.eu.int/comm/competition/index_en.html

I. SUMMARY OF THE INFRINGEMENT

Addressees and nature of the infringement

- (1) This Decision is addressed to Chisso Corporation (hereinafter Chisso), Daicel Chemical Industries Ltd (hereinafter Daicel), Hoechst AG (hereinafter Hoechst), The Nippon Synthetic Chemical Industry Co. Ltd (hereinafter Nippon) and Ueno Fine Chemicals Industry Ltd (hereinafter Ueno).
- (2) The addressees participated in a single and continuous infringement of Article 81(1) of the Treaty establishing the European Community (hereinafter the EC Treaty or the Treaty) and, from 1 January 1994, Article 53(1) of the Agreement on the European Economic Area (hereinafter EEA Agreement), covering the whole of the EEA territory, by which they:
 - agreed on price targets,
 - allocated volume quotas for sorbates,
 - decided not to supply technology to potential market entrants, and
 - monitored their anti-competitive arrangements.

Duration of the infringement

- (3) The undertakings participated in the infringement from at least 31 December 1978 until at least 30 November 1995 in the case of Nippon, and until at least 31 October 1996 for the other Parties.

⁽¹⁾ OJ L 1, 4.1.2003, p. 1.

The market for sorbates

- (4) Sorbates are chemical preservatives (anti-microbial agents) capable of retarding or preventing growth of micro-organisms, such as yeast, bacteria, moulds or fungi, used primarily in food and beverages. Their principal mechanisms are to reduce water availability and increase acidity. Sometimes these additives also preserve other important food characteristics such as flavour, colour, texture and nutritional value. In addition to their use as a preservative in food and beverages, sorbates also perform well in the stabilisation of other types of products such as pharmaceutical products, cosmetics, pet food and animal feed.
- (5) There are three main types of sorbates: sorbic acid, potassium sorbate and calcium sorbate.
- (6) Sorbic acid is the basic product. It is a fatty acid, decomposed and utilised in the body, and physiologically inert. It has no effect on the odour or flavour of products it is used to preserve. It is widely used in margarine, mayonnaise, salads, cheese, fish products, meat and sausage products, fruit products, beverages, confectionery and bakery products, and for fungistatic packaging materials. It is a technically complex substance to produce, whilst other sorbate products are the result of a technically simpler conversion step from sorbic acid. The production of sorbic acid requires two essential raw materials ketene and crotonic aldehyde, the former (a gas) must be produced on site. The high investment necessary for production plants poses important barriers for potential entrants.
- (7) Potassium sorbate is used where high water solubility is desired. Use of sorbic acid is limited because of its low solubility in water. Therefore, potassium sorbate is the primary form used in most products with high water content.
- (8) Calcium sorbate is produced in small quantities, being used for the coating of cheese wrapping paper in France and Italy.
- (9) Sorbic acid and its salts (including potassium sorbate) rank among the main preservatives used in western Europe. Sorbic acid represents 30 % of sorbates sales and potassium sorbate represents the remaining 70 %.
- (10) Preservatives are mature products and not research and development intensive, and the prospects for new preservatives entering the market place are minimal.
- (11) Sorbates are the leading product segment in the preservatives sector. The main substitution products for sorbates are sodium and potassium benzoate together with parabens. However, many manufacturers prefer the sorbates, notwithstanding their higher price, for quality reasons. None of these products constitute perfect substitutes, with parabens in particular occupying only a niche market in the food preservative industry. The demand for sorbates is not price elastic since there are few, if any, alternatives to its use.
- (12) The geographic relevant market is worldwide in scope. It exceeds, thus, the geographic area on which the sanction applies, namely the EEA.

Functioning of the cartel

- (13) The structure, organisation and operation of the cartel were based upon a shared assessment of the market. Hoechst, representing the European market and Daicel, Chisso, Nippon and Ueno, as a group, representing the Japanese market.
- (14) Cartel meetings were held at several different levels. The twice-yearly meetings between Hoechst and the four Japanese producers (joint meetings); the Japanese producers' preparatory meetings (preparatory meetings or pre-meetings) and the bilateral meetings and telephone contacts (bilateral contacts).
- (15) Prior to each joint meeting, the Japanese producers used to have a series of preparatory meetings in order to agree on the prices and volume quotas to be discussed with Hoechst.
- (16) In addition to group meetings, there were a number of bilateral meetings and telephone contacts, between Hoechst and the Japanese producers.

II. FINES

Basic amount

- (17) Taking into account the nature of the infringement in this case, its actual impact on the sorbates market and the fact that it covered the whole of the common market and, following its creation, the whole of the EEA market, the Commission considers that the undertakings concerned by this Decision have committed an infringement of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement, which was very serious.

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 to cause significant damage to competition. This exercise is particularly necessary where, as in this case, there is considerable disparity in the market size of the undertakings participating in the infringement.
- (19) In the circumstances of this case, which involves several undertakings, it will be necessary in setting the basic amount of the fines to take account of the specific weight and therefore the real impact of the offending conduct of each undertaking on competition. For this purpose, the undertakings concerned can be divided into different groups established according to their relative importance in the relevant market.
- (20) In this case, the Commission therefore considers it appropriate to take the worldwide product turnover in the last full year of the infringement (1995) as the basis for comparing the relative importance of each undertaking in the market concerned.
- (21) According to worldwide product turnover provided by the companies themselves in their response to the Commission's requests for information, in 1995 Hoechst was by far the largest producer of sorbates in the worldwide market with a market share of [...] (*) % (in the EEA [...] (*) %). It is therefore placed in the first group. Daicel, Chisso Nippon and Ueno all have market shares between [...] (*) % and [...] (*) % (in the EEA between [...] (*) % and [...] (*) %). Therefore, they are placed in the second group.
- (22) On the basis of the foregoing, the appropriate starting amount for the fines to be imposed in this case resulting from the criterion of relative importance in the market concerned is, for each of the two groups, as follows:

— first group: EUR 20 million,

— second group: EUR 6,66 million.

Sufficient deterrence

- (23) In order to ensure that the fine has a sufficient deterrent effect on large undertakings and take account of the fact that large undertakings have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement, and to be aware of the consequences stemming from that conduct under competition law, the starting amount for Hoechst should be further adjusted.
- (24) In the case of Hoechst, being by far the largest undertaking concerned by this Decision, the Commission considers that the appropriate starting amount for a fine resulting from the criterion of the relative importance in the market concerned requires further upward adjustment to take account of its size and its overall resources. Therefore, the starting amount of its fine determined in recital 22 should be increased by 100 % to EUR 40 million.

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

Duration

- (25) The Commission considers that Chisso, Daicel, Hoechst and Ueno infringed Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement from 31 December 1978 until 31 October 1996. They committed a long-term infringement of 17 years and 10 months. The starting amount of the fines determined for gravity for Chisso, Daicel, Ueno and for Hoechst, should therefore be increased by 175 %.
- (26) Nippon infringed Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement from 31 December 1978 until 30 November 1995. It committed a long-term infringement of 16 years and 11 months. The starting amount of its fine determined in recital (22) for gravity should therefore be increased by 165 %.
- (27) The Commission accordingly sets the basic amounts of the fines for Chisso at EUR 18,315 million, for Daicel at EUR 18,315 million, for Hoechst at EUR 110 million, for Nippon at EUR 17,649 million and for Ueno at EUR 18,315 million.

Aggravating circumstances

- (28) Hoechst's leading role in the cartel and its recidivist behaviour should therefore be considered as aggravating circumstances, justifying increases of 30 % and of 50 % respectively of the basic amount of the fine.
- (29) Daicel, alongside with Hoechst, was a driving force behind the cartel. The two undertakings were by far the most powerful cartel members, with the largest market share and sharing the same interests. The fact that Hoechst played a leading role in the infringement does not mean that Daicel did not also do so. However, the Commission accepts that other members of the cartel took certain initiatives in order to realise their common anti-competitive goals. Having regard to the foregoing, the basic amount of the fine should be increased, in the case of Daicel, by 30 %.
- (30) There are no aggravating circumstances relating to the infringement in Chisso's case.
- (31) There are no aggravating circumstances relating to the infringement in Nippon's case.
- (32) There are no aggravating circumstances relating to the infringement in Ueno's case.

Attenuating circumstances

- (33) There are no attenuating circumstances relating to the infringement in Hoechst's case.
- (34) There are no attenuating circumstances relating to the infringement in Daicel's case.
- (35) There are no attenuating circumstances relating to the infringement in Chisso's case.
- (36) There are no attenuating circumstances relating to the infringement in Nippon's case.
- (37) With reference to Ueno's case the Commission will consider as an attenuating circumstance the non-implementation in practice of the agreed volume quota allocations.

Application of the 1996 Leniency Notice

- (38) The 2002 Leniency Notice is clearly inapplicable to this case. The dividing line for the application *ratione temporis* of the 1996 and 2002 Notices has been drawn in point 28 of the 2002 Notice, which reads as follows:

'From 14 February 2002, this notice replaces the 1996 notice for all cases in which no undertaking has contacted the Commission in order to take advantage of the favourable treatment set out in that notice.'

- (39) In this case, several undertakings, including Hoechst, had already 'contacted' the Commission before that date. The 1996 Leniency Notice therefore remains applicable.
- (40) In accordance with Section B of the 1996 Leniency Notice, the Commission grants Chisso a 100 % reduction of the fine that would otherwise have been imposed had it not cooperated with the Commission.
- (41) Therefore, the Commission will not impose any fine on Chisso.

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

- (42) After due consideration of Hoechst's cooperation under the 1996 Leniency Notice, the Commission grants it, in accordance with the first and second indent of Section D(2) of that Notice, a 50 % reduction of the fine that would have been imposed if it had not cooperated with the Commission.
- (43) After due consideration of Nippon's cooperation under the 1996 Leniency Notice, the Commission grants it, in accordance with the first and second indent of Section D(2) of that Notice, a 40 % reduction of the fine that would have been imposed if it had not cooperated with the Commission.
- (44) After due consideration of Daicel's cooperation under the 1996 Leniency Notice, and having taken into account the stage of the procedure when this cooperation took place, the Commission grants it, in accordance with the first and second indent of Section D(2) of that Notice, a 30 % reduction of the fine that would have been imposed if it had not cooperated with the Commission.
- (45) After due consideration of Ueno's cooperation under the 1996 Leniency Notice, and having taken into account the stage of the procedure when this cooperation took place, the Commission grants it, in accordance with the first and second indent of Section D(2) of that Notice, a 25 % reduction of the fine that would have been imposed if it had not cooperated with the Commission.
- (46) In conclusion, with regard to the nature of their cooperation and in the light of the conditions as set out in the 1996 Leniency Notice, the fines to be imposed on the addressees of this Decision should be reduced as follows:
- (a) Chisso: a reduction of 100 %,
 - (b) Daicel: a reduction of 30 %,
 - (c) Hoechst: a reduction of 50 %,
 - (d) Nippon: a reduction of 40 %,
 - (e) Ueno: a reduction of 25 %.

Ability to pay

Arguments of Chisso and Ueno

- (47) Chisso submits that its financial situation has deteriorated in recent years due to the severe and lasting economic crisis in Japan for over two decades and the immense financial exposure to Chisso for damages and clean up costs arising from the Minamata disease. In its submission made on 10 June 2003, Chisso further explains and describes its precarious financial position and provides the Commission with financial data.
- (48) The Commission notes that Ueno failed to produce consolidated figures. After having examined Ueno's financial situation on the basis of non-consolidated figures, the Commission concludes that it is not appropriate to adjust the amount of the fine in Ueno's case. To take into account the adverse financial situation of an undertaking would be tantamount to conferring an unjustified competitive advantage on undertakings least well adapted to the conditions of the market. As the Commission does not impose a fine on Chisso, its argument is irrelevant.

Decision

- (49) In conclusion, the fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 should be as follows:
- Daicel Chemical Industries Ltd: EUR 16,6 million
 - Hoechst AG: EUR 99,0 million
 - The Nippon Synthetic Chemical Industry Co. Ltd: EUR 10,5 million
 - Ueno Fine Chemicals Industry Ltd: EUR 12,3 million
- (50) The 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.
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