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(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 13 September 2006

relating to a proceeding under Article 81 of the Treaty establishing the European Community

(Case No COMP/F/38.456 — Bitumen (NL))

(notified under document number C(2006) 4090)

(only the Dutch, English, French and German versions are authentic)

(2007/534/EC)

1. SUMMARY OF THE INFRINGEMENT

- (1) The addressees of the Decision participated in a single and continuous infringement of Article 81 of the Treaty establishing the European Community, involving the fixing of prices concerning road pavement bitumen in the Netherlands.

1.1. The road pavement bitumen sector

- (2) Bitumen is a by-product in the production of fuel. Normally, it is produced during the distillation of specific heavy crude oils. Different crude oils and refinery configurations produce different bitumen types, which can be further modified by the addition of polymers in order to enhance performance. Bitumen is mainly used in the production of asphalt, where it serves as an adhesive binding the other materials together. The remainder of bitumen production goes into various industrial applications.
- (3) The product that is the subject of this Decision is all bitumen used for road construction and similar applications. It is also referred to as penetration bitumen, paving-grade bitumen or pen-grade bitumen. It will be referred to as road pavement bitumen.
- (4) The investigation showed that the cartel covered the territory of the Netherlands. The size estimated is at around EUR 62 million in 2001, the last full year of the infringement. A peculiar feature of the arrangements is that the collusion occurred not only among sellers, as is usually the case, but among sellers and buyers

together. Eight out of nine suppliers of road pavement bitumen and the six (now five) largest road construction companies, purchasers of the product, participated in the cartel.

- (5) The addressees referred to below participated in a single and continuous infringement of Article 81 of the EC Treaty, covering the territory of the Netherlands, the main features of which were that suppliers and purchasers jointly agreed on prices and rebates for the product concerned.

1.2. Addressees and duration of the infringement

- (6) The undertakings, with their legal entities, which have participated in the infringement (some of them are held liable as parent companies) are the following, for the periods indicated. Please note that for certain undertakings more than one legal entity is the addressee of the Decision:

Suppliers:

- (a) BP: BP plc. from 1 April 1994 to 15 April 2002, BP Nederland BV from 1 April 1994 to 1 January 2000 and BP Refining & Petrochemicals GmbH from 31 December 1999 to 15 April 2002;
- (b) Esha: Esha Holding BV, Smid & Hollander BV and Esha Port Services Amsterdam BV from 1 April 1994 to 15 April 2002;

- (c) Klöckner: Klöckner Bitumen BV from 1 April 1994 to 15 April 2002 and Sideron Industrial Development from 1 January 2000 to 15 April 2002;
- (d) Kuwait Petroleum: Kuwait Petroleum Corporation, Kuwait Petroleum International Ltd. and Kuwait Petroleum (Nederland) BV from 1 April 1994 to 15 April 2002;
- (e) Nynäs: AB Nynäs Petroleum and Nynäs Belgium AB from 1 April 1994 to 15 April 2002;
- (f) Shell: Shell Petroleum NV, The Shell Transport and Trading Company Ltd and Shell Nederland Verkoopmaatschappij BV from 1 April 1994 to 15 April 2002;
- (g) Total: Total Nederland NV from 1 April 1994 until 15 April 2002 and Total SA from 1 November 1999 to 15 April 2002;
- (h) Wintershall: Wintershall AG from 1 April 1994 until 31 December 1999.

Purchasers:

- (i) Ballast Nedam: Ballast Nedam NV and Ballast Nedam Infra BV from 21 June 1996 to 15 April 2002;
- (j) BAM: BAM NBM Wegenbouw BV from 1 April 1994 to 15 April 2002 and Koninklijke BAM Groep NV from 1 November 2000 to 15 April 2002;
- (k) Dura Vermeer: Vermeer Infrastructuur BV from 1 April 1994 to 15 April 2002, Dura Vermeer Groep NV from 13 November 1998 until 15 April 2002 and Dura Vermeer Infra BV from 1 July 2000 to 15 April 2002.
- (l) HBG: HBG Civiel BV from 1 April 1994 to 15 April 2002;
- (m) Heijmans: Heijmans NV and Heijmans Infrastructuur BV from 1 April 1994 to 15 April 2002;
- (n) KWS: Koninklijke Volker Wessels Stevin NV and Koninklijke Wegenbouw Stevin BV from 1 April 1994 to 15 April 2002;

1.3. Functioning of the cartel

- (7) The collusive practices can be categorised as price fixing practices for road pavement bitumen in the Netherlands

between the suppliers, between the main purchasers, as well as between these suppliers and purchasers.

- (8) The evidence of this cartel covers the period between 1 April 1994 and 15 April 2002 and relates essentially to the practice of regularly fixing collectively the gross price for sales and purchases of road pavement bitumen, a uniform rebate on the gross price for participating road builders and a smaller maximum rebate on the gross price for other road builders.
- (9) The Commission considers that the entire system of preparatory and joint meetings, with the ensuing agreements between the group of bitumen suppliers and the group of road builders on gross prices and rebates for road pavement bitumen in the Netherlands forms part of a single overall scheme and therefore constitutes a single infringement of Article 81 of the Treaty.

2. FINES

2.1. Basic Amount

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

Gravity

- (11) 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.
- (12) Regarding the nature of the infringement, the fact that it must have had an impact and the fact that it covered a substantial part of the common market, the Commission considers that the undertakings to which this Decision is addressed have committed a very serious infringement of Article 81 of the Treaty.

Differential treatment

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

- (14) The undertakings have been divided into six categories according to their relative importance in the relevant market in 2001, the last full year of the infringement.

Sufficient deterrence

- (15) The Commission notes that in this proceeding Shell, BP, Total and Kuwait Petroleum had worldwide turnovers in financial year 2005, the most recent financial year preceding this Decision, of respectively EUR 246, 203, 143 and 37 billion. All other undertakings had worldwide turnovers of less than EUR 10 billion.

- (16) The Commission considers that, given the circumstances of the case, no multiplier is necessary to ensure a sufficient deterrent effect of the fines for these undertakings with worldwide turnovers of less than EUR 10 billion. The Commission considers only multiplying the fine for Shell, BP, Total and Kuwait Petroleum with a factor that has been adapted to the circumstances of the case.

Duration

- (17) Individualised multiplying factors are applied accordingly to the duration of the infringement proper to each company ranging from 1,5 to 8 years (see recital 6 above).

2.2. Aggravating and attenuating circumstances*Aggravating circumstances*

- (18) At the time the infringement took place, Shell had already been subject to previous Commission prohibition decisions for cartel activities⁽¹⁾. This recidivism constitutes an aggravating circumstance justifying an increase of 50 % in the basic amount of the fine to be imposed on Shell.
- (19) During the inspections, KWS refused to submit to the investigation, prompting the inspectors to invoke the assistance of the national competition authority and the police. The Commission considers that this obstruction constitutes an aggravating circumstance that justifies an increase of 10 % in the basic amount of the fine to be imposed on KWS.
- (20) Shell, within the group of bitumen suppliers, and KWS, within the group of the bitumen purchasers, bear a

⁽¹⁾ Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — *Polypropylene*, OJ L 230, 18.8.1986, p. 1) and Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding under Article 85 of the EEC Treaty (IV/31865 — *PVC II*, OJ L 239, 14.9.1994, p. 14).

special responsibility for their role in instigating and leading the cartel. They were the driving forces in the operation of the cartel. This role justifies an increase of 50 % in the basic amount of the fine to be imposed on Shell and KWS.

2.3. Application of the 10 % turnover limit

- (21) Article 23(2) of Regulation (EC) No 1/2003⁽²⁾ provides that the fine imposed on each undertaking is not to exceed 10 % of its turnover. This threshold is applied to the fines calculated for Esha (Esha Holding BV, Smid & Hollander BV and Esha Port Services Amsterdam BV) and Klöckner Bitumen BV.

2.4. Application of the 2002 Leniency Notice*Immunity*

- (22) BP was the first undertaking to inform the Commission of the existence of a bitumen cartel in the Netherlands and the Commission granted BP conditional immunity from fines in accordance with point 15 of the Notice. BP has co-operated fully, on a continuous basis and expeditiously throughout the Commission's administrative procedure. BP ended its involvement in the suspected infringement no later than the time at which it submitted evidence under the Leniency Notice and did not take steps to coerce other undertakings to participate in the infringement. Hence, BP qualifies for a full immunity from fines.

Point 23(b), first indent (reduction of 30 to 50 %)

- (23) Kuwait Petroleum was the next undertaking to approach the Commission under the Leniency Notice and was the first undertaking to meet the requirements of point 21 thereof. The evidence provided by Kuwait Petroleum strengthened by its very nature the Commission's ability to prove the facts in question, and therefore represented added value with respect to the evidence in the Commission's possession at that time. This added value was significant because it corroborated the existing information and, together with the information already in the Commission's possession, assisted the Commission in proving the infringement. It must be taken into account that BP was not a regular attendant of the bitumen consultation meetings with the purchasers and Kuwait Petroleum was the first to give direct evidence on this central element of the cartel's functioning. In accordance with point 23 of the Leniency Notice, Kuwait Petroleum therefore qualifies for a reduction of the fine between 30 % and 50 %.

⁽²⁾ OJ L 1, 4.1.2003, p. 1. Regulation as last amended by Regulation (EC) No 1419/2006 (OJ L 269, 28.9.2006, p. 1).

(24) For the exact reduction of the fine to be imposed on Kuwait Petroleum, it must be taken into account that Kuwait Petroleum's leniency application and the further evidence provided thereafter strengthened by its level of detail the Commission's ability to prove the facts in question. However, it must also be taken into account that the application was made more than 11 months after the Commission had conducted inspections and only after the Commission had sent the parties a request for information asking for detailed factual information about the events. Moreover, the Commission considers it serious that certain important statements Kuwait Petroleum had made in respect of the alleged participation in the cartel of ExxonMobil were later reformulated and could not be used in evidence against this undertaking. The Commission concludes that Kuwait Petroleum is entitled to a 30 % reduction of the fine that would otherwise have been imposed.

Other applications for leniency

(25) Shell also filed an application under section B of the Leniency Notice but no reward is proposed, due to lack of significant added value.

(26) Nynäs and Total also claim that they have provided the Commission with self-incriminating information on a voluntary basis. But the Commission considers that the information provided does not constitute significant added value on the basis of which the Commission should grant a reduction of penalty.

(27) Wintershall claims that it ought to be covered by the immunity application of BP. But Wintershall still exists as a separate undertaking from BP and it was BP, not Wintershall, which decided to apply for immunity with the Commission.

3. DECISION

(28) The following undertakings infringed Article 81 of the Treaty by regularly fixing collectively, for the periods indicated, for sales and purchases of road pavement bitumen in the Netherlands the gross price, a uniform rebate on the gross price for participating road builders and a smaller maximum rebate on the gross price for other road builders:

(a) Ballast Nedam: Ballast Nedam NV and Ballast Nedam Infra BV from 21 June 1996 to 15 April 2002;

(b) BAM NBM: BAM NBM Wegenbouw BV from 1 April 1994 to 15 April 2002 and Koninklijke

BAM Groep NV from 1 November 2000 to 15 April 2002;

(c) BP: BP plc from 1 April 1994 to 15 April 2002, BP Nederland BV from 1 April 1994 to 1 January 2000 and BP Refining & Petrochemicals GmbH from 31 December 1999 to 15 April 2002;

(d) Dura Vermeer: Vermeer Infrastructuur BV from 1 April 1994 to 15 April 2002, Dura Vermeer Groep NV from 13 November 1998 to 15 April 2002 and Dura Vermeer Infra BV from 30 June 2000 to 15 April 2002;

(e) Esha: Esha Holding BV, Smid & Hollander BV and Esha Port Services Amsterdam BV from 1 April 1994 to 15 April 2002;

(f) HBG: HBG Civiel BV from 1 April 1994 to 15 April 2002;

(g) Heijmans: Heijmans NV and Heijmans Infrastructuur BV from 1 April 1994 to 15 April 2002;

(h) Klöckner: Klöckner Bitumen BV from 1 April 1994 to 15 April 2002 and Sideron Industrial Development BV from 1 January 2000 to 15 April 2002;

(i) Kuwait Petroleum: Kuwait Petroleum Corporation, Kuwait Petroleum International Ltd and Kuwait Petroleum (Nederland) BV from 1 April 1994 to 15 April 2002;

(j) KWS: Koninklijke Volker Wessels Stevin NV and Koninklijke Wegenbouw Stevin BV from 1 April 1994 to 15 April 2002;

(k) Nynäs: AB Nynäs Petroleum and Nynäs Belgium AB from 1 April 1994 to 15 April 2002;

(l) Shell: Shell Petroleum NV, The Shell Transport and Trading Company Ltd and Shell Nederland Verkoopmaatschappij BV from 1 April 1994 to 15 April 2002;

(m) Total: Total Nederland NV from 1 April 1994 to 15 April 2002 and Total SA from 1 November 1999 to 15 April 2002;

(n) Wintershall AG from 1 April 1994 to 31 December 1999.

- (29) For the infringements referred to in previous recital, the following fines are imposed:
- (a) Ballast Nedam: Ballast Nedam NV and Ballast Nedam Infra BV, jointly and severally: EUR 4,65 million;
 - (b) BAM NBM: BAM NBM Wegenbouw BV: EUR 13,5 million, of which Koninklijke BAM Groep NV is jointly and severally liable for EUR 9 million;
 - (c) BP: BP plc: EUR 0 million, of which BP Nederland BV is jointly and severally liable for EUR 0 million and BP Refining & Chemicals GmbH is jointly and severally liable for EUR 0 million;
 - (d) Dura Vermeer: Vermeer Infrastructuur BV: EUR 5,4 million, of which Dura Vermeer Groep NV is jointly and severally liable for EUR 3,9 million and Dura Vermeer Infra BV is jointly and severally liable for EUR 3,45 million;
 - (e) Esha: Esha Holding BV, Smid & Hollander BV and Esha Port Services Amsterdam BV, jointly and severally: EUR 11,5 million;
 - (f) HBG: HBG Civiel BV: EUR 7,2 million;
 - (g) Heijmans: Heijmans NV and Heijmans Infrastructuur BV, jointly and severally: EUR 17,1 million;
 - (h) Klöckner: Klöckner Bitumen BV: EUR 10 million, of which Sideron Industrial Development BV is jointly and severally liable for EUR 9 million;
 - (i) Kuwait Petroleum: Kuwait Petroleum Corporation, Kuwait Petroleum International Ltd and Kuwait Petroleum (Nederland) BV, jointly and severally: EUR 16,632 million;
 - (j) KWS: Koninklijke Volker Wessels Stevin NV and Koninklijke Wegenbouw Stevin BV, jointly and severally: EUR 27,36 million;
 - (k) Nynäs: AB Nynäs Petroleum and Nynäs Belgium AB, jointly and severally: EUR 13,5 million;
 - (l) Shell: Shell Petroleum NV, The Shell Transport and Trading Company Ltd and Shell Nederland Verkoopmaatschappij BV, jointly and severally: EUR 108 million;
 - (m) Total: Total Nederland NV: EUR 20,25 million, of which Total SA is jointly and severally liable for EUR 13,5 million;
 - (n) Wintershall AG: EUR 11,625 million.
- (30) The undertakings listed above shall immediately bring to an end the infringements referred to in recital 28, insofar as they have not already done so. They shall refrain from repeating any act or conduct described in recital 28, and from any act or conduct having the same or similar object or effect.
- (31) A non-confidential version of the Decision will be available in the authentic languages of the case on the Competition DG website at: http://ec.europa.eu/comm/competition/index_en.html
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