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

DECISIONS

COMMISSION

COMMISSION DECISION

of 30 November 2005

relating to a proceeding under Article 81 of the Treaty establishing the European Community against Armando Álvarez SA, Bernay Film Plastique, Bischof + Klein France SAS, Bischof + Klein GmbH & Co. KG, Bonar Technical Fabrics NV, British Polythene Industries PLC, Cofira-Sac SA, Combipac BV, Fardem Packaging BV, FLSmidth & Co. A/S, FLS Plast A/S, Groupe Gascogne, JM Gesellschaft für industrielle Beteiligungen mbH & Co. KGaA, Kendrion NV, Koninklijke Verpakingsindustrie Stempfer CV, Low & Bonar PLC, Nordenia International AG, Nordfolien GmbH, Plásticos Españoles SA, RKW AG Rheinische Kunststoffwerke, Sachsa Verpackung GmbH, Stempfer BV, Trioplast Industrier AB, Trioplast Wittenheim SA, UPM-Kymmene Oyj

(Case COMP/38354 — Industrial bags)

(notified under document number C(2005) 4634)

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

(2007/686/EC)

On 30 November 2005 the Commission adopted a decision relating to a proceeding under Article 81 of the EC Treaty. 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, including any penalties imposed, having regard to the legitimate interest of undertakings in the protection of their business secrets.

1. SUMMARY OF THE CASE

1.1. Addressees

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| <p>(1) The decision is addressed to the following undertakings for having infringed Article 81(1) of the EC Treaty:</p> <p>— Combipac BV and British Polythene Industries plc;</p> <p>— Bischof + Klein GmbH & Co., KG;</p> <p>— Bischof + Klein France SAS;</p> <p>— RKW AG Rheinische Kunststoffwerke and JM Gesellschaft für industrielle Beteiligungen mbH & Co. KGaA;</p> <p>— Fardem Packaging BV and Kendrion NV;</p> | <p>— Nordenia International AG and Nordfolien GmbH;</p> <p>— Trioplast Wittenheim SA and Trioplast Industrier AB;</p> <p>— FLS Plast A/S and FLSmidth & Co. A/S;</p> <p>— Cofira-Sac SA;</p> <p>— Plásticos Españoles SA (hereinafter Aspla) and Armando Álvarez SA;</p> <p>— Sachsa Verpackung GmbH and Groupe Gascogne;</p> <p>— UPM-Kymmene Oyj;</p> |
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⁽¹⁾ OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

- Bernay Film Plastique, formerly Conditionnement et Industrie SA;
- Bonar Technical Fabrics NV and Low & Bonar PLC;
- Stempheer BV and Koninklijke Verpakkingsindustrie Stempheer CV.

- (2) The addressees referred to above participated in a single and continuous infringement of Article 81 of the EC Treaty, covering the Benelux, France, Germany and Spain ⁽¹⁾, by which they agreed to fix prices of industrial bags, to set common models for price calculation, to allocate market shares and quotas, to allocate customers and deals, to proceed to concerted submissions to tenders and to exchange individualised information. The duration of the infringement proper to each addressee retained in the decision is ranging from three to 20 years.

1.2. The industrial bags sector

- (3) Plastic industrial bags ⁽²⁾, commonly referred to as 'industrial bags', are used for packaging basic commodities, and more generally raw materials, fertilisers, polymers, building materials, agricultural and horticultural products and animal feeding stuffs.
- (4) Plastic industrial bags can be divided into four categories:
- open mouth bags,
 - valve bags,
 - FFS (form, fill and seal) bags,
 - Block bags.

1.3. The supply

- (5) Since the beginning of the 1990s a trend towards concentration can be observed among manufacturers of plastic films and bags, and several acquisitions have taken place in recent years. Nevertheless, alongside European players based in several EU Member States, smaller companies that have opted for a local development strategy are also present on this market.

1.4. The demand

- (6) Until the 1950s, industry used textile and paper bags for carrying commodities. With the development of bulk maritime transport, the textile bags industry went into decline. The introduction of the polyethylene bag in the

1950s triggered growing demand for this type of bag, which among other things met industry's needs for waterproof packaging.

- (7) Since the mid-1970s, FFS bags have gradually been replacing the other types of industrial bags. Their success is due notably to the automated filling process, which allows large volumes to be handled, and the limited need for labour.

1.5. Scope of the infringement

- (8) The investigation showed that the cartel covered the Benelux, the French, German and Spanish markets. The market concerned was estimated at around EUR 220 million in 1996 and between EUR 250 and 300 million in 2001. The cartel members represented around 75 % of the market in 1996.

1.6. Origin and procedure

- (9) In November 2001, the company BPI informed the Commission of the existence of a cartel in the industrial bags sector and expressed the wish to cooperate with the Commission under the 1996 Notice on immunity from fines and reduction of fines in cartel cases (Leniency Notice) ⁽³⁾. BPI provided the Commission with evidence that allowed the carrying out of inspections in June 2002.

1.7. Functioning of the cartel

- (10) The cartel operated basically at two levels:
- the global level under the umbrella of an official professional organization called 'Valve-Plast'. The meetings were held at least since 1982 and three or four times a year. A functional sub-group dedicated to block bags was set up in 1994,
 - the sub-group level composed of five regional subgroups (France, Germany, Benelux, Belgium and Netherlands).
- (11) The anticompetitive practices identified covered in particular:
- fixation of prices and setting of common models for calculating prices,
 - allocation of quotas,

⁽¹⁾ Stempheer's participation to the infringement was limited to the Netherlands and occasionally Belgium.

⁽²⁾ There are also industrial bags made of paper, but these do not fall within the scope of this investigation.

⁽³⁾ OJ C 207, 18.7.1996, p. 4.

- allocation of clients and deals,
- discussions during the meetings over lists of major clients, designation of account managers in charge of coordinating the offers to those clients,
- multilateral and bilateral discussions over specific customers, submissions of concerted bids,
- regular exchange of sensitive information related to market shares.

category with a market share of 8,9 %. Aspla (7,2 %) and Fardem (6,6 %) are placed in the third category. UPM-Kymmene (4,8 %), RKW (4,6 %) and Stempher (4,3 %) are placed in the fourth category. Bonar Technical Fabrics (3,1 %), Cofira (2,9 %) and Trioplast Wittenheim (2,8 %) are placed in the fifth category. Sachsa (2,3 %), Bischof + Klein France (1,9 %) and Bernay Film Plastique (1,6 %) are placed in the sixth category.

- (17) For Stempher (Koninklijke Verpakingsindustrie Stempher CV and Stempher BV), there is no evidence in the file of its knowledge of the global scheme of the cartel. Its participation has been limited to one of the subgroups dealing only with the Dutch market (and from time to time with Belgium). Therefore a reduction of 25 % is applied to the basic amount of the fine imposed on Stempher.

2. FINES

2.1. Basic Amount

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

2.1.1. Gravity

- (13) Regarding the nature of the infringement and its geographic scope, the infringement must be qualified as very serious.

2.1.2. Differential treatment

- (14) Within the category of very serious infringements, the scale of applicable fines makes it possible to apply differential treatment to undertakings in order to take account of the effective economic capacity to cause significant damage to competition. This is appropriate where, as in this case, there are considerable disparities in terms of importance between the undertakings participating in the infringement.

- (15) The undertakings have been divided into six categories according to their relative importance in the relevant market in 1996. 1996 was used as a reference year because it was the closest complete year of infringement in which all the undertakings implicated in the cartel were still present on the relevant market.

- (16) With market shares estimated at 12,5 % and 11,5 %, Wavin/BPI and Bischof + Klein are placed in the first category. Nordenia/Nordfolien are placed in the second

2.1.3. Sufficient deterrence

- (18) Within the category of very serious infringements, the scale of the fines that can be imposed also makes it possible to set the fines at a level which ensures that they have sufficient deterrent effect, having regard to the size and the economic power of each undertaking. In this respect, the Commission notes that in 2004, the most recent business year preceding this decision, the turnover of the UPM-Kymmene group was EUR 9 820 million. Accordingly, it is considered appropriate, to apply a multiplication factor of two to the fine imposed on UPM-Kymmene.

2.1.4. Duration

- (19) Individualised percentage increases are applied accordingly to the duration of the infringement proper to each company. Bischof + Klein Co., KG, Cofira-Sac SA, Fardem Packaging, Nordenia International AG, Trioplast Wittenheim, RKW and JM Gesellschaft für industrielle Beteiligungen took part in the infringement during a period of more than 20 years leading to a percentage increase of the starting amount of 200 %. Combipac took part in the infringement during a period of 19 years and 10 months leading to a percentage increase of the starting amount of 195 %. Bischof + Klein France SAS took part in the infringement during a period of 18 years and 11 months leading to a percentage increase of the starting amount of 185 %. Sachsa took part in the infringement during a period of 14 years and four months leading to a percentage increase of the starting amount of 140 %. Aspla and Armando Álvarez SA took part in the infringement during a period of 11 years and three months leading to a percentage increase of the starting amount of 110 %. Groupe Gascogne, FLS Plast and FLSmidth & Co took part in the infringement during a period of eight years (and five months for Groupe Gascogne) leading to a percentage increase of the starting amount of 80 %. Kendrion NV took part in the infringement during

a period of seven years leading to a percentage increase of the starting amount of 70 %. Nordfolien took part in the infringement during a period of nine years and seven months leading to a percentage increase of the starting amount of 95 %. Bonar Technical Fabrics and Low & Bonar took part in the infringement during a period of six years and two months leading to a percentage increase of the starting amount of 60 %. UPM-Kymmene and British Polythene Industries plc took part in the infringement during a period of four years and six months leading to a percentage increase of the starting amount of 45 %. K.V. Stempher CV and Stempher BV took part in the infringement during a period of four years leading to a percentage increase of the starting amount of 40 %. Finally, Trioplast Industrier AB and Bernay Film Plastique took part in the infringement during a period of more than three years leading to a percentage increase of the starting amount of 30 %.

2.2. Aggravating circumstances

2.2.1. Repeated infringements

- (20) At the time the infringement took place, UPM-Kymmene had already been subject to previous Commission prohibition decisions for cartel activities in Decision 94/601/CE in the Cartonboard case (IV/C/33.833). This aggravating circumstance justifies an increase of 50 % in the basic amount of the fine to be imposed on UPM-Kymmene.

2.2.2. Obstruction to the investigation

- (21) During the inspection, one manager of Bischof + Klein destroyed a document selected by the Commission officials. It is considered that irrespective of its effects, such behaviour necessarily disrupted the Commission's investigation and hindered its inspectors in the exercise of their investigative powers. This deliberate obstruction constitutes an aggravating circumstance, as provided for in the Guidelines on Fines, that has to be penalised by an increase of 10 % on the basic amount of the fine.

2.3. Attenuating circumstances

- (22) Several undertakings claimed for the application of attenuating circumstances indicating several factors such as their passive role, the absence of an effective implementation of the practices, the early termination of the infringement, the implementation of compliance programs and crisis situation of the industrial bags sector. These claims are all rejected as being unfounded.

2.4. Application of the 10 % turnover limit

- (23) Article 15(2) of Regulation No 17 and Article 23(2) of Regulation (EC) No 1/2003 provide 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' ⁽¹⁾.
- (24) The 10 % ceiling is applied when appropriate, namely to Stempher, Bernay Film Plastique, Nordenia International AG, Nordefolien GmbH, Cofira-Sac, Fardem, Combipac BV, Bischof + Klein GmbH & Co. KG and Bischof + Klein France.

2.5. Application of the 1996 Leniency Notice

- (25) Given the fact BPI applied for leniency before the entry into force of the 2002 leniency notice, the provisions of the 1996 notice apply to this case.

2.5.1. Section B (reduction from 75 % to 100 %)

- (26) In November 2001, BPI was the first undertaking to provide the Commission with decisive elements of proof of the infringement that allowed the Commission to conduct successful inspections. BPI maintained its cooperation throughout the investigation and thus fulfilled its obligations imposed by the leniency notice.
- (27) Three parties stated in their reply to the Statement of Objections that BPI had participated after November 2001 to a collusive arrangement concerning a tender. After a close investigation of these allegations and since no decisive material evidence is produced, the Commission considers that BPI should be retained under section B of the notice. Therefore, the Commission considers that BPI (including its subsidiary Combipac BV) is entitled to benefit from a 100 % reduction in the amount of the fine that would otherwise have been imposed.

⁽¹⁾ See judgment of Court of First Instance in Cases T-71/03, T-74/03, T-87/03 and T-91/03, *Tokai Carbon and Co., Ltd and others v Commission*, cited above, point 390.

2.5.2. Section D (reduction from 10 % to 50 %)

- (28) Trioplast-Wittenheim applied for leniency soon after having received the request for information which the Commission addressed to it pursuant to Article 11 of Regulation No 17. The explanations it gave concerning the functioning of the cartel and on some documents helped to confirm the existence of the infringement. In view of its cooperation, the Commission considers that Trioplast Wittenheim and Trioplast Industrier are entitled to benefit from a 30 % reduction in the amount of the fine that would otherwise have been imposed, in accordance with the Section D of the 1996 Leniency Notice.
- (29) Bischof + Klein and Cofira provided some information or documents that exceeded the required replies to the Article 11 letter and did not contest the facts. In view of their cooperation, the Commission considers that Bischof + Klein GmbH & Co. KG, Bischof and Klein France SAS and Cofira-Sac SA are entitled to benefit from a 25 % reduction in the amount of the fine that would otherwise have been imposed.
- (30) The Commission considers that Nordfolien ⁽¹⁾ and Bonar Technical Fabrics ⁽²⁾ are entitled to benefit from a 10 % reduction in the amount of the fine that would otherwise have been imposed for not contesting the facts.
- (31) The Commission considers that the information provided voluntarily by Sachsa did not contribute substantially to the establishment of the infringement and does therefore not qualify for a reduction of the fine.
- (32) The claims of FLS-Plast and FLSmidth for a reduction of the fine for not contesting the facts are rejected.

3. DECISION

- (33) The following undertakings have infringed Article 81 of the Treaty by participating, during the periods indicated, in a complex of agreements and concerted practices in the plastic industrial bags sector in Belgium, Germany, Spain, France, Luxembourg and the Netherlands, consisting in the fixing of prices and the establishment of common price calculation models, the sharing of markets and the allocation of sales quotas, the assignment of customers, deals and orders, the submission of concerted bids in response to certain invi-

tations to tender and the exchange of individualised information:

- (a) Combipac BV, from 6 January 1982 until 9 November 2001, and British Polythene Industries plc, from 25 April 1997 until 9 November 2001;
- (b) Bischof + Klein GmbH & Co. KG, from 6 January 1982 until 26 June 2002, and Bischof + Klein France SAS, from 6 January 1982 until 18 December 2000;
- (c) RKW AG Rheinische Kunststoffwerke and JM Gesellschaft für industrielle Beteiligungen mbH & Co. KGaA, from 6 January 1982 until 26 June 2002;
- (d) Fardem Packaging BV, from 6 January 1982 until 26 June 2002, and Kendrion N.V., from 8 June 1995 until 26 June 2002;
- (e) Nordenia International AG, from 6 January 1982 until 26 June 2002;
- (f) Nordfolien GmbH, from 24 November 1992 until 26 June 2002;
- (g) Trioplast Wittenheim SA, from 6 January 1982 until 26 June 2002, and Trioplast Industrier AB, from 21 January 1999 until 26 June 2002;
- (h) FLS Plast A/S and FLSmidth & Co A/S from 31 December 1990 until 19 January 1999;
- (i) Cofira-Sac SA, from 24 March 1982 until 26 June 2002;
- (j) Plásticos Españoles SA and Armando Álvarez SA, from 8 March 1991 until 26 June 2002;
- (k) Sachsa Verpackung GmbH, from 9 February 1988 until 26 June 2002, and Groupe Gascogne, from 1 January 1994 until 26 June 2002;
- (l) UPM-Kymmene Oyj, from 18 July 1994 until 31 January 1999;

⁽¹⁾ Since Nordfolien and Nordenia International AG have belonged to two different undertakings since 2003, the cooperation on which Nordfolien seeks to rely should be regarded as imputable solely to that company, and there are therefore no grounds for allowing Nordenia International AG to benefit from the reduction in the fine granted to Nordfolien.

⁽²⁾ As Low & Bonar plc forms a common undertaking with Bonar Technical Fabrics, it is also entitled to benefit from this reduction.

- (m) Bernay Film Plastique, from 31 August 1995 until 9 November 1998;
- (n) Bonar Technical Fabrics NV and Low & Bonar PLC, from 13 September 1991 until 28 November 1997.
- (34) Stempfer BV and Koninklijke Verpakkingsindustrie Stempfer CV have infringed Article 81 of the Treaty by participating, from 25 October 1993 until 31 October 1997, in a complex of agreements and concerted practices in the plastic industrial bags sector in the Netherlands and, occasionally, in Belgium, consisting in the fixing of prices and the establishment of common price calculation models, the sharing of markets, the assignment of customers, deals and orders and the exchange of individualised information.
- (35) For these infringements the following fines are imposed:
- (a) Combipac BV: EUR 0. Of this amount, British Polythene Industries plc shall be jointly and severally liable for the sum of EUR 0;
- (b) Bischof + Klein GmbH & Co. KG: EUR 29,15 million and Bischof + Klein France SAS: EUR 3,96 million;
- (c) RKW AG Rheinische Kunststoffwerke and JM Gesellschaft für industrielle Beteiligungen mbH & Co. KGaA, jointly and severally: EUR 39 million;
- (d) Kendrion NV: EUR 34 million. Of this amount, Fardem Packaging BV shall be jointly and severally liable for the sum of EUR 2,20 million;
- (e) Nordenia International AG: EUR 39,10 million. Of this amount, Nordfolien GmbH shall be jointly and severally liable for the sum of EUR 7,18 million;
- (f) Trioplast Wittenheim SA: EUR 17,85 million. Of this amount, FLSmidth & Co. A/S and FLS Plast A/S shall be jointly and severally liable for the sum of EUR 15,30 million and Trioplast Industrier AB shall be jointly and severally liable for the sum of EUR 7,73 million;
- (g) Cofira-Sac SA: EUR 350 000;
- (h) Plásticos Españoles SA and Armando Álvarez SA, jointly and severally: EUR 42 million;
- (i) Sachsa Verpackung GmbH: EUR 13,20 million. Of this amount, Groupe Gascogne shall be jointly and severally liable for the sum of EUR 9,90 million;
- (j) UPM-Kymmene Oyj: EUR 56,55 million;
- (k) Bernay Film Plastique: EUR 940 000;
- (l) Bonar Technical Fabrics NV and Low & Bonar PLC, jointly and severally: EUR 12,24 million;
- (m) Stempfer BV and Koninklijke Verpakkingsindustrie Stempfer CV, jointly and severally: EUR 2,37 million.
- (36) The undertakings listed above shall immediately bring to an end the infringements referred to in recitals 33 and 34 above, in so far as they have not already done so. They shall refrain from repeating any act or conduct described in recitals 33 and 34 and from any act or conduct having the same or similar object or effect.
- (37) A non-confidential version of the full text of the Decision will be published in the authentic languages of the case at DG Competition web-site at http://ec.europa.eu/comm/competition/index_en.html
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