

Summary of Commission Decision

of 20 July 2010

relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement

(Case COMP/38.866 — Animal feed phosphates)

(notified under document C(2010) 5004)

(Only English and French texts are authentic)

(Text with EEA relevance)

(2011/C 111/09)

On 20 July 2010, the Commission adopted a decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union. 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. INTRODUCTION

- (1) In this case two decisions have been produced: on the one hand, a more 'streamlined' decision for the undertakings which admitted their participation to the cartel regarding the sale of feed phosphates used in animal feed in their formal requests to settle ('settlement submissions')⁽²⁾ and, on the other hand, another decision for the undertakings Timab Industries S.A. and Compagnie Financière et de Participation Roullier (FR) (hereafter CFPR/Timab), who discontinued the settlement procedure. This summary relates to the Decision addressed to the settling parties.
- (2) The 11 addressees of this Decision participated in a single and continuous infringement of Article 101 of the TFEU and, from 1 January 1994, of Article 53 of the Agreement on the European Economic Area (hereinafter 'EEA Agreement'), by which they colluded as regards the sale of feed phosphates used in animal feed (FP).

2. CASE DESCRIPTION

2.1. Procedure

- (3) The case was opened on the basis of an immunity application from Kemira on 28 November 2003. The application concerned the period from 1989 to 2003. The Commission obtained further evidence from inspections that took place on 10 and 11 February 2004. On 18 February 2004, Tessenderlo submitted an application for leniency. Subsequently the Commission received further applications for leniency from Quimitécnica and from CFPR/Timab.
- (4) The parties were notified of the decision to initiate settlement proceedings by letter dated 19 January 2009.

Following settlement discussions, all parties introduced their settlement submissions within their respective time limit, except for CFPR/Timab who discontinued the settlement procedure.

- (5) On 23 November 2009, the Commission adopted a bundle of six statements of objections addressed to all the parties. With the exception of CFPR/Timab, all the parties replied by confirming that the statement of objections corresponded to the contents of their settlement submissions and that they therefore remained committed to following the settlement procedure.
- (6) The Advisory Committee on Restrictive Practices and Dominant Positions issued a favourable opinion on 2 July 2010 and on 16 July 2010. This Decision (as well as the Decision addressed to TIMAB/CFPR) was adopted on 20 July 2010.

2.2. Summary of the infringement

- (7) This case concerns an infringement of Article 101 of the TFEU and, from 1 January 1994, of Article 53 of the EEA Agreement with regard to the sale of FP. The aim of the cartel was to share a large part of the European feed phosphates market, by allocating sales quotas to cartel members, and to coordinate prices and, to the extent necessary, sales conditions.
- (8) The cartel arrangements, known as the 'Club', CEPA (Centre d'Etude des Phosphates Alimentaires) or later Super CEPA, proved to be resilient and able to adapt to different industry and market conditions over the years.
- (9) The main aim of the coordination was to share the volumes of FP supplied in several European countries, including some which were or became Member States

⁽¹⁾ OJ L 1, 4.1.2003, p. 1.

⁽²⁾ Pursuant to Article 10a(2) of Regulation (EC) No 773/2004, as amended by Regulation (EC) No 622/2008 as regards the conduct of settlement procedures in cartel cases.

and some which became contracting parties to the EEA Agreement. The undertakings also coordinated restrictions in production (for example, production based on the phosphoric acid technology or redirecting part of the raw material and output surplus to the fertilizer market) and allocated customers. In particular, the cartel fixed a system of quotas covering different geographic areas within Europe on the basis of which sales volumes and specific customers were allocated to the producers. Compensations were applied to correct deviations, where appropriate.

- (10) The cartel also aimed at coordinating prices for each country between the relevant cartel members and, where necessary, sales conditions.
- (11) The undertakings had frequent contacts and met regularly to coordinate through price monitoring and market sharing agreements at both European and country levels. Monitoring and compensation mechanisms were foreseen and used to control the market sharing agreement and to correct and mediate in disputes concerning large deviations from the agreed quotas at European and country levels. This did not prevent the parties from seizing opportunities to supply incorrect data to deceive each other.
- (12) Prices, price increases and other commercial or purchase conditions — these last ones only when necessary — were discussed and coordinated country by country.
- (13) The overall infringement covered most of the Union and subsequently also a great part of the EEA territory⁽¹⁾, and lasted from at least 19 March 1969 until at least 10 February 2004.

2.3. Addressees and duration

- (14) In this Decision, the following legal entities are considered liable for the infringement for the periods indicated:
- Yara Phosphates Oy: at least from 19 March 1969 to 28 November 2003,
 - Kemira Oyj: at least from 1 April 1989 to 28 November 2003,
 - Yara Suomi Oy: at least from 1 January 1994 to 28 November 2003,
 - Tessenderlo Chemie N.V.: at least from 19 March 1969 to 10 February 2004,

⁽¹⁾ The geographic scope of the cartel concerned at all times Austria, Belgium, Denmark, Finland, France, Germany, Hungary, Ireland, The Netherlands, Norway, Sweden and the United Kingdom, while other countries such as Spain or Portugal were covered at least from 1992 and 1993, respectively.

- Ercros S.A.: at least from 31 January 1992 to 10 February 2004,
- Ercros Industrial S.A.: at least from 31 January 1992 to 10 February 2004,
- FMC Foret S.A.: at least from 31 January 1992 to 31 December 2001,
- FMC Chemicals Netherlands B.V.: at least from 31 January 1992 to 31 December 2001,
- FMC Corporation: at least from 31 January 1992 to 31 December 2001,
- Quimitécnica.com — Comércio e Indústria Química S.A.: at least from 21 October 1993 to 10 February 2004,
- José de Mello SGPS S.A.: from at least 1 January 1997 to 10 February 2004.

2.4. Remedies

- (15) In setting the fines to be imposed, the Commission refers to the principles laid down in the 2006 Guidelines on fines⁽²⁾. The Commission also applies the provisions of the 2002 Leniency Notice and its Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases.

2.4.1. Basic amount of the fine

- (16) In applying the Guidelines on fines, the basic amounts of the fines to be imposed on each party result from the sum of a variable amount and an additional amount. The variable amount of the fine is related to a proportion, between 0 % and 30 %, of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement. The additional amount is a sum of between 15 % and 25 % of the value of sales of goods or services to which the infringement relates in a given year (normally, the last year of the infringement).
- (17) The calculation of the fine to be imposed on the settling companies follows the same methodology set out in the Guidelines on fines as that applied to the non-settling

⁽²⁾ OJ C 210, 1.9.2006, p. 2.

companies (CFPR/Timab) in the separate decision referred to above. However a reduction under the Settlement Notice is only applied to the settling companies.

(18) In application of the Guidelines on fines, the basic amount of fine is set at 17 % of the undertakings' sales of feed phosphates for animal feed in the countries within the EEA concerned by the infringement.

(19) The basic amount is multiplied by the number of years of participation in the infringement in order to take fully into account the duration of the participation for each undertaking in the infringement individually.

2.4.2. Adjustments to the basic amount

(20) There are no aggravating or mitigating circumstances in this case.

2.4.3. Application of the 10 % turnover limit

(21) Article 23(2) of Regulation (EC) No 1/2003 provides that the fine imposed on each undertaking must not exceed 10 % of its total turnover relating to the business year preceding the date of the Commission decision. Given that the basic amounts of Tessengerlo Chemie N.V., Yara Suomi Oy, Yara Phosphates Oy and Quimitécnica.com — Comércio e Indústria Química S.A. exceed the cap of 10 % of 2009 turnover, the basic amounts of the fines to be imposed on them are adjusted in accordance with Article 23(2) of Regulation (EC) No 1/2003.

2.4.4. Application of the 2002 Leniency Notice: reduction of fines

(22) Kemira applied for immunity from fines on 28 November 2003. Having fulfilled the requirements under the Leniency Notice, Kemira was granted conditional immunity from fines on 16 December 2003. Yara Phosphates and Yara Suomi, which formed part of the same undertaking as Kemira at the time of the immunity application, benefit from the same immunity from the fine.

(23) The evidence submitted by Tessengerlo constitutes significant added value in the sense of the Leniency Notice. A reduction of 50 % of the fine which would otherwise have been imposed is granted to Tessengerlo in respect of the period after 31 March 1989. In addition, pursuant to point 23 of the Leniency Notice,

partial immunity was granted to Tessengerlo since its application allowed the Commission to extend the duration of the infringement.

(24) The evidence submitted by Quimitécnica, on 27 March 2007 and later supplemented, constitutes significant added value in the sense of the Leniency Notice. A reduction of 25 % of the fine which would otherwise have been imposed is granted to Quimitécnica. José de Mello, which formed part of the same undertaking as Quimitécnica at the time of the leniency application, benefits from the same reduction of the fine.

(25) On 14 October 2008, CFPR/Timab submitted an application pursuant to the Leniency Notice, further supplemented on 28 October 2008. A reduction of 5 % was awarded to CFPR/Timab under the Leniency Notice in the decision addressed to these companies.

2.4.5. Application of the Settlement Notice

(26) According to Point 32 of the Settlement Notice⁽¹⁾, the reward for settlement results in the reduction by 10 % of the amount of the fine to be imposed after the 10 % cap has been applied having regard to the Guidelines on fines. When settled cases involve also leniency applicants, the reduction of the fine granted to them for settlement is being added to their leniency reward pursuant to point 33 of the Settlement Notice. Following the application of the Settlement Notice, the fine to be imposed on all addressees of this Decision is reduced by 10 %.

2.4.6. Ability to pay

(27) Two of the undertakings in this case have invoked their 'inability to pay' under point 35 of the 2006 Guidelines on fines. The Commission reviewed those applications and carefully analysed the available financial data on those undertakings. As a result of this assessment, the Commission accepted one of the applications and granted a reduction of 70 % of the fine.

3. DECISION

(28) The fines imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 are as follows:

⁽¹⁾ Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (OJ L 171, 1.7.2008, p. 3) and Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (OJ C 167, 2.7.2008, p. 1).

EUR 0	Jointly and severally on Yara Phosphates Oy, Yara Suomi Oy and Kemira Oyj.
EUR 83 752 000	On Tessenderlo Chemie N.V.
EUR 1 750 905	Jointly and severally on Quimitécnica.com — Comércio e Indústria Química S.A. and José de Mello SGPS S.A.
EUR 1 044 095	On José de Mello SGPS S.A.
EUR 14 400 000	Jointly and severally on FMC Foret S.A., FMC Chemicals Netherlands B.V. and FMC Corporation
EUR 14 850 000	Jointly and severally on Ercros Industrial S.A. and Ercros S.A.