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Legislation

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[1] Text with EEA relevance

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([1]) Text with EEA relevance

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COMMISSION

COMMISSION DECISION

of 17 December 2002

relating to a proceeding under Article 65 of the ECSC Treaty against Alfa Acciai SpA, Feralpi Siderurgica SpA, Ferriere Nord SpA, IRO Industrie Riunite Odolesi SpA, Leali SpA, Acciaierie e Ferriere Leali Luigi SpA in liquidazione (in liquidation), Lucchini SpA, Siderpotenza SpA, Riva Acciaio SpA, Valsabbia Investimenti SpA, Ferriera Valsabbia SpA and the association of undertakings Federacciai (Federazione delle Imprese Siderurgiche Italiane)

(Case C.37.956 — Reinforcing bars)

(notified under document number C(2002) 5807

(Only the Italian text is authentic)

(2006/894/EC)

On 17 December 2002 the Commission adopted a decision relating to a proceeding under Article 65 of the ECSC Treaty. In accordance with the provisions of Article 30 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [1] *the Commission herewith publishes the names of the parties concerned and the main content of the decision, including 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 is available in the authentic language and in the Commission's working languages at the website of the Directorate-General for Competition: http://europa.eu.int/comm/competition/index_en.html.*

I. SUMMARY OF THE INFRINGEMENT

Addressees and nature of the infringement

(1) The Decision is addressed to Alfa Acciai SpA, Feralpi Siderurgica SpA, Ferriere Nord SpA, IRO Industrie Riunite Odolesi SpA, Leali SpA, Acciaierie e Ferriere Leali Luigi SpA in liquidazione (in liquidation), Lucchini SpA, Siderpotenza SpA, Riva Acciaio SpA, Valsabbia Investimenti SpA, Ferriera Valsabbia SpA and the association of undertakings Federacciai (Federazione delle Imprese Siderurgiche Italiane).

(2) The addressees took part in a single, complex and continuous infringement of Article 65(1) of the Treaty establishing the European Coal and Steel Community (hereinafter 'the Treaty') which had as its object or effect the fixing of prices and which provided the basis for agreements limiting or controlling output or sales on the Italian market for concrete reinforcing bar in bars or coils.

Attribution of liabilities

(3) The addressee Alfa Acciai SpA is an undertaking to which can be attributed not only the behaviour of Alfa Acciai SpA but also the behaviour of Acciaieria Meghara SpA (as from 1996), Alfa Acciai srl (before 1996) and Acciaierie di Sicilia SpA.

(4) The addressee Feralpi Siderurgica SpA is an undertaking to which can be attributed not only the behaviour of the existing Feralpi Siderurgica SpA but also the behaviour of Feralpi Siderurgica srl (from 1990) and the former Feralpi Siderurgica SpA.

(5) The addressees Leali SpA and Acciaierie e Ferriere Leali Luigi (in liquidation) are undertakings to which can be attributed not only the behaviour of Leali SpA and Acciaierie e Ferriere Leali Luigi SpA but also the behaviour of Acciaierie e Ferriere Leali Luigi SpA (until November 1998), which they replaced. After that date, Leali SpA is solely liable for the behaviour objected to.

[1] OJ L 1, 4.1.2003, p. 1.

(6) The addressees Lucchini SpA and Siderpotenza SpA are undertakings to which can be attributed not only the behaviour of Lucchini SpA and Siderpotenza SpA but also the behaviour of the joint undertakings Siderpotenza SpA (until 1991) and Lucchini Siderurgica SpA (until the end of 1997).

(7) The addressee Riva SpA is an undertaking to which can be attributed not only the behaviour of Riva SpA but also the behaviour of Fire Finanziaria SpA, Riva Prodotti Siderurgici SpA, Acciaierie e Ferriere di Galtarossa SpA and Acciaierie del Tanaro SpA.

(8) The addressees Valsabbia Investimenti SpA and Ferriera Valsabbia SpA are undertakings to which can be attributed not only the behaviour of Valsabbia Investimenti SpA and Ferriera Valsabbia SpA but also the behaviour of the former Ferriera Valsabbia SpA (until 2000) and the even earlier Ferriera Valsabbia SpA (until 1990).

(9) As regards the other addressees of the Decision, they are the same undertakings and the same association, as well as the same legal persons with the same business name, that operated on the market for reinforcing bar since the start of the infringement (from 1993 as regards Ferriere Nord SpA).

Duration of the infringement

(10) The undertakings participated in the infringement during at least the following periods:

Alfa Acciai SpA, from 6 December 1989 to 4 July 2000;

Feralpi Siderurgica SpA, from 6 December 1989 to 27 June 2000;

Ferriere Nord SpA, from 1 April 1993 to 4 July 2000;

IRO Industrie Riunite Odolesi SpA, from 6 December 1989 to 27 June 2000;

Leali SpA and Acciaierie e Ferriere Leali Luigi SpA (in liquidation), from 6 December 1989 to 27 June 2000;

Lucchini SpA/Siderpotenza SpA, from 6 December 1989 to 27 June 2000;

Riva SpA, from 6 December 1989 to 27 June 2000;

Ferriera Valsabbia SpA and Valsabbia Investimenti SpA, from 6 December 1989 to 27 June 2000;

Federacciai (Federazione delle Imprese Siderurgiche Italiane), from 6 December 1989 to 24 July 1998.

The market for reinforcing bars

(11) Reinforcing bars are a long hot-rolled steel product in coils or bars of 5 mm and over, with a smooth, crenellated or ribbed surface, used to reinforce concrete. The conventional form in which reinforcing bars are supplied is straight reinforcing bar that has been hot-rolled in a bar mill. The bars may be 12 m, 6 m, 14 m or, more rarely, 18 m long.

(12) Reinforcing bar in coils takes the form of superimposed coil, which the user straightens and cuts to the desired length. It usually costs slightly more than the straight bar form but the price nevertheless tends to fall into line with that of straight bars.

(13) All these types of reinforcing bar are manufactured in circular cross sections of 5 mm to 40 mm, to be used in structures with different requirements. Reinforcing bar in coil does not exceed a diameter of 16 mm. On top of the base price for reinforcing bars there is a supplement to be paid depending on the diameter, which is known as a 'size extra'.

(14) Reinforcing bar is used principally in the construction industry to strengthen concrete.

(15) Of the fifteen Member States of the European Union, the country in which the largest volume of reinforcing bar is manufactured is Italy. Turnover for reinforcing bar achieved by the addressees of this Decision, which, towards the end of the infringement period, accounted for some 80 % of the Italian market, totalled some EUR 900 million in 2000-01.

Functioning of the cartel

(16) From at least the end of 1989 Federacciai and the other firms cooperating with it decided on and applied standard size extras for reinforcing bar in Italy. From April 1992 the firms, with the support of Federacciai, extended their decisions and behaviour to cover the base price for reinforcing bar in Italy. From that date until September 1995 the agreement extended to the fixing of payment terms.

(17) From at least the end of 1994 Federacciai structured its business activities more systematically, as regards both the prices and quantities of reinforcing bar produced and sold.

(18) From 1995 the parties to the agreement started colluding on reducing or controlling output or sales in order to reduce the quantities of reinforcing bar on the market. Some of them set up a more detailed and systematic system of multilateral mutual control of quantities produced and sold by each firm.

(19) The Commission does not have sufficient evidence to show that the competition rules were infringed in the period after 4 July 2000. It is pointed out that not all the firms necessarily took part in all the behaviour described here

and that some of them took part for a shorter time.

II. FINES

Basic amount

(20) The infringement consists in a single, complex and continuous restrictive practice which, having as its object the fixing of prices and the limiting or controlling of production or sales, constitutes a very serious infringement of Article 65(1) of the ECSC Treaty. The cartel covered the whole of Italy. The cartel arrangements were put into practice and had effects on the market, although the hoped-for effects were not always fully achieved. The Commission considers therefore that the addressees committed a very serious infringement. The fact that the restrictive practice was confined solely to the Italian market does not mean that the gravity of the infringement can be regarded as serious rather than very serious, since account must be taken of the volume of Italian production.

(21) However, without prejudice to the very serious nature of the infringement, The Commission has, in determining the basic amount of the fine, taken account of the specific characteristics of the case, involving a national market that was subject at the time to the rules of the ECSC Treaty and on which the firms in question accounted for a limited share of the relevant market during the first period of the infringement.

(22) Pursuant to Article 65(5) of the ECSC Treaty, an association of undertakings cannot be made the subject of a fine or periodic penalty payment. However, there is nothing in the wording of Article 65(1) to support the view that an association which has adopted a decision tending to prevent, restrict or distort normal competition is not itself covered by the prohibition laid down in that provision. Accordingly, whilst Federacciai cannot be fined for the above-mentioned anti-competitive behaviour, it is an addressee of this Decision.

Differential treatment

(23) Within the category of very serious infringements, the scale of fines applicable makes it possible to treat firms differently in order to take account of the effective economic capacity of the offenders to impair competition significantly, as well as to set the fine at a level that ensures sufficient deterrence.

(24) The Commission considers that the market shares acquired by the addressees of this Decision in the last full calendar year of the infringement (1999) are not representative of their actual presence on the relevant market in the reference period. Between 1990 and 1999 the market shares of the firms virtually tripled. On the basis of the average market shares in the period 1990-99, it is possible to identify three groups of firms in descending order of presence on the market. In the first group are Feralpi and Valsabbia, and in the second Lucchini/Siderpotenza, Alfa, Riva and Leali (with an average market share of some 70 % of that of the firms in the first group). In the third group are IRO and Ferriere Nord (with an average market share of some 35 % of that of the firms in the first group).

(25) As regards Riva and Lucchini/Siderpotenza, the basic amount of the fine calculated in relation to the relative size of the relevant market must be increased in order to take account of the size and global resources of the firms. The turnover in ECSC products achieved by these firms is very much higher (some EUR 3,5 billion for Riva in 2001 and about EUR 1,2 billion for Lucchini) than that of the other firms involved. It should also be pointed out how the documents in the case show that, on many occasions, the heads of these firms were directly involved in the infringements objected to. In order to ensure a level of sufficient deterrence, the basic amount of the fine should be increased by 225 % in the case of Lucchini/Siderpotenza because its turnover in ECSC products is some three times greater than that of the larger of the other firms and by 375 % in the case of Riva, which has a total turnover in ECSC products that is about three times higher than that of Lucchini/Siderpotenza. These multipliers take account of the significant disparity in size and overall resources between the two firms and the other addressees of the Decision.

Duration

(26) The infringement lasted for more than ten years and six months as regards all the firms with the exception of Ferriere Nord SpA, where the infringement lasted for more than seven years. The basic amount of the fine is thus increased by 105 % for all the firms, with the exception of Ferriere Nord, where it is increased by 70 %.

Aggravating circumstances

(27) In the present case the Commission has identified only one aggravating circumstance, i.e. the fact that Ferriere Nord has already been the subject of a Commission decision of 2 August 1989 concerning its involvement in an agreement to fix prices and limit sales in the welded steel mesh sector. ([2])

(28) The Commission therefore considers it necessary to impose an increase of 50 % of the basic amount in respect of Ferriere Nord.

Attenuating circumstances

(29) The Commission has not identified any attenuating circumstances.

([2]) OJ L 260, 6.9.1989, p. 1.

Application of the 1996 leniency notice

(30) None of the firms to which the Decision is addressed qualifies for the non-imposition of, or a substantial or significant reduction in, the fine pursuant to points B and C of the 1996 Leniency Notice ([3]) as none of the conditions provided for therein have been met. None of the firms disclosed the cartel either before or after the Commission started its investigation or provided any decisive evidence of the existence of the restrictive practice.

(31) With regard to point D of the 1996 Notice, the Commission acknowledges that Ferriere Nord provided it with useful information that allowed it to gain a better understanding of the details of the restrictive practice. It considers that this satisfies the first paragraph of point D of the Notice, which states that a reduction in the amount of a fine is possible if, before a statement of objections is sent, an enterprise provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement.

(32) The Commission considers that it would be justified to grant Ferriere Nord a reduction of 20 % in the amount of the fine.

Decision

1. The following fines are imposed:

— Feralpi Siderurgica SpA.:	EUR 10,25 million,
— Valsabbia Investimenti SpA and Ferriera Valsabbia SpA, jointly and severally liable:	EUR 10,25 million,
— Lucchini SpA and Siderpotenza SpA, jointly and severally liable:	EUR 16,14 million,
— Alfa Acciai SpA:	EUR 7,175 million,
— Riva Acciaio SpA:	EUR 26,9 million,
— Leali SpA and Acciaierie e Ferriere Leali Luigi SpA in liquidazione (in liquidation), jointly and severally liable:	EUR 6,093 million,
— Leali SpA ([4])	EUR 1,082 million,
— IRO Industrie Riunite Odolesi SpA:	EUR 3,58 million,
— Ferriere Nord SpA:	EUR 3,57 million,

2. Federacciai and the firms listed must forthwith put an end to the infringement if they have not already done so. They must refrain from repeating the acts or behaviour that constituted the infringement and from adopting measures having equivalent effect.

([3]) OJ C 45, 19.2.2002, p. 3.

([4]) A distinction should be made between the behaviour of Acciaierie e Ferriere Leali Luigi SpA until it entered into liquidation and the behaviour of Leali SpA from the date it was set up: the former can be attributed jointly and severally to Acciaierie e Ferriere Leali Luigi SpA (in liquidation) and to Leali SpA, the latter solely to Leali SpA. The amount of the fine is accordingly subdivided into two periods, in proportion first to the period from the start of the infringement to 25 November 1998 and second from that date to the end of the infringement. The amount of the fine relating to the first period is imposed on Leali SpA and Acciaierei e Ferriere Leali Luigi SpA (in liquidation), jointly and severally, while that relating to the second period is imposed solely on Leali SpA.

COMMISSION DECISION

of 26 May 2004

relating to a proceeding under Article 81 of the EC Treaty against The Topps Company Inc, Topps Europe Limited, Topps International Limited, Topps UK Limited and Topps Italia SRL

(Case No COMP/C-3/37.980 — Souris-Topps)

(notified under document number C(2004) 1910)

(Only the English text is authentic)

(2006/895/EC)

On 26 May 2004, 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 Regulation No 1/2003 ([1]), the Commission herewith publishes the names of the parties and the main content of the decision, 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 language of the case and in the Commission's working languages at DG COMP's website at http://europa.eu.int/comm/competition/index_en.html.

I: SUMMARY OF THE INFRINGEMENT

Addressees, Nature and Duration of the Infringement

(1) This Decision is addressed to The Topps Company Inc (hereinafter 'Topps USA'), Topps Europe Ltd (hereinafter 'Topps Europe'), Topps UK Ltd (hereinafter 'Topps UK'), Topps International Ltd (hereinafter 'Topps International') and Topps Italia SRL (hereinafter 'Topps Italia') (together referred to as 'Topps').

(2) The addressees infringed Article 81(1) of the Treaty by participating with several of their intermediaries in the United Kingdom, Italy, Finland, Germany, France and Spain in a complex of agreements and concerted practices with the object of restricting parallel imports of Pokémon stickers, trading cards and other collectibles from 4 February 2000 until 29 November 2000.

(3) The case originates from a complaint by La Souris Bleue, a French retailer for collectible products, alleging that Topps and its distributors had successfully prevented parallel imports of Pokémon stickers and albums from Spain into France.

Products Concerned and Behaviour of Topps

(4) The Decision concerns Pokémon collectibles. Collectibles are items like stickers, trading cards or removable tattoos popular with young children which follow certain themes (e.g. members of sports teams or characters of cartoon series). Pokémon is the name for a whole range of characters originally developed for the Nintendo 'Game Boy' videogame but also used, under a licence, by Topps to illustrate collectible products. In 2000, there was a significant demand for such Pokémon collectibles.

(5) The definition of the relevant market can be left open since this case concerns a restriction of competition by object.

(6) The Decision identifies the existence of agreements and concerted practices between Topps and seven of its European intermediaries with the overall objective of restricting parallel imports of Pokémon collectibles between Member States. Topps and its intermediaries pursued this objective with the following instruments and mechanisms:

— Topps actively collected information so that it learned of instances of parallel trade from its intermediaries;

— Topps monitored the final destination of Pokémon products;

— when Topps knew from its intermediaries about instances of parallel trade, it asked them for help in order to trace back parallel imports to their source;

— Topps also involved its intermediaries by requesting and receiving assurances that stock would not be re-exported to other Member States;

— in some cases where Topps had the impression that its intermediaries did not cooperate, it threatened to cut the supply.

(7) Topps acknowledged that it *'engaged in activities that have had the effect of impeding cross-border trade within the EU'* and that *'a complete ban on exports and extensive territorial protection for its distributors in the circumstances described above is difficult to reconcile with Article 81'.*

(8) The agreements and concerted practices between Topps and its distributors or agents are restrictive by object. They aim

([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).

at preventing intermediaries from exporting, both actively and passively, Pokémon products outside their respective contractual territories. As the object of the agreements and concerted practices in this case is to restrict competition, it is not necessary to consider their actual effects on competition. Notwithstanding this, the evidence on the Commission file shows that parallel imports were, in fact, prevented.

(9) The block exemption regulations No 1983/83 (applicable until 31 May 2000) and No 2790/1999 did not apply since the restrictions aimed at guaranteeing absolute territorial protection, thereby covering both active and passive sales. Nor could the agreements benefit from an individual exemption under Article 81(3) of the Treaty since they did not result in any improvement of the distribution of these products and were detrimental to consumers.

(10) The Decision is addressed to all European Topps subsidiaries which participated in the anti-competitive agreements and concerted practices, and the ultimate US parent company which are held jointly and severally liable for the infringement. The latter is held liable because it was in a position to decisively influence the conduct of its wholly owned subsidiaries. The Commission legally presumes, on the basis of the case law of the Court, that this power to influence was actually exercised. Topps did not succeed in rebutting this legal presumption which was, on the contrary, confirmed by the parallel involvement of all European subsidiaries and by the dual position of one Topps employee as both Managing Director of the Irish subsidiary and Vice President (International) of the US parent company. The decision is not addressed to Topps' intermediaries because their responsibility for the infringement was less significant.

II: **FINE**

Basic Amount

(11) In its assessment of gravity, the Commission considers that infringements with the objective of preventing parallel imports between Member States are by their *nature* very serious violations of Article 81(1) of the Treaty. Such infringements have the objective of artificially partitioning the single market and, thereby, jeopardise a fundamental principle of the Treaty. As regards the *actual impact* of the infringement, the Commission takes into account that it has no evidence showing that the restrictions of parallel imports were applied systematically to all intermediaries or products. Some of the agreements or concerted practices appear not to have been implemented in full and may have had a limited effect in terms of value of the goods concerned. The Commission has no evidence of substantial effects of the restrictions on the market. Concerning the *size of the relevant market*, the agreements or concerted practices identified in this Decision concerned seven national markets but the restrictive effects were mainly felt in only three importing Member States.

(12) Consequently, the infringement committed by Topps is considered serious. In the light of this, the Decision considers EUR 2 650 000 an appropriate amount to take as a basis for calculating the fine. As the infringement is of short duration (from 4 February 2000 until 29 November 2000), the basic amount of the fine is not increased.

Aggravating and Attenuating Circumstances

(13) The Commission does not take into account aggravating circumstances in this case.

(14) As regards attenuating circumstances, the Commission takes into account that Topps terminated the infringement after the first Commission intervention. In view of this, the basic amount of the fine is reduced by 20 % (EUR 530 000). The Commission also considers that Topps has cooperated effectively with the Commission during the proceedings. Topps went beyond what was legally necessary to comply with the obligations under Article 11 of Regulation No 17, does not contest the facts upon which the infringement is based and contributed significantly to establishing the infringement. Therefore, the basic amount of the fine is reduced by an additional 20 % (EUR 530 000).

The Final Amount Imposed

(15) In view of the above, the final amount of the fine imposed on Topps is EUR 1 590 000.

COMMISSION DECISION

of 26 October 2004

declaring a concentration compatible with the common market and the functioning of the EEA Agreement

(Case No COMP/M.3436 — Continental/Phoenix)

(notified under document number C(2004) 4219)

(Only the German text is authentic)

(Text with EEA relevance)

(2006/896/EC)

On 26 October 2004 the Commission adopted a Decision in a merger case under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings ([1]) (the Merger Regulation) and in particular Article 8(2) of that Regulation. A non-confidential version of the full Decision can be found in the authentic language of the case and in the working languages of the Commission on the website of the Directorate-General for Competition, at the following address: http://europa.eu.int/comm/competition/index_en.html.

I. THE TRANSACTION

(1) On 12 May 2004, the Commission received a notification of a proposed concentration by which the undertaking Continental AG acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of the undertaking Phoenix AG by way of a public bid announced on 26 April 2004.

1. The parties

(2) Continental AG ('Continental') is a leading producer of tyres, brakes, suspension systems and other technical rubber products, mainly for automotive use.

(3) Phoenix AG ('Phoenix') is also specialised in the production of technical rubber products (e.g. suspension systems, anti-vibration systems, hoses and conveyor belts), but not active in the production of tyres. Both companies are based in Germany.

2. The operation

(4) Continental intends to acquire sole control within the meaning of Article 3(1)(b) of the Merger Regulation of the whole of Phoenix. The transaction was notified to the Commission on 12 May 2004; on 28 June, Continental acquired 75,51 % of the shares in Phoenix by way of a public bid.

II. THE RELEVANT MARKETS

(5) The concentration leads to horizontal overlaps in a number of product markets in the field of technical rubber products. The Commission has identified potential competition problems on four markets:

— air springs for commercial vehicles;

— air springs for passenger cars;

— air springs for rail vehicles;

— heavy steel cord conveyor belts.

1. Air springs for commercial vehicles (OEM/OES)

(6) Both parties are active in the production of air springs for commercial vehicles ([2]). Air springs usually consist of a rubber bellow and a metal plate made of steel. They are used in commercial vehicles to reduce the vibrations between axle and chassis and to adapt the chassis to various loads ([3]). Although Continental proposes to define a market encompassing all types of suspension systems for commercial vehicles (spiral steel springs, flat compound springs and air springs), the market investigation has confirmed the Commission's position that air springs constitute a distinct product market. The investigation also confirmed the distinction between *air springs sold to vehicle manufacturers (OES/OEM)* and air springs sold to the *independent aftermarket (IAM)*. A further delineation of smaller markets (e.g. for air springs for trucks/buses on the one hand and for trailers/axles on the other hand) has not been supported by the market investigation and would — in any event — not change the competitive assessment.

([1]) OJ L 395, 30.12.1989, p. 1. Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p. 1).

([2]) *Phoenix* markets its OES/OEM air springs for trucks and buses in a joint venture ('*Vibracoustic*') with the German component producer *Freudenberg* (see case M.1778 — Freudenberg/Phoenix/JV). Vibracoustic has, however, no own production for air springs for commercial vehicles but sells springs produced by Phoenix.

([3]) By varying the pressure of the air in the air spring, the height of the chassis can be regulated.

(7) As to the geographic market, Continental argues that the geographic market for air springs for commercial vehicles is worldwide in scope. However, the market investigation has demonstrated that market conditions for air springs for commercial vehicles in Europe differ significantly from other regions. Due to different technical requirements (e.g. bigger trucks) and different customer preferences (European springs being technically more sophisticated), springs used in US trucks cannot be used in Europe and vice versa. As a result, there is no significant competitive impact from outside Europe on the European market. Only one company (the US-firm Firestone) is currently importing air springs to Europe. These air springs are designed specifically for the European market. They contain metal components which are bought in Europe, shipped to the USA, built into the air spring and then re-shipped to Europe. Another cost-disadvantage is caused by tariffs and transport costs. Although these imports accounted for approx. 12 % in 2003, imports are likely to decrease significantly in the near future, since Firestone is in the process of building a production plant in Poland, which will be ready for production in 2005. Therefore, the Commission is of the opinion that the relevant market for air springs for OEM/OES is Europe.

(8) With regard to air springs sold by independent dealers in the after market (IAM), the question of the relevant geographic market can be left open since the market investigation has shown that no competition concern will occur in the IAM market.

2. Air springs for passenger cars

(9) Both, Continental and Phoenix/Vibracoustic, also produce *air springs for passenger cars*. In passenger cars, air springs (bellow/plate unit) are part of a more sophisticated air spring *system*, consisting of an air spring and other components (e.g. air pressure system, control units, etc.). Continental's and Phoenix' activities overlap only in the field of air springs. Air springs are currently a niche product, mainly used in luxury cars. The market investigation has confirmed that air springs for passenger cars have to be assessed separately from other spring types (e.g. steel springs). It does not, though, seem appropriate to further distinguish between different customer segments in the market for car air springs (e.g. 'limousines', 'SUVs' and 'light trucks'), as the production process and the customers are similar for all three segments.

(10) Continental claims the market to be worldwide in scope. The market investigation has supported a *European* geographic market definition, though. In fact, there is currently only one non-European supplier — Gates from the US — active in Europe. Imports accounted only for about [5-10* (*)] % in 2003. Recently, Gates has opened a new production facility for air springs in Aachen/Germany in order to serve the European market from Europe. In fact, most customers are not inclined to buy imported air springs. This is mainly because the development of passenger car air springs requires a close cooperation between customers, since air springs are technologically sensitive products. What is more, the development of an entire air spring system involves also other component suppliers, who are regularly based in Europe. As a result, most car manufacturers prefer to source from the two European manufacturers (Phoenix/Vibracoustic or Conti).

3. Air springs for rail vehicles

(11) Both parties produce also suspension products for *rail vehicles*. Again, Continental proposes to define one product market for all kinds of different suspension and anti-vibration systems used in rail vehicles (e.g. steel springs, hydraulic systems, air springs, rubber-metal parts). Though, the market investigation has confirmed the Commission's view that secondary air spring systems (rubber bellow plus rubber-metal parts) form a distinct product market, separate from other primary or secondary suspension parts. This is mainly because most customers buy the air spring separate from other suspension parts and the production know-how for air springs varies significantly from the know-how for other products. Unlike in the field of commercial vehicles, there is no IAM for rail suspension products.

(12) Continental claims the market to be worldwide in scope. The market investigation has rather supported a *European* geographic market definition, most European customers dealing with European manufacturers. The geographic market definition, however, can be left open, since even on a European wide market the transaction would not lead to a dominant position of Continental and Phoenix.

4. Heavy steel cord conveyor belts

(13) Phoenix and Continental are also specialised in the production of conveyor belts. Conveyor belts, made of rubber, textile or PVC, are designed for the transport of goods. There are three main types of conveyor belts: *light conveyor belts*, *heavy conveyor belts* and *specialty belts*. Heavy conveyor belts are used for the transport of heavy goods such as coal, ore, gravel or sand. Two main types of heavy conveyor belts can be distinguished, *steel cord* conveyor belts and *textile* conveyor belts. The parties are particularly strong in the field of steel cord conveyor belts. Continental argues that both types (textile and steel cord belts) belong to the same market for heavy conveyor belts. This market delineation, however, has not been confirmed by the outcome of the market investigation.

(*) Parts of the original decision are omitted in this summary to ensure that confidential information is not disclosed; those parts are enclosed in square brackets.

(14) From the supply side, textile belts and steel cord belts involve a significantly different production process, since steel cord belts are made of rubber and steel ropes whilst textile belts are woven of different layers of technical fibres. What is more, competitors and customers have explained that both types have their respective fields of application, due to their manifestly different product characteristics: While textile belts can be used for smaller applications (short distances, smaller loads), the transport of heavy loads over long distances (e.g. for open cast mining applications) requires imperatively steel cord conveyor belts. This is because textile belts are by far more elastic than steel rope belts and can, therefore, only surmount relatively short distances. Although Continental rightly claims that for some applications both belt types can be used, the market investigation indicates that only 5-10 % of steel rope applications can be substituted by textile belts. Accordingly, heavy steel cord conveyor belts do not seem to belong to the same market as heavy textile conveyor belts and should be assessed separately.

(15) According to Continental, the relevant geographic market for heavy conveyor belts is *worldwide* in scope. However, the outcome of the market investigation militates clearly in favour of a European-wide market. This is due to the fact that steel cord conveyor belts are in many cases tailor-made for a specific application. What is more, transport and logistic problems play an important role. As a result, non-European producers play only a minor role in the European steel cord conveyor belts market. Therefore, the Commission has analysed the competitive situation on the basis of a European market.

III. ASSESSMENT

1. Air springs for commercial vehicles (OEM/OES)

(16) Continental and Phoenix would have a combined market share on this market of [55-65] %. The main competitors are CF Gomma [10-15] %, Firestone [10-15] % and Goodyear [5-10] % .

(17) Such a high market share would already in its own be indicative of a dominant position [4] of Continental. A dominant position is also likely with a view to the market structure: The combined entity's market share will be four times higher than the one of the closest competitor.

(18) Potential competition problems are not excluded by the mere fact that the merged entity's customers are, at least to a certain extent, big automotive companies. Although it is true that some of the bigger truck producers have not raised series concerns about the merger, many smaller axle/trailer producers are afraid of a negative impact of the transaction on prices.

(19) There are additional factors which underpin such competition concerns. First, in case of a price rise of the merged entity, customers would not be able to switch easily significant volumes to competitors. This is not only because any new supplier would have to undergo a qualification procedure with most customers. What is more, all competitors are capacity constraint. Both CF Gomma and Goodyear are utilising almost all their capacity. Firestone's new production plant in Poland will probably be filled by its current supply contracts.

(20) Second, the transaction would combine the two leading firms in the OEM/OES market. Indeed, the current market position of Phoenix does not seem to reflect its true potential. Phoenix brought its OEM/OES business with trucks and buses into the joint venture with Freudenberg, Vibracoustic. However, the joint venture focused its marketing efforts on air springs for passenger cars and achieved a rather minor position in the market for trucks and buses. Phoenix is contractually bound to refrain from participating in requests for quotations by truck and bus manufacturers. However, Phoenix managed to negotiate a suspension of the penalty clause and was able to participate in two recent competitions. In both of these two competitions it ended up as runner up behind Continental. Customers rank Phoenix close to Contitech when it comes to technical skills and even better in terms of pricing.

(21) Third, contrary to what Continental claimed, the market investigation has shown that patents are used to prevent competitors from stepping in as a second supplier in an ongoing delivery contract. A competitor told the Commission that especially Continental is using claimed IP rights aggressively to exclude competitors from competitions.

(22) For all these reasons the Commission believes that the proposed takeover of Phoenix by Continental would lead to a dominant position of the merged entity in the market for air springs for commercial vehicles in Europe.

2. Air springs for passenger cars

(23) The takeover of Phoenix/Vibracoustic by Continental would combine the two only European producers of passenger car air springs. The market share of the combined entity in Europe would be around [85-95] % for 2003. Although all customers of air spring modules are big automotive companies and have usually some buyer power over their suppliers, even some of the big customers have raised concerns about the transaction. Indeed, the investigation has shown that many car producers have only one supplier for air springs. The merger would eliminate the ability from car manufacturers to instil competition between Continen-

[4] It should be noted that the case was notified under the old regulation 4064/89.

tal and Phoenix, leaving them with only one supplier active in Europe. On the other hand, the Commission has found some evidence that new players from outside Europe might enter the European market in the near future.

(24) The question, whether the transaction would lead to a dominant position in the passenger car air springs market can be left open, since Continental has recently committed to divest Phoenix' activities in this market by selling Phoenix' share in the joint venture Vibracoustic to Freudenberg. The acquisition of Phoenix' shares in Vibracoustic by Freudenberg removes the competition concerns in the field of air springs for passenger cars, since Phoenix is only active in the market for passenger car air springs through Vibracoustic.

3. Air springs for rail vehicles

(25) The market investigation revealed that the combined market share for Continental and Phoenix for secondary air spring systems would be approx. [55-65] %. Other competitors (e.g. Paulstra, Schwab, Trelleborg or Toyo) would hold only minor shares of 5 % or less.

(26) Despite these relatively high market shares, the Commission has come to the conclusion that no dominant position is to be expected in the market for railway air springs for two main reasons: Firstly, all competitors (including the parties) have to buy up to 70 % of the parts of the air spring system from their competitors who are either manufactures of the rubber bellow or the metal parts. Indeed, Continental was able to demonstrate that is has recently increased its supplies of rubber bellows to a competitor of the air spring system underpinning the fact that in this industry cross-supplies are a common practice. Secondly, there are enough potential competitors in the market who could prevent the parties from raising prices independently. Toyo and Sumitomo from Japan have significantly strengthened their European presence through subsidiaries in Europe. They were able to gain new business through their newly created subsidiaries in Europe and are most likely to further increase their market position in the near future. Given the long lifetime of trains (up to 30 years), customers will have enough time to qualify new suppliers.

(27) Therefore, the Commission believes that the proposed takeover will not lead to the creation of a dominant position in the market for railway air springs.

4. Heavy steel cord conveyor belts

(28) The operation would combine Europe's two leading suppliers. Indeed, the in-depth market investigation led to the conclusion that the combined market share of Continental and Phoenix would be [>70] %. Remaining competitors are Sempertrans [5-15] %, Bridgestone [0-5] % and several small, mostly regional suppliers with market shares of less than [0-5] %.

(29) The transaction thus reduces the number of main European competitors from four to three, the two remaining (Sempertrans and Bridgestone) being very small compared to the merged entity. One the one hand, the market investigation has revealed that the main customers — big energy companies such as RWE — have certainly some buyer power which they will use to defend competition in the market. However, they admit that they had only limited — if any — alternative suppliers after the merger. The market position of the merged entity would be particularly strong in the segment of belts for lignite mining and belts with a width of more than 2,4m. Lignite mining customers account for more than 50 % of the entire demand for steel cord conveyor belts. For some belt widths (>2,4 m), the merged entity would even enjoy a de facto monopoly position in Europe.

(30) For the above reasons the proposed takeover of Phoenix by Continental is likely to lead to a dominant position in the market for heavy steel conveyor belts in Europe.

5. Conclusion

(31) The decision, therefore, concludes that the notified concentration raises serious doubts as to its compatibility with the Common Market with regard to the markets of *air springs for commercial vehicles (OES/OEM)* and *heavy steel cord conveyor belts*.

IV. UNDERTAKINGS SUBMITTED BY THE PARTIES

(32) In order to address the aforementioned competition concerns, the notifying party has submitted undertakings on 1 October. Continental commits

1. to sell Phoenix' 50 % share in Vibracoustic to the joint venture partner Freudenberg ([5]);

2. to sell Phoenix' entire production for passenger car air springs (OES/OEM), located in Nyireghyza in Hungary, to Freudenberg;

3. to sell a production line for 3,2 m heavy steel cord conveyor belts to its competitor Sempertrans.

([5]) It should be noted that Freudenberg has a call option for Phoenix' 50 %-share in Vibracoustic in case of a takeover of Phoenix by a third undertaking. In absence of the commitment, it was, however, not clear, if Freudenberg would exercise this call option or not.

Assessment of the undertakings submitted

Commercial vehicle air springs

(33) The divestiture of Phoenix' shares Vibracoustic will allow Freudenberg/Vibracoustic to offer the full range of air springs for commercial vehicles, including springs for trailers/axles and springs for the IAM market. Controlling Vibracoustic, Freudenberg can use a strong research & development and an experienced distribution team to compete in the markets for air springs. With the acquisition of Phoenix' air spring production in Hungary, Freudenberg/Vibracoustic will have their own air spring production facility, which will enable them to sell air springs not only to van/bus customers but also to trailer/axle manufacturers. The divestiture also comprises the existing supply contracts with Phoenix' customers.

(34) The complete divestiture of Phoenix' activities in the market for air springs for commercial vehicles (OES/OEM) eliminates the overlap in this market.

Heavy steel cord conveyor belts

(35) The commitment to sell a whole production line for steel cord belts with a width of more than 2,4m to Sempertrans is also an appropriate remedy to solve the competition problems in the market for heavy steel cord conveyor belts. In fact, the main concerns in this market relate to the segment of belts for lignite mining customers. The acquirer Semperit/Sempertrans, already qualified with some belts in this segment, will get access to the production technology for wide belts through the divestiture, this capacity being a key factor for the success in the steel cord belt market. The market test has confirmed the effectiveness of the commitment, since all major customers have indicated to the Commission that they regard the divestiture of a production line as an effective measure to instil competition in the steel cord belt market. Therefore, the Commission believes that the divestiture will solve the competitive concerns in this market.

V. **CONCLUSION**

(36) The Decision, therefore, reaches the conclusion that, on the basis of the commitments submitted by the Parties, the notified concentration will not lead to a dominant position of the Parties in the markets for air springs for commercial vehicles (OEM/OES), for passenger cars, for rail vehicles and for heavy steel cord conveyor belts, as a result of which effective competition would be significantly impeded in the common market or a substantial part thereof. The merger should therefore be declared compatible with the common market and the EEA Agreement subject to full compliance with the obligations contained in the Annex under Article 2 (2) and Article 8(2) of the Merger Regulation and Article 57 of the EEA Agreement.

COMMISSION DECISION

of 19 January 2005

relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement against Akzo Nobel NV, Akzo Nobel Nederland BV, Akzo Nobel Chemicals BV, Akzo Nobel Functional Chemicals BV, Akzo Nobel Base Chemicals AB, Eka Chemicals AB, and Akzo Nobel AB, jointly and severally, Clariant AG and Clariant GmbH jointly and severally, Elf Aquitaine SA and Arkema SA, jointly and severally, and Hoechst AG

(Case No C.37.773 — MCAA)

(notified under document number C(2004) 4876)

(Only the English, French and German texts are authentic)

(Text with EEA relevance)

(2006/897/EC)

On 19 January 2005, 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, including any penalties imposed, while 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 DG COMP's website at the following address: http://europa.eu.int/comm/competition.

I. SUMMARY OF THE INFRINGEMENT

Introduction

(1) The Decision is addressed to Akzo Nobel NV, Akzo Nobel Nederland BV, Akzo Nobel Chemicals BV, Akzo Nobel Functional Chemicals BV, Akzo Nobel Base Chemicals AB, Eka Chemicals AB, and Akzo Nobel AB (hereinafter 'Akzo'), jointly and severally, Clariant AG and Clariant GmbH (hereinafter 'Clariant') jointly and severally, Elf Aquitaine SA (hereinafter 'Elf Aquitaine') and Arkema SA (hereinafter 'Arkema', formerly known as Atofina SA), jointly and severally, and Hoechst AG (hereinafter 'Hoechst').

(2) Reference in this summary will be made mostly to Atofina SA (or 'Atofina') and not to Arkema, even though it is the addressee of this Decision, as Atofina was the name in use during the administrative procedure.

(3) The addressees participated in a single and continuous infringement of Article 81 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.

(4) The Commission initiated an investigation into the EEA-wide MCAA industry after it received a leniency application in December 1999 from Clariant. The investigation revealed that the cartel lasted from at least 1 January 1984 to 7 May 1999.

The market for mcaa

(5) Monochloroacetic acid (or 'MCAA') is a reactive organic acid which is a chemical intermediate used in the manufacture of detergents, adhesives, textile auxiliaries and thickeners used in food, pharmaceuticals and cosmetics.

(6) The geographic market was considered to be the EEA. The value of this market was approximately EUR 121 million in 1998, the last full year of the infringement. During the period of investigation, almost every part of the common market and the EEA was under the influence of the cartel.

Description of the cartel

(7) In terms of the organisation of the cartel, contacts between the major producers of MCAA can be traced back to the late 1970s and early 1980s and at this stage were largely bilateral and related to the exchange of customer and pricing information.

(8) By the early to mid 1980s multilateral meetings began to be organised and arrangements became more solidified with the aim of maintaining their respective market shares. The participants at this stage were Hoechst, Akzo and Atochem SA (subsequently Atofina SA, now known as Arkema). Clariant joined only in 1997 after it purchased Hoechst's MCAA business.

(9) At this time the participants would meet 2-4 times a year on a multilateral basis with meetings organised on a rotating basis in the respective countries of the undertakings involved. Bilateral contacts were maintained and the participants also met during special meetings and social occasions.

([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).

(10) The cartel became more formalised in 1993 with the aim of having more transparent statistics, stamping out cheating, having greater control over sales personnel and implementing a compensation system. A formal system of exchange of quarterly sales and price data was also implemented between the participants.

(11) In addition, in an attempt to justify the exchanged market figures a statistical organisation, […] (hereinafter '[…]'), was retained. […] provided aggregated market statistics and the participants met a […] representative twice a year, usually in Zurich, to discuss these and other matters of industry concern.

(12) However, these legitimate meetings served as a cover for the real purpose of the gatherings which was for the parties to get together to discuss the implementation of the cartel arrangements. These illegal meetings usually took place the evening prior to the […] meeting at a separate location. 13 […] meetings were planned between 1994-1999 although the final meeting appears to have been cancelled.

(13) Even though the organisation of the cartel may have shifted in the course of its duration, essential features remained the same. This involved volume and customer allocation in order to maintain market shares. Market shares were additionally safeguarded by a compensation mechanism between the parties in the event of over- or under-selling. There was significant exchange of sales and price information and also evidence of concerted price increases.

II: **FINES**

Basic amount

Gravity

(14) The infringement consisted of allocating customers and volume quotas, agreeing concerted price increases, arranging a compensation mechanism to ensure the implementation of quotas, exchanging sales volumes and prices, and, participating in regular meetings, both multilateral and bilateral, as well as other contacts to ensure the proper functioning of the cartel. These types of conduct are by their very nature very serious violations of Articles 81 EC and 53(1) EEA.

(15) The cartel agreement was implemented by producers, which for the relevant period covered the vast majority of the Common market and the EEA, after 1 January 1994. It must therefore have had an impact on the MCAA market in the Common market and the EEA.

(16) Given the nature of the behaviour under scrutiny, the Commission considered that the addressees of this Decision committed a very serious infringement of Article 81 EC and 53(1) EEA.

Differential treatment

(17) The undertakings were divided into different categories according to their relative importance in the market to account for the specific weight and therefore the real impact of each undertaking on the market.

(18) As the basis for comparing the relative importance of an undertaking in the market concerned, the Commission considered it appropriate to take the EEA-wide product turnover. The comparison was made on the basis of the EEA-wide product turnover in the last full year of the infringement: 1998 for all the undertakings except for Hoechst for whom 1996 was the reference year, as it exited the MCAA market in mid-1997.

(19) Akzo, Clariant, and Atofina were the major producers of MCAA in the EEA in 1998, with respective approximate market shares of 44 %, 34 % and 17 %. Hoechst had a market share of 28 % in 1996 before it exited the MCAA market in mid-1997. The undertakings were therefore split into three categories. First category: Akzo; second category: Hoechst and Clariant; third category: Atofina.

Sufficient deterrence

(20) Within the category of very serious infringements, the scale of likely fines also makes it possible to set the fines at a level which ensures that they have sufficient deterrent effect, taking into account the size of each undertaking. In this respect, the Commission noted that in 2003 the turnover of Atofina/Elf Aquitaine was EUR 84,5 billion, and that of Akzo was EUR 13 billion. Accordingly, the Commission considered it appropriate to multiply the fine for Atofina/Elf Aquitaine with a factor of 2,5 and that of Akzo with a factor of 1,5.

Duration

(21) Akzo and Atofina have committed an infringement of a long duration. They participated in the cartel from January 1984 to May 1999, equating to 15 years and four months, which justified an increase of 150 % of the basic amount of the fine for both undertakings.

(22) Hoechst has also committed an infringement over a long time, by being involved in the illegal arrangements from January 1984 to the end of June 1997, or a period of 13 years and 6 months, which justified an increase of 135 % of the basic amount of the fine.

(23) Clariant's participation is restricted to the period from July 1997, date at which it acquired the MCAA business from Hoechst, to May 1999. It was accordingly involved in the cartel for a period of 1 year and 10 months, which justified an increase of 15 % of the basic amount of the fine.

Aggravating circumstances

Recidivism

(24) At the time the infringement took place, two of the addressees of this Decision had already been subject to previous Commission Decisions in cartel cases. Hoechst was an addressee in the PVC II (94/599/EC; 27 July 1994) and Dyestuffs (69/243/EEC; 24 July 1969) Commission Decisions. Atofina was also an addressee of the PVC II Decision. These aggravating circumstances justified an increase of 50 % in the basic amount of the fine imposed on Hoechst and Atofina.

Attenuating circumstances

Effective cooperation outside of the 1996 Leniency Notice

(25) Akzo made voluntary statements which allowed the Commission to conclude that Eka Nobel AB, Eka Nobel Skoghall AB and Nobel Industrier AB (now respectively Eka Chemicals AB, Akzo Nobel Base Chemicals AB and Akzo Nobel AB) were independently involved in the cartel from 15 June 1993 until they became part of the Akzo group on 25 February 1994. As a result of Akzo's disclosures it faces a higher fine than it would without its cooperation. The Commission therefore considered it appropriate, having regard to the principles of fairness and the particular circumstances of the case, to reduce to zero the fine on the above companies for their independent infringement.

Application of the 1996 Leniency Notice

(26) Three of the addressees (Akzo, Atofina and Clariant) of the present Decision co-operated with the Commission at different stages of the investigation into the infringement for the purpose of receiving the favourable treatment set out in the Commission's 1996 Leniency Notice ([2]).

(27) The Leniency Notice was applied as follows in the Decision:

1. *Non-imposition of a fine or a very substantial reduction of its amount ('Section B': reduction from of 75 % to 100 %)*

(28) Clariant was the first undertaking to submit decisive evidence on the existence of a secret cartel affecting the MCAA industry in the EEA. This information was provided in a statement and evidence submitted by Clariant on 6 December 1999, and, it enabled the Commission to carry out an investigation at the premises of Akzo and Atofina. Clariant also fulfilled the other conditions of Section B: it ended its involvement in the cartel, cooperated fully throughout the investigation and did not act as an instigator of the cartel. The Decision took into account all of these elements when granting a 100 % reduction of the fine that would otherwise have been imposed on Clariant AG and Clariant GmbH had they not cooperated with the Commission.

2. *Substantial reduction in a fine ('Section C': reduction from 50 % to 75 %)*

(29) Neither Akzo or Atofina met the conditions set out in Section C of the Leniency Notice.

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

(30) Both Akzo and Atofina co-operated with the Commission.

(31) Atofina closely cooperated with the Commission and therefore qualified for a significant reduction in the amount of the fine as it was the second undertaking that provided the Commission with information and evidence that materially contributed to the establishment of the existence of the cartel. Additionally, Atofina did not contest the facts relied upon to establish the existence of the cartel. The information and evidence provided by Atofina was detailed and extensively relied upon by the Commission in this Decision. Atofina fulfilled the conditions set out in Section D and its cooperation is reflected in a 40 % reduction of the fine that would otherwise have been imposed.

(32) Akzo qualified for a significant reduction of the amount of the fine as it was the third undertaking that provided the Commission with information and evidence that corroborated the existence of the MCAA cartel. Akzo did not contest the facts that the Commission relied upon. The Commission concluded that Akzo fulfilled the conditions set out in Section D. The information and evidence provided by Akzo was detailed, was relied upon by the Commission and this is reflected in the 25 % reduction of the fine that would otherwise have been imposed.

Decision

(33) The following undertakings infringed Article 81 of the Treaty by allocating volume quotas, allocating customers, agreeing concerted price increases, agreeing on a compensation mechanism, exchanging information on sales volumes and prices, and, participating in regular meetings and other contacts to agree and implement the above restrictions. The following undertakings' behaviour also constituted an infringement of Article 53(1) of the EEA Agreement as from 1 January 1994.

(a) Akzo Nobel Chemicals BV, Akzo Nobel Functional Chemicals BV, Akzo Nobel Nederland BV and Akzo Nobel NV, from 1 January 1984 to 7 May 1999;

([2]) According to point 28 of the 2002 Leniency Notice, from 14 February 2002, the 2002 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. As in this case several undertakings applied for leniency with the Commission before 14 February 2002, the 1996 Leniency Notice applies.

(b) Akzo Nobel Base Chemicals AB, Eka Chemicals AB and Akzo Nobel AB, from 15 June 1993 to 7 May 1999;

(c) Hoechst AG, from 1 January 1984 to 31 June 1997;

(d) Elf Aquitaine and Arkema SA (formerly known as Atofina SA), from 1 January 1984 to 7 May 1999;

(e) Clariant AG, Clariant GmbH, from 1 July 1997 to 7 May 1999.

(34) For these infringements, the following fines are imposed:

(a)	Akzo Nobel Chemicals BV, Akzo Nobel Nederland BV, Akzo Nobel NV, Akzo Nobel Functional Chemicals BV, Akzo Nobel Base Chemicals AB, Eka Chemicals AB and Akzo Nobel AB:	EUR 84,38 million;
(b)	Hoechst AG:	EUR 74,03 million;
(c)	Elf Aquitaine SA and Arkema SA (formerly known as Atofina SA) jointly and severally:	EUR 45,00 million;
(d)	Arkema SA (formerly known as Atofina SA):	EUR 13,50 million;
(e)	Clariant AG and Clariant GmbH jointly and severally:	EUR 0 million.

Akzo Nobel Base Chemicals AB, Eka Chemicals AB and Akzo Nobel AB shall be jointly and severally liable for payment of the fine imposed in point (a) of the first paragraph, up to an amount of EUR 50,63 million. The other Akzo companies listed in that point shall be jointly and severally liable for the full amount of the fine.

(35) The undertakings listed in point 1 above shall immediately bring their infringement to an end, insofar 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.

COMMISSION DECISION

of 22 June 2005

on the measure implemented by Italy for professional sports clubs (Decreto Salva Calcio)

(notified under document number C(2005) 1794)

(Only the Italian version is authentic)

(Text with EEA relevance)

(2006/898/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having called on interested parties to submit their comments pursuant to the provision cited above ([1]) and having regard to their comments,

Whereas:

I. PROCEDURE

(1) The Commission learned through the press that, when Decree-Law No 282 of 24 December 2002 was being converted into statute, the Italian Government adopted a measure on accounting rules for professional sports clubs. By letter D/51643 of 12 March 2003, the Commission requested information on the measure in question. By letter No 5243 of 22 April 2003, the Italian authorities requested an extension of the deadline for submitting the information to 14 May. Not having received any reply by the date set, the Commission requested the information by letter of 22 May, in which it reminded the Italian authorities that, according to Article 88(3) of the EC Treaty, the aid measure may not be put into effect until the Commission has presented its comments on the matter. The reply of the Italian authorities was received on 26 June 2003.

(2) By letter of 11 November 2003, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the measure.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union*. ([2]) The Commission invited interested parties to submit their comments on the measure.

(4) The Commission received comments from the Italian authorities by letter of 13 February 2004 and from interested parties by letters of 19 January 2004 and 16 February 2004. By letter D/51415 of 25 February 2004, the Commission forwarded the comments of interested parties to Italy, which was given the opportunity to react.

(5) By letter No 08/RB/04 of 10 March 2004, the Italian authorities undertook to amend the measure in question with a view to removing any tax effects it might have. In view of the undertaking to render the measure compatible with the Community rules on competition and since the measure had no immediate effect from the point of view of state aid, the Commission suspended the procedure until such time as the measure had been amended.

(6) By letter No 13346 of 11 November 2004, the Italian authorities submitted to the Commission the text of the amendments to the *Legge Comunitaria 2004*, which was being examined by the Italian Parliament. The pre-announced amendments were finally introduced by way of Article 28 of Law No 62 of 18 April 2005 (*Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunita' europee. Legge comunitaria 2004* ([3])).

II. DESCRIPTION OF THE MEASURE

(7) The measure, introduced by virtue of Article 3(1*bis*) of Decree-Law No 282 of 24 December 2002, which lays down urgent measures regarding compliance with Community and tax law, collection and accounting procedures and was converted into Law No 27 of 21 February 2003 ('Law No 27/2003'), is applicable to the sports clubs governed by Law No 91 of 23 March 1981 ('Law No 91/1981').

([1]) OJ C 308, 18.12.2003, p. 9.

([2]) See footnote 1.

([3]) Published in Official Gazette No 96 of 27 April 2005 (*Supplemento ordinario n. 76*).

(8) The measure, set out in Article 18*bis*(i) of Law No 91/1981, as amended by Law No 27/2003, allows sports clubs to enter in a special balance-sheet item in the first annual accounts following the entry into force of the Law the capital losses arising from the decreased value of the rights to exploit the performances of professional players, as determined on the basis of a sworn expert valuation. This item will, with the agreement of the board of auditors, be accounted for on the assets side of the balance sheet and amortised over the years.

(9) Article 18*bis*(2) of Law No 91/1981, as amended by Law No 27/2003, stipulates that companies taking up the option provided for in paragraph 1 must, for accounting and tax purposes, amortise the losses in ten annual charges of equal amount.

(10) In order to ascertain whether the measure constitutes state aid within the meaning of Article 87(1) of the EC Treaty, the Commission has to assess whether (i) the measure favours certain undertakings or the production of certain goods by granting an advantage that is of an economic nature, (ii) whether that advantage is selective, therefore distorting or threatening to distort competition, (iii) whether it affects trade between Member States, and (iv) whether it is granted through state resources.

(11) In the decision to initiate the formal investigation procedure laid down in Article 88(2) of the EC Treaty, the Commission observed *inter alia* that:

(a) The sports clubs benefiting from the measure perform an economic activity and are therefore to be considered undertakings within the meaning of Article 87(1). The measure would have allowed the sports clubs to offset losses suffered in the past against future profits for a longer period of time: the possibility of extending the period over which losses can be deducted would have represented an economic advantage.

(b) The measure is selective since it is addressed only to the sports clubs governed by Law No 91 of 23 March 1981; it would therefore have constituted sectoral aid.

(c) Professional sports clubs perform various economic activities. At least some of the clubs perform a number of these activities on international markets. Since sports clubs and other economic operators from other Member States are active on these markets, the measure in question could have affected intra-Community trade.

(d) The measure would have implied the use of state resources in terms of tax revenues forgone. As already indicated, it would have allowed sports clubs to carry forward deductible losses for a longer period than at present, alongside a lower rate of possible depreciation in the early years. By giving sports clubs a choice between two alternative methods of taxation, the State would have allowed these taxpayers to opt for the method which was more favourable to them, thereby agreeing to forgo tax revenue.

(12) On the basis of the above summary analysis, the measure seemed to satisfy all the necessary conditions to be considered as state aid within the meaning of Article 87 (1) of the EC Treaty.

(13) Moreover, for the reasons set out in paragraphs 22 to 29 of the decision to initiate the formal investigation procedure, the circumstances for considering the aid compatible with the common market did not seem to be present.

III. ASSESSMENT OF THE MEASURE

(14) Article 28 of Law No 62 amended Article 18*bis*(2) of Law No 91/1981, referred to in paragraph 9, the expression 'for accounting and tax purposes' was replaced by the expression 'only for accounting purposes'.

(15) This amendment rules out the possibility of using for tax purposes the different accounting method provided for in Law No 91/1981, which, as amended by Law No 27/2003, introduced the option. Accordingly, it is no longer possible for sports clubs to extend the period over which losses can be deducted for tax purposes.

(16) Although Law No 91/1981, as amended by Law No 27/2003, continues to grant sports clubs an advantage in terms of favourable accounting treatment, it no longer, in its new wording, provides any tax advantage. Moreover, since the tax advantage previously possible would have materialised only in the future, [4] the measure has not granted any tax advantage during the period in which the amended rules have been in force.

(17) Since the measure no longer involves the forgoing of tax revenues, it does not involve the use of state resources. Accordingly, one of the essential tests for the presence of state aid within the meaning of Article 87(1) of the EC Treaty is no longer met. The Commission therefore concludes that, following the amendments made by Law No 62/2005 (*Legge Comunitaria 2004*), the measure does not constitute state aid.

(18) Accordingly, the comments by the Italian authorities and by third parties need not be examined in detail.

[4] That is, beyond the normal five-year period for carrying forward losses.

IV. **CONCLUSION**

HAS ADOPTED THIS DECISION:

Article 1

The measure which Italy has implemented for professional sports clubs by way of Law No 27 of 21 February 2003, as amended by Law No 62 of 18 April 2005, does not constitute state aid.

Article 2

This decision is addressed to the Italian Republic.

Done at Brussels, 22 June 2005

For the Commission
Neelie KROES
Member of the Commission

COMMISSION DECISION

of 13 July 2005

declaring a concentration compatible with the common market and the EEA Agreement

(Case No COMP/M.3653 — Siemens/VA Tech)

(notified under document number C(2005) 2676)

(Only the German text is authentic)

(Text with EEA relevance)

(2006//EC)

On 13 July 2005 the Commission adopted a Decision in a merger case under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, and in particular Article 8(2) of that Regulation. A non-confidential version of the full Decision can be found in the authentic language of the case and in the working languages of the Commission on the website of the Directorate-General for Competition, at the following address: http://ec.europa.eu/comm/competition/index_en.html.

I. EXECUTIVE SUMMARY

(1) This case concerns the takeover by Siemens of the Austrian engineering group VA Tech.

(2) Siemens is a diversified engineering group active in the following core business areas: information and communications, automation and control, power technology, transportation, street lighting and medical equipment.

(3) VA Tech, headquartered in Linz, is Austria's largest industrial group with a EUR4,3 billion annual turnover and some 17 000 employees. Its four main business areas cover power generation, power transmission and distribution, metallurgy and electrical plant building and infrastructure.

(4) On 10 December 2004, Siemens launched a public bid for VA Tech aimed at raising its current 16,45 % shareholding to at least 50 % plus one share. […] (*). The only outstanding condition for the bid to become effective at this point is the Commission's regulatory approval.

(5) The proposed acquisition, whereby Siemens acquires sole control over VA Tech, constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

(6) The undertakings concerned have a combined aggregate worldwide turnover of more than EUR5 billion (Siemens: EUR74 billion for the year ending 30 September 2003; and VA Tech: EUR3,9 billion in 2003). Siemens and VA Tech each have an aggregate Community-wide turnover in excess of EUR250 million […] (*). Neither of the companies achieves more than two thirds of its aggregate Community-wide turnover within one and the same Member State. The notified transaction therefore has a Community dimension.

(7) The Commission's market investigation confirmed that the proposal leads to numerous horizontal and vertical overlaps in the fields of power generation (see Section A), power transmission and distribution (B), rail transport technology (C), frequency inverters (D), metallurgical and electrical plant building (E), low-voltage switchgear (F), building technology (G), infrastructure and ropeways (H) and other IT services (I).

(8) The Commission came to the conclusion in its Decision that, having regard to the commitments given by the parties in the areas of (i) hydroelectric power equipment and (ii) mechanical metallurgical plant building, the notified merger did not significantly impede effective competition in any of these areas either in the common market or in a substantial part thereof.

II. DETAILED SUMMARY

A. *POWER GENERATION*

A1. EQUIPMENT FOR HYDROELECTRIC POWER PLANTS

Relevant markets

(9) Equipment for hydroelectric power plants comprises a large number of separate components, notably hydroelectric turbines, generators and various other mechanical and electrical parts (known as the mechanical (electrical) balance of plant). Customers often tender for these components separately, especially in Europe, where most demand is for replacement or modernisation of existing hydroelectric power plants. The different components are

(*) 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.

not substitutable from the demand side. Following a series of mergers between manufacturers of mechanical and electrical hydroelectric power equipment, Siemens/VA Tech and their main competitors can supply the full range of components. Supply-side factors lead the Commission to agree with Siemens that there exists a single relevant product market for hydroelectric power plant equipment, although the products included in this market are significantly differentiated.

(10) As to the relevant geographic market, the Decision explains that different sets of competitors compete in the different world regions, but that the leading European players (Siemens, VA Tech, Alstom and GE Hydro) operate worldwide. Particularly in China and the rest of Asia, there are a number of Chinese, Indian and Japanese companies that European customers do not recognise as credible bidders. Customers in the EEA either do not know these manufacturers or they rate them significantly lower than the suppliers active in Europe. They have so far neither won any contracts in the EEA, nor have they submitted bids (although Siemens has pointed to two successful Chinese projects in Albania in the 1960s and '70s).

(11) […] (*) The Decision concludes that conditions of supply and demand differ significantly between the EEA and other world regions and that, consequently, the relevant geographic market is the EEA.

Competition assessment

(12) For the period from 2000 to 2004 Siemens estimates its combined EEA market share together with VA Tech at [40-50] (*) % (Voith Siemens [20-30] (*) % ([1]), VA Tech [20-30] (*) %). VA Tech's estimate is [40-50] (*) %, whereas Alstom puts Siemens/VA Tech's combined market share at 61 %. Customers' market share estimates are generally in the same range, although one smaller competitor (Andino) believes that Siemens/VA Tech has 70 % of the EEA market. Based on the turnover figures submitted by the main competitors for the same five-year period, the following market shares arise (accepting Siemens's estimate of 'others" sales):

EEA 2000-2004	EUR (millions)	Market share %
Siemens	318	[10-20] (*) %
VA Tech		[30-40] (*) %
Combined		**50 %**
Alstom		[20-30] (*) %
GE Hydro		[0-10] (*) %
Ansaldo		[<1] (*) %
Andritz		[<1] (*) %
Others	473	[20-30] (*) %
Total		100 %

Source: Commission's market investigation

(13) Although Siemens argues that this is a bidding market and that market shares fluctuate greatly from year to year […] (*), a number of factors indicate that market shares nevertheless contain significant information about market power in this market. In particular, bids are frequent and often small in volume (only […] (*) of […] (*) tenders submitted by Siemens are larger than EUR[…] (*) in size), and products are highly customised and significantly differentiated. In addition, for larger contracts, there is ex-ante uncertainty about the actual value (i.e. profitability) of a project for the winning bidder. The expected value of the price offered by the lowest bidder is therefore bound to increase as the number of credible bidders decreases. Hence, Siemens/VA Tech's high combined market share, the relatively small size of the remaining competitors and the elimination of an important bidder increase the possibility that a dominant position will be created as a result of the merger.

(14) From the replies to the market investigation […] (*), a group of four leading competitors (Siemens, VA Tech, Alstom and GE Hydro) can be identified. These companies are recognised by customers as credible bidders for large hydroelectric power equipment. All other competitors are rated significantly lower or do not produce comparable equipment, even if they are eligible for smaller contracts. The Decision presents a quantitative aggregation of customer ratings for the various hydroelectric equipment suppliers to corroborate this finding […] (*).

(15) Bidding lists submitted by Siemens, […] (*) indicate, furthermore, that Siemens meets VA Tech more frequently in tenders (in […] (*) % of tenders above EUR[…] (*) in value) […] (*) than it meets Alstom […] (*) or GE […] (*). In […] (*) of tenders, Siemens and VA Tech were the only companies among the Big 4 to submit a bid. The frequency of interaction is partly explained by the fact that GE Hydro rarely bids outside the Nordic region and the UK (GE Hydro originates from GE's takeover of Kvaerner's hydroelectric power unit.) Alstom participates more frequently across the different parts of Europe, although it has been somewhat more active in the Iberian peninsula than elsewhere. It also bids more frequently for larger projects than for smaller ones.

([1]) Voith Siemens is the joint venture through which Siemens is active in hydroelectric power.

(16) A large number of customers and competitors complained in their Article 11 replies that the transaction will lead to price increases, as two close competitors in an already concentrated market would be combined.

(17) Siemens appears to agree with the Commission's finding that Siemens and VA Tech, along with Alstom, are at present the leading competitors for hydroelectric power equipment in the EEA. It consequently invokes mainly dynamic arguments in its defence.

(18) According to Siemens, Chinese and small European suppliers would readily be able to supply competitive equipment if Siemens/VA Tech attempted to raise prices after the merger. Siemens argues that long-established supplier relationships have so far prevented new bidders from emerging and that, with some effort, customers could develop new supply sources. However, Siemens provides no evidence of any attempts or plans by suppliers not yet active in Europe to participate in tenders in the EEA. Apart from Chinese manufacturers, Siemens lists a number of small European manufacturers of small hydroelectric equipment and suppliers of small components that can, among other applications, also be used in hydroelectric power plants. However, all of these companies have market shares below 1 % and do not supply products comparable to those of Siemens and VA Tech.

(19) The Decision concludes that Siemens's arguments are speculative and amount essentially to a general contention that every monopoly will in the long run attract new entrants. Siemens/VA Tech's high combined market share, the reduction in the number of credible bidders from four to three, bidding data indicating that Siemens/VA Tech supply close (or even the closest) substitutes and the large number of customer complaints lead the Commission to conclude that the transaction will lead to a significant impediment to effective competition ('SIEC'), through the creation of a dominant position, in the market for hydroelectric power equipment.

A2. FOSSIL POWER PLANT EQUIPMENT

(20) In fossil power plant equipment, VA Tech supplies combined-cycle power plants as a turnkey integrator using mainly components supplied by third parties, notably gas turbines made by GE, together with turbo generators from its own in-house production. In the turnkey contracting market, several competitors remain after the transaction (mainly the turbine manufacturers Siemens, GE, Alstom and Mitsubishi, but also general contractors such as Bechtel and the boiler manufacturer Foster & Wheeler). VA Tech's EEA-market share for turnkey contracts is below 15 % […] (*). The notified transaction will thus deprive GE of one sales channel for its turbines and a supplier of generators designed to work with its turbines. However, given the strategic role of gas turbines in combined-cycle plants and GE's market-leading position in that area, the Decision concludes that GE will be able to replace VA Tech as a distribution channel for its turbines. GE has its own in-house generator manufacturing capacity. It has itself not raised any concerns about the transaction. The Decision, therefore, concludes that no competition concerns arise in this area.

B. *TRANSMISSION AND DISTRIBUTION (T&D) EQUIPMENT*

(21) Like power generation equipment, the T&D market comprises a wide range of different components that are supplied to customers (mainly national grid operators and local/regional electricity distributors) at a certain level of aggregation. Based on Siemens/VA Tech's horizontal overlap, Siemens proposes to define relevant markets at the level of the product groups listed under a.-e. below.

a. HIGH-VOLTAGE PRODUCTS (FOR TRANSMISSION NETWORKS OPERATING AT VOLTAGES BETWEEN 52 KV AND 800 KV)

(i) air-insulated switchgear

(ii) gas-insulated switchgear

(iii) circuit breakers

(iv) disconnectors

(v) instrument transformers

(vi) coils

b. TRANSFORMERS

(i) power transformers

(ii) distribution transformers

c. ENERGY AUTOMATION AND INFORMATION SYSTEMS

(i) power system management

(ii) protective relays

d. TURNKEY PROJECTS

(i) high-voltage projects

(ii) medium-voltage projects

e. T&D SERVICES

(i) asset services

(ii) network planning.

(22) On product markets, the market investigation provided some indications that, contrary to Siemens's view, at least some of the components identified under (i), (ii), … in each section may by themselves constitute separate relevant product markets. However, the exact product market definition can be left open for purposes of this Decision as no SIEC will arise under any possible market definition.

(23) On geographic market definition, the Decision concludes that the T&D markets are EEA-wide. Technical standards no longer pose an obstacle for grid operators to source products from abroad, especially in the high-voltage markets, where products are significantly customised. The main suppliers participate successfully in tenders for T&D equipment throughout the EEA.

(24) The following market share estimates provided by Siemens in the notification as well as the identity of the competitors in each market were largely confirmed by the market investigation. The exception is the market for high-voltage turnkey projects, where no other market participant estimated Siemens's market share as high as [50-60] (*) %. However, the turnkey market comprises a range of products and components and allocating sales to turnkey services, as opposed to underlying components, may be handled differently by respondents to the market investigation.

Product	Siemens	VA Tech	Combined	Main competitors
a. High-voltage products	[10-20] (*)	[0-10] (*)	[20-30] (*)	Areva 18, ABB 15
(i) air-insulated switchgear	[0-10] (*)	[0-10] (*)	[10-20] (*)	Areva 12; ABB 9, Cegelec 6, EFACEC 6
(ii) gas-insulated switchgear	[30-40] (*)	[10-20] (*)	[40-50] (*)	ABB 33, Areva 23
(iii) circuit breakers	[30-40] (*)	[0-10] (*)	[40-50] (*)	Areva 30, ABB 28
(iv) disconnectors	[30-40] (*)	[20-30] (*)	[30-40] (*)	Areva 21, HAPAM 14
(v) instrument transformers	10-20] (*)	[0-10] (*)	[10-20] (*)	Areva 20-25, ABB 10-15, Ritz 10-15, Arteche 10-15, Pfiffner 3-8
(vi) coils	[20-30] (*)	[10-20] (*)	[40-50] (*)	Areva 22-27, ABB 17-22, Trafomec 5-10
b. Transformers	[10-20] (*)	[0-10] (*)	[20-30] (*)	ABB 18-23, Areva 13-18, RWE Solutions 8-13, Schneider 4-7, Pauwels 4-7, others
(i) power transformers	[10-20] (*)	[10-20] (*)	[20-30] (*)	ABB 20-25, Areva 15-20, RWE Solutions 7-14, Pauwels 2-5, EFACEC 2-5, others
(ii) distribution transformers	[10-20] (*)	[0-10] (*)	[10-20] (*)	ABB 12-17, Schneider 10-15, RWE Solutions 8-13, Areva 7-12, Pauwels 5-10, others

Product	Siemens	VA Tech	Combined	Main competitors
c. Energy Automation and Information Systems				
(i) power system management	[10-20] (*)	[10-20] (*)	[20-30] (*)	ABB 8-12, Areva 6-10, others (including various software companies)
(ii) protective relays	[20-30] (*)	[0-10] (*)	[20-30] (*)	Areva 23-27, ABB 13-17, Schneider 4-8
d. Turnkey projects	[20-30] (*)	[0-10] (*)	[30-40] (*)	ABB 18, Areva 14, Cegelec 9
(i) high-voltage projects	[50-60] (*)	[10-20] (*)	[70-80] (*)	ABB 21, Areva 9
(ii) medium-voltage projects	[10-20] (*)	[0-10] (*)	[10-20] (*)	ABB 17, Areva 16, Cegelec 12
e. T&D services	No affected markets on an EEA or national basis			

(*) 40 % non-controlling shareholding; 60 % sold in 2004 to Southern States LLC (United States)

(25) Siemens, VA Tech, Areva and ABB supply a wide range of T&D components, whereas several smaller competitors, including Cegelec, EFACEC, Ansaldo, HAPAM, Pauwels and others cover only smaller product segments.

(26) The transaction leads to high market shares in excess of [30-40] (*) % in several tentative T&D markets, namely gas-insulated switchgear (GIS), circuit breakers and high-voltage turnkey projects. It would also reduce from four to three the number of credible competitors in these product markets (Siemens/VA Tech, Areva and ABB). The three markets are vertically related as a large proportion of HV-turnkey projects include GIS as the main underlying component. Circuit breakers, in turn, are used as a component in GIS. Siemens, VA Tech, Areva and ABB are all active at all three of these vertical levels.

(27) In the remaining (tentative) T&D markets, Siemens/VA Tech's combined market shares are lower, and additional competitors exist. No competition concerns arise here.

(28) Replies by customers and competitors to the Commission's market investigation have overall been less negative than in hydroelectric power. Negative remarks tended to be more general, pointing to the fact that a competitor is eliminated in an already concentrated market. The Commission's investigation therefore focused on the potential effect resulting from the reduction in the number of credible bidders from four to three in some tentative markets.

(29) In the HV-turnkey market, the main competitive overlap between Siemens and VA Tech is in GIS-based turnkey substations. Market power in the HV-turnkey market is thus linked to the suppliers' market position in the underlying GIS components. The turnkey market is heavily project-driven and market shares have fluctuated widely. During the five-year period from 1999 to 2003, Siemens's share varied from [5-10] (*) % (2000) to [50-60] (*) % (2003). VA Tech's market share ranged from [0-5] (*) % (1999) to [15-20] (*) % (2002). ABB and Areva captured the remaining projects in each year. A single large project can have a strong impact on a supplier's market share in a given year. Similarly, its strong market position in 2003 ([50-60] (*) %) resulted from […] projects in excess of EUR[…] million and […] +EUR[…] million contracts. The Decision thus concludes that the HV-turnkey market is indeed a bidding market where competition is 'for the market' (rather than 'in the market') and where market shares reveal little about a competitor's ability to win future projects.

(30) In GIS, the same competitors as in HV turnkey are active in the EEA: Siemens, VA Tech, ABB and Areva. Siemens/VA Tech's combined share in 2003, according to Siemens, was [40-50] (*) % (Siemens [30-40] (*) %, VA Tech [10-15] (*) %). The combined market shares fluctuated between [40-50] (*) % and [60-70] (*) % in the period 1999 to 2003. Individual market shares fluctuated more widely (Siemens [10-15] (*) %-[40-50] (*) %, VA Tech [10-15] (*) %-[40-50] (*) %). As in the turnkey market, ABB and Areva accounted for the remaining EEA market share.

(31) Although the safety-critical nature of HV products limits the number of eligible suppliers to European electricity operators, there appears to be little product differentiation between the equipment supplied by the four market leaders

for a given tender specification. Based on these characteristics (bidding market, little product differentiation among the majors), the GIS/HV-turnkey markets could in principle produce competitive outcomes, even with only three credible competitors.

(32) The market investigation examined bidding lists for HV-turnkey projects, GIS and circuit breakers supplied by Siemens and data from competitors covering the periods from 1999 to date. The data show that ABB was Siemens's most frequent competitor in tenders, followed by Areva. VA Tech participated less frequently in GIS tenders and rarely bid in competition with Siemens. One explanation for the rare encounter of Siemens and VA Tech may be that VA Tech's European GIS business originates from its takeover of Schneider's HV activities in Grenoble. VA Tech's installed base is therefore concentrated in France, whereas Siemens's traditional geographic strength has been elsewhere in Europe.

(33) Ganz-Transelektro of Hungary has submitted several bids in the EEA since the country became an EU member. It has recently won a GIS contract in the Netherlands (with Corus). By contrast, the Japanese GIS manufacturers Toshiba-Mitsubishi (TM) and JAEPS have in the EEA limited their activities to tenders in the island states of Iceland and Cyprus.

(34) The Commission also compared bids from […] (*) tenders, where all four firms submitted bids, in order to verify whether any one firm frequently submitted the lowest or second-lowest bid. This was not the case.

(35) As outlined in the Decision, the GIS market could potentially produce competitive outcomes even with three credible bidders, provided the merger does not involve the lowest and second-lowest-cost bidder or competitors who are particularly close substitutes by another dimension. The bidding data provided no indications to this effect.

(36) The Decision also examines the possibility that the notified transaction may lead to coordinated effects. However, it appears from the structure of the GIS, HV-turnkey and circuit-breaker markets (three close competitors, inhomogeneous products, large customers) and the observed bidding pattern (all competitors participate successfully in tenders throughout Europe) that any effective coordination mechanism in the GIS market would have to be highly elaborate and would be difficult to implement.

(37) The Decision concludes that no significant impediment to effective competition arises in the T&D market under any possible product market definition.

C. *RAIL TECHNOLOGY*

C1. RAIL ROLLING STOCK

(38) The takeover of VA Tech leads to the disappearance of VA Tech Elin EBG Traction (ETR) as an independent supplier of electrical traction for trams, metros and regional trains. ETR is also a supplier to integrated manufacturers of rolling stock, forming consortia for particular types of trams and trains with among others Bombardier and Siemens.

(39) Following past cases the present Decision analyses the impact of the proposed transaction on the basis of an EEA market for electrical traction and national markets for rolling stock, separate for the various types of rolling stock, i.e. trams, metros, regional trains and locomotives in this case. The overlap in the market for electrical traction is rather limited and does not lead to any competition concerns. However, owing to ETR's and Siemens's position in some Member States there are vertically affected markets.

(40) The market investigation showed that in the markets affected by the proposed transaction, i.e. trams in Spain, Poland, Austria and the Czech Republic, metros in Belgium and regional trains in Germany and Austria, sufficient competition will remain after the transaction. In order to sever the links between ETR and Bombardier created by Commission Decision COMP/M.2139 *Bombardier/Adtranz* of 3 April 2001, it is proposed to adopt in parallel an Article 8(2) decision cancelling one of the commitments given by Bombardier in that case should Siemens acquire sole control of VA Tech. That commitment obliges Bombardier to offer its CityRunner tram of the 'Linz' type only with traction by ETR.

(41) The non-integrated companies will not be foreclosed for the following reasons. First, at least one independent supplier of electrical traction for trams (Kiepe) and metros (Mitsubishi) will remain available. Secondly, there is the possibility for the non-integrated manufacturers to integrate within two to three years, as has been demonstrated by Stadler for trams and regional trains. Thirdly, the integrated suppliers have, in the past, often teamed up with the non-integrated, and this option will remain as well. Lastly, even if the non-integrated suppliers had to leave the market for electrically driven rolling stock, sufficient competition would remain in the market for rolling stock. The Decision concludes that no significant impediment to effective competition arises in

both the market for electrical traction and for trams, metros, regional trains and locomotives.

C2. CATENARY WIRES

(42) The Decision concludes that the question whether there is an overall market for all types of catenary wires or whether smaller product markets such as catenary wires for long-distance traffic exist can be left open. The concentration leads to one affected national market. In Germany, Siemens and VA Tech would have a combined market share of around [30-40] (*) % in the overall market, followed by Balfour Beatty with a similar share and five small competitors. On the basis of the market investigation the Commission concludes that there is no significant impediment to effective competition after the concentration. The same applies to the smaller possible product market of catenary wires for long-distance traffic since there is only one customer, the incumbent Deutsche Bahn, for the product for which there is an overlap, and at least four credible competitors. Moreover, it turned out that Siemens and VA Tech were rarely competing against each other. Lastly, tacit coordination between the merged entity and Balfour Beatty seems very unlikely since the market is declining year by year, and VA Tech cannot be described as the maverick which would be taken over and, therefore, make coordination easier. The Decision concludes that no significant impediment to effective competition arises in the market for catenary wires.

C3. TRACTION POWER SUPPLY

(43) Traction power supply concerns the supply of electricity into the catenary system of the railway operator through substations. The Decision identified two product markets, one overall market for substations and a market for components. In addition, there is an overlap in the market for the servicing of traction power generation stations in Germany. The concentration leads to two affected national markets for traction power supply. Siemens and VA Tech would have a combined market share of [40-50] (*) % in the overall market in Austria. In addition to Siemens/VA Tech, there are four internationally active credible suppliers, ABB, Areva, Balfour Beatty and SAG (RWE), which have market shares between 5 and 25 %, and some fringe players. The demand side is highly concentrated: the national railway company ÖBB and Wiener Linien account for more than 90 % of demand in that rather small market, and use tenders. As a consequence, market shares in this bidding market vary a lot.

(44) In Germany, Siemens and VA Tech would have a similarly high market share as in Austria. Competitors are ABB, Balfour Beatty, Elpro and Spitzke. VA Tech is almost exclusively active in the long-distance segment where there is one customer, Deutsche Bahn. Given that this market is a bidding market with one powerful customer in the segment where the overlap is, there is no competition issue for entire substations for traction power supply. With regard to substation components it has been brought to the Commission's attention that the merged entity would become a monopolist for certain components with the potential to foreclose competitors. However, the market investigation showed that Siemens does not have any of the three components in question, there are other competitors for two of these components and that, for the one component where indeed VA Tech is the only supplier, the customer Deutsche Bahn played a very active part in getting it tested and ultimately approved by the regulator. The Decision concludes that no significant impediment to effective competition arises in the market for traction power supply. The same is true for the servicing of traction power generation stations where VA Tech only supplied one of approximately 20 stations for which it is best placed to do also the servicing and since there are several credible alternatives to Siemens and VA Tech.

C4. LEVEL CROSSINGS

(45) Both Siemens and VA Tech are suppliers of level crossings. While VA Tech is active only in Austria, Siemens is not, but can be seen as a potential entrant. A customer raised the issue that after the merger Siemens might withdraw the VA Tech product and replace it with its own. However, the market investigation showed that VA Tech's product is owned by a German firm which has all the legal means to transfer the distribution rights to someone else if necessary. Therefore, the number of suppliers in the Austrian market does not change.

D. *FREQUENCY INVERTERS*

(46) Both Siemens and VA Tech are suppliers of frequency inverters. The market investigation confirmed Siemens's view that the relevant geographic market for frequency inverters is the EEA. In line with previous decisions the relevant product market is divided into two with the dividing line at 100 kW. Whether in the market for inverters above 100 kW a further segmentation for liquid-cooled and fourquadrant inverters is needed is left open since the competition assessment would not change.

(47) The combined market share of Siemens and VA Tech in the market for inverters below 100 kW is less than [15-20] (*) %. Since in 2004 VA Tech entered into a joint venture with Schneider and Toshiba ('STI') the market share of STI has to be added. However, even then the combined market share is below [30-40] (*) %. Important competitors are ABB and Danfoss with 10-20 %, and Lenze, SEW

Eurodrive, Vacon and Yaskawa/Omron with 5-10 % each. There are numerous smaller companies which are strong at the local level. For inverters above 100 kW the combined market share including the STI JV is less than [20-30] (*) %. For liquid-cooled and fourquadrant inverters the combined market share is below [20-30] (*) %. Therefore, the Commission came to the conclusion that competition concerns are unlikely to arise under any plausible product market definition.

E. *METALLURGICAL AND OTHER INDUSTRIAL PLANT BUILDING*

1. RELEVANT PRODUCT MARKETS

a. ***Fundamental distinctions***

(48) In the area of industrial plant building a distinction can be drawn firstly according to sectors (such as metallurgy, chemicals, paper, cement, etc.). This case relates primarily to metallurgical plant building. In this respect, a distinction can be drawn between mechanical plant building, electrical plant building and plant maintenance and services.

(49) Mechanical industrial plant building involves planning the use of machines in the industrial production process in question, procuring those machines and installing them in the production plant. VA Tech is a supplier in this area via its subsidiary VAI. Siemens is not itself active in this area as a supplier but, in the metallurgical sector, has a […] (*) holding in SMS Demag, one of the VA Tech's two closest rivals.

(50) Electrical plant building primarily covers general plant electrification, the configuration and assembly of traction solutions and the area of actual automation, which essentially consists of electrical monitoring and control systems and process automation. Both Siemens and VA Tech are suppliers in this area, the latter via its subsidiaries VAI (in the metallurgical sector) and Elin EBG (in various sectors).

(51) Plant maintenance and services include ongoing maintenance work and service provision, but exclude the redesign of parts of the plant. Siemens and VA Tech are both active in plant maintenance and services in the field of metallurgy.

b. ***Mechanical metallurgical plant building***

(52) Siemens considers the mechanical part of industrial plants to be sector-specific and therefore assumes a separate product market for mechanical metallurgical plant building. However, Siemens does not apply the further subdivision by process stage adopted by the Commission in its *SMS/Mannesman Demag* decision [1] but takes the view that these are only segments of a larger market for mechanical metallurgical plant building.

(53) The Commission concludes from the results of the market investigation that the subdivision by process stage in mechanical industrial plant building applied in the *SMS/Mannesmann Demag* case in the iron and steel sector can also be adopted for the purposes of this Decision. This involves making a distinction between product markets for pig iron making, steelmaking, continuous casting plants, hot rolling mills, cold rolling mills, strip plants, section rolling mills and hot pressing and forging. A distinction should also be made between metallurgical plant building for iron and steel on the one hand and for non-ferrous metals, in particular aluminium and copper, on the other.

(54) However, the precise definition of the product market can be left open in the area of mechanical metallurgical plant building.

c. ***Electrical metallurgical plant building***

(55) Electrical metallurgical plant building covers so-called 'level 0' automation (electricity supply and traction), actual automation (levels 1 and 2) and the more recent area of IT solutions for drive logistics/MES (level 3).

No uniform market

(56) Siemens does not consider electrical industrial plant building for the metallurgical sector to be a separate market, but takes the view that electrical industrial plant building as a whole is independent of any sector.

(57) In the context of the market investigation carried out by the Commission, however, most market participants expressed the view that special know-how is necessary for building electrical plants in the metallurgical sector. In their statements, competitors particularly stressed the specialisation of their engineers. The importance of reference lists in the replies received in the context of the market investigation leads to the conclusion that most customers demand relevant experience from suppliers in the area of metallurgy. […] (*). A further indication of an increasing branch-related specialisation is the advance of the former mechanical metallurgical plant building specialists, Danieli,

[1] IV/M. 1450 — *SMS/Mannesmann Demag*.

SMS Demag and VAI, in the area of electrical metallurgical plant building.

(58) Although level-0 products (electrical, drives) are metallurgy-specific to a relatively minor extent, this is not true for level-1 and level-2 products (automation proper). This is because levels 1 and 2 require branch-specific solutions (software modules) in order to be applicable. Siemens and its competitors are developing such solutions in branch-specific product families in the area of electrical industrial plant building.

(59) For the said reasons, the existence of a specific market for electrical plant building should be assumed for the purposes of defining the product market here, at least for the metallurgical sector. Such an overall market can be defined either as an overall market for electrical metallurgical plant building, including all possible submarkets, or more narrowly as a possible overall market for electrical metallurgical plant building at automation levels 0 to 2 in the area of iron and steel.

Possible separate submarkets for individual process areas or steps

(60) Market participants also take the view that the market for electrical plant building can be subdivided even further according to the various process steps of metallurgical production. There was some evidence of this in the market investigation, although it can ultimately remain open whether separate electrical product markets exist according to the three main process stages of electrical metallurgical plant building (liquid phase, hot phase, cold phase) and the special area of long product rolling. The question whether there should be a further subdivision by process step can also be left open for the purposes of this Decision.

Separate submarkets for level-1 and level-2 automation?

(61) It can also be left open for the purposes of this Decision whether separate product markets should be assumed for levels 1 and 2 combined or for submarkets thereof.

Separate markets for the iron and steel sector and the aluminium sector, in particular for aluminium hot and cold rolling

(62) The question whether or not there should be a separation of product markets for the rolling markets in iron/steel and aluminium can also be left open for the purposes of this Decision.

Possible market for IT solutions for plant logistics/MES/level 3

(63) The Commission's market investigation also revealed indications of a separate, possibly emerging metals-specific product market for IT solutions for plant logistics/MES/level 3. However, the question whether this is a specific branch and whether it should be included in or separated from the market for electrical metallurgical plant building can ultimately be left open for the purposes of this Decision.

d. ***Maintenance and services***

(64) Siemens takes the view that there is a specific market for the provision of services to metallurgy plants. The Commission's market investigation tends to confirm this view. However, a precise market definition can be left open in this area.

e. ***Electrical industrial plant building in non-metal sectors***

(65) For the purposes of this Decision the question of the branch-specific market definition of non-metallurgical electrical industrial plant building can be left open since the proposed merger does not give rise to any competition concerns whatever the definition of product market (i.e. covering several branches or in terms of a separate market for each branch).

f. ***Conclusion concerning the definition of product market in the areas of metallurgical plant building and industrial plant building in other branches***

(66) For the purposes of this Decision, therefore, the product markets are deemed to be the following in the area of mechanical metallurgical plant building:

— an overall market for mechanical metallurgical plant building (either limited to ferrous metals or covering both ferrous and non-ferrous metals);

— possible submarkets for the various process steps of mechanical metallurgical plant building.

(67) For the purposes of this Decision, the product markets are deemed to be the following in the area of electrical metallurgical plant building:

— the overall market for electrical metallurgical plant building including all of the following possible submarkets:

— the possible (more narrowly defined) overall market for electrical metallurgical plant building at automation levels 0 to 2 in the area of iron/steel;

— the possible submarkets for electrical metallurgical plant building at the liquid phase, hot phase and cold phase and for long product rolling (process-stage markets) in the area of iron/steel and the possible process-step markets (or further subdivision, e.g. by levels of automation), and possible level-1 and level-2 submarkets;

— the markets for aluminium hot rolling and aluminium cold rolling.

— the possible market for IT solutions for plant logistics/MES/level 3.

(68) For the purposes of this Decision, at least one separate product market for metallurgical plant maintenance and services may also be assumed.

(69) The definition of product market in electrical industrial plant building in other branches can remain open for the purposes of this Decision.

2. RELEVANT GEOGRAPHIC MARKETS

a. ***Mechanical metallurgical plant building***

(70) Siemens takes the view that the market for mechanical metallurgical plant building is a world market or at least an EEA-wide market with a strong tendency towards a worldwide market.

(71) However, it is not necessary to determine the geographic market for the purposes of this Decision since the merger gives rise to competition concerns in the area of mechanical metallurgical plant building whichever definition of geographical market (EEA-wide or larger) is applied.

b. ***Electrical metallurgical plant building***

(72) Siemens also assumes the existence of a world market in the area of electrical metallurgical plant building.

(73) According to the findings of the market investigation, the relevant geographic market should at least be EEA-wide for the purposes of this Decision, but consideration should also be given to the possibility of a larger market than the EEA.

(74) This is true for all possible submarkets and markets for electrical metallurgical plant building, including the possible market for IT solutions for plant logistics/MES/level 3.

(75) Siemens can agree with the Commission's definition of the geographic market for electrical metallurgical plant building only if the Commission is prepared to consider the possibility of a larger market than the EEA, but opposes the view that certain Asian regions cannot be included in the relevant market. The corresponding submarkets are entirely accessible to foreign suppliers.

(76) However, the Commission continues to take the view that different competitive conditions exist in certain regions of the world which cannot be attributed purely to historical factors, and that, consequently, a larger market than the EEA but not a global market can be assumed.

c. ***Maintenance and services***

(77) In Siemens's view, this market should be defined as EEA-wide, but it is perceived as being narrower by the majority of market participants, as geographical proximity to the supplier and, to a certain extent, the sharing of a common language are cited as being particularly relevant in this area. A number of customers would not select a supplier from a Member State other than the one in which their production site is located even if the prices for services from their current suppliers were to rise by 5-10 %. This applies to both the mechanical and the electrical areas.

(78) For the purpose of this Decision, a precise market definition can ultimately be left open. In any case, the relevant geographic market is not smaller than national and not larger than EEA-wide.

d. ***Electrical industrial plant building in other areas***

(79) VA Tech's internal organisation, according to which VAI is active worldwide in the area of metallurgical plant building

and Elin EBG, which generally covers electrical plant building, concentrates its activities in Austria and is otherwise highly active in the area of industrial plant building in Central Europe, suggests that the market or markets in other areas of electrical industrial plant building should be defined more narrowly in geographical terms than that of the specialised field of electrical metallurgical plant building. This view was confirmed by the Commission's market investigation, with many of the responding industrial companies indicating that they tended to consider there to be national or regional markets. For some specialised processing industries (such as paper and chemicals) a larger geographic market may, if necessary, be considered. However, the Commission's market investigation gave no indication of the existence of a geographic market which should be defined as larger than the area covered by the EEA.

(80) The question of the precise definition of the relevant geographic market can ultimately be left open for the purposes of this Decision. The relevant market or markets are, in any case, not smaller than national and not larger than EEA-wide.

3. COMPETITION ASSESSMENT

a. ***Mechanical metallurgical plant building***

(81) The merger substantially weakens competition between Siemens/VAI and its main competitor, SMS, in the EEA or world market for mechanical metallurgical plant building or in the submarkets for mechanical plant building for steelmaking and for continuous casting. This will pose a significant impediment to effective competition, in particular by creating a dominant position for Siemens/VAI in the submarkets mentioned above.

(1) **Market conditions**

(82) Only VA Tech is active in this area, not Siemens. Siemens estimates VA Tech's market share at [10-15] (*) in all possible submarkets.

(83) By contrast, market participants argued for considerably higher market shares for VA Tech in possible product markets in mechanical plant building. The worldwide and EEA market shares of VA Tech in the metallurgical plant building market were seen as being close to those of the previous sole market leader SMS-Demag (hereinafter called 'SMS'), followed by the third and only other full line supplier active in the EEA, Danieli. In individual possible mechanical engineering submarkets VA Tech is seen as the clear market leader.

(84) Statements by market participants also suggest that the market or markets for mechanical metallurgical plant building are to be regarded as highly concentrated.

(85) SMS sees VAI as its main competitor in most of its business areas. It gives its own market shares and those of VAI in mechanical metallurgical plant building overall as 24 % and 20 %. In the process step markets the combined market shares of the two leading firms are significantly higher. In one process step market, steel production, VAI is level with SMS (33 % each), while in the process step market of continuous casting VAI is well ahead of SMS (SMS: 23 %; VAI: 62 %). VAI has confirmed its leading position in continuous casting, with high market shares, in public statements.

(2) **Overall market for mechanical metallurgical plant building in the area of iron and steel or overall market for mechanical metallurgical plant building including non-ferrous metals: significant impediment to effective competition**

(86) The Commission's market investigation shows that the merger will lead to a substantial weakening of the current competition between VAI and SMS owing to Siemens's minority stake in SMS. Because of VAI's market strength in this highly concentrated market and the very close competition between VAI and SMS, and in particular because other competitors are not able to restrict Siemens/VAI's competitive room for manoeuvre sufficiently if the competitive pressure exerted on Siemens/VAI by SMS is weakened, the merger will in any event pose a significant impediment to effective competition through uncoordinated behaviour and possibly also by creating a dominant position for Siemens/VAI.

(87) VAI and SMS are the closest competitors in the relevant market. Because of this close competition between VAI and SMS, a customer who decides against VA Tech in a particular metallurgical project would very probably regard SMS as the next best alternative. This is shown by the ratings given by the competitors and customers questioned during the Commission's market investigation.

(88) Danieli is usually regarded as the third strongest competitor, but on average well behind SMS and VAI. Its strength lies mainly in long product rolling, where it is the market leader. Because of its market position and customer rating, Danieli is unlikely to be able either to prevent a decline of competition in the market for mechanical metallurgical plant building as a whole or to threaten the dominant position that VAI might gain as a result of Siemens/VAI's information advantage. Moreover, customers need at least three competitive bids in order to negotiate successfully in the field of metallurgical plant building.

(89) There is no significant competitive pressure from other competitors. The major suppliers mentioned by Siemens

besides the three market leaders are rarely or never active in Europe and so do not represent a proper alternative for European customers. Smaller suppliers are very unlikely to be able to bid successfully for major contracts. Apart from the three market leaders, competition is very fragmented and is not sufficiently capable of curbing the market power of the three leading suppliers.

(90) A large supplier of mechanical metallurgical plant building has a large number of customers accounting for the bulk of the firm's orders and is not therefore highly dependent on individual customers.

(91) The merger would substantially weaken the competitive pressure exerted by SMS on Siemens/VAI. It would give Siemens control of VA Tech in addition to its existing 28 % holding in SMS. In view of the special circumstances of the case (see following paragraph: prior exercise of the put option; it is common ground that the value of the share is to be determined as of 31 December 2004), it cannot be assumed with sufficient certainty that Siemens's 28 % share interest in SMS (and the financial participation in SMS's business success that this would normally entail) will induce Siemens/VA Tech to compete less strongly with SMS. […] (*)

(92) Siemens has exercised a put option to sell its share in SMS to the majority shareholder. However, the matter is contentious as regards the value of Siemens's share and potentially lengthy litigation is pending before the German courts. Until this litigation has been settled and the sale of Siemens's 28 % share is therefore completed […] (*).

(93) […] (*).

(94) […] (*).

(95) […] (*). Given Siemens's continuing 28 % share in SMS, the merger would thus substantially weaken competition between Siemens/VAI and SMS. Whether the information advantage over its strongest competitor SMS and its lead over Danieli in terms of market power would give Siemens/VAI a dominant position can be left open. In any event the merger would have a serious harmful impact on competition as a result of uncoordinated behaviour by firms. For these reasons there would be a significant impediment to effective competition in the overall market for mechanical metallurgical plant building.

(3) **Submarkets of mechanical metallurgical plant building: Creation of a dominant position**

(96) The above conclusions apply even more forcefully to the possible process step submarkets in mechanical plant building for steelmaking and for continuous casting. In the other possible submarkets in mechanical metallurgical plant building, however, it is impossible to state with sufficient certainty that the merger would constitute a significant impediment to effective competition.

(97) In the possible market in mechanical plant building for steelmaking, VAI is the firm rated highest overall by competitors and customers in the Commission's market investigation. In second place, just behind, is SMS. VAI and SMS have high EEA and world market shares in a concentrated market. VAI and SMS each have estimated world market shares of around 30–40 %; their EEA market shares are, with a high likelihood, even higher. These high market shares suggest that the market is already highly concentrated, which makes a significant negative impact on customers more likely. This is especially true given the close competition between the two strongest players, which would diminish as a result of the merger in favour of the leading firm. VAI and SMS are the closest competitors. Danieli lies well behind in third place and is not in such close competition. The remaining competition is fragmented. Smaller suppliers cannot compete with the big players in major projects or rely on cooperation with the big suppliers or specialise in specific market niches.

(98) In the possible market for mechanical plant building for continuous casting, VAI is clearly rated by customers and competitors alike as the market leader both in the EEA and worldwide. VAI very probably has market shares of over 50 % in the EEA and worldwide. SMS ranks second and is VAI's closest competitor. Danieli is well behind in third place. Competition is fragmented and is not sufficiently capable of curbing VAI's market power.

(99) Under these circumstances […] (*) would result in a dominant position of Siemens in the possible markets for mechanical plant building for steelmaking and mechanical plant building for continuous casting, constituting a significant impediment to effective competition.

b. ***Electrical metallurgical plant building***

Market for electrical metallurgical plant building (level 0-2, iron/steel), possible process area and process step markets

Market structure and market shares

(100) The Commission's market investigation has shown that Siemens is seen by many market participants as the most important supplier of electrical metallurgical plant building in the iron/steel sector in the EEA and worldwide. This is true for the possible overall market and in most of the

submarkets, except in the possible long rolling submarket, where Danieli is seen as the leader. In all these areas VAI is regarded as a strong competitor, usually in second place in the market; and in the field of continuous casting it is even regarded as roughly on a par with Siemens. It is, however, significant that besides them, around four other competitors are held to be strong and credible suppliers. The main firms in question are ABB, Alstom, SMS and Danieli, in some areas, especially worldwide, Toshiba (or TMEIC-GE) as well, and in some areas also Sundwig-Andritz, Ingelectric or ASI Robicon.

Market shares

(101) Market shares are rather difficult to quantify objectively in this very varied and differentiated product or service area. The Commission has several estimates from Siemens, some produced for the purpose of the proceedings and others produced well before they started. The Commission also has estimates drawn up by VA Tech before the proceedings began as well as estimates drawn up during the proceedings at the Commission's request. Finally, estimates drawn up by SMS for the purposes of the proceedings were also submitted to the Commission. The estimates give quite a wide range of figures for market shares. Siemens's estimates generally assume combined market shares of less than 20 %, whereas VAI's estimates are considerably higher, somewhere in the region of 40–50 %. The highest figures, for some process step markets, appear in SMS's estimates.

(102) In the view of the Commission (and of some of the competitors mentioned) none of these estimates can be regarded as very reliable.

(103) The Commission carried out an analysis of the strength of the major competitors in the main part of the markets referred to above, i.e. for orders of more than EUR1 million, for the years 2002-04. It asked competitors about all the orders they had won during the relevant period and aggregated the figures. The results of the inquiry reflect the relative size of the firms questioned. At a late stage in the proceedings, Siemens provided further details about other competitors (in the liquid phase). The Commission checked the information and took it into account where it was confirmed in time by the customers and/or competitors in question. In the Commission's view this calculation represents a reasonable approximation of the actual market shares. However, the percentages indicated must be regarded as the upper limit and the actual market shares are very probably somewhat lower.

(104) The figures show that the merger will probably not lead to market shares of more than 35–40 %. At least four strong suppliers will remain in the market in each process area and process step, and they can be expected to exert sufficient competitive pressure on the merged firms.

Tender analysis

(105) The relevant market/markets are bidding markets, where market shares are only indicative. The decisive factor is the strength of the competitive pressure exerted by firms on one another in the bidding process, although long-term market shares are an important indicator of such strength.

(106) The tender analysis of data from Siemens and VAI showed that, at the most, Siemens and VAI can be regarded as close competitors in a few possible submarkets (continuous casting, liquid phase). But even in those few submarkets they are not the closest competitors.

Effect of Siemens's shareholding in SMS

(107) The commitments that were required from Siemens regarding its shareholding […] (*) in SMS in order to eliminate the competition concerns in the field of mechanical metallurgical plant building also rule out a significant impediment to competition solely as a result of this holding […] (*), at any rate in electrical metallurgical plant building. (This also applies to all other electrical metallurgical plant building markets.)

Possible level 1 and 2 automation markets

(108) The market investigation has confirmed that competitors' level 1 and 2 software solutions are considered relevant indicators of market strength.

(109) […] (*). However, in these possible markets also, a sufficient number of strong competitors remain: SMS, Danieli, ABB, Alstom and TMEIC-GE. In addition, there are a number of other competitors who are active above all in the area of level 1, where entry barriers are lower than in level 2, or in niche solutions in competition with the parties to the merger. This is confirmed by an analysis carried out by the Commission of market strengths in the case of level 1 and 2 software modules in a few process stages. Data from individual major competitors were lacking, but it was possible to carry out an analysis of a worst-case scenario which confirms the continued existence of strong competitors in the possible markets.

Electrical metallurgical plant building for aluminium hot rolling and aluminium cold rolling

(110) The possible markets for aluminium rolling mill building are, in comparison with steel rolling, very small. For this reason alone, in the case of joint steel and aluminium rolling markets the above analysis of steel rolling markets could not be substantially affected.

(111) The overwhelming majority of customers regard the impact of the merger in the area of electrical plant building for aluminium hot and cold rolling mills as unproblematic. It is true that both parties are often named prominently as being among the leading bidders. However, a number of other companies have won tenders. Mention was made of ABB, TMEIC, Alstom, ASI Robicon and IAS.

(112) Entry barriers in the aluminium field are appreciably lower for suppliers of mechanical aluminium mills and for companies which already offer level 1 and 2 automation in the steel field. A certain degree of buyer power can definitely be ascribed to the highly concentrated demand side and this may promote the entry of new suppliers from these groups. Mention can be made above all of SMS in this connection.

IT solutions for plant logistics/MES/level 3

(113) In this relatively young and relatively strongly growing market, the transaction does not give rise to any competition concerns. The area is small and therefore does not make a substantial difference when it comes to examining a possible overall market for electrical metallurgical plant building.

Conclusion on a possible overall market for electrical metallurgical plant building including all the above submarkets and on all possible submarkets

(114) Since no competition problems arise in any of the possible submarkets of an overall market for electrical metallurgical plant building, the same necessarily holds true for a possible overall market. In no possible market for electrical metallurgical plant building is there any question of the creation or strengthening of a dominant position or of any other significant impediment to effective competition. Nor are any anticompetitive effects for electrical metallurgical plant building apparent from the supplementary examination of possible non-horizontal effects.

c. ***Metallurgical plant maintenance and servicing***

(115) The activities of Siemens and VA Tech overlap in this market also. The Commission's market investigation revealed, however, no signs of any competition problems in the market for metallurgical plant maintenance and servicing. The entry thresholds in this market are substantially lower than in the markets for electrical and mechanical plant building. A sufficient number of local competitors are active in the area of the maintenance and servicing of metallurgical plant. The customers of metallurgical plant manufacturers are, moreover, themselves capable of carrying out such work.

(116) The merger would therefore not lead in this market to the creation or strengthening of a dominant position or to any other significant impediment to effective competition.

d. ***Electrical industrial plant building in other sectors***

(117) The planned merger is unobjectionable from a competition point of view in the electrical, non-metallurgical industrial plant building sector however the product market is defined.

e. ***Conclusions on the electrical metallurgical plant building markets and on the market/s for electrical industrial plant building in non-metallurgical sectors***

(118) For the reasons given above, the notified transaction would not lead in any of the relevant electrical metallurgical plant building markets or in the market/s for industrial plant building in non-metallurgical sectors to the creation or strengthening of a dominant position or to any other significant impediment to effective competition.

F. *LV SWITCHGEAR AND COMPONENTS*

(119) The relevant product market for low-voltage switchgear ('LV switchgear') can be segmented into three submarkets according to the built-in circuit breaker which can be an ACB, MCB or MCCB. In addition there is a separate market for busways, another component. Further components are programmable logic controllers and contactors. The markets for both the components and the assembled switchgear were, in line with previous decisions, analysed on a Member State basis, but since the proposed merger does not raise competition concerns at EEA level the question can ultimately be left open.

(120) On that basis the markets for LV switchgear and some components in Austria and for other components in the EEA and in some Member States would be markets horizontally and/or vertically affected by the proposed transaction. VA Tech is a panel builder and sources all components it needs to assemble an LV switchboard from third parties. Siemens is both a panel builder and a supplier of all components needed. However, regardless of the market definition chosen the combined market share is in no horizontally affected market higher than [30-40] (*) %, and there are strong competitors in all affected markets which either produce their own components or have their own, independent source of components so that it will be impossible for Siemens to foreclose these competitors. Therefore, the Commission came to the conclusion that

competition concerns are unlikely to arise.

G. *BUILDING TECHNOLOGY AND FACILITY MANAGEMENT*

1. RELEVANT PRODUCT MARKETS

G1. ***Building technology***

(121) Siemens and VA Tech are active in the field of building technology, which in Siemens's view must be segmented into three levels: the component level, the system level and the installation level. Siemens states that, although there are markets for facility management (see G.2), other services should be allocated to the respective primary market. The component and system levels should be divided according to area of application. At the component level, a distinction should be made above all between the areas of electrical installation technology, safety technology, control and instrumentation technology and HVAC (heating, ventilating and air-conditioning), and at the system level between safety technology and control and instrumentation technology. Lastly, at the installation level, it is necessary to distinguish between electrical and mechanical contracting. On the basis of the results of the Commission's market investigation, a distinction ought to be made in the case of safety technology at least between the areas of (i) fire protection and (ii) access control/intruder detection. The question of any further subdivisions can remain open for the purposes of this Decision.

(122) At the installation level, a distinction can be made between electrical contracting and mechanical contracting. The market investigation showed that there may be a separate, overlapping market for the construction of electrical and mechanical building installations ([1]) by a technical general contractor bearing overall responsibility. The exact definition of the market can, however, ultimately be left open.

G2. ***Facility management***

(123) The market investigation shows that the market may be segmented into technical facility management, commercial facility management and general facility management. The question of the precise product market definition can, however, be left open.

2. RELEVANT GEOGRAPHIC MARKETS

G1. ***Building technology***

(124) In Siemens's view, all the markets referred to above in part G (apart from that for installation technology components) are at least EEA-wide. According to the findings of the market investigation, there are many indications that the markets are national. The question of the geographic market definition can, however, be left open.

([1]) The parties' activities in this area relate as a rule to non-industrial building installations (residential and office buildings and such structures as concert halls, museums, hospitals and tunnels).

G2. ***Facility management***

(125) The same holds true for the market or markets in the area of facility management.

3. COMPETITION ASSESSMENT

G1. ***Building technology***

(126) At the component level, it is only in a vertical respect that there can be any relevant markets inasmuch as VA Tech is not itself active in these markets.

(127) The market investigation provided insufficient indications that Siemens would as a result of the merger be in a position to foreclose the said component markets in Austria to its competitors on the component level. There is sufficient competition in the markets for downstream systems and installations. At the immediately downstream systems level, the addition of market shares due to the merger would, moreover, be very small. In the said component markets themselves, Siemens faces competition from large, internationally established companies (including ABB and Möller or Honeywell, Johnson Controls and Sauter).

(128) According to the company itself, VA Tech is not at all active at the systems level. VA Tech attributes all of its turnover in this area to contracting (installation level). The horizontal effects of the merger in the area of individual works outside Austria are marginal. Likewise within Austria there are no relevant markets with a market share addition of more than 10 %. A sufficient number of alternative system suppliers and integrators are available. Also from a vertical standpoint the merger would not lead to any significant impediment to competition.

(129) At the installation level, it is only in Austria that there are any overlaps worth mentioning between VA Tech and Siemens. Most pronounced are the direct competitive position and the respective market strengths of Siemens and VA Tech in the possible submarket for technical general contractors. Although the merger would result in a reduction in the number of suppliers in Austria, RWE Solutions, MCE, the Dutch Imtech group (through its German subsidiary) and M+W Zander (Germany) would still remain as technical general contractors in Austria. Medium-sized electrical contractors such as, for example, Klenk & Meder, Landsteiner and Bostelmann operate in the market through consortia. If, as might happen especially in the case of major projects, there were not enough suppliers available to carry out the technical general contract, then customers have indicated that they see no problem in reacting by breaking up tenders into smaller parts (for individual systems/works instead of the overall technical general contract). Customers would then either take care of

the planning and integration themselves or entrust it to an engineering consultancy. There would therefore not be any significant impediment to competition. The same holds true for the areas of electrical and mechanical contracting.

G2. ***Facility management***

(130) Most of Siemens's and VA Tech's customers indicated in the market survey that the respective other party was not the most promising competitor in the context of the tendering or negotiated procedure. In Austria, the only possible relevant market, there are a number of other suppliers whose services in the area of technical facility management are from a customer standpoint basically equivalent to those of VA Tech and Siemens. Even smaller companies, especially at regional level, exert competitive pressure on the above-mentioned larger competitors. The merger would therefore not lead to any significant impediment to effective competition in this area.

H. *INFRASTRUCTURE INSTALLATIONS AND ELECTRICAL EQUIPMENT FOR ROPEWAYS*

H1. TRAFFIC INFRASTRUCTURE INSTALLATIONS

(131) With respect to traffic infrastructure installations, only in Austria would there be a few small overlaps between Siemens and VA Tech in the case of street lighting, traffic signalling equipment, parking space control installations and traffic control installations. The question of product markets and geographic markets can be left open in these areas. Customers have sufficient alternatives available. The merger would therefore not lead to any significant impediment to effective competition.

H2. WATER TREATMENT INSTALLATIONS

(132) The same holds true for water treatment installations.

H3. ELECTRICAL EQUIPMENT FOR ROPEWAYS

(133) The same holds true for electrical equipment for ropeways.

I. *OTHER IT SERVICES*

(134) The same holds true for electrical equipment for other IT services.

CONCLUSIONS

(135) The Decision therefore concludes that the notified concentration would lead to a SIEC, in particular through the creation of a dominant position, in the markets for (i) hydroelectric power equipment and (ii) mechanical metallurgical plant building.

J. *COMMITMENTS*

(136) In order to address the aforementioned competition concerns in the markets for (i) hydroelectric power equipment and (ii) mechanical metallurgical plant building, the parties have submitted the commitments described below.

(137) In hydroelectric power equipment, the parties commit to divest VA Tech Hydro, a subsidiary of VA Tech containing the company's activities in hydroelectric power equipment as well as in combined-cycle power generation equipment. No competition concerns were raised in the latter area, but most of this business is heavily integrated with the hydroelectric operations, both physically and financially. The market test confirmed that divestiture of VA Tech Hydro (which removes entirely the competitive overlap in hydroelectric power) would solve the competition problems in this market.

(138) In mechanical metallurgical plant building, divestiture of Siemens's 28 % shareholding in VA Tech's most important competitor, SMS Demag, would be necessary to prevent a significant impediment to effective competition. Siemens has already exercised a put option (effective 31 December 2004) to sell its stake to SMS Demag's controlling shareholder. However, implementation of the divestiture is delayed for an uncertain period owing to litigation with SMS about valuation of the shares. Siemens has, therefore, submitted a commitment that will remove any competitive effect of the continued shareholding […] (*) in SMS and the economic interest in its future competitor. Under the commitment, a trustee will replace Siemens's representatives in SMS's shareholder committee and supervisory board. No sensitive strategic information concerning SMS's future business activities will be passed on to Siemens. The trustee will provide Siemens with information only as far as strictly required for Siemens's defence in the court proceedings and for producing its annual accounts. The former information will relate only to information before 31 December 2004, while the latter information will not rely on the shareholders' agreement, but on normal legal rights of minority shareholders. In addition, a non-buyback commitment and clarification by Siemens that the shareholding will be valued as of 31 December 2004, as well as the fact that Siemens cannot count on dividends, eliminates any concern that Siemens can expect to continue to participate in SMS Demag's future profits. Hence the commitment replicates, as closely as feasible, a full divestiture of the SMS Demag stake while litigation continues. The market test of the proposed commitment in mechanical metallurgical plant building was positive.

(139) In its Decision, the Commission has, therefore, reached the conclusion that, on the basis of the commitments submitted by the parties, the notified concentration will not lead to a dominant position of the parties in (i) hydroelectric power equipment and (ii) mechanical metallurgical plant building.

K. *CONCLUSION*

(140) The Decision concludes that, subject to full compliance with the commitments given by the parties, the proposed concentration will not impede effective competition in the common market or in a substantial part of it. The Commission has therefore decided to declare the concentration compatible with the common market and the EEA Agreement in accordance with Articles 2(2) and 8(2) of the Merger Regulation and Article 57 of the EEA Agreement.

III. **ADVISORY COMMITTEE**

(141) At its 133rd meeting on 29 June 2005 the Advisory Committee on Concentrations gave its unanimous support to the Commission's draft decision to clear the concentration subject to conditions and obligations based on the commitments given by the parties.

(142) Pursuant to Article 19(7) of the Merger Regulation, the Commission is making public the opinion of the Advisory Committee together with the Decision, having regard to the legitimate interest of the undertakings in the protection of their business secrets. In the present case the Advisory Committee's opinion does not contain any business secrets.

COMMISSION DECISION

of 20 October 2005

on the State Aid implemented by Finland for investment aid to Componenta Corporation

(notified under document number C(2005) 3871)

(Only the Finnish and Swedish versions are authentic)

(Text with EEA relevance)

(2006/900/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above [1],

Whereas:

I. PROCEDURE

(1) By letter dated 10 March 2004 from Metalls Verkstadsklubb vid Componenta Alvesta AB, Sweden, the Commission was informed that the City of Karkkila had made a financial transaction with Componenta Corporation Oyj in Karkkila, Finland which it suspected contained state aid. Based on this information the Commission requested clarifications from Finland. By letter dated 22 June 2004 Finland provided the Commission with the information requested.

(2) By letter dated 19 November 2004 the Commission informed Finland that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the suspected aid.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* [2]. The Commission invited interested parties to submit their comments on the measure.

(4) The Commission received no comments from interested parties.

II. DETAILED DESCRIPTION OF THE AID

The aid and the beneficiaries

(5) Componenta Corporation Oyj (hereinafter called Componenta) is a metal sector company with international operations, based in Karkkila, Finland. It has production plants in Finland, the Netherlands and Sweden. Most of the company's net sales in 2004 of EUR 316 million came from the Nordic countries and Central Europe. The Group employs around 2 200 people.

(6) The suspected aid was provided to Componenta in December 2003 and consisted of two operations. In one case it was provided through the purchase by the city of Karkkila (hereinafter called Karkkila) of 50 % of the shares in the real estate company Karkkilan Keskustakiinteistöt Oy (hereinafter called KK), which was jointly owned (50/50) by Karkkila and Componenta. In the other case Karkkila granted KK an interest-free loan, which was used by KK to reimburse a loan of the same amount that it had been granted by Componenta in 1996. The total sum of the deal was EUR 2 383 276,5 (EUR 713 092,5 for the shares and EUR 1 670 184 in the form of the loan repayment) [3].

(7) The price for the shares was based on the estimated net value of the company (assets minus liabilities) and by dividing this amount by 2, since Componenta owned 50 % of KK. Since the net value of KK was calculated as EUR 1 495 918, the value of the 50 % shares was EUR 747 958. The price for the shares was set somewhat lower at EUR 713 092,5.

(8) The sales agreement between Karkkila (Buyer) and Componenta (Seller) furthermore stated the following:

a. 'The Seller agrees to invest in the extension of Componenta Karkkila Oy's production facilities in the territory of the City of Karkkila as specified in Appendix 1 of this contract. It is estimated that the investment will create 50–70 new full-time jobs in Karkkila in 2004 (the average number of Componenta employees in Karkkila in 2003 was 130).

b. If the extension of the Seller's facilities is not commenced in 2004 as specified in the above paragraph, the Buyer has the right to cancel the transaction at its own discretion.'

(9) Annex 1 of the sales agreement stated that Componenta will merge the operations of two of the Group's foundries (the Alvesta foundry in Sweden and the Karkkila foundry); that the two units that operate at a low utilisation rate will be merged; that analyses were required for making the decision on the location of the foundry and commence-

[1] OJ C 49, 25.2.2005, p. 11.
[2] See footnote 1.
[3] Elsewhere in the text these amounts have been rounded for convenience.

ment of employer–employee negotiations as regards the decision on the closing of the Alvesta or the Karkkila foundry and that detailed planning of the new foundry, including the transfer of machinery from the other foundry, was necessary. It is, therefore, clear that the decision was linked to the moving of the production facilities from one of the two locations to the other.

(10) According to information in Componenta's annual report 2004, its foundry in Alvesta, Sweden, was closed down in May 2004 with the key production and machinery thereafter moved to Karkkila, Finland. According to the information from the company the total cost of closing production in Sweden and investing in Finland amounted to EUR 13 million.

(11) Finland argued that the transaction between Componenta and Karkkila was market-based and that no aid was involved. In its decision to initiate the formal procedure the Commission, however, expressed doubts that the transaction between Karkkila and Componenta was market-based. It stated that if the purchase price was above the market value of the shares, this would constitute aid to Componenta. The aid amount would be the difference between the price a private investor would be willing to pay for the shares and the EUR 2,4 million transferred from Karkkila to Componenta.

(12) The Commission furthermore considered that the clauses of the sales agreement referred to above provided a strong indication that the transaction was not market-based, and that it was instead intended as a form of compensation for Componenta's new investments in the territory of Karkkila, which were linked to the closure of the Alvesta foundry.

(13) After taking over Componenta's shares in KK, Karkkila decided to liquidate KK and transfer the land to the city.

III. COMMENTS FROM FINLAND

(14) Since the only significant asset of KK was its land, Finland has specified in more detail how the land owned by KK was valued when setting the price of the shares.

a. For land to be used for private homes and apartment buildings the value was based on the land sales criteria used by the city itself when selling land. According to Finland this was equal to or below the market price. Finland also provided a copy of a letter from a certified real estate agent stating that the market value per square metre of the different land types was slightly above the price used in the transaction in question.

b. As regards a large area of land situated in the centre of Karkkila called Asemansuo, Finland claims that the purchase price was calculated on the basis of the lower limit of permitted building area specified in the city plan, but no information was provided on which base the amount in euro per square metre was fixed.

c. Finally, as regards the value of land designated for parks, a valuation of EUR 456 000 was considered by the real estate agent to be the market value.

(15) The Commission requested Finland to make a market valuation of all the land owned by KK at the time of the sales agreement. Finland replied that this was not needed, since Karkkila and Componenta had used a real estate agent to estimate the unit value of land similar to the land involved in the transaction and that a market evaluation had therefore already been done.

(16) As regards the condition in the sales agreement stipulating that Karkkila would buy the shares in KK from Componenta only if Componenta invested in new production facilities (thereby moving its foundry from Alvesta, Sweden to Karkkila), Finland denies allegations by the Commission that this clause is a sign that the transaction was not market-based. It justifies the clause by the fact that if Componenta's activity were increased in Karkkila this would be favourable for the city, boosting its revenue. It would also increase the demand for real estate, thereby raising the value of the land owned by KK. Otherwise, Karkkila would not 'need' to conclude the transaction.

(17) Asked by the Commission whether Componenta had tried to find another buyer for the shares, Finland replied that it had not, since Karkkila had the right of first refusal to redeem the shares at the market price in the event of Componenta wanting to sell its shares in KK.

(18) Finally, as regards the loan transaction, Finland confirms that the repayment of Componenta's shareholder loan by new funds from Karkkila to KK was an integral part of the share transaction between Karkkila and Componenta and that the 'total purchase price' consisted of the payment for the shares and the repayment of the loan.

(19) In this respect, Finland argues that the loan transaction too was market-based, since the total amount provided to Componenta for the shares and the loan, EUR 2,37 million, was less than the market value of half of KK. Furthermore, Finland argues that KK's financial situation had improved since 1996 when the loan was granted to KK by Componenta.

IV. ASSESSMENT OF THE AID

Definition of aid

(20) According to Article 87(1) of the EC Treaty, any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market. Pursuant to the established case law of the European Courts, the criterion of trade being affected is met if the

recipient firm carries out an economic activity involving trade between Member States.

(21) The activities of Componenta involve trade between Member States. Therefore, aid to this company would fall within the scope of Article 87(1) of the EC Treaty. State resources include financial assistance granted by regional and local authorities ([4]).

Existence of aid

(22) In its decision to open the formal investigation the Commission stated that the aid amount would be the difference between the price a private investor would be willing to pay for the shares and the purchase price of EUR 2,37 million.

(23) The Commission notes that the total purchase price consisted of two parts. First, Componenta received EUR 0,7 million in cash in return for its shares and, second, it was repaid EUR 1,67 million that it had provided as a loan to KK. Therefore, in total Componenta received EUR 2,37 million in the transaction concerned. The two elements will be assessed separately.

The conditional clause

(24) The Commission notes that one alternative for Componenta had been to move its foundry activities from Karkkila to Alvesta. It is therefore understandable that Karkkila may have been concerned about the prospects of losing production facilities and thereby employment.

(25) Furthermore, it may be correct that the demand for land would increase if a main employer in the city expanded its activities instead of reducing them. However, the fact that the issue of buying the shares in KK and providing a loan to KK was contractually linked with Componenta's investment decision and that the city even had the right to cancel the entire transaction if Componenta did not make the promised investments in Karkkila proves that the decision of the city to perform the transaction with Componenta was not based only on the market value of KK, but took other considerations into account as well.

(26) However, according to the market economy investor principle, as established by the Court, a market economy investor takes his decisions having regard to the foreseeability of obtaining a return and leaving aside all social, regional policy and sectoral considerations. Given that Componenta's investment in new production facilities was a direct condition for the financial transaction under investigation, it can be concluded that the behaviour of Karkkila did not comply with the market economy investor principle. To accept boosting tax revenue and improving general welfare in the municipality as being market economy investor considerations would be to mix the roles of the city as a public authority and as commercial co-owner of KK.

([4]) Case 248/84, *Germany* v *Commission* [1987] ECR 4013, paragraph 17.

(27) The Commission also notes that that the Karkkila City Board at its meeting on 1 September 2003 stated that the transaction with Componenta was directly linked to its investment decision in Karkkila and that when Karkkila bought the shares of KK, Componenta would have the funds to make the investment in its Karkkila plant.

(28) These observations further support the Commission's findings below that the transaction was not market-based.

The price for the shares

(29) The price paid for the shares in KK is one part of the financial transaction between Karkkila and Componenta. The issue is whether this price was market based.

(30) Finland justified the price of the shares in KK in terms of the net value of the assets owned by KK. However, the transaction at issue is not a sale of real estate itself, but the acquisition of shares in a company. For such investment, a market economy operator would base his assessment of the market price primarily on the likely return he could expect from his investment. This is because a market economy investor invests in view of the profits, i.e. the expected return on the investment. He would therefore have taken into account the ratio between the expected yearly return on the shares and the capital invested in order to see whether he could expect an appropriate return, compared to other investment alternatives.

(31) On the basis of the results of the last few years, the return on an investment in KK would clearly be negative. Moreover, there are no signs that this situation is set to improve in the future. Finland has not provided any KK business plan setting out measures planned to improve the profit situation nor has it even claimed that Karkkila had any expectations of improvement in profits and return.

(32) The reason for the negative results is that KK was clearly in difficulties, the demand for its land was weak and revenue from its land was only marginal. The company had shown losses for the past four years, had very low sales, could not distribute any dividends and had a precarious financial situation. Furthermore, this difficult financial situation existed even though the company was benefiting from interest-free loans. Had it financed its activities by normal loans with interest, the situation would have been even worse. On the basis of past experience, and lacking any prospects of an improvement in the company's financial situation, a market investor could not have expected any return on investment when purchasing the shares of KK. Based on this, the Commission considers that the value of the shares in KK was zero.

(33) This conclusion is reinforced by the fact that KK was, as explained above, to a large extent financed by two interest-free shareholder loans. This means that a change of

ownership in the shares would have to be accompanied by the takeover of the interest-free loans, which, as will be explained below, a market investor would not have done.

(34) As already stated above, what is decisive is the expected return in the long run, which might differ from the return actually generated in the past. Nevertheless, a market economy investor would also take past performance into account. As regards expected returns, the crucial question is whether KK could reasonably be expected to generate adequate income through sale of land and through the leasing out of land. This is linked to the valuation of the real estate in its totality as discussed below.

(35) Finland explained that the value of the land owned by KK was the basis for the valuation of the shares. It is true that the net value of assets is also considered by a market economy investor for his decision. The Finnish argumentation for the valuation of the shares is summarised in the table below:

Table 1

Value of KK according to Finland:

Land type	Value according to Finland (Euro)
For detached houses	1 031 565
For terraced houses and apartment blocks	1 136 849
Asemansuo	2 358 158
Parks and communal land	491 738
Other area (Haapala)	49 678
Total land value	**5 067 988**
Book equity of KK	- 231 595
Debts of KK	- 3 340 475
Net value KK	**1 495 918**
Net value 50 % of KK	747 959
Price paid by city	713 092
Aid	0

(36) The considerations of the *Commission Communication on State aid elements in sales of land and buildings by public authorities* ([5]) do not apply directly, because the transaction does not concern individual pieces of real estate, but shares in a company. However, they can be applied by analogy in this case, since the aim of the Commission's Communication, which is to ensure that transactions between public and private undertakings involving land are free from aid, is relevant for both the sale and purchase of land by public undertakings and also because in this case Finland argues that the valuation of the land was the basis for setting the price of the shares. The Communication states that land evaluation, if not based on an unconditional bidding procedure, should be carried out by one or more independent asset valuers prior to the sale, in order to establish the market value on the basis of generally accepted market indicators and valuation standards.

(37) The Commission notes that the land was not evaluated on the basis of an unconditional bidding procedure. Therefore a valuation should have been made by an independent asset valuer. The question is whether the valuation made by Finland fulfils the requirement for such an independent asset valuation. The Commission firstly notes that the short report from a real estate agent provided by Finland does not clearly indicate that it concerns the valuation of land owned by KK. The relevance of this report will be further assessed below.

(38) The Commission notes that the land owned by KK was valued in different ways for different types of land, i.e. land for detached houses, land for terraced houses and blocks of flats, a specific area called Asemansuo, and parks and communal land. These different land types will be analysed separately.

(39) As regards land for detached houses, the valuation was based on Karkkila's official unit sales price for such land of EUR 10,19 per square metre. The Commission notes that this was the price used by the city to sell land to individual buyers and thus the retail price. Finland also provided information from a real estate expert on the unit value (for the final customer, i.e. also in this case the retail value) of different types of land in Karkkila. The expert notes that such land was sold in Karkkila for between EUR 9,43 and EUR 14,76 per square metre in 2003, but also notes that the price used by Karkkila is close to the going value for land, without providing any further details.

(40) However, the Commission notes that there was no actual external valuation made of the specific land to be used for detached houses that was owned by KK. Furthermore, there was no estimation of the wholesale value of the land. In the view of the Commission it is evident that the value of land at the retail stage is considerably higher than when land is sold in large quantities (such as in this case, where KK owned 80 plots for detached houses) where the buyer's intention is not to use it, but to sell it on at a later date.

(41) Therefore, an evaluation whereby the estimated retail value for one type of land is simply multiplied by the total amount of land owned by KK contains two errors. First, the specific land in question is not valued and, second, the valuation does not indicate what a market investor buying all the land at once would be willing to pay at the time of the transaction, in particular taking into account the limited size of the market for such plots.

([5]) OJ C 209, 10.7.1997, p. 3.

(42) As regards the land intended for construction of terraced houses and blocks of flats, in total valued at EUR 1 136 849, Finland refers to the valuation made by the real estate expert. The Commission notes that the valuation provided by the real estate expert is EUR 70-80 per square metre floor area for terraced houses and EUR 60-75 for apartments. The value used by Finland was EUR 74,02 per square metre of floor area for terraced houses and EUR 79,56 for apartment blocks. These figures are thus in the middle of the range or slightly above those provided by the real estate expert. The expert furthermore stresses that there have been only a few comparable transactions in recent years and demand continues to be low.

(43) The Commission notes that for these types of land too the expert appears to provide the retail value of the land, and not the wholesale value, which is the price that a market investor would pay to buy all the land in one transaction. Given that the expert stresses that the demand for this type of land continues to be low, the view of the Commission is that the wholesale market value at the time of the assessed transaction was greatly overestimated for these types of land too.

(44) As regards the estimated value of the land in the city centre (Asemansuo), which amounts to around half of the estimated value of KK's land (EUR 2 358 158), it is unclear how the market valuation was made. Finland refers to a value per square metre to be built on (EUR 79,56), and multiplies this by the area allowed to be built on (29 640 m^2. However, the real estate agent referred to by Finland has valued this particular land at EUR 50 per square metre to be built on, which would lead to a value of EUR 1 480 200. The difference between these valuations is EUR 877 958. Since this concerns one large piece of land, it can be assumed that the estimate made by the real estate expert for Asemansuo was the retail value, and the figure provided by the real estate expert can therefore be considered as plausible by the Commission. Finland has not provided any explanation for the substantial deviation from the expert report.

(45) As regards land intended for gardens and communal areas, valued at EUR 491 738, the Commission questions whether it should be given much value at all, since such land, which cannot be exploited for productive use, will not provide any financial return, and a market economy investor would therefore not be willing to pay any significant amount for this.

(46) Based on the above observations, the Commission considers that the valuation of the land owned by KK was not correctly done and did not comply with the valuation criteria in the *Commission Communication on State aid elements in sales of land and buildings by public authorities*.

(47) Taking just the overvaluation of Asemansuo, the total value of KK's land, and thus of the value of the company, if calculated on the basis of asset value, is reduced by EUR 876 158 to EUR 619 760.

(48) The Commission furthermore considers that the value of the land intended for detached houses, terraced houses and blocks of apartments, and communal land and gardens was considerably overvalued, being based on the two errors outlined above, namely that the specific land at stake was not valued and secondly, that the valuation did not indicate what a market investor selling all the land at once would receive at the time of the transaction. The total value of the land was, according to Finland, EUR 2 660 152. The Commission considers that the land was overvalued by more than EUR 619 760, which would be the remaining net value of KK based on the calculation made by Finland, after correction of the overvaluation of Asemansuo. Consequently, even calculating the value of the shares in this way, the entire amount paid for the shares in KK by Karkkila was aid to Componenta.

Table 2

Commission estimate of aid linked to the price of the shares in KK:

	Euro
Net value KK according to Finland	1 495 918
Reduction based on real estate expert valuation of Asemansuo	876 158
Estimated net value of KK after this correction	619 760
Further overvaluation of land according to the Commission	At least 619 760
Net value of KK, based on asset value	0

(49) Since an investor buying the shares in KK could not expect a return on the capital and since the land was overvalued, the Commission concludes that the net value of the shares in KK was zero. Furthermore, Componenta did not even try to find another buyer for its shares in KK, which is also an indication that Karkkila paid a price above market price, since at least an attempt to find another buyer of the shares would have been a useful manner to determine their market price.

(50) The Commission therefore concludes, on the basis of the valuation of both the company itself and the land owned by it, that the shares in KK had no value at all at the time of the change in ownership, and that the price paid for them by Karkkila (EUR 713 092) therefore is aid in its entirety to Componenta.

(51) However, if Finland can provide evidence that the overvaluation of the land, as described above, is less than EUR 619 760, the aid element in the shares transaction could be reduced accordingly. Such a proof should be based on a precise evaluation, by an independent asset valuer, who should be a person with a good reputation who has

obtained an appropriate degree or academic qualification, or equivalent, and has suitable experience and is competent in valuing land and buildings in the location and of the category at issue. The evaluation should estimate the wholesale value of all the land owned by KK at the time of the transaction and, therefore, how much KK could have received if all its land was sold at that time on market terms.

The loan repayment

(52) The other part of the financial transaction between Karkkila and Componenta was that Karkkila granted KK an interest-free loan of EUR 1,67 million, which KK used to immediately repay a loan it had been granted by Componenta in 1996. Two equal loans were provided to KK in 1996, one from Karkkila and one from Componenta, on equal terms, since KK at the time was not able to meet its obligations towards private creditors. That means that the total amount of the two loans was EUR 3,34 million.

(53) Finland claims that KK was in a good financial position in 2003. It refers, for example, to a footnote in KK's annual report 2003 where it is stated that the present value of the land owned by KK was estimated to be EUR 5 052 459, which is EUR 1 971 845 higher than the book value of the land. However, as stated in the previous section, the Commission's assessment is that the KK land was not worth this much.

(54) The annual reports of KK for the years 2001 to 2003 provide the following key figures:

(amount in Euro)	Sales/ income	Result	Cash (year end)	Own capital (year end)
2000	19,883	- 14,817	94,147	- 207,052
2001	25,127	- 16,180	65,576	- 223,233
2002	50,015	- 1,879	53,425	- 225,113
2003	48,044	- 6,481	28,256	- 231,595

(55) From this table it is clear that the demand for land was very limited during those four years. It also reveals that the company receives very little revenue from its land in the form of land sales or rental income. It is also clear that the company was running out of cash and that it had an unusual balance sheet situation with a permanent negative own capital. It can furthermore be noted that the company's main financing, the two loans of a total sum of EUR 3,34 million from Karkkila and from Componenta, were interest-free. With a normal interest rate on the loans the financial situation would have been much worse.

(56) Based on this information, the Commission does not agree with statements from Finland that the financial situation of the KK was good.

(57) The question is whether KK would have been able to repay its loan to Componenta without the action taken by Karkkila.

(58) The Commission first notes that there were two interest-free loans of equal amounts provided to KK in 1996, from Componenta and from Karkkila, in order to rescue KK. These two loans clearly provided a benefit to KK. Any market economy investor who had provided such a loan would require that repayment of the loans be made in equal parts to both the parties that granted them. The partial or total repayment of these loans should therefore be done equally to both lenders (Componenta and Karkkila) in order to avoid giving an advantage to one of them.

(59) Since in the transaction at issue Componenta was fully repaid for the loan it had granted, it has to be assessed whether KK, in a normal market situation, would have been able to repay not only its loan to Componenta but also its loan to Karkkila, in order to ensure that no advantage was granted to Componenta. The issue is thus whether KK would have been able to raise EUR 3,34 million on the market, to be used to repay its two shareholder loans.

(60) If KK had not been financed by interest-free loans, but had, instead, had to pay the market interest rate on its loans of EUR 3,34 million, its annual interest payments would have been at least EUR 265 000 per year. This calculation is based on a Commission reference rate for 2003, plus 4 % points, which the Commission normally add for a company in difficulty (3,95 % + 4 % =7,59 % multiplied by 3,4 million).

(61) Given the company's income over the past years and its cash situation, KK would have to sharply increase its annual income in order to service an interest-bearing debt of this amount. Since the land apparently did not generate any, or only marginal, rental income, the only way for KK to service its debt would have been to sharply increase its sales of land.

(62) Since, according to the real estate expert, demand for most of the land owned by KK was low (for terraced houses and apartment blocks) and that the Asemansuo area was not ready for exploitation it is difficult to see how KK could suddenly increase its annual income sharply.

(63) Even more importantly, such land sales to service the debt would mean that the company would be getting rid of its main assets just to service debt. This would mean that if KK had to sell land for at least EUR 300 000 per year to service its debt and to cover some minimal administrative costs, it would after ten years, for example, have basically no assets left, but still owe the principal of EUR 3,34 million.

(64) Therefore, the Commission concludes that even on the basis of a simple calculation it is evident that KK would not have been able to replace its two interest-free loans with a loan at the market rate. Given the state of its finances, it is even unlikely that KK would be able to receive a smaller

market-based loan, allowing it to repay part of its interest-free loans.

(65) The Commission's conclusion is that the transaction whereby KK received an interest-free loan of EUR 1,67 million from Karkkila, which KK immediately used to repay Componenta, did not comply with the market economy investor principle and is state aid to Componenta.

Conclusion on aid amount

(66) In conclusion, the aid amount based on information provided by Finland is the entire amount provided to Componenta in the transaction at issue. This comprises the payment for shares in KK (EUR 713 092,50) and the loan to KK, enabling it to repay a loan (EUR 1 670 184) granted by Componenta. The total sum of the aid is thus EUR 2 383 276,5. However, if Finland can provide evidence that the overvaluation of the land, by the method described above, is less than EUR 619 760, the aid element in the share transaction (EUR 713 092,5) could be reduced accordingly.

Appraisal of the compatibility of the aid in the light of the doubts expressed by the Commission

(67) The Commission notes that its doubts on whether the transaction between Karkkila and Componenta was market-based have been confirmed, and that Componenta received aid of EUR 2 383 276,5.

(68) The Commission also notes that this state aid was illegal, since it was not notified to the Commission.

(69) The Commission further notes that the activities of Componenta involve trade between Member States and that state resources include financial assistance granted by regional and local authorities ([6]).

(70) The Commission therefore concludes that the aid, the existence of which has been established above, falls under the prohibition of Article 87(1) of the Treaty, since it was granted through state resources, threatens to distort competition by favouring an undertaking (Componenta), and affects trade between Member States.

(71) The only exception to this prohibition is where the aid falls under one of the derogations stated in Article 87 of the Treaty. Since the aid was intended to finance a new investment in Karkkila, the Commission has assessed whether Componenta would have been eligible for regional investment aid. The Commission's conclusion is that this would not be possible for two reasons.

([6]) Case 248/84, *Germany* v *Commission* [1987] ECR 4013, paragraph 17.

(72) First, Karkkila is situated in a non-assisted area according to the regional aid map for Finland for the years 2000 to 2006. Second, Componenta is not an SME according to the criteria laid down in Annex I of Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Article 87 and 88 of the EC Treaty to state aid for SMEs ([7]). Componenta had sales in 2003 of EUR 178 million, whereas the definition of an SME stipulates sales of no more than EUR 40 million. Furthermore, the company's average number of employees in 2003 was 1 595, as against a maximum of 250 employees under the SME criteria.

(73) The Commission furthermore concludes that the aid cannot be approved on the basis of any of the other derogations provided for in the Treaty, and in particular Article 87. Therefore the illegal aid is incompatible with the common market and should be recovered with interest.

V. CONCLUSION

(74) The Commission finds that Finland has unlawfully implemented aid for a total sum of EUR 2 383 276,5 in breach of Article 88(3) of the Treaty. The aid has been illegally granted by the City of Karkkila, Finland to Componenta Oyj, Finland, in two parts.

(75) The first part totals EUR 713 092.5 in the form of a price above market price paid to Componenta Oyj for its shares in Karkkilan Keskustakiinteistöt Oy. This amount may be reduced by the estimated theoretical value of KK, if Finland provides evidence that the overvaluation of the land, as described above, is less than EUR 619 760.

(76) The second part totals EUR 1 670 184,0, provided to Componenta Oyj through an interest-free loan granted to Karkkilan Keskustakiinteistöt Oy, which was used to repay a loan of the same amount to Componenta Oyj.

(77) The aid is not compatible with the common market and must, therefore, be recovered, with interest, from the beneficiary, Componenta Oyj,

HAS ADOPTED THIS DECISION:

Article 1

The state aid which Finland has implemented for Componenta Oyj, amounting to EUR 2 383 276,5 in the form of a payment from Karkkila City for shares in Karkkilan Keskustakiinteistöt Oy of EUR 713 092,5 and an interest-free loan of EUR 1 670 184,0 granted from Karkkila City to Karkkilan Keskustakiinteistöt Oy, which was used by Karkkilan Keskustakiinteistöt Oy to repay Componenta Oyj for its outstanding loan of the same amount, is incompatible with the common market.

([7]) OJ L 10, 13.1.2001, p. 33.; see the regulation as amended by Regulation (EC) No 364/2005 (OJ L 63, 28.2.2004, p. 22).

This aid amount of EUR 713 092,5 can be reduced if Finland provides evidence that the overvaluation of the land, as described above, is less than EUR 619 760. The aid amount would then be reduced by the corresponding proven value of the shares in Karkkilan Keskustakiinteistöt Oy sold to Karkkila City.

Article 2

1. Finland shall take all necessary measures to recover from the beneficiary, Componenta Oyj, the aid referred to in Article 1 and unlawfully made available to the beneficiary.

2. Recovery shall be effected without delay and in accordance with the procedures under national law, provided that they allow the immediate and effective execution of this Decision.

3. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiary until the date of its recovery.

4. Interest shall be calculated in accordance with the provisions laid down in Chapter V of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([8]).

Article 3

1. Finland shall inform the Commission, within two months of notification of this Decision, of the measures already taken and planned to recover the aid referred to in Article 1. It will provide this information using the questionnaire attached in the Annex of this Decision.

2. Finland shall also submit, within two months of notification of this Decision, documents giving evidence that recovery proceedings have been initiated against the beneficiary Componenta Oyj.

Article 4

This Decision is addressed to the Republic of Finland.

Done at Brussels, 20 October 2005

For the Commission

Neelie KROES

Member of the Commission

([8]) OJ L 140, 30.4.2004, p. 1.

ANNEX I

Information regarding the implementation of the Commission decision (2006//EC)

1. **Calculation of the amount to be recovered**

1.1. Please provide the following details on the amount of unlawful state aid that has been put at the disposal of the recipient:

Date(s) of payment (°)	Amount of aid (*)	Currency	Identity of recipient

(°) Date(s) on which (individual instalments of) the aid has been put at the disposal of the recipient (if the measure consists of several instalments and reimbursements, use separate rows).
(*) Amount of aid put at the disposal of the recipient, in gross grant equivalents.

Comments:

1.2. Please explain in detail how the interest payable on the amount to be recovered will be calculated.

2. **Recovery measures planned or already taken**

2.1. Please describe in detail what measures have been taken and what measures are planned to bring about the immediate and effective recovery of the aid. Please also explain what alternative measures are available under national law to effect recovery. Where relevant, please also indicate the legal basis for the measures taken or planned.

2.2. By what date will the recovery of the aid be completed?

3. **Recovery already effected**

3.1. Please provide the following details of aid that has been recovered from the recipient:

Date(s) (°)	Amount of aid repaid	Currency	Identity of recipient

(°) Date or dates on which the aid was repaid.

3.2. Please attach supporting documents for the repayments shown in the table at point 3.1.

COMMISSION DECISION

of 20 October 2005

relating to a proceeding under Article 81(1) of the EC Treaty

(Case COMP/C.38.281/B.2 — Raw tobacco Italy)

(notified under document number C(2005) 4012)

(Only the English and Italian texts are authentic)

(2006/901/EC)

SUMMARY OF THE DECISION

1. Introduction

On 20 October 2005, the Commission adopted a decision relating to a proceeding under article 81 of the EC Treaty (the 'Decision'). In accordance with the provisions of Article 30 of Regulation 1/2003, 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. 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 DG COMP web-site at http://europa.eu.int/comm/competition/index_en.html.

From 1995 until the beginning of 2002 four major Italian processors of raw tobacco, namely Deltafina, Dimon (now renamed Mindo), Transcatab and Romana Tabacchi hereinafter collectively referred to as 'the processors') entered into agreements and/or participated into concerted practices aimed at fixing the trading conditions for the purchase of raw tobacco in Italy (in respect of both direct purchases from producers and purchases from third packers), including price fixing and market sharing.

The Decision also considers two separate infringements, which took place at least between the beginning of 1999 and the end of 2001, consisting of the fixing by the professional association of Italian tobacco processors (*Associazione Professionale Trasformatori Tabacchi Italiani*, hereinafter 'APTI') of contract prices which it would negotiate, on behalf of its members, for the conclusion of Interprofessional Agreements with the Italian confederation of associations of raw tobacco producers, *Unione Italiana Tabacco*, ('UNITAB'), and the fixing by UNITAB, of the prices which it would negotiate, on behalf of its members, with APTI for the conclusion of the same agreements.

2. Origin of the case and procedure

Having received certain information on the existence of sector-wide agreements setting price ranges for distinct qualities of one or more varieties of raw tobacco, on 15 January 2002 the Commission addressed requests for information to the processors' and the producers' trade associations (APTI and UNITAB respectively) which replied on 12 February 2002.

On 19 February 2002, the Commission received an application for leniency from Deltafina S.p.A. ('Deltafina', the leading Italian processor) under the terms of the then newly adopted Commission notice on immunity from fines and reduction of fines in cartel cases (the 'Leniency Notice'). On 6 March 2002 the Commission granted Deltafina conditional immunity status in pursuance of point 15 of the Leniency Notice.

On 4 and 10 April 2002 the Commission received other two Leniency applications from Dimon S.r.l. ('Dimon') and Transcatab S.p.A. ('Transcatab') respectively.

On 18-19 April 2002, the Commission carried investigations at the premises of Dimon, Transcatab Trestina Azienda Tabacchi S.p.A. ('Trestina') and Romana Tabacchi s.r.l. ('Romana Tabacchi').

The Commission informed Dimon and Transcatab of its intention to apply reductions to them at the end of the procedure (within bands of 30 %-50 % and 20-30 % respectively) on 8 October 2002.

On 25 February 2004, the Commission initiated proceedings in this case and adopted a Statement of Objections (hereinafter 'SO') to which the addressees were given the opportunity to reply in writing and at the oral hearing which was held on 22 June 2004.

An Addendum to the SO of 25 February 2004 (hereinafter also referred to as 'Addendum') was adopted on 21 December 2004. A second oral hearing was thus held on 1 March 2005.

3. Parties

3.1. *Processors' side*

Deltafina is the Italian wholly owned subsidiary of Universal Corporation ('Universal'), the world biggest tobacco merchant. In 2001 (the last full year of the processors' infringement), Deltafina bought some 25 % of Italian raw tobacco. Both Deltafina and Universal are addressees of the Decision

Dimon and Transcatab were, at the time of the infringement, the Italian wholly owned subsidiaries of, respectively, Dimon Incorporated ('Dimon Inc') and Standard Commercial Corporation ('SCC'), i.e. the second and third biggest tobacco merchants.

Since September 2004, Dimon has changed its name into Mindo S.r.l ('Mindo') and is no longer part of the Dimon Inc. group. Dimon Inc. and SCC have merged on 13 April 2005 to form Alliance One International Inc. ('Alliance'). In 2001, Dimon bought some 11,28 % and Transcatab 10,8 % of raw tobacco produced in Italy. Mindo, Transcatab and Alliance are addressees of the Decision.

Romana Tabacchi is a family owned company. Until 1997, it acted as the agent of an international dealer (which was then acquired by Dimon Inc.). Since 1997, it operates as an independent dealer. In 2001, Romana Tabacchi bought 9,5 % of raw tobacco produced in Italy.

APTI is the Italian association of processors of raw tobacco. APTI's members are 17, out of a total of 59 processors in Italy.

3.2. *Producers' side*

UNITAB Italia is the Italian confederation of tobacco producers' associations, representing some 80 % of all producers.

4. The sector concerned: Italian raw tobacco

The production of raw tobacco in the EU represents approximately 5 % of raw tobacco production worldwide. Greece, Italy and Spain are the leading Member States in terms of tobacco produced, covering 38 %, 37,5 % and 12 % of the production in the EU respectively.

Raw tobacco is not a homogeneous product. In Italy, Burley and Bright are the most common varieties. Within each category, different quality grades can be distinguished. After drying, producers sell the tobacco to processors in batches whose price differs depending on the quality of the tobacco they contain.

Italian processors of raw tobacco buy raw tobacco from producers and producers' associations in Italy (as well as conditioned tobacco from other intermediaries), and process (or re-process) it, and resell it in suitable form to the tobacco manufacturing industry in Italy and worldwide. They are known also as 'first processors' for their being first at processing tobacco (as opposed to the second processing done by the cigarettes manufacturers) or 'tobacco leaf merchants' for their role of intermediaries between the producers and the final product manufacturer.

The expression 'exporter' is generally employed in respect of processors who have threshing equipment, which allows to produce the finished processed product (strips) sought by the cigarette manufacturers. Processors which are only able to produce loose leaves are called 'third packers' or simply 'packers'. After their initial treatment (e.g. removal of impurities and sorting) packers forward the tobacco to exporters for further treatment so that tobacco can be offered to manufacturers. The processors which are addresses of the Decision qualify as 'exporters'.

5. The Regulatory Framework

Both the production of raw tobacco and its sale to processors are subject to regulation under Community and national law.

5.1. *The CMO for raw tobacco*

The CMO in the raw tobacco [1] sector provides for (i) a production quota system and (ii) support of producers' income through a premium system for the production of raw tobacco.

Premium is only granted in respect of tobacco produced within the quota (with certain adjustments). Since 1998, the payment of part of the Community premium (so-called variable part) has been linked to the quality of the tobacco produced which is reflected in the price. The payment of the variable part of the premium is entrusted to the producers' groups.

The CMO requires each producer or producers' group and each first processor to enter into so-called 'cultivation contracts' at the start of each year's campaign (around March-May, when tobacco seedlings are transplanted) where they agree on 'contract prices' for each quality grade for each individual variety. At this stage, prices are often expressed as minimum prices or a price range. To note, however, that the final price (or 'delivery price') can only be determined when the harvest takes place (i.e. between October and January) and can vary significantly from the 'cultivation contract price', depending on quality, quantities and further bargaining.

Community law favours the creation of inter-branch organisations within which producers and processors should co-operate for the efficient operation of the market. Prices and quota fixing are however expressly forbidden. None of the associations involved in this case is an inter-branch organisation within the meaning of Community law.

5.2. *National legislation*

In Italy, Law 88/88 regulating interprofessional (meaning sector-wide) agreements, cultivation contracts and sales of agricultural

[1] Council Regulation (EEC) No 727/70 of 21 April 1970 on the common organisation of the market in raw tobacco, hereinafter 'Regulation 727/70' (OJ L 94, 28.4.1970, p. 1) as amended by Council Regulation (EEC) No 2075/92 of 30 June 1992 on the common organisation of the market in raw tobacco, hereinafter 'Regulation 2075/92' (OJ L 215, 30.7.1992, p. 70) (last amended by Council Regulation (EC) No 864/2004 of 29 April 2004 (OJ L 161, 30.4.2004, p. 48)). See also Council Regulation (EC) No 1636/98, of 20 July 1998 amending Regulation 2075/92, hereinafter 'Regulation 1636/98' (OJ L 210, 28.7.1998, p. 23) and Commission Regulation (EC) No 2848/98 of 22 December 1998 laying down detailed rules for the application of Council Regulation 2075/92 as regards the premium scheme, production quotas and the specific aid to be granted to producer groups in the raw tobacco sector, hereinafter 'Regulation 2848/98' (OJ L 358, 31.12.1998, p. 17), as last amended by Commission Regulation (EC) No 1983/2002 of 7 November 2002 (OJ L 306, 8.11.2002, p. 8).

products. More specifically, Article 5(1)(b) of law 88/88 provides that interprofessional agreements must determine the product concerned by the agreement, the modalities and the timing for its delivery and the minimum price. Incentives (especially in terms of preferential aid) are offered to producers and processors complying with the terms of interprofessional agreements. Law 88/88 has found application in a number of agricultural sectors, including tobacco, where APTI and UNITAB concluded a number of interprofessional agreements (providing for cultivation contract prices expressed in the form of minimum prices or price ranges) between 1999 and 2001.

6. Practises addressed in the decision

6.1. *The processors infringement*

From 1995 until the beginning of 2002 Deltafina, Dimon, Transcatab and Romana Tabacchi entered into agreements and or participated into concerted practices aimed at fixing their trading conditions for the purchase of raw tobacco in Italy (to include both direct purchases from producers and purchases from third packers), including: (a) The setting of common purchase prices which processors would pay at the delivery of tobacco and other trading conditions; (b) the allocation of suppliers and quantities; (c) the exchange of information to co-ordinate their competitive purchasing behaviour; (d) the determination of quantities and prices in respect of surplus production; and (e) the co-ordination of bids for public auctions in 1995 and 1998.

6.2. *APTI's infringement*

From 1999 and until the end of 2001 APTI determined its negotiating position in respect of prices for each quality grade of each tobacco variety to be agreed with UNITAB in the context of the conclusion of the Interprofessional Agreements.

6.3. *UNITAB's infringement*

From 1999 and until the end of 2001 UNITAB determined its negotiating position in respect of prices for each quality grade of each tobacco variety to be agreed with APTI in the context of the conclusion of the Interprofessional Agreements.

7. Legal assessment

In the Decision, the Commission finds that the practices described above constitute three separate (single and continuous) infringements of Article 81 of the Treaty.

All the participants in the infringements to which the Decision is addressed are or form part of undertakings, associations of undertakings or associations of associations of undertakings within the meaning of Article 81 of the Treaty.

Agreements and/or concerted practices which directly or indirectly fix transaction prices or share quantities are by their very object restrictive of competition. More specifically, co-ordination by the processors of their purchasing conduct in this case affected fundamental aspects of their competitive conduct and was also by definition capable of affecting the behaviour of the same companies in any other market in which they compete, including downstream markets. These conducts are specifically envisaged under Article 81(1) of the EC Treaty.

Such conducts are capable, at least potentially, to have an impact on the trade of raw tobacco between Italy and other Member States, as they cover a significant amount of the purchases of Italian raw tobacco and relate to a product (raw tobacco) which is an intermediate product of processed tobacco, a product which is largely exported.

The Decision addresses the issue of the application of Council Regulation No 26 of 4 April 1962 (applying certain rules on competition to production of and trade in agricultural products — 'Regulation No 26') to the practices which are being considered. It concludes that the restrictive practices at issue cannot be regarded as being 'necessary' for the attainment of the objectives of the Common agricultural policy and are therefore fully subject to the application of Article 81(1) of the Treaty.

Finally, the Decision concludes that neither national law nor the administrative practice obliged the processors to agree on the average or maximum purchase price for raw tobacco or to share out quantities of tobacco to be bought by each processor. Moreover, such regulatory framework did not require processors and producers to agree collectively on the 'contract prices' nor did it remove all possibility of competitive behaviour on their part. Consequently, the agreements and/or concerted practices of the producer representatives, on the one hand, and the processors, on the other, are fully caught by Article 81(1) of the Treaty.

8. Liability of the mother companies of deltafina, Transcatab and dimon

The Decision also finds that Universal (for Deltafina), Dimon Inc. (for Dimon) and SCC (for Transcatab) exercised decisive influence on their subsidiaries during the period considered and should therefore found to be jointly and severally liable for their subsidiary's conduct.

9. Fines

9.1. *Fines imposed in respect of UNITAB's and APTI's infringements*

Concerning the producers and processors representatives' behaviour, the Decision considers that a fine of only EUR 1 000 is appropriate.

Although the conclusion of Interprofessional Agreements under the terms of Law 88/88 was not mandatory and in fact no Interprofessional Agreement was entered for several years, Law 88/88 (as further applied in the administrative practice of the Ministry), created incentives for the conclusion of Interprofes-

sional Agreements containing minimum prices. It should also be considered that Law 88/88 had found application in several instances in the agricultural sector before the conclusion of the Interprofessional Agreements discussed in this Decision, including in the tobacco sector, and the behaviour of the parties negotiating them had never been challenged under either national or Community law, notwithstanding these agreements were in the public domain and communicated to the Ministry.

9.2. *Fines imposed in respect of the processors' infringement*

9.2.1. Gravity of the processors' infringement

The nature of the processors' infringement is considered to be very serious, since it concerns the fixing of the prices of the varieties of Italian raw tobacco and the sharing of quantities. Buying cartels can in fact distort producers' willingness to generate output as well as limit competition amongst processors in downstream markets. This is particularly so in cases like the present one, where the product affected by the buying cartel (raw tobacco) constitutes a substantial input of the activities carried out by participants downstream (the first processing and sale of processed tobacco in this case). The production of raw tobacco in Italy accounts for some 38 % of the Community in-quota production. The overall value of this production was Eur 67,338 million in 2001 (the last full year of infringement).

9.2.2. Individual weight and deterrence

The Commission considers that fines to the four processors involved should be set in consideration their market position. A higher starting amount should apply in respect of Deltafina as it appears to be the bigger purchaser with a market share of around 25 % in 2001 (full last year of the infringement). In consideration of their smaller shares in the market of raw tobacco in Italy (between, 8,86 and 11,28) Transcatab, Dimon and Romana Tabacchi should be grouped together and receive lower starting amounts.

As Deltafina, Transcatab and Dimon (now Mindo) are (or, in the case of Mindo, used to be) part of large groups that are also addressees of the Decision, a multiplying factor will be applied to their fines to ensure sufficient deterrence.

For these reasons, the starting amount of the fines in this case is set as follows:

— Deltafina EUR 37 500 000
— Transcatab EUR 12 500 000
— Dimon (Mindo) EUR 12 500 000
— Romana Tabacchi EUR 10 000 000

9.2.3. Duration of the infringement

Deltafina's, Dimon's, Transcatab's infringement lasted for approximately 6 years and 5 months. Romana Tabacchi's participation in the infringement is taken to have lasted for more than 2 years and 9 months.

For these reasons, the basic amount of the fines to be imposed in this case should be set as follows:

— Deltafina EUR 60 000 000
— Transcatab EUR 20 000 000
— Dimon (Mindo) EUR 20 000 000
— Romana Tabacchi EUR 12 500 000

9.2.4. Attenuating circumstances

An attenuating circumstance is recognised in favour of Romana Tabacchi for not taking part in certain aspects of the cartel and for acting against the purpose of the cartel to the point of causing the other participants' joint reaction against it.

Mitigating effect is also recognised to Deltafina's effective co-operation during the proceedings. As explained below, Deltafina has forfeited its entitlement to immunity from fines under the terms of the Leniency Notice. However, in consideration of the exceptional circumstances of this case (being this the first case where an application under the Leniency Notice was made and the first where a decision applies it), Deltafina's co-operation should be favourably taken into consideration. Deltafina's cooperation was indeed substantial and continued throughout the procedure (with the exception of the facts discussed below) and should therefore attract the application of a mitigating factor.

9.2.5. Upper limit to the fine

The 10 % turnover limit set out under Article 23(2) of Regulation (EC) No 1/2003 does not appear to be exceeded in this case in respect of fines to be imposed on Universal/Deltafina and Alliance/Transcatab-Mindo. However, as Mindo does no longer maintain any link with the former Dimon group, its joint and several liability should be apportioned within the 10 % of its turnover in its most recent business year (i.e. Eur 2,59 million).

Reduction within the 10 % is necessary in respect of Romana Tabacchi.

The resulting amounts are therefore as follows:

— Deltafina EUR 30 000 000
— Dimon (Mindo) EUR 20 000 000
— Transcatab EUR 20 000 000
— Romana Tabacchi EUR 2 050 000

9.3. *Application of the Leniency Notice*

Deltafina, Dimon and Transcatab applied for leniency under the terms of the 2002 Leniency Notice (see above under section)

9.3.1. Deltafina's application for immunity

The Leniency Notice makes the granting of final immunity conditional upon the fulfilment of the cumulative conditions set out in point 11 of the Notice. In particular point 11(a) requires undertakings (having been granted conditional immunity) to cooperate '*fully, on a continuous basis* […]'.

At the oral hearing of 22 June 2004 it became apparent that Deltafina had divulged its Immunity application on the occasion of a meeting of APTI's managing committee which was also attended by representatives of Dimon, Transcatab and Trestina. Such disclosure occurred before the Commission had an opportunity to carry out the investigations and was well capable of jeopardising them.

The Decision concludes that by so acting Deltafina breached the co-operation obligation to which it was bound by virtue of point 11(a) of the Leniency Notice. Accordingly, immunity cannot be granted to Deltafina.

In reply to Deltafina's defence on this point, the Decision confirms that point 11(a) of the Leniency Notice includes a duty to keep the immunity application confidential, which is justified by the need to ensure that the result of the subsequent investigations which the Commission needs to carry out be not compromised. Deltafina was aware of the Commission's intention to carry out surprise investigations. Inspection were actually organised and occurred as announced to Deltafina at a meeting between Deltafina and the Commission services.

A certain degree of difficulty in keeping an immunity application confidential is inherent in all cases where a cartel participant decides to apply for immunity. However, any such difficulty (or the fact of having informed the Commission of it) does not licence the immunity applicant to voluntarily disclose its immunity application at meetings with competitors.

9.3.2. Deltafina's alternative application for reduction of the fine

Deltafina's application for immunity also included an application for a reduction of the fine which would have been otherwise applicable to it in this case, strictly subject to '*rejection by DG Comp of its application for full immunity*'.

The Decision (based on the tenor of the Leniency Notice, as well as on its teleological and systematic interpretation), finds that subsidiary applications for reduction can only be accepted in cases where conditional immunity cannot be granted at the time an application is made and loses any legal value once conditional immunity is granted. Given that Deltafina was initially granted conditional immunity and lost it for breaching the cooperation obligations to which it was subject, it cannot benefit from a reduction of the fine.

9.3.3. Application of the Leniency Notice to Dimon and Transcatab

The Decision concludes that the non application of final immunity to Deltafina does not have any direct bearing on the way the Leniency Notice should apply to Dimon and Transcatab. In particular, the Leniency Notice does not warrant any up-grading of their positions following withholding of final immunity to Deltafina.

Both Dimon and Transcatab are found to have complied with the conditions imposed on them by virtue of their application for reduction. Upon assessment of the evidence supplied to the Commission and their co-operation with the Commission during the procedure, the Decision awards Dimon and Transcatab with the highest level of reduction which is envisaged within the brackets which were indicated to them following their applications for reduction (i.e. 50 % and 30 % respectively).

In view of the above, the final amount of the fines in this case is set as follows:

— Deltafina and Universal, jointly and severally,	EUR 30 000 000
— Dimon (Mindo) and Alliance One International, Alliance One International being responsible for the whole, Mindo only being jointly and severally liable for EUR 3,99 million	EUR 10 000 000
— Transcatab and Alliance One International, jointly and severally	EUR 14 000 000
— Romana Tabacchi	EUR 2 050 000
— APTI	EUR 1 000
— UNITAB	EUR 1 000

COMMISSION DECISION

of 21 December 2005

relating to a proceeding under Article 81 of the Treaty establishing the European Community and Article 53 of the EEA Agreement against Flexsys NV, Bayer AG, Crompton Manufacturing Company Inc. (former Uniroyal Chemical Company Inc.), Crompton Europe Ltd, Chemtura Corporation (former Crompton Corporation), General Química SA, Repsol Química SA and Repsol YPF SA.

(Case No COMP/F/C.38.443 — Rubber chemicals)

(notified under document number (2005) 5592)

(only the English, German and Spanish texts are authentic)

(Text with EEA relevance)

(2006/902/EC)

1. SUMMARY OF THE INFRINGEMENT

1.1. Addressees

(1) This decision is addressed to the following undertakings:

— Flexsys N.V.;

— Bayer AG;

— Crompton Manufacturing Company, Inc. (former Uniroyal Chemical Company Inc.);

— Crompton Europe Ltd;

— Chemtura Corporation (former Crompton Corporation);

— General Química SA;

— Repsol Química SA;

— Repsol YPF SA.

(2) The addressees of the Decision participated in a single, complex and continuous infringement of Article 81 of the Treaty establishing the European Community and of Article 53 of the Agreement on the European Economic Area, involving the fixing of prices and the exchange of confidential information concerning certain rubber chemicals (antioxidants, antiozonants and primary accelerators) in the EEA and worldwide markets.

1.2. The rubber chemicals sector

(3) Rubber chemicals are synthetic or organic chemicals that act as productivity and quality enhancers in the manufacture of rubber, mainly used in vehicle tires. In 2001, the EEA market value was estimated at EUR 200 million, covering the categories antiozonants, antioxidants and primary accelerators that were affected by the cartel.

(4) The major global producers of rubber chemicals are Flexsys, Bayer and Chemtura (former Crompton), accounting together for approximately a half of the world-wide rubber chemical market. There are a number of significant smaller competitors, such as General Química (Spain), Duslo (Slovakia), Istrochem (Slovakia), Noveon (USA) and Great Lakes (USA), as well as many minor competitors particularly in Asia.

(5) The major customers for rubber chemicals are the globally operating big tire companies Michelin (France), Goodyear (USA), Bridgestone/Firestone (Japan), Continental (Germany) and Pirelli (Italy), accounting together for about 35-40 % of world-wide consumption.

(6) The geographic scope of rubber chemicals business changed gradually from regional to global in the mid-1990s. This affected the scope of the cartel as well, so that after 1995 the parties reached understandings mostly about world-wide price increases.

1.3. Functioning of the cartel

(7) Whilst there are a number of indications that collusive activities within the rubber chemicals industry were already taking place at least occasionally in the 1970s, the Commission only has sufficiently firm evidence of the existence of the cartel for the period covering the years 1996-2001 for Flexsys, Bayer and Crompton (now Chemtura) (including Crompton Europe and Uniroyal Chemical Company). These undertakings agreed to raise prices of certain rubber chemicals (antioxidants, antiozonants and primary accelerators) in the EEA and world-wide markets at least in 1996, 1998, 1999, 2000 and 2001. General Química, which must be considered a fringe player, participated to these agreements in 1999 and 2000.

(8) Coordination of price increases normally followed a general pattern, involving contacts among the competitors during a preparatory phase preceding the announcement to customers, thereafter during the negotiations with customers, and lastly after the contracts had been made to monitor compliance and success on the market. During the contacts preceding the coordinated action, the parties sought support for a suggested price increase and agreed upon its amount, the products and territory covered, as well as the leader and the timing of the announcements. During the implementation phase, the focus was on the customers' reactions to the announced price increases and exchanges on the positions regarding price negotiations with the customers. The follow-up contacts included typically the exchange of detailed information on contracted volumes and prices with specific customers.

1.4. **Procedure**

(9) The investigation into the rubber chemicals sector was initiated as a result of an application for conditional immunity from fines by Flexsys in April 2002, which was granted in June 2002. Subsequently, the Commission carried out inspections at the premises of Bayer, Crompton Europe and General Química in September 2002.

(10) Crompton (now Chemtura), Bayer and General Química applied for leniency, on 8 October 2002, 24 October 2002 and 7 June 2004, respectively. The Commission informed, in due course, all the applicants of its intention to apply reductions of fines.

(11) On 12 April 2005, the Commission adopted a Statement of Objections against Bayer, Crompton, Crompton Europe, Uniroyal Chemical Company, Flexsys, Akzo Nobel, Pharmacia (former Monsanto), General Química, Repsol Química, Repsol YPF, Duslo, Prezam, Vagus and Istrochem. An Oral Hearing on the case was held on 18 July 2005. The proceedings were subsequently closed against Akzo Nobel NV, Pharmacia Corporation, Duslo a.s., Prezam a.s., Vagus a.s., and Istrochem a.s.

1.5. **Liabilities**

(12) Repsol YPF SA and Repsol Química SA, although they did not participate themselves in the arrangements in question, are nevertheless held responsible for the conduct of their wholly owned subsidiary General Química.

2. **FINES**

2.1. **Basic Amount**

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

2.1.1. *Gravity*

(14) 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.

(15) Considering the nature of the infringement and its geographic scope (the infringement in this case consisted primarily of secret collusion between cartel members to fix prices in the EEA and elsewhere, supported by the exchange of confidential information), the infringement must be qualified as very serious.

2.1.2. *Differential treatment*

(16) 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, as well as to set the fine at a level which ensures that it has sufficient deterrent effect.

(17) Based on the fact that both the geographic scope of the cartel and the rubber chemicals business in general is essentially world-wide, the global market shares in 2001, the last full year of the infringement, are used as reference values in the calculation of the fines.

(18) Flexsys was the largest market operator in the world, with a market share of approximately [20-30] %. It is therefore placed in a first category. Bayer, with a market share of approximately [10-20] %, is placed in a second category. Crompton, with a market share of approximately [10-20] %, is placed in a third category. Finally, General Química, with a market share of approximately [0-10] %, is placed in a fourth category. The starting amounts will be fixed proportionally, albeit not arithmetically, having regard to the market shares.

2.1.3. *Sufficient deterrence*

(19) Within the category of very serious infringements, the scale of likely fines also makes it possible to set the fines at a level which ensures that they have sufficient deterrent effect, taking into account the size of each undertaking. In 2004, the total turnovers of the undertakings were as follows: Bayer EUR 29,7 billion; Crompton approximately EUR 2 billion; Flexsys EUR approximately 425 million and Repsol YPF 41,7 billion. Accordingly, the Commission considers it appropriate to multiply the fine for Bayer by 2 and for Repsol by 2,5.

2.1.4. *Increase for duration*

(20) Flexsys, Bayer and Uniroyal (including Crompton Europe) committed an infringement of six years, whereas Crompton Corporation (now Chemtura) is liable for an infringement of five years and four months. All of these undertakings committed an infringement of long duration, and their starting amounts will consequently be increased by 10 % for each full year of infringement.

(21) General Química committed an infringement of eight months. Its infringement amounting to less than one year, no increase will be applied to its fine.

2.2. **Attenuating circumstances**

(22) In the case of General Química, it is appropriate to reduce its fine due to its passive and minor role in the infringement, as compared to the other participants in the cartel, by 50 %.

2.3. **Application of the 2002 Leniency Notice**

2.3.1. *Immunity*

(23) Flexsys was the first to submit evidence which enabled the Commission to adopt a decision to carry out an investigation in connection with the alleged cartel in the rubber chemicals industry. Flexsys has co-operated fully, on a continuous basis and expeditiously throughout the Commission's administrative procedure and provided the Commission with all evidence available to it relating to the suspected infringement. Flexsys 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, Flexsys qualifies for a full immunity from fines.

(24) Crompton has contested Flexsys' immunity, claiming *inter alia* that Flexsys has failed to fulfil the conditions of its immunity by coercing other parties and by continuing the infringement after its application for immunity. After a close investigation of Crompton's allegations, the Commission considers that there is no decisive material evidence to support these allegations.

2.3.2. *Point 23 (b), first indent (reduction of 30-50 %)*

(25) Crompton was the first undertaking to meet the requirements of point 21 of the Leniency Notice, as it provided the Commission with evidence which represents significant added value with respect to the evidence already in the Commission's possession at the time of its submission. It qualifies, therefore, under point 23 (b), first indent, for a reduction of 30-50 % of the fine.

(26) In view of its early cooperation, the quality of its evidence and its extensive and continuous cooperation throughout the proceedings, the Commission considers that Crompton qualifies for the maximum of 50 % reduction

2.3.3. *Point 23 (b), second indent (reduction of 20-30 %)*

(27) Bayer was the second undertaking to meet the requirements of point 21 of the Leniency Notice, as it provided the Commission with evidence which represents significant added value with respect to the evidence already in the Commission's possession at the time of its submission. It qualifies, therefore, under point 23 (b), second indent, for a reduction of 20-30 % of the fine. The extent of the value added by Bayer to the case is limited and it has admitted the infringement only for its last four years. Thus, the Commission considers that Bayer qualifies for the very minimum reduction within the relevant band, i.e. a reduction of 20 %.

2.3.4. *Point 23 (b), third indent (reduction of up to 20 %)*

(28) General Química was the third undertaking to meet the requirements of point 21 of the Leniency Notice, as it provided the Commission with evidence which represents significant added value with respect to the evidence already in the Commission's possession at the time of its submission. General Química qualifies, therefore, under point 23 (b), third indent, for a reduction of up to 20 % of the fine. Considering that General Química fulfilled the condition of significant added value relatively late in the proceedings, over a year and a half after the Commission's inspections to its premises, and that the extent to which its submission added value to the evidence has remained limited, the Commission finds that General Química (and Repsol) is entitled to a 10 % reduction of the fine that would otherwise have been imposed.

2.3.5. *Final remark on the application of the leniency notice*

(29) In this case, the Commission also issued a strong warning against leniency applicants attempting to weaken its ability to prove the infringement, where, taken together, there is a consistent body of indicia and evidence showing the existence of the cartel. The Commission considered that such attitude puts the extent and continuity of cooperation of leniency applicants into serious doubt.

3. **DECISION**

(30) The following undertakings have infringed Article 81(1) of the Treaty and Article 53 of the EEA Agreement by participating, for the periods indicated, in a complex of agreements and concerted practices consisting of price fixing and the exchange of confidential information in the rubber chemicals sector in the EEA:

a) Bayer AG, from 1 January 1996 until 31 December 2001;

b) Crompton Manufacturing Company Inc., from 1 January 1996 until 31 December 2001;

c) Crompton Europe Ltd., from 1 January 1996 until 31 December 2001;

d) Chemtura Corporation, from 21 August 1996 until 31 December 2001;

e) Flexsys N.V., from 1 January 1996 until 31 December 2001;

f) General Química SA, from 31 October 1999 until 30 June 2000;

g) Repsol Química SA, from 31 October 1999 until 30 June 2000;

h) Repsol YPF SA, from 31 October 1999 until 30 June 2000.

(31) The undertakings listed above shall immediately bring to an end the infringements also referred to above, insofar as they have not already done so. They shall refrain from repeating any act or conduct described above, and from any act or conduct having the same or similar object or effect.

(32) For the infringements referred to above,, the following fines are imposed on the following undertakings:

(a)	Flexsys N.V	EUR 0,
(b)	Crompton Manufacturing Company, Inc., jointly and severally with Crompton Europe Ltd.	EUR 13,60 million,
	of which jointly and severally with Chemtura Corporation:	EUR 12,75 million,
(c)	Bayer AG:	EUR 58,88 million,
(d)	General Química SA, jointly and severally with Repsol Química SA and Repsol YPF SA	EUR 3,38 million.

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 DG Competition website at http://ec.europa.eu/comm/competition/.

COMMISSION DECISION

of 3 May 2006

relating to a proceeding under Article 81 of the Treaty establishing the European Community and Article 53 of the EEA Agreement against Akzo Nobel NV, Akzo Nobel Chemicals Holding AB, EKA Chemicals AB, Degussa AG, Edison SpA, FMC Corporation, FMC Foret S.A., Kemira OYJ, L'Air Liquide SA, Chemoxal SA, Snia SpA, Caffaro Srl, Solvay SA/NV, Solvay Solexis SpA, Total SA, Elf Aquitaine SA and Arkema SA.

(Case COMP/F/C.38.620 — Hydrogen Peroxide and perborate)

(notified under document number C(2006) 1766)

(only the English, French and Italian versions are authentic)

(Text with EEA relevance)

(2006/903/EC)

1. SUMMARY OF THE INFRINGEMENT

1.1. Addressees

(1) The decision is addressed to the following undertakings:

— Akzo Nobel NV ('Akzo')

— Akzo Nobel Chemicals Holding AB ('ANCH')

— EKA Chemicals AB ('EKA')

— Degussa AG ('Degussa')

— Edison SpA ('Edison')

— FMC Corporation ('FMC')

— FMC Foret S.A. ('Foret')

— Kemira OYJ ('Kemira')

— L'Air Liquide SA ('Air Liquide')

— Chemoxal SA ('Chemoxal')

— Snia SpA ('Snia')

— Caffaro Srl ('Caffaro')

— Solvay SA/NV ('Solvay')

— Solvay Solexis SpA ('Solexis')

— Total SA ('Total')

— Elf Aquitaine SA ('Elf Aquitaine')

— Arkema SA ('Atofina').

(2) The addressees of the Decision participated in a single and continuous infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement regarding **hydrogen peroxide** ('HP') and its downstream product **sodium perborate** ('PBS'), covering the whole EEA territory ('the infringement'). The period of infringement retained in the decision is from 31 January 1994 to 31 December 2000. The infringement consisted mainly of competitors exchanging commercially important and confidential market- and/or company relevant information, limiting and/or controlling production as well as potential and actual capacities, allocating market shares and customers, and fixing and monitoring (target) prices.

1.2. The hydrogen peroxide and perborate sector

(3) HP is a strong oxidising agent which has several industrial applications. It is a clear, colourless liquid which is available commercially as an aqueous solution in concentrations mainly ranging from 30 % to 70 %. As a final product HP is used as a bleaching agent in the pulp and paper manufacturing industries, for the bleaching of textiles, for disinfection and for other environmental applications such as sewage treatment. HP is also used as a raw material for the production of other downstream peroxigen products, such as persalts (which include PBS) and peracetic acid.

(4) PBS is mainly used, as well as sodium percarbonate ('PCS'), as an active substance in synthetic detergents and washing powders. PBS and PCS have been both investigated in the current proceedings, however following the replies to the Statement of Objections and arguments presented at the Oral Hearing, it cannot be established that the infringing behaviour extended to PCS as well. The decision therefore only covers infringing behaviour as regards HP and PBS, not as regards PCS, despite to the Statement of Objections which also regarded PCS.

1.3. The supply

(5) HP: in the EEA there were six main suppliers throughout the period of the infringement: the leading company was Solvay with an approximate market share of [20-30] %, followed by EKA. The other players were Atofina, Kemira, Degussa and Foret. Air Liquide and Ausimont sold HP until June 1998 and May 2002 respectively. Finally there were a small number of resellers importing HP from Eastern Europe and from outside Europe. There have been no new market entrants in recent years.

(6) PBS: the undertakings active in the EEA during the whole of, or part of, the period of the infringement were: Degussa, Foret, Solvay, Caffaro (which however suspended its production in 1999), Atofina (which ceased production in 1999), Air Liquide (stopped in 1994) and Ausimont.

1.4. The demand

(7) During the period of the infringement, in the EEA the main purchasers of HP were relatively small in number (six to eight) and mainly from the pulp and paper segment, which negotiated EEA-wide contracts at EEA-wide prices.

(8) Major customers (such as Scandinavian and German pulp and paper manufacturers) negotiated contracts with a single price for multi-site supplies throughout the EEA. Transport costs were thus borne by the supplier, who may therefore have had an interest in obtaining HP from a source situated geographically close to the plants of the customers.

(9) In the persalts domain during the period of the infringement, a very small number of large multinational companies existed on the demand side: 75-80 % of EEA purchases of persalts was concentrated in the hands of a small number of customers. They each had centralised European purchasing operations that negotiated purchases twice a year. They usually purchased persalts from more than one supplier, seeking to maintain a certain degree of competitive pressure.

1.5. Geographic scope

(10) The infringement covered the whole of the EEA where demand of the products under investigation existed.

1.6. Functioning of the cartel

(11) The period of infringement retained in the decision is 31 January 1994 until 31 December 2000.

(12) The collusive practices can be categorised as follows: it concerned exchange of market related information (including prices and sales volumes), market sharing, limitation/control of production and sources of supply as well as price fixing for HP and PBS. The collusion regarding the two products is considered to be related and forms part of a single overall scheme and therefore constitutes a single infringement, even though the behaviour as regards HP and PBS separately would equally fall under the prohibition of Article 81(1) of the Treaty.

1.7. Procedure

(13) In December 2002 Degussa informed the Commission of the existence of a cartel in the HP and PBS sector and expressed the wish to cooperate with the Commission under the 2002 Notice on immunity from fines and reduction of fines in cartel cases ('Leniency Notice') ([1]). Degussa provided the Commission with evidence that allowed carrying out inspections in March 2003 at the premises of three companies (the investigation against other companies was first conducted by requests for information).

(14) After the inspections five other companies submitted an application for reduction of fines. Three of them were granted a reduction of fines, in accordance with point 23 and 26 of the Leniency Notice, namely EKA, Atofina and Solvay. The applications of Kemira and Solexis were rejected.

2. FINES

2.1. Basic Amount

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

2.1.1. *Gravity*

(16) 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.

(17) Taking into account the nature of the infringement committed, the fact that it must have had an impact and the fact that it covered the whole of the EEA, where the HP and PBS market taken together had a total value of around EUR 470 million in 1999, the last full year of the infringement, the Commission considers that the undertakings to which this Decision is addressed have committed a very serious infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement.

2.1.2. *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, respectively, to cause significant damage to competition. This is appro-

([1]) OJ C 45, 19.2.2002, p. 3.

priate where, as in this case, there are considerable disparities between the respective market shares of the undertakings participating in the infringement.

(19) By assessing the turnover in the respective products for each undertaking and setting them off against the total turnover for HP and PBS for the purposes of determining the individual weight, the Commission has taken account of the fact that certain undertakings were only active on the market for one of the two products concerned. In doing so the Commission has taken account of the real impact of the unlawful conduct of each undertaking on competition. Because of the different varieties in which HP and PBS can be sold, sales based on the total value amount appear a more reliable indicator of operators' capacities. These figures show that Solvay was the largest market operator in the EEA, with a share of the combined sales of around [20-30] %. It is therefore placed in a first category. Degussa, with a market share of [10-20] %, is placed in a second category. Foret, EKA, Atofina, Kemira and Ausimont with shares of [5-15] % respectively, are placed in a third category. Finally, Caffaro, with a market share in PBS of around [5-10] % in its last full year, 1998, and a share of sales with regard to the combined HP and PBS market of [1-5] % is placed in a fourth category.

(20) In the case of Caffaro, the Commission takes into account, despite the several links existing between the two products, that it has not been established that Caffaro was aware or could necessarily have had knowledge of the overall scheme of the anti-competitive arrangements. Consequently, given the circumstances of the case, a reduction of 25 % is applied to the starting amount of the fine calculated for Caffaro.

2.1.3. *Sufficient deterrence*

(21) Within the category of very serious infringements, the scale of likely fines also makes it possible to set the fines at a level which ensures that they have sufficient deterrent effect, taking into account the size of each undertaking. In this respect, the Commission notes that in 2005, the most recent financial year preceding this Decision, the world-wide turnover of Total was EUR 143 billion, that of Elf Aquitaine EUR 120 billion, that of Akzo EUR 13,000 million, that of Degussa EUR 11,750 million, that of Solvay EUR 8,560 million and that of Edison EUR 6,650 million. Accordingly, the Commission considers it appropriate to multiply the fine for Total by a factor of 3, that is based on the size of the parent companies, Elf Aquitaine and Total, which each have a turnover well above EUR 100 billion. Akzo and Degussa, with a turnover each of around 10 % of that of Total are still very large undertakings, with a turnover well exceeding EUR 10,000 million. It is therefore considered it appropriate to multiply the fine for these undertakings by a factor of 1,75. In view of the fact that Solvay had a turnover of EUR 8,560 million, the Commission considers it appropriate to multiply the fine for Solvay by a factor of 1,5. In view of the fact that Edison had a turnover of EUR 6,650 million, the Commission considers it appropriate to multiply the fine for this undertaking by a factor of 1,25. Given that Ausimont was transferred to a different undertaking, in the circumstances of the case, the multiplier applies to the fine to be attributed to Edison only.

2.1.4. *Increase for duration*

(22) Degussa, Solvay and Kemira participated in the infringement from 31 January 1994 to 31 December 2000, a period of six years and eleven months. These undertakings committed an infringement of long duration. The starting amounts of the fines should consequently be increased by 10 % for each full year of infringement. They should be further increased by 5 % for any remaining period of 6 months or more but less than a year. This leads to a percentage increase of the starting amount for each undertaking of 65 %. EKA participated in the infringement from 31 January 1994 until 31 December 1999, a period of five years and eleven months, while Atofina and Ausimont participated in the infringement from 12 May 1995 until 31 December 2000, a period of five years and seven months. This leads to a percentage increase of the starting amount for each undertaking of 55 % ([2]). Foret participated in the infringement from 29 May 1997 until 13 December 1999, a period of two years and seven months. This leads to a percentage increase of the starting amount of 25 %. Caffaro participated in the infringement from 29 May 1997 until 31 December 1998, a period of one year and seven months. This leads to a percentage increase of the starting amount of 15 %.

2.2. **Aggravating circumstances**

(23) At the time the infringement took place, Atofina, Degussa, Edison and Solvay had already been addressees of previous

([2]) As EKA's evidence enabled the Commission to trace back the cartel to 31 January 1994, in accordance with point 23 of the Leniency Notice, these elements will not be taken into account when setting the fine, resulting in an increase for duration of 20 % instead of 55 % for this undertaking.

Commission decisions concerning cartel activities ([3]). The fact that the undertakings have repeated the same type of conduct either in the same industry or in different sectors from that in which they had previously incurred penalties, shows that the first penalties did not prompt these undertakings to change their conduct. This constitutes for the Commission an aggravating circumstance. This aggravating circumstance justifies an increase of 50 % in the basic amount of the fine to be imposed on the undertakings mentioned above ([4]).

2.3. Attenuating circumstances

(24) In the case of Caffaro, it is appropriate to reduce its fine due to its passive and minor role in the infringement, as compared to the other participants in the cartel, by 50 %.

2.4. Application of the 10 % turnover limit

(25) Article 23(2) of Regulation (EC) No 1/2003 provides 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'* ([5]).

(26) The world-wide annual turnover achieved by Solexis in 2005 was EUR 256 190 307. The fine imposed on Solexis must therefore not exceed EUR 25,619 million.

2.5. Application of the 2002 Leniency Notice

(27) Degussa, EKA, Atofina, Solvay, Solexis and Kemira submitted applications under the Leniency Notice. They co-operated with the Commission at different stages of the investigation with a view to receiving the favourable treatment provided for in the Leniency Notice.

([3]) Such decisions include: As regards *Degussa*: Commission decision of 23 November 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.907 — *Peroxygen products*, OJ L 35 of 7.2.1985, p. 1), Commission decision of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — *Polypropylene*, OJ L 230 of 18.8.1986, p. 1). As regards *Edison*: Commission decision of 27 July 1994 relating to a proceeding under Art. 85 of the EEC Treaty (IV/31865 — *PVC II*, OJ L 239 of 14.9.1994, p. 14). As regards *Solvay*: Commission decision of 23 November 1984 quoted (*Peroxygen products*), Commission decision of 23 April 1986 quoted (*Polypropylene*), Commission decision of 27 July 1994 quoted (*PVC II*). As regards Atofina/*Arkema*: Commission decision of 23 November 1984 quoted (*Peroxygen products*), Commission decision of 27 July 1994 quoted (*PVC II*).

([4]) The increase for recidivism applies only to Atofina and not to its parent companies, Elf Aquitaine and Total, as the latter were not in control of Atofina at the time of the previous infringement. The multiplying factor applied to Total, namely 3 is not included in the calculation. Instead a multiplying factor of 1.25, which would have been applied had Atofina been the sole addressee of the Decision (given its worldwide turnover of 5.7 billion EUR in 2005), is used for the purposes of calculating recidivism. A separate fine is accordingly addressed to Atofina alone for this amount.

([5]) See the judgment of the Court of First Instance of 15 June 2005 in joined cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon Co. Ltd. and Others v Commission*, not yet reported (see OJ C 205 of 20.8.2005, p. 18), paragraph 390.

2.5.1. *Point 8 (a) — Immunity*

(28) Degussa was the first European producer of HP and persalts to inform the Commission of the existence of a cartel in the HP market as well as in the HP-linked PBS market. Degussa has co-operated fully, on a continuous basis and expeditiously throughout the Commission's administrative procedure and provided the Commission with all evidence available to it relating to the suspected infringement, giving details of meetings between competitors as concerns both products and enabling the Commission to prove the existence of a cartel for both products. Degussa ended its involvement in the suspected infringement no later than the time at which it submitted evidence under point 8 (a) of the Leniency Notice and did not take steps to coerce other undertakings to participate in the infringement. Hence, Degussa qualifies for a full immunity from the fine that would otherwise have been imposed on it.

2.5.2. *Point 23 (b), first indent (reduction of 30-50 %)*

(29) EKA was the second undertaking to approach the Commission under the Leniency Notice, on 29 March 2003, and the first undertaking to meet the requirements of point 21 thereof, as it provided the Commission with evidence which represents significant added value with respect to the evidence already in the Commission's possession at the time of its submission.

(30) EKA terminated its involvement in the infringement no later than the time at which it submitted the evidence and its involvement has remained terminated. The Commission therefore will apply a reduction of fines in the band of 30-50 %. The Commission granted EKA a 40 % reduction of the fine.

(31) EKA's evidence enabled the Commission to trace the existence of the cartel back to 31 January 1994. EKA's evidence for the period of the infringement before 14 October 1997 related to facts previously unknown to the Commission which had a direct bearing on the duration of the suspected cartel. In accordance with point 23 of the Leniency Notice, the Commission did not take these elements into account for the purposes of setting the amount of the fine to be imposed on EKA

2.5.3. *Point 23 (b), second indent (reduction of 20-30 %)*

(32) Atofina, (now Arkema), was the second undertaking to meet the requirements of point 21 of the Leniency Notice, as it provided the Commission with evidence which represents significant added value with respect to the evidence already in the Commission's possession at the time of its submission and, to the Commission's knowledge, Atofina terminated its involvement in the infringement no later than the time at which it submitted the evidence. It qualifies, therefore, under the second indent of point 23 (b) of the Leniency Notice, for a reduction of 20-30 % of the fine. In the assessment of the level of reduction within the band of 20-30 %, the Commission took into account the time at which the evidence of significant added value was submitted and the extent to which it represents such value. The Commission granted Atofina a 30 % reduction of the fine that would otherwise have been imposed on it.

2.5.4. *Point 23 (b), third indent (reduction of up to 20 %)*

(33) Solvay was the third undertaking to meet the requirements of point 21 of the Leniency Notice. On 4 April 2003, also soon after its premises had been inspected under Article 14 of Regulation No 17, on 25 March 2003, Solvay submitted an application under the Leniency Notice. The submission on 4 April 2003 met the requirements of point 21 of the Leniency Notice, as Solvay provided the Commission with evidence representing significant added value with respect to the evidence already in the Commission's possession. To the Commission's knowledge, Solvay terminated its involvement in the infringement no later than the time at which it submitted the evidence.

(34) Solvay submits that it contacted the Commission by telephone on the morning of 3 April 2003 to inform it that Solvay wished to make an application under the Leniency Notice. The application by Atofina, made on 3 April 2003 at 15:50hrs enclosed thirteen documents which, according to Solvay, were illegible and/or unintelligible without a transcript or other form of explanation, so that the Commission was unable to make use of any of these documents until a full explanation was provided, on 26 May 2003, in any case after Solvay's leniency application was made.

(35) Solvay submits that a decisive factor in determining whether an application for leniency qualifies for a reduction under the Leniency Notice is the objective quality of the information submitted in terms of the extent to which it is useful to the Commission. Solvay submits that its application for leniency was properly made on the morning of 3 April 2003 and provided significant added value in relation to both HP and PBS. It therefore qualifies for the maximum reduction (50 %) of any fine imposed in relation to the two products.

(36) The Commission considers that EKA's and Atofina's submissions represented significant added value in accordance with point 21 of the Leniency Notice prior to the first submission by Solvay, which only occurred on 4 April 2003. Therefore the Commission rejects Solvay's argument.

(37) Solvay was granted a 10 % reduction of the fine that would otherwise have been imposed on it.

2.5.5. *Other applications under the Leniency Notice*

(38) Solvay Solexis and Kemira also filed applications under section B of the Leniency Notice but no reduction was granted, due to lack of significant added value in their applications.

3. DECISION

(39) The following undertakings have infringed Article 81(1) of the Treaty and Article 53 of the EEA Agreement by participating, for the periods indicated, in a single and continuous infringement regarding hydrogen peroxide and sodium perborate, covering the whole EEA territory, which consisted mainly of exchanges between competitors of information on prices and sales volumes, agreements on prices, agreements on reduction of production capacity in the EEA and monitoring of the anti-competitive arrangements:

(a) Akzo Nobel NV, from 25 February 1994 until 31 December 1999;

(b) Akzo Nobel Chemicals Holding AB, from 31 January 1994 until 31 December 1999;

(c) EKA Chemicals AB, from 31 January 1994 until 31 December 1999;

(d) Degussa AG, from 31 January 1994 until 31 December 2000;

(e) Edison SpA, from 12 May 1995 until 31 December 2000;

(f) FMC Corporation, from 29 May 1997 until 13 December 1999;

(g) FMC Foret S.A., from 29 May 1997 until 13 December 1999;

(h) Kemira OYJ, from 31 January 1994 until 31 December 2000;

(i) L'Air Liquide SA, from 12 May 1995 until 31 December 1997;

(j) Chemoxal SA, from 12 May 1995 until 31 December 1997;

(k) Snia SpA, from 29 May 1997 until 31 December 1998;

(l) Caffaro Srl, from 29 May 1997 until 31 December 1998;

(m) Solvay SA/NV, from 31 January 1994 until 31 December 2000;

(n) Solvay Solexis SpA, from 12 May 1995 until 31 December 2000;

(o) Total SA, from 30 April 2000 until 31 December 2000;

(p) Elf Aquitaine SA, from 12 May 1995 until 31 December 2000;

(q) Arkema SA, from 12 May 1995 until 31 December 2000.

(40) For the infringements referred to in previous recital, the following fines were imposed:

(a) Akzo Nobel NV, Akzo Nobel Chemicals Holding AB and EKA Chemicals AB, jointly and severally: EUR 25,2 million;

(b) Degussa AG: EUR 0;

(c) Edison SpA: EUR 58,125 million, of which EUR 25,619 million jointly and severally with Solvay Solexis SpA;

(d) FMC Corporation and FMC Foret S.A., jointly and severally: EUR 25 million;

(e) Kemira OYJ: EUR 33 million;

(f) L'Air Liquide SA and Chemoxal SA: EUR 0;

(g) Snia SpA and Caffaro Srl, jointly and severally: EUR 1,078 million;

(h) Solvay SA/NV: EUR 167,062 million;

(i) Arkema SA: EUR 78,663 million, of which EUR 42 million jointly and severally with Total SA and EUR 65,1 million jointly and severally with Elf Aquitaine SA.

(41) The undertakings listed above were ordered to bring to an end immediately the infringements referred to in that Article, in so far as they have not already done so and to refrain from repeating any act or conduct described in recital and from any act or conduct having the same or similar object or effect.

COMMISSION DECISION

of 7 June 2006

on State Aid No C 8/2005 (ex N 451/2004) which Germany is planning to implement for Nordbrandenburger UmesterungsWerke

(notified under document number C(2006) 2088)

(Only the German version is authentic)

(Text with EEA relevance)

(2006/904/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provision(s) cited above [1],

Whereas:

1. PROCEDURE

(1) By letter dated 11 October 2004, registered as received on 12 October 2004, Germany informed the Commission of its intention to implement a regional aid measure for NUW Nordbrandenburger UmesterungsWerke. The aid was registered as notified aid number N 451/2004. In response to a Commisison request for information sent on 6 November 2004, Germany submitted further information on 16 December 2004.

(2) By letter dated 16 February 2005 the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the Treaty in respect of the aid.

(3) The Commission's decision to initiate the procedure was published in the Official Journal of the European Union [2]. Interested parties were invited to submit their comments on the aid measure.

(4) By letter dated 22 March 2005, registered as received on 23 March 2005, Germany replied to the initiation of proceedings and submitted comprehensive additional information to the Commission.

(5) The Commission received no comments from interested parties.

(6) As a result of its own investigations the Commission established that the information provided by Germany was not complete and by letter dated 8 November 2005 it sent further questions to Germany. Germany replied on 13 January 2006 and submitted further information.

2. DESCRIPTION OF THE AID

2.1 The recipient and the project

(7) The recipient of the aid is NUW Nordbrandenburger UmesterungsWerke GmbH & Co. KG ('NUW'), located in Schwedt, in the *Land* of Brandenburg, Germany, an assisted area pursuant to Article 87(3)(a) of the Treaty. NUW was established on 4 May 2004. Before the implementation of the planned investment it will not carry out any operational activities. Consequently, in October 2004 NUW did not yet have any full-time or part-time employees.

(8) NUW intends to build and operate in Schwedt a manufacturing plant for biodiesel with an expected annual capacity of 130 000 tonnes and eligible investment costs of EUR 41,84 million. It will mainly deliver to PCK Raffinerie GmbH Schwedt ('PCK'), whose equipment is currently being prepared for the further processing of biofuels.

2.2 The financial measures

(9) The *Land* of Brandenburg wants to grant NUW state aid, under schemes approved by the Commission, of 50 % of the eligible cost with a total aid amount of up to EUR 20,92 million.

(10) The aid will be provided in the form of a direct investment grant of EUR 14,204 million and in the form of an investment premium of EUR 6,716 million on the basis of the joint Federal Government/Länder scheme for improving regional economic structures (in original language: *'Gemeinschaftsaufgabe Verbesserung der regionalen Wirtschaftsstruktur'*) [3] (hereinafter referred to as the GA scheme) and under the aid scheme entitled 'Investment premium for

[1] OJ C 27, 27.1.2001, p. 44.
[2] OJ C 86, 8.4.2005, p. 2.
[3] 'Gesetz über die Gemeinschaftsaufgabe (GA) 'Verbesserung der regionalen Wirtschaftsstruktur' vom 6. Oktober 1969 in Verbindung mit den einschlägigen Bestimmungen von Teil II des 31. Rahmenplans zur GA', the latest prolongation approved by Commission decision under the number N 642/02 on 1.10.2003, OJ C 284, 27.11.2003, p. 2.

investment at operational level in the year 2004' (in original language: *'Investitionszulage für betriebliche Investitionen im Jahr 2004'*) ([4]). Germany will ensure that the 50 % ceiling for aid intensity will not be exceeded.

2.3 Reasons for initiating the formal investigation procedure

(11) Since the aid is based on approved schemes the Commission limits its assessment to the question whether the recipient qualifies as an SME and is thus eligible for an additional SME bonus of 15 % as included in the envisaged aid amount.

(12) According to Article 2 of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (SME Recommendation) ([5]), small and medium-sized enterprises are defined as enterprises which have fewer than 250 employees and have an annual turnover not exceeding EUR 50 million and/*or* an annual balance sheet total not exceeding EUR 43 million.

(13) The concept of undertaking does not require that the recipient be limited to one distinct legal entity; it may encompass an economic group of companies which is larger than an individual SME. Enterprises may be considered to be linked enterprises if they are linked through a natural person and operate in the same relevant market or in adjacent markets.

(14) The link between NUW and other enterprises through natural persons, in particular through members of the Sauter family, may result in joint activities in the same or adjacent markets. Linked enterprises are taken into account jointly when staff headcounts and financial amounts are calculated in establishing the SME status of an enterprise.

(15) With regard to the relations between the above mentioned enterprises, the Commission doubted whether the recipient of the investment aid, NUW, really needs to benefit from the advantages accruing to SMEs from the different rules or measures in their favour and that NUW would be eligible for the notified SME bonus. The Commission also doubted that the recipient complies with the definition of an SME under the SME Recommendation.

3. COMMENTS FROM INTERESTED PART IES

(16) The Commission did not receive any comments from interested parties.

4. COMMENTS FROM GERMANY

Criterion of independence

(17) Germany explains that NUW Verwaltung GmbH is financially not involved in the recipient NUW. Its operational objective is exclusively to take over the management and to assume the liabilities of NUW. All other complementary enterprises ('Verwaltung GmbH') exclusively take over the liabilities of their relevant enterprises and do not carry out further operations.

(18) Whereas Daniela Sauter has a 74 % stake in NUW, her holdings in NBE Nordbrandenburger BioEnergie GmbH & Co. KG, MBE Mitteldeutsche BioEnergie GmbH & Co. KG and SBE Swiss BioEnergy AG do not exceed 50 %. According to Germany there are no other enterprises linked to NUW.

(19) With regard to the partner enterprises Germany states that Daniela Sauter has holdings of 50 % in NBE, 38 % in MBE and 20 % in SBE. Consequently, only the holdings in NBE and MBE would be relevant for the assessment of the recipient's size.

(20) With regard to possible joint behaviour by a group of natural persons, Germany informs the Commission that Daniela Sauter and Georg Pollert as the main partners of NUW appear jointly only with regard to NUW, but not with regard to other undertakings. Their joint interests exclusively concern NUW; apart from the deed of partnership, no other agreements exist.

(21) Germany underlines that regarding the involvement of brothers, parents and the sister-in-law no uniform structure of holdings exists that may involve equal interests. Apart from the fact that they are relatives there are no legal or economic relations between these persons. Apart from the deed of partnership, no other agreements exist.

Relevant markets

(22) According to Germany, NUW and MUW Mitteldeutsche UmesterungsWerke GmbH & Co. KG operate on the same market although their customers are different. The enterprises have a relationship via Mr Pollert, but this is low-key and not significant.

(23) Whereas NUW will produce biodiesel, NBE and MBE are active in the bioethanol market. Although the customers of all three companies are the large oil companies, the input of raw materials and the production processes are substantially different.

The undertakings' management, financial and employment criteria

(24) Since end of 2004 Mr Heidenreich is no longer the manager of NBE Verwaltung GmbH. According to Germany, all the other enterprises involved are managed

([4]) 'Investitionszulage für betriebliche Investitionen im Jahr 2004', approved under the number N 336/2003 on 10.12.2003, based on 'Investitionszulagengesetz 1999 in der Fassung der Bekanntmachung vom 11. Oktober 2002 unter Berücksichtigung des Entwurfs des Steueränderungsgesetzes 2003'; OJ C 67, 17.3.2004, p. 12.

([5]) OJ L 124, 20.5.2003, p. 36.

by different persons and no links between the management of the enterprises exist.

(25) Based on the assumption that NUW, MBE and NBE are partner enterprises and that no linked enterprises exist, Germany calculates the financial and employment figures. With reference to the SME definition, it concludes that this group remains below the critical thresholds for all the SME criteria.

The general contractor SBE Swiss BioEnergy AG

(26) NUW engaged SBE, whose business purpose is the construction and operation of biodiesel plants and the trade in biofuels in Europe, to carry out the construction of the biodiesel plant. Although SBE will finance a part of the investments, Germany states that there are no further dependencies between the two undertakings. In order to ensure that NUW does not become dependent on SBE, only NUW can determine the date of the repayment of the loan.

(27) Further, SBE will pre-finance the direct investment grant from 2004. Germany stresses that the contract between SBE and NUW was drafted in such a way that SBE could not influence NUW's management decisions.

Sauter Verpachtung GmbH

(28) According to Germany, the sale of fuel is of only minor importance and accounts for only 1 % of the turnover of the enterprise. Sauter Verpachtung GmbH has no significant business in the processing of or trade in biodiesel or bioethanol.

(29) However, this enterprise was the main contractor in the construction of the bioethanol production plant of NBE.

(30) Sauter Verpachtung has neither direct legal nor economic relations with NUW.

Conclusions by Germany

(31) Since relations between NBE and MBE only exist via the person of Mrs Daniela Sauter and since there are no further relevant relations to other enterprises, Germany concludes that NUW qualifies as an SME. The participants in NUW are not a jointly acting group of natural persons. According to the *Land* of Brandenburg, family links are insufficient to conclude that there is a joint interest within the meaning of the SME definition.

5. ADDITIONAL INFORMATION PROVIDED BY GERMANY

(32) As part of its own investigations, the Commission found evidence that other undertakings, about which Germany had not informed the Commission, were owned by members of the Sauter family. Replying to the Commission's questions sent in this context to Germany on 8 November 2005, Germany provided additional information on 13 January 2006.

Shareholdings and ownership

(33) In addition to various real estate and wind energy undertakings (Germany did not provide further details) the members of the Sauter family have majority shareholdings in 16 enterprises. Daniele Sauter holds the majority (74 %) of the shares in NUW, for which the SME bonus was notified; she is the sister of Bernd and Claus Sauter. Alois and Albertina Sauter are the parents of Daniele, Bernd and Claus Sauter. Marion Sauter is married to Claus Sauter. Finally, Georg Pollert, who has no family link to the Sauter family, holds 24 % of the shares in NUW.

(34) With the exception of NUW Nordbrandenburger Umesterungswerke *Verwaltung* GmbH ([6]) (Daniela Sauter: 50 %), the Sauter family controls all the Sauter family enterprises via majority shareholdings:

SBE Swiss BioEnergy AG (100 %), Sauter Verpachtung GmbH (100 %), Alois Sauter Landesprodukten-Großhandlung GmbH & Co. KG (100 %), Sauter GmbH (100 %), Compos Entsorgung GmbH (100 %), MUW Mitteldeutsche UmesterungsWerke GmbH & Co. KG (66 %), MUW Mitteldeutsche UmesterungsWerke Verwaltungs GmbH (66 %), AIIEN GmbH (100 %), Autokontor Bayern GmbH (66 %), Autokontor Vertriebs GmbH (60 %), MBE Mitteldeutsche BioEnergie GmbH & Co. KG (100 %), MBE Mitteldeutsche BioEnergie Verwaltung GmbH (100 %), NBE Nordbrandenburger BioEnergie GmbH & Co. KG (100 %), NBE Nordbrandenburger BioEnergie Verwaltung GmbH (100 %) and NUW (74 %).

(35) The business purposes of NUW Nordbrandenburger Umesterungswerke *Verwaltung* GmbH, MUW Mitteldeutsche UmesterungsWerke Verwaltungs GmbH, Mitteldeutsche BioEnergie Verwaltung GmbH and NBE Nordbrandenburger BioEnergie Verwaltung GmbH are to manage and represent other enterprises.

Business relations

(36) According to Germany the term 'Sauter Group' is publicly used only for Alois Sauter Landesproduktengroßhandlung, Sauter Verpachtung and Compos Entsorgung, which closely cooperate in the area of transport and waste treatment. The transport fleet of Sauter Verpachtung and Alois Sauter Landesproduktengroßhandlung carries advertising for biodiesel. Germany cannot explain why credit institutions as NordLB use the term 'group' for some enterprises of the Sauter family.

(37) The enterprises have numerous business relations, which according to Germany cannot be 'fully listed':

([6]) NUW Nordbrandenburger Umesterungswerke *Verwaltung* GmbH is NUW's associate company.

(a) As a general contractor SBE Swiss BioEnergy AG will install the biodiesel plant for the proposed recipient NUW. Further, it will partially finance the investment and pre-finance the investment grant. Sauter Verpachtung GmbH has been the general contractor for setting up the bioethanol plants of MBE GmbH and NBE GmbH and the biodiesel plant of MUW. Furthermore, it constructed several wind energy stations for MUW and MBE. Its gas stations are used by MBE and Autokontor Bayern.

(b) For waste water management, Compos Entsorgung Gmbh uses mainly the transport fleet of Alois Sauter Landesproduktengrosshandlung GmbH and Sauter Verpachtung GmbH. Sauter Verpachtung shares an office building with Compos Ensorgung GmbH and Autokontor Bayern GmbH.

(c) Customers of MUW are Alois Sauter Landesproduktengroßhandlung, Autokontor Bayern, Sauter Verpachtung and MBE. SBE delivers crude oil and refined products to MUW for further processing into biodiesel.

(d) Alois Sauter Landesproduktengroßhandlung lets buildings and ground to Autokontor Bayern and repairs and maintains the transport fleet of Sauter Verpachtung, Autokontor Bayern, MBE and MUW. It operates a gas station for MUW, MBE, Sauter Verpachtung and Autokontor Bayern.

(e) For some time MBE and Sauter Verpachtung were sharing an office building. MBE carries out transport services for Sauter Verpachtung and Autokontor Bayern.

(f) SBE cooperates with MUW, NUW, MBE NBE and Autokontor Bayern.

Relations concerning management and staffing

(38) Formerly, the managing director of NUW, Mr Niesmann, was the operational manager of MUW. Until 2004 the managing director of MBE, Mr Klotz, had power of procuration at Sauter Verpachtung.

(39) The recipient's majority owner, Mrs Daniela Sauter, is the managing director of NBE.

(40) Mr Johne has power of procuration at SBE and worked for MUW until December 2004. Mr Heidenreich was managing director at NBE and took over the same function at NUW.

(41) In specific cases staff may have changed posts between the different enterprises of the Sauter family.

Suppliers and customers of the enterprises of the Sauter family

(42) The enterprises Bunge Deutschland GmbH and Cargill supply both MUW and NUW with vegetable oil. SBE is the common customer of NUW, MUW, MBE and NBE.

6. ASSESSMENT OF SME STATUS

Criteria to qualify for the SME bonus

(43) According to the Annex to the Commission Recommendation of 6 May 2003, an SME is defined as an enterprise which employs fewer than 250 persons and which has an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.

(44) Article 87 (1) of the EC Treaty refers to the concept of undertakings to define the recipients of aid. As the Court of Justice of the European Communities has confirmed, the concept of undertaking is not limited to one distinct legal entity, but may encompass a group of companies ([7]).

(45) According to the case law the Commission is entitled to determine, first, whether an undertaking is part of a group which should be regarded as a simple economic entity and only then ascertain whether that group satisfies the test of the SME Recommendation. Where legally distinct natural or legal persons constitute a simple economic entity, they should be treated as a single undertaking for the purposes of Community competition law. Further, it is necessary to eliminate legal arrangements in which SMEs form an economic group which is much stronger than a normal SME and to ensure that the definition of SMEs is not circumvented for purely formal reasons. The Court of First Instance of the European Communities expressly noted that the Commission has a broad discretion in determining whether companies which form part of a group should be regarded as an economic unit ([8]).

(46) The SME Recommendation concerning the definition of small and medium-sized enterprises adopts this approach. In Article 3(3) of the Annex, it stipulates that enterprises which have a dominant influence over one another through a natural person or a group of natural persons acting jointly are to be considered linked enterprises if they engage in their activity or in part of their activity in the same relevant market or in adjacent markets. Adjacent markets are considered to be markets for a product or services situated directly upstream or downstream of the relevant market.

(47) The judgment of the Court of Justice in Case C-91/01 ([9]) further clarifies how the Commission may decide when assessing the compatibility of an SME bonus : 'If an

([7]) Judgement of the ECJ of 14.11.1984, Case 323/82 *Intermills* v *Commission* [1984] ECR 3808.

([8]) Judgement of the CFI of 14.10.2004, Case T-137/02 *Pollmeier Malchow* v *Commission* [2005] ECR II-3541.

([9]) Judgement of the European Court of Justice of 29.4.2004, Case C-91/01 *Italian Republic* v *Commission* [2004] ECR I-4355, paragraph 54.

enterprise concerned does not in reality suffer from the handicaps typical of an SME, the Commission is entitled to refuse such increased aid. Approving increased aid for enterprises which, although meeting the formal criteria defining an SME, do not suffer from the handicaps typical of an SME would be contrary to Article 87 EC, since such an increase in aid is likely to produce more severe distortions of competition and thus adversely affect trading conditions to an extent contrary to the common interest within the meaning of Article 87(3)(c).'

(48) In order to determine the necessity of the increased aid intensity for the recipient company, the Commission considers that it is necessary to examine various factors such as the shareholding structure, the identity of the managing directors, the degree of economic integration and any other links of the companies involved. By taking into account the above-mentioned principles, the Commission determines whether NUW falls within the scope of the definition of SMEs and whether it could qualify for the increase in the aid intensity.

Relations between the enterprises of the Sauter family

(49) The ownership structure is a primary criterion in analysing the controlling powers in enterprises. It allows proof to be established on links between individual enterprises and conclusions to be reached on economic entities.

(50) With the exception of NUW Nordbrandenburger Umesterungswerke *Verwaltung* GmbH (no turnover, no staff, balance sheet EUR 32 000), in which Daniela Sauter has a shareholding of 50 %, the Sauter family controls 15 enterprises via majority shareholdings (see paragraph 34 and the Annex).

(51) Regarding links between natural persons who control individual enterprises, family relationships appear to be particular close as only six persons are involved.

(52) Daniela Sauter holds the majority (74 %) of the shares in NUW, for which the SME bonus was notified; she is the sister of Bernd and Claus Sauter. Alois and Albertina Sauter are the parents of Daniela, Bernd and Claus Sauter. Marion Sauter is married to Claus Sauter. It follows from this that Daniela, Bernd, Claus, Alois and Albertina belong to the traditional 'core family' and that Marion Sauter is a sister-in-law. Both the quality and the intensity of family relationships limited to only six natural persons appear particularly strong.

(53) Business relationships such as links between the management, overlapping relations to suppliers and clients, common use of logistics (e.g. means of transport, buildings and offices) are considered as further check-points in this case indicating a link between enterprises. These indicators may serve to double-check whether a link via natural persons not only informally but also formally translates into links between the enterprises' business and specific operations.

(54) According to Germany, the enterprises have so many business relationships that they could not be fully listed. First of all, SBE Swiss BioEnergy AG and Sauter Verpachtung serve as general contractors for setting up bioethanol and biodiesel plants operated by entities held by the family. The cooperation between enterprises controlled by the Sauter family particularly in the area of transport, management, staffing and customers demonstrates that the enterprises' activities are coordinated and that joint behaviour is actively sought.

(55) As provided by Germany, three simple examples out of numerous joint activities and instances of cooperation illustrate the link between the different enterprises of the Sauter family. The transport fleet of both Sauter Verpachtung GmbH and Alois Sauter Landesprodukten-großhandlung GmbH & Co. KG carries advertising for biodiesel. Furthermore, Alois Sauter Landesprodukten-großhandlung GmbH & Co. KG owns a helicopter which the members of the family jointly use for their various business activities. The same enterprise maintains and repairs the transport fleet of Sauter Verpachtung GmbH, Autokontor Bayern GmbH, MBE and MUW.

(56) In addition to these business relations, the close relationship between the members of the Sauter family are also evident in numerous real estate and wind energy undertakings.

(57) The Commission considers that, from an economic perspective too, the group of enterprises has to be regarded as one entity. Particularly as a result of the link via natural persons — the Sauter family — but also because of their business relationships and organisational links, the Sauter family can easily coordinate not only their daily operational activities, but also their strategic development as a group. The links between the companies have not been established recently, but appear based on a common history and a planned joint development.

(58) At the Internet site http://www.sauter-logistik.de/Sauter_-Gruppe.htm the enterprises Landesprodukten-Grosshandlung GmbH, Sauter GmbH, Compos Ensorgung GmbH, MUW GmbH, AIIEN GmbH, Autokontor Bayern GmbH and Biodiesel Production S.A present themselves as the Sauter Group, again indicating joint economic behaviour.

(59) Furthermore, banks such as NordLB refer to several enterprises controlled by the Sauter family as the 'Sauter Group'. The appearance of the Sauter enterprises as a group seems to be supported by the bank's analysis. Germany could not explain why the banks refer to the undertakings in this way.

(60) The specific business relations between NUW and SBE Swiss BioEnergy AG underline the profound integration of NUW in the network of enterprises owned by the Sauter family. As mentioned above, SBE Swiss BioEnergy AG will as a general contractor install the biodiesel plant for the proposed recipient NUW. Further, it will partially finance the investment and pre-finance the investment grant.

(61) From the information submitted by Germany (see sections 4 and 5 above), the Commission concludes that undertakings, in which members of the Sauter family individually or jointly have a majority shareholding, belong to a simple economic entity. It appears evident that the members of the family are a group of natural persons acting jointly within the meaning of Article 3(3) of the Annex to the SME Recommendation and act jointly in their business activities.

(62) The different enterprises are largely active in the same or adjacent markets. In this context it should be emphasised that NUW, MUW, MBE and NBE all supply their products to SBE Swiss BioEnergy AG and that three companies of the group (NUW NBE and MBE) sell their production to the large oil companies. On the other hand, NUW and MUW both purchase their vegetable oil, which is their primary pre-product, from Bunge Deutschland GmbH and Cargill GmbH. It also appears important that SBE Swiss BioEnergy AG installs and operates chemical plants for the production of biofuels (such production plants are operated by many enterprises owned by the Sauter family) and that it also trades in biofuels. Apparently Sauter Verpachtung GmbH, Alois Sauter Landesproduktenhandlung and Autokontor Bayern are engaged in transport services, which all the enterprises of the group require to a large extent and may use when necessary. Finally, both biodiesel and bioethanol serve as fuels for vehicles. With regard to the analysis of adjacent markets it is irrelevant that biodiesel is directly used by trucks, while bioethanol is mixed with mineral oil and used by cars. Both products are distributed via similar or indeed the same trading and marketing channels and are ultimately used for transportation services by vehicles. Therefore, the staff numbers and financial data of the enterprises have to be aggregated in order to decide on NUW's status as an SME.

The reference year

(63) According to the Commission Recommendation, the reference year to be considered in order to determine whether the recipient of aid is an SME is that of the last approved accounting period. If an enterprise exceeds either the employee thresholds or financial ceilings, it loses the status of an SME only if the phenomenon is repeated over two consecutive financial years. In the case of newly established enterprises whose accounts have not yet been approved, the data to apply are to be derived from a bona fide estimate made in the course of the financial year.

(64) Quite apart from the years which are taken into account (2002, 2003, 2004 and 2005), the Sauter group consistently exceeded the thresholds for annual turnover and the annual balance sheet total. In 2004 and 2005 it exceeded all the thresholds, including the one concerning staff.

The Sauter Group's staff and financial data

(65) According to the information provided by Germany, the staff and financial data of the enterprises in which the Sauter family has a majority holding (excluding NUW Verwaltung GmbH) for the years 2002, 2003, 2004 and 2005 were as follows:

	2002	2003	2004	2005
Staff	122	164	332	412
Annual turnover in EUR	79 819 124	107 082 928	296 332 725	421 855 238
Annual balance sheet total in EUR	135 966 984	327 657 218	331 071 069	404 652 910

Details of the employment and financial data for each enterprise are set out in the Annex.

(66) According to the Annex to the Commission Recommendation, an SME is defined as an enterprise which employs fewer than 250 persons and which has an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million. Whereas the Sauter group exceeded the thresholds of annual turnover and annual balance sheet total in 2002 and 2003, it actually exceeded all three criteria in 2004 and 2005. Consequently, NUW as a member of this group cannot be considered to be an SME and is therefore not eligible for the SME bonus.

(67) Taking into account the structure of the Sauter group, the links between the shareholders of the different companies and the economic links between the different entities of the group, it further appears that neither the group as a whole nor NUW as a member of the group suffers from the typical handicaps of an SME: in view of the turnover and the annual balance sheet total of the group, it must be assumed that NUW has full access to the financial markets and can finance the envisaged investment on terms similar to those of any large enterprise.

(68) At least NUW, NBE and MBE have large oil companies as customers. Therefore the members of the Sauter group are able to supply beyond the regional or German market. Particularly through SBE Swiss BioEnergy AG they also have access to the necessary technology. As the different members of the group are active on different levels of the production and marketing chain, the Sauter group will be

able to act on the market as an integrated group and not as a typical SME. The Commission concludes that NUW and the Sauter group do not form an SME within the meaning of the definition of the Recommendation and that therefore they do not suffer from the typical handicaps of an SME. Consequently, they are not eligible for the SME bonus.

7. CONCLUSION

(69) In the light of all facts brought to the Commission's attention, the Commission concludes that the state aid which Germany intends to grant to NUW in the form of the SME bonus should be deemed incompatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The aid which Germany is planning to implement for NUW Nordbrandenburger UmesterungsWerke GmbH & Co. KG in the form of an SME bonus is incompatible with the common market. The aid may accordingly not be implemented.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 7 June 2006.

For the Commission

Neelie KROES

Member of the Commission

ANNEX

Enterprises of the Sauter family according to information provided by Germany

Shareholdings															
Bernd Sauter:	33 %	Bernd Sauter:	33 %	Mario Biele:	1 %			Bernd Sauter:	12 %	Bernd Sauter:	12 %				
Claus Sauter:	33 %	Claus Sauter:	33 %	Karl-Heinz Reipert:	1 %			Claus Sauter:	12 %	Claus Sauter:	12 %				
Dr. Georg Pollert	34 %	Dr. Georg Pollert:	34 %	Daniela Sauter :	74 %	Daniela Sauter:	50 %	Daniela Sauter:	38 %	Daniela Sauter:	38 %	Daniela Sauter:	50 %	Daniela Sauter:	50 %
				Dr. Georg Pollert:	24 %	Dr. Georg Pollert:	50 %	Marion Sauter:	38 %	Marion Sauter:	38 %	Marion Sauter:	50 %	Marion Sauter:	50 %
Managing Directors															
Dr. Georg Pollert		Dr. Georg Pollert		Theodor Niesmann		Theodor Niesmann		Dr. Bernd Klotz		Dr. Bernd Klotz		Daniela Sauter and Klaus-Dieter Bettin		Daniela Sauter and Klaus-Dieter Bettin	
MUW Mitteldeutsche UmesterungsWerke GmbH & Co. KG		MUW Mitteldeutsche UmesterungsWerke Verwaltungs GmbH		NUW Nordbrandenburger UmesterungsWerke GmbH & Co. KG		NUW Nordbrandenburger UmesterungsWerke Verwaltung GmbH		MBE Mitteldeutsche BioEnergie Verwaltung GmbH		MBE Mitteldeutsche BioEnergie GmbH & Co. KG		NBE Nordbrandenburger BioEnergie Verwaltung GmbH		NBE Nordbrandenburger BioEnergie GmbH & Co. KG	
represented by MUW Mitteldeutsche UmesterungsWerke GmbH				represented by NUW Nordbrandenburger Umesterungswerke Verwaltung GmbH						represented by MBE Mitteldeutsche BioEnergie Verwaltung GmbH				represented by Nordbrandenburger BioEnergie Verwaltung GmbH	
Product: biodiesel		Product: biodiesel		Product: biodiesel		Product: biodiesel		Product: bioethanol		Product: bioethanol		Product: bioethanol		Product: bioethanol	
2004	EUR	2004	EUR	2004	EUR	2004	EUR	2004	EUR	2004	EUR	2004	EUR	2004	EUR
Turnover:	110 358 000	Turnover:	0	Turnover:	0	Turnover:	0	Turnover:	0	Turnover:	4 104 087	Turnover:	0	Turnover:	12 531 681
Balance sheet:	73 788 863	Balance sheet:	48 084	Balance sheet:	25 085 041	Balance sheet:	28 000	Balance sheet:	48 084	Balance sheet:	60 894 944	Balance sheet:	36 147	Balance sheet:	67 919 722
Employees:	44	Employees:	0	Employees:	2	Employees:	0	Employees:	0	Employees:	76	Employees:	0	Employees:	65
2005 (estimated)	EUR	2005 (estimated)	EUR	2005 (estimated)	EUR	2005 (estimated)	EUR	2005 (estimated)	EUR	2005 (estimated)	EUR	2005 (estimated)	EUR	2005 (estimated)	EUR
Turnover:	120 000 000	Turnover:	0	Turnover:	10 200 000	Turnover:	0	Turnover:	0	Turnover:	26 135 000	Turnover:	0	Turnover:	35 300 000
Balance sheet:	60 000 000	Balance sheet:	50 000	Balance sheet:	48 000 000	Balance sheet:	32 000	Balance sheet:	50 000	Balance sheet:	60 900 000	Balance sheet:	40.000	Balance sheet:	70 000 000
Employees:	44	Employees:	0	Employees:	45	Employees:	0	Employees:	95	Employees:	95	Employees:	0	Employees:	70

Shareholdings

Bernd Sauter:	40 %	Albertina Sauter:	25 %	Bernd Sauter:	50 %	Bernd Sauter:	50 %								
Claus Sauter:	40 %	Alois Sauter:	25 %	Claus Sauter:	50 %	Claus Sauter:	50 %	Claus Sauter:	100 %	Bernd. Sauter:	50 %	Bernd Sauter:	33,33 %	Bernd Sauter:	40 %
Daniela Sauter:	20 %	Bernd Sauter:	25 %	Sauter GmbH:	0 %					Claus Sauter:	50 %	Claus Sauter:	33,33 %	Claus Sauter:	20 %
		Claus Sauter:	25 %									Roland Koch:	33,33 %	Roland Koch:	40 %

Managing Directors

Claus Sauter		Bernd Sauter and Alois Sauter		Bernd Sauter		Bernd Sauter		Alois Sauter		Bernd Sauter		Bernd Sauter		Roland Koch	
SBE Swiss BioEnergie AG		Sauter Verpachtung GmbH		Alois Sauter Landesprodukten-Großhandlung GmbH & Co. KG		Sauter GmbH		Compos Entsorgungs GmbH		ALLEN GmbH		Autokontor Bayern GmbH		Autokontor Vertriebs GmbH	
trade in bioenergy		renting and l, easing, trade, processing and marketing of renewables		*Represented by Sauter GmbH* trade in agricultural products		trade in agricultural products		disposal in agricultural products		energy generation plants		trade in vehicles, transport		trade in vehicles, transport	
2004	EUR	2004	EUR	2004	EUR	2004	EUR	2004	EUR	2004	EUR	2004	EUR	2004	EUR
Turnover:	41 923 832	Turnover:	99 610 485	Turnover:	5 078 988	Turnover:	0	Turnover:	1 120 786	Turnover:	0	Turnover:	18 203 975	Turnover:	3 400 000
Balance sheet:	33 947 576	Balance sheet:	54 695 450	Balance sheet:	5 938 678	Balance sheet:	41 790	Balance sheet:	1 787 142	Balance sheet:	1 442 219	Balance sheet:	4 006 114	Balance sheet:	1 400 000
Employees:	4	Employees:	61	Employees:	37	Employees:	0	Employees:	4	Employees:	0	Employees:	32	Employees:	7
2005	EUR	2005	EUR	2005	EUR	2005	EUR	2005	EUR	2005	EUR	2005	EUR	2005	EUR
(estimated)		(estimated)		(estimated)		(estimated)		(estimated)		(estimated)		(estimated)		(estimated)	
Turnover:	172 220 238	Turnover:	25 000 000	Turnover:	4 800 000	Turnover:	0	Turnover:	1 200 000	Turnover:	0	Turnover:	27 000 000	Turnover:	0
Balance sheet:	95 677 910	Balance sheet:	55 000 000	Balance sheet:	5 900 000	Balance sheet:	43 000	Balance sheet:	1 800 000	Balance sheet:	1 100 000	Balance sheet:	6 000 000	Balance sheet:	100 000
Employees:	7	Employees:	50	Employees:	37	Employees:	0	Employees:	4	Employees:	0	Employees:	60	Employees:	0