



COMMISSION OF THE EUROPEAN COMMUNITIES

**COMMISSION DECISION**

**of 13 September 2006**

relating to a proceeding under Article 81 of the EC Treaty

(Case COMP / 38.456 – Bitumen - NL)

*(notified under document number (2006) 4090)*

## TABLE OF CONTENTS

I. INTRODUCTION.....	6
II. THE INDUSTRY SUBJECT TO THE PROCEEDING .....	7
1. THE PRODUCT .....	7
2. UNDERTAKINGS .....	8
2.1. SHELL .....	8
2.2. KUWAIT PETROLEUM.....	8
2.3. BP.....	9
2.4. EXXONMOBIL .....	9
2.5. KLÖCKNER.....	10
2.6. TOTAL.....	10
2.7. NYNÄS .....	11
2.8. ESHA.....	11
2.9. WINTERSHALL .....	12
2.10. HEIJMANS .....	12
2.11. KWS.....	12
2.12. BAM NBM .....	13
2.13. HBG .....	13
2.14. BALLAST NEDAM.....	14
2.15. DURA VERMEER .....	14
2.16. OTHER ACTORS IN THE INDUSTRY, NOT SUBJECT TO THE PROCEEDING.....	14
2.16.1. ASPHALT PLANTS .....	14
2.16.2. CROW .....	15
3. SIZE, VALUE AND MARKET SHARES .....	16
3.1. THE GEOGRAPHIC SCOPE OF THE ROAD PAVEMENT BITUMEN BUSINESS .....	16
3.2. MARKET SHARES .....	17
III. PROCEDURE .....	19
1. THE COMMISSION’S INVESTIGATION .....	19
2. OTHER INVESTIGATIONS .....	22
IV. DESCRIPTION OF EVENTS .....	24

1.	THE ORGANISATION OF THE CARTEL .....	24
1.1.	GENERAL DESCRIPTION OF THE CARTEL .....	24
1.2.	BITUMEN CONSULTATION .....	25
1.3.	PRE-MEETINGS .....	28
1.4.	W5 MEETINGS .....	30
1.5.	PARTICIPANTS IN MEETINGS .....	31
1.6.	IMPLEMENTATION, MONITORING AND SANCTIONS .....	35
2.	OPERATION OF THE CARTEL .....	36
2.1.	ORIGINS OF THE CARTEL .....	37
2.2.	THE PERIOD 1996-2002 .....	39
V.	APPLICATION OF ARTICLE 81 OF THE TREATY .....	46
1.	THE NATURE OF THE INFRINGEMENT .....	46
1.1.	PRINCIPLES CONCERNING AGREEMENTS AND CONCERTED PRACTICES .....	46
1.2.	PRINCIPLES CONCERNING SINGLE AND CONTINUOUS INFRINGEMENT .....	48
1.3.	APPLICATION TO THE BEHAVIOUR OF THE ADDRESSEES .....	49
1.3.1.	AGREEMENTS AND CONCERTED PRACTICES .....	49
1.3.2.	SINGLE AND CONTINUOUS INFRINGEMENT .....	50
2.	RESTRICTION OF COMPETITION .....	54
2.1.	APPLICATION OF ARTICLE 81(1) OF THE TREATY .....	54
2.2.	APPLICATION OF ARTICLE 81(3) OF THE TREATY .....	56
3.	EFFECT UPON TRADE BETWEEN MEMBER STATES .....	57
4.	DURATION OF THE INFRINGEMENT AND INDIVIDUAL INVOLVEMENT OF UNDERTAKINGS .	59
4.1.	START OF THE INFRINGEMENT .....	59
4.2.	END OF THE CARTEL .....	61
4.3.	INDIVIDUAL INVOLVEMENT IN THE CASE OF UNDERTAKINGS THAT CHANGED OWNERSHIP DURING THE PERIOD OF INFRINGEMENT .....	61
4.4.	PERIOD OF INFRINGEMENT OF EACH UNDERTAKING .....	62
VI.	ADDRESSEES OF THIS DECISION .....	63
1.	GENERAL PRINCIPLES ON LIABILITY .....	63
2.	LIABILITY IN THIS CASE .....	65
2.1.	SHELL .....	68

2.2. KUWAIT PETROLEUM.....	72
2.3. BP.....	75
2.4. KLÖCKNER.....	76
2.5. TOTAL.....	77
2.6. NYNÄS.....	80
2.7. ESHA.....	83
2.8. WINTERSHALL .....	84
2.9. HEIJMANS .....	84
2.10. KWS.....	86
2.11. BAM NBM .....	87
2.12. HBG .....	88
2.13. BALLAST NEDAM.....	89
2.14. DURA VERMEER .....	90
VII. REMEDIES.....	91
1. ARTICLE 7 OF REGULATION NO 1/2003 .....	91
2. ARTICLE 23(2) OF REGULATION NO 1/2003.....	92
3. THE BASIC AMOUNT OF THE FINES.....	92
3.1. GRAVITY.....	92
3.1.1. NATURE OF THE INFRINGEMENT.....	92
3.1.2. ACTUAL IMPACT ON THE MARKET .....	93
3.1.3. SIZE OF THE RELEVANT GEOGRAPHIC MARKET.....	94
3.1.4. CONCLUSION ON GRAVITY .....	94
3.2. DIFFERENTIAL TREATMENT.....	95
3.3. SUFFICIENT DETERRENCE.....	96
3.4. DURATION OF THE INFRINGEMENT .....	97
3.5. CONCLUSION ON THE BASIC AMOUNTS.....	98
4. AGGRAVATING AND ATTENUATING CIRCUMSTANCES .....	99
4.1. AGGRAVATING CIRCUMSTANCES .....	99
4.1.1. RECIDIVISM .....	99
4.1.2. REFUSAL TO COOPERATE WITH OR ATTEMPTS TO OBSTRUCT THE COMMISSION IN CARRYING OUT ITS INVESTIGATIONS .....	100

4.1.3. ROLE OF INSTIGATOR AND LEADER .....	101
4.2. ATTENUATING CIRCUMSTANCES .....	103
4.2.1. PASSIVE OR “FOLLOW MY LEADER” ROLE .....	103
4.2.2. NON-IMPLEMENTATION OF THE AGREEMENTS AND ABSENCE OF BENEFIT .....	105
4.2.3. EARLY TERMINATION OF THE INFRINGEMENT .....	107
4.2.4. EXISTENCE OF REASONABLE DOUBT ON THE PART OF THE UNDERTAKING AS TO WHETHER THE RESTRICTIVE CONDUCT CONSTITUTED AN INFRINGEMENT .....	108
4.2.5. EFFECTIVE CO-OPERATION OUTSIDE THE LENIENCY NOTICE .....	108
4.2.6. PROCEEDINGS OF OTHER COMPETITION AUTHORITIES .....	109
4.3. CONCLUSION ON AGGRAVATING AND ATTENUATING CIRCUMSTANCES.....	110
4.4. APPLICATION OF THE 10% TURNOVER LIMIT.....	110
5. APPLICATION OF THE LENIENCY NOTICE .....	111
5.1. BP.....	111
5.2. KUWAIT PETROLEUM.....	112
5.3. TOTAL.....	113
5.4. NYNÄS.....	113
5.5. SHELL .....	114
5.6. WINTERSHALL .....	115
5.7. CONCLUSION .....	115
6. THE AMOUNTS OF THE FINES IMPOSED IN THIS PROCEEDING .....	115

# COMMISSION DECISION

of 13 September 2006

relating to a proceeding under Article 81 of the EC Treaty

(Case COMP / F / 38.456 – Bitumen - NL)

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

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to 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<sup>1</sup> and in particular, Article 7(1) and Article 23(2) thereof,

Having regard to the Commission Decision of 18 October 2004 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty.<sup>2</sup>

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer in this case<sup>3</sup>,

Whereas:

---

<sup>1</sup> OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (L 68, 6.3.2004, p. 1).

<sup>2</sup> OJ L 123, 27.4.2004, p. 18.

<sup>3</sup> OJ C 176, 28.7.2007, p. 8.

## I. Introduction

- (1) This Decision is addressed to the following undertakings, suppliers and purchasers of road pavement bitumen:

Suppliers:

- BP Nederland BV, BP Refining & Petrochemicals GmbH and BP plc;
- Klöckner Bitumen BV and Sideron Industrial Development BV;
- Kuwait Petroleum (Nederland) BV, Kuwait Petroleum International Ltd and Kuwait Petroleum Corporation;
- Nynäs Belgium AB and AB Nynäs Petroleum;
- Shell Nederland Verkoopmaatschappij BV, Shell Petroleum NV and The Shell Transport and Trading Company Ltd;
- Smid & Hollander BV, Esha Port Services Amsterdam BV and Esha Holding BV;
- Total Nederland NV and Total SA;
- Wintershall AG.

Purchasers:

- Ballast Nedam Infra BV and Ballast Nedam NV;
  - BAM NBM Wegenvbouw BV and Koninklijke BAM Groep NV;
  - HBG Civiel BV;
  - Heijmans Infrastructuur BV and Heijmans NV.
  - Koninklijke Wegenvbouw Stevin BV and Koninklijke Volker Wessels Stevin NV;
  - Vermeer Infrastructuur BV, Dura Vermeer Infra BV and Dura Vermeer Groep NV.
- (2) The undertakings referred to in recital (1) participated in a single and continuous infringement of Article 81 of the Treaty in the Netherlands. This infringement lasted from at least 1 April 1994 until at least 15 April 2002 (hereinafter referred to as the “period of infringement”).<sup>4</sup> The infringement consisted essentially in price fixing practices for road pavement bitumen in the Netherlands between these suppliers, between these purchasers, as well as between these suppliers and purchasers.
- (3) The Commission initiated its investigation into sales and purchases of road pavement bitumen in the Netherlands after it had received an immunity application from BP in June 2002. The investigation covered the period from 1992 to 2002.

---

<sup>4</sup> In Chapter VII of this Decision, the individual duration of the participation of each undertaking is explained.

## II. The industry subject to the proceeding

### 1. THE PRODUCT

- (4) Bitumen is a by-product in the production of fuel. Normally, it is produced during the distillation of specific heavy crude oils. Different crude oils and refinery configurations produce different bitumen types, which can be further modified by the addition of polymers in order to enhance performance. Bitumen is mainly used in the production of asphalt, where it serves as an adhesive binding the other materials together. The remainder of bitumen production goes into various industrial applications.<sup>5</sup>
- (5) The product that is the subject of this Decision is all bitumen used for road construction and similar applications. It is also referred to as penetration bitumen, paving-grade bitumen or pen-grade bitumen. Throughout this Decision it is referred to as ‘road pavement bitumen’.
- (6) BAM NBM Wegenbouw BV and HBG Civiel BV mention in their combined reply to the Statement of Objections that the product concerned is the (standard) road pavement bitumen, with the exclusion of other bitumen products used in road construction, because these other bitumen products were not discussed in the cartel.<sup>6</sup> The Commission does not accept this narrow interpretation of the product concerned. As BP explained in the context of its immunity application the key price agreed upon may have related to standard grades of road pavement bitumen but, building on that, the prices of other bitumen products used in road construction were directly related to and at a premium above the general market price for bitumen of standard paving grade.<sup>7</sup> It was therefore well understood by participants in the cartel that the price changes agreed would apply to all types of road pavement bitumen, including specialty types.<sup>8</sup> ExxonMobil confirmed that bitumen price changes for road building “*will normally influence other bitumen products used in this sector as well.*”<sup>9</sup> This information is also corroborated by various price lists and price change announcements in the Commission’s file.<sup>10</sup> These announcements to asphalt producing and road building clients in principle refer to all road pavement bitumen products and do not exclude special bitumen products used in road building. For example, regular new price lists provided by Shell to its customers applied the announced price increases not only to standard grades and types of road pavement bitumen but also to specialty road pavement bitumen products.<sup>11</sup> In contrast, bitumen for industrial

---

<sup>5</sup> Roofing felts and their adhesives, paints and varnishes, impregnated, treated materials, railroads, water and moisture barriers, dam linings, automotive etc.

<sup>6</sup> Specialty types of bitumen that are developed for specific road pavement applications such as bitumen emulsions, modified bitumen, fluid bitumen.

<sup>7</sup> [redacted]

<sup>8</sup> [redacted] [37024] Reply of 30.9.2003 to request for information.

<sup>9</sup> [redacted] [27036] Reply of 12.9.2003 to request for information.

<sup>10</sup> For instance, [redacted] [21868-21877] inspection documents. [redacted]

<sup>11</sup> [redacted] [17287-17322] inspection documents. These documents also show that specialty road pavement bitumen products were purchased by Dutch asphalt plants, including those owned or participated in by major road builders. See, for example, document [17301].



applications is not concerned by this Decision, as its price development is largely independent of that for road pavement bitumen.<sup>12</sup>

## 2. UNDERTAKINGS

### *Bitumen suppliers subject to the proceeding*

- (7) The following suppliers of bitumen are subject to this proceeding. They are ranked in decreasing order of market share for retail sales of road pavement bitumen in the Netherlands in 2001, the last full year of the infringement.<sup>13</sup>

#### **2.1. Shell**

- (8) The Shell Group is a global group of energy and petrochemical companies. Since 20 July 2005, the Group is owned by a single parent company, Royal Dutch Shell plc, with headquarter in The Hague, the Netherlands. Under the new structure<sup>14</sup> the public shareholders hold the shares in Royal Dutch Shell plc which holds (nearly) all shares in Shell Petroleum NV, a group holding company. Shell Petroleum NV owns the entire share capital of Shell Nederland BV, which in turn is the parent company of Shell Nederland Verkoopmaatschappij BV.<sup>15</sup> The latter is the legal entity within the Shell Group which is responsible for the marketing of road pavement bitumen in the Netherlands. Another operating company, Shell Nederland Raffinaderij BV, used to produce bitumen in the Netherlands in its Pernis refinery, but stopped its production of bitumen in the Netherlands in 1995. Since then, Shell sources the bitumen for the Dutch customers from other producers. Royal Dutch Shell plc, Shell Petroleum NV, Shell Nederland BV, Shell Nederland Verkoopmaatschappij BV and Shell Nederland Raffinaderij BV are all part of the Shell Group of companies. This group is hereafter referred to as ‘Shell’. In 2005, the total worldwide consolidated sales revenue of Shell was EUR 246 606 million<sup>16</sup>. Shell’s retail sales of road pavement bitumen in 2001 in the Netherlands were EUR [between 10 and 15] million.<sup>17</sup>

#### **2.2. Kuwait Petroleum**

- (9) Kuwait Petroleum Corporation, located in Kuwait, is the state-owned oil company of Kuwait. Its marketing operations in Europe are carried out through its subsidiary Kuwait Petroleum International Ltd, located in London, the United Kingdom. The subsidiary that has been involved in the production of bitumen in the European Community since 1993 is Kuwait Petroleum Europoort BV in the Netherlands. The subsidiary selling bitumen in the Netherlands is Kuwait Petroleum (Nederland) BV.

---

<sup>12</sup> [redacted] [27036]. Reply of 12.9.2003 to request for information: “*The industrial sector price changes normally differ from the road building sector.*” [redacted] [37024] Reply of 30.9.2003 to request for information: “*In contrast, the pricing for industrial bitumen followed a completely different pattern.*”

<sup>13</sup> The retail sales of road pavement bitumen are the total sales of road pavement bitumen to asphalt plants and road builders, excluding sales of bitumen for industrial applications and excluding the sales to other bitumen suppliers on the basis of supply or exchange contracts.

<sup>14</sup> See recital (210).

<sup>15</sup> Shell Petroleum NV, Shell Nederland BV and Shell Nederland Verkoopmaatschappij BV are all located in The Hague in the Netherlands.

<sup>16</sup> [redacted], replies of 23.5.2006, 22.6.2006 and 4.7.2006 to requests for information of 8.5.2006 and 9.6.2006.

<sup>17</sup> See footnote 16.

Kuwait Petroleum International Ltd, Kuwait Petroleum Europoort BV, Kuwait Petroleum (Nederland) BV are all, directly or indirectly, 100% owned by Kuwait Petroleum Corporation. This group of companies is hereafter referred to as ‘Kuwait Petroleum’. In 2005, the most recent fiscal year preceding this Decision, the total worldwide consolidated sales revenue of Kuwait Petroleum was EUR 37 053 million.<sup>18</sup> Kuwait Petroleum’s retail sales of road pavement bitumen in 2001 in the Netherlands were EUR [between 10 and 15] million.<sup>19</sup>

### 2.3. BP

- (10) BP is a global energy group, headed by BP plc, located in London, the United Kingdom. Before October 1996 BP marketed bitumen in the Netherlands via its sales subsidiary BP Nederland BV and since October 1996 through a 70/30 joint venture with Mobil that was operated by BP. On 1 January 2000 BP's bitumen business in the Benelux was transferred to ExxonMobil. As from 1 February 2002, BP became again involved in the supply of road pavement bitumen in the Netherlands, when BP Fuels Deutschland GmbH<sup>20</sup> acquired Veba Oel AG (Germany). Veba Oel AG was already active in selling road pavement bitumen in the Netherlands since 31 December 1999, when it took over Wintershall’s downstream oil activities. Veba Oel AG was incorporated into BP Fuels and has ceased to exist as a separate legal entity. The legal entity of Veba Oel that was involved in the manufacturing and marketing of bitumen was Veba Oil Refining & Petrochemicals GmbH. Following the incorporation of its parent company into BP Fuels, it was renamed as BP Refining & Petrochemicals GmbH. BP plc, BP Nederland BV, BP Fuels Deutschland GmbH and BP Refining & Petrochemicals GmbH are all part of the BP group of companies. This group is hereafter referred to as ‘BP’. ‘Veba’ is the name used hereafter for Veba Oel AG and its subsidiary Veba Oil Refining & Petrochemicals GmbH, prior to the acquisition by BP. In 2005, the total worldwide consolidated sales revenue of BP plc was EUR 203 589 million.<sup>21</sup> BP’s retail sales of road pavement bitumen in 2001 in the Netherlands were EUR [between 5 and 10] million.<sup>22</sup>

### 2.4. ExxonMobil

- (11) ExxonMobil is a global energy company. The group is headed by ExxonMobil Corporation, located in the USA. ExxonMobil sells bitumen in the Netherlands through its subsidiary Esso Nederland BV. ExxonMobil has no bitumen production in the Netherlands, but its Belgian subsidiary<sup>23</sup> manufactures bitumen in its Antwerp refinery also for the Dutch market. Esso Nederland BV belongs, via a number of intermediary companies, 100% to ExxonMobil Corporation. These companies form part of the ExxonMobil group of companies and are hereafter referred to as ‘ExxonMobil’. In 2005, the total worldwide consolidated sales revenue of ExxonMobil Corporation was EUR 288 790 million.<sup>24</sup> ExxonMobil’s retail sales of

---

<sup>18</sup> [redacted], replies of 23.5.2006 and 30.6.2006 to requests for information of 8.5.2006 and 9.6.2006. The data relates to the fiscal year ending 31 March 2005.

<sup>19</sup> See footnote 18.

<sup>20</sup> BP Fuels Deutschland GmbH is a wholly-owned subsidiary of Deutsche BP AG, the holding company for all BP group activities in Germany. Both are directly or indirectly owned by BP plc.

<sup>21</sup> [redacted], reply of 23.5.2006 to request for information of 8.5.2006.

<sup>22</sup> See footnote 21.

<sup>23</sup> Esso Belgium, a division of ExxonMobil Petroleum & Chemical BVBA.

<sup>24</sup> Source: ExxonMobil Corporation 2005 Financial and Operating Review: USD 358 955 million.

road pavement bitumen in 2001 in the Netherlands were EUR [between 5 and 10] million.<sup>25</sup>

## 2.5. Klöckner

- (12) Klöckner Bitumen BV, located in the Netherlands, was a wholesaler of bitumen in the Netherlands. Klöckner Bitumen BV was a subsidiary of KHM International BV, a subsidiary of Klöckner & Co. AG.<sup>26</sup> KHM International BV became in 1999 part of the Sideron group of companies.<sup>27</sup> Klöckner Bitumen BV, KHM International BV and its main shareholder, Sideron Industrial Development BV, were all declared bankrupt in 2004.<sup>28</sup> Klöckner Bitumen BV, KHM International BV and Sideron Industrial Development BV are hereafter referred to as ‘Klöckner’. In the last years before the bankruptcy, the reported total annual worldwide consolidated sales revenue of Sideron Industrial BV was around EUR 100 million.<sup>29</sup> Klöckner’s retail sales of road pavement bitumen in 2001 in the Netherlands were EUR [between 5 and 10] million.<sup>30</sup>

## 2.6. Total

- (13) Total SA, the headquarters of which are in Paris, France, is the parent company of the Total group. The Total group is a global energy group that has emerged from the subsequent mergers between Total (France), Fina (Belgium) and Elf (France). Fina has always been active in the sales of bitumen in the Netherlands. Elf entered this market in 1994, but only managed to achieve some volume as from 1997. Total never sold bitumen in the Netherlands before merging with Fina and later Elf. Due to the mergers, different companies were active on the Dutch bitumen market from the start of the investigation period:

- until 1/11/1999:<sup>31</sup> Fina Nederland BV  
Elf Oil BV (Nederland)
- 1/11/1999 – 1/1/2001: TotalFina Nederland NV  
Elf Oil BV (Nederland)
- as from 1/1/2001 - : TotalFinaElf Nederland NV, later Total  
Nederland NV<sup>32</sup>

---

<sup>25</sup> Reply of 23.5.2006 to request for information of 8.5.2006.

<sup>26</sup> A German producer of steel products, non-ferro products, bitumen and construction materials.

<sup>27</sup> A Dutch group with a wide spectrum of industrial service activities and products. Sideron Industrial Development BV (the Netherlands) held 60% and Sifin SA (Luxembourg), another Sideron group entity held the remaining 40% of KHM International BV.

<sup>28</sup> Klöckner Bitumen BV on 21.1.2004 (District Court of The Hague), KHM International BV on 27.1.2004 (District Court of The Hague) and Sideron Industrial Development BV on 20.10.2004 (District Court of Den Bosch). At the time of issuing this Decision, the Commission has no information that these bankruptcy procedures have been closed. Reply of 22.5.2006 of Dengerink en Kremer Advocaten, trustee in the bankruptcy procedure, to request for information of 8.5.2006.

<sup>29</sup> Reply of 11.6.2004 [redacted] [36270-36271], to request for information of 2.6.2004. In the absence of any more detailed information, the Commission will use this figure as best available information for Klöckner’s worldwide consolidated turnover in the last years before the bankruptcy.

<sup>30</sup> Reply of 22.5.2006 [redacted] to the request for information of 8.5.2006.

<sup>31</sup> [redacted] [37094] Reply of 13.9.2003 to request for information. The merger charter was registered on 4.11.1999.

<sup>32</sup> [redacted] [37094] Reply of 13.9.2003 to request for information. TotalFina Nederland NV changed its name to become TotalFinaElf Nederland NV on 1.1.2001. The merger charter between the

The Total group and its predecessors had no bitumen production in the Netherlands. Total manufactures bitumen in its Antwerp refinery and markets part of the production in the Netherlands. Total SA, Total Nederland NV and their legal predecessors are all part of the Total group of companies. This group is hereafter referred to as 'Total'. This reference relates to the consecutive actions of companies of the Fina group, the TotalFina group and the TotalFinaElf group, now Total group.<sup>33</sup> In 2005, the total worldwide consolidated sales revenue of Total SA was EUR 143 168 million.<sup>34</sup> Total's retail sales of road pavement bitumen in 2001 in the Netherlands were EUR [between 5 and 10] million.<sup>35</sup>

## 2.7. Nynäs

- (14) The Nynäs group consists of some thirty companies, with the production and marketing of bitumen and naphtenic specialty oils as its core business. The group parent holding company is AB Nynäs Petroleum, located in Sweden. During the period of the investigation, its continental European bitumen business was operated through Nynäs NV/SA, a Belgian subsidiary of the Nynäs group. Nynäs NV/SA produced bitumen in its Antwerp refinery and marketed part of the production in the Netherlands. Early in 2003, the refinery and the legal entity Nynäs NV/SA were divested, but the bitumen marketing activities for continental Europe were retained and continued from Belgium through Nynäs Belgium AB, a Swedish subsidiary of AB Nynäs Petroleum. AB Nynäs Petroleum, Nynäs NV/SA (until its divestment) and Nynäs Belgium AB are all part of the Nynäs group of companies. This group is hereafter referred to as 'Nynäs'. In 2005, the total worldwide consolidated sales revenue of AB Nynäs Petroleum was EUR 1 472 million.<sup>36</sup> Nynäs' retail sales of road pavement bitumen in 2001 in the Netherlands were EUR [between 5 and 10] million.<sup>37</sup>

## 2.8. Esha

- (15) The Esha group manufactured and marketed bitumen for various applications.<sup>38</sup> Esha Holding BV was the group parent company. The marketing of road building bitumen in the Netherlands took place through its subsidiaries Smid & Hollander BV and since 1997 Smid & Hollander Raffinaderij BV.<sup>39</sup> These entities were all part of the Esha group of companies. Together they are hereafter referred to as 'Esha'. The production of road pavement bitumen in the Amsterdam refinery was stopped in 2002 and in 2005 all those entities of the Esha group were declared bankrupt.<sup>40</sup> In 2004, the last year

---

(disappearing) entity Elf Oil BV (Nederland) and TotalFinaElf NV was registered on 13.6.2001. TotalFinaElf Nederland NV changed its name to Total Nederland NV on 30.6.2003.

<sup>33</sup> It excludes the actions of companies of the Total group before the merger with Fina and it excludes the actions of companies of the Elf group before the merger with TotalFina.

<sup>34</sup> Source: Comptes Total: compte de résultat consolidé 2005.

<sup>35</sup> Replies of 23.5.2006 and 5.7.2006 [redacted] to requests for information of 8.5.2006 and 9.6.2006.

<sup>36</sup> [redacted] reply of 22.5.2006 to request for information of 8.5.2006.

<sup>37</sup> [redacted] replies of 22.5.2006, 14.6.2006 and 23.6.2006 to requests for information of 8.5.2006 and 9.6.2006.

<sup>38</sup> The name Esha is derived from the Dutch pronunciation of the letters S and H, the two initials of Smid & Hollander, the traditional name of the operational entities of the group.

<sup>39</sup> Smid & Hollander Raffinaderij BV later changed name into Esha Port Services Amsterdam BV.

<sup>40</sup> Esha Holding BV and Smid & Hollander BV were declared bankrupt on 23.2.2005. Esha Port Services Amsterdam BV (previously Smid & Hollander Raffinaderij BV) was declared bankrupt on 16.3.2005. All entities of the Esha group have been liquidated, all assets have been transferred to Icopal a/s (Denmark), Kaneb Pipe Line Operating Partnership L.P. (USA) and Erdo (Holding) BV (Netherlands,

before the bankruptcy, the total worldwide consolidated sales revenue was EUR 115 million.<sup>41</sup> Esha's retail sales of road pavement bitumen in 2001 in the Netherlands were EUR [between 5 and 10] million.<sup>42</sup>

## **2.9. Wintershall**

- (16) Wintershall AG (hereinafter referred to as 'Wintershall') is a German energy company, mainly active in oil and natural gas. In the period of investigation, Wintershall manufactured road pavement bitumen in Germany relatively close to the Dutch border and marketed a part of its production in the Netherlands. On 31 December 1999 Wintershall sold its complete downstream oil activities - including bitumen - to Veba Oel AG. In 2005 Wintershall's total worldwide turnover was EUR 8 385 million.<sup>43</sup> Wintershall's retail sales of road pavement bitumen in the Netherlands in 1999, its last year of activity in the bitumen business, were EUR [between 5 and 10] million.<sup>44</sup>

### *Road builders subject to the proceeding*

- (17) The following road builders, purchasers of bitumen (via their asphalt plants), are also subject to this proceeding. They are ranked in decreasing order of bitumen consumption in the Netherlands in 2001, the last full year of the infringement.

## **2.10. Heijmans**

- (18) Heijmans is a major group of companies active in the Dutch construction industry. The group is headed by Heijmans NV. Road construction activities are performed through Heijmans Infrastructuur BV and its operational subsidiary Wegenbouwmaatschappij J. Heijmans BV. Both of these companies are directly or indirectly 100% owned by Heijmans NV. Heijmans NV, Heijmans Infrastructuur BV and Wegenbouwmaatschappij J. Heijmans BV are all part of the Heijmans group of companies. This group is hereafter referred to as 'Heijmans'. In 2005, the consolidated worldwide turnover of Heijmans for all products was EUR 2 835 million.<sup>45</sup> Heijmans' purchases of road pavement bitumen in 2001 in the Netherlands were EUR [between 5 and 10] million.<sup>46</sup>

## **2.11. KWS**

- (19) Koninklijke Volker Wessels Stevin is a major Dutch construction group, consisting of approximately 120 operating companies. The group is headed by Koninklijke Volker Wessels Stevin NV. The road construction activities of the group are performed through Volker Wessels Stevin Verkeersinfra BV and its subsidiary Koninklijke

---

but the bankruptcy procedure has not yet been closed, pending the settlement of a large outstanding claim of Esha Holding against Essential Business Management Inc. (British Virgin Islands) and Alfa Alfa Energy SA (Greece). [redacted], reply of 12.5.2006 to request for information of 8.5.2006.

<sup>41</sup> [redacted], reply of 12.5.2006 to request for information of 8.5.2006.

<sup>42</sup> See footnote 41.

<sup>43</sup> [redacted] reply of 15.5.2006 to request for information of 8.5.2006.

<sup>44</sup> [redacted] reply of 30.9.2003 to request for information of 1.7.2003 and of 23.5.2006 to request for information of 8.5.2006.

<sup>45</sup> [redacted] reply of 22.5.2006 to request for information of 8.5.006.

<sup>46</sup> See footnote 45.

Wegenbouw Stevin BV. The latter is the company within the group that negotiates and purchases bitumen for the production of asphalt in the Netherlands. Both of these companies are directly or indirectly 100% owned by Koninklijke Volker Wessels Stevin NV. Koninklijke Volker Wessels Stevin NV, Volker Wessels Stevin Verkeersinfra BV and Koninklijke Wegenbouw Stevin BV are all part of the Koninklijke Volker Wessels Stevin group of companies. This group is hereafter referred to as 'KWS'. In 2005, the consolidated worldwide turnover of KWS for all products was EUR 3 103 million.<sup>47</sup> KWS' purchases of road pavement bitumen in 2001 in the Netherlands were EUR [between 5 and 10] million.<sup>48</sup>

## 2.12. BAM NBM

- (20) Koninklijke BAM NBM NV emerged on 1 November 2000 when Koninklijke BAM Groep NV took over all building activities of NBM-Amstelland NV.<sup>49</sup> Prior to this operation, Koninklijke BAM Groep had not been very active in road construction, but NBM-Amstelland was an important player in road construction in the Netherlands via its subsidiaries NBM-Amstelland Bouw & Infra BV and NBM Wegenbouw BV<sup>50</sup> and its operational regional subsidiaries. After the merger with NBM, Koninklijke BAM NBM NV therefore became a strong player in the road building sector in the Netherlands via its subsidiary for road construction BAM NBM Wegenbouw BV and its operational regional subsidiaries. On 14 November 2002, Koninklijke BAM NBM NV acquired HBG NV and became Koninklijke BAM Groep NV again.<sup>51</sup> Together, this group of companies is hereinafter referred to as 'NBM', 'BAM' or 'BAM NBM'. In 2001, the last full year before the acquisition of HBG NV, the consolidated worldwide turnover of BAM NBM amounted to EUR 2 916 million.<sup>52</sup> In 2005, the consolidated worldwide turnover of the BAM Groep amounted to EUR 7 425 million.<sup>53</sup> BAM NBM's purchases of road pavement bitumen in 2001 in the Netherlands were EUR [between 5 and 10] million.<sup>54</sup>

## 2.13. HBG

- (21) Hollandsche Beton Groep NV (HBG NV) has a strong tradition in road building via its operational subsidiary Hollandsche Wegenbouw ZanenBV (HWZ BV), which was reorganised to HBG Civiel BV in 2000. Since 14 November 2002, Hollandsche Beton Groep NV and its subsidiaries have been part of the Koninklijke BAM Groep NV (BAM NBM). However, during the entire period of the infringement, the HBG group of companies acted as a separate undertaking from BAM NBM. For the period of the infringement this group of companies is hereafter referred to as 'HBG'.<sup>55</sup> In 2001, the last full year of independent operations, the consolidated worldwide turnover of HBG

<sup>47</sup> [redacted] reply of 23.5.2006 to request for information of 8.5.2006.

<sup>48</sup> See footnote 47.

<sup>49</sup> Reply [redacted] to the Statement of Objections, page 11. The remaining activities of NBM-Amstelland NV, namely project development, trade and industry (construction materials) continued as Amstelland NV.

<sup>50</sup> Previously NBM Amstelland Infrastructuur & Milieu BV.

<sup>51</sup> See Commission Decision COMP/M.2881 (OJ C 36, 15.2.2003, p. 27).

<sup>52</sup> [redacted] [27059] reply of 23.9.2003 to request for information.

<sup>53</sup> [redacted] reply of 24.5.2006 to request for information of 8.5.2006.

<sup>54</sup> See footnote 53.

<sup>55</sup> HWZ is therefore also referred to as HBG throughout this Decision.

NV amounted to EUR 5 617 million.<sup>56</sup> HBG's purchases of road pavement bitumen in 2001 in the Netherlands were EUR [ $< 5$ ] million.

#### **2.14. Ballast Nedam**

- (22) Ballast Nedam is another important Dutch group of companies active in the construction industry. The group is headed by Ballast Nedam NV. Its road construction activities are performed through Ballast Nedam Infra BV.<sup>57</sup> Bitumen is purchased centrally since 1996.<sup>58</sup> The Ballast Nedam group of companies is hereafter referred to as 'Ballast Nedam'. In 2005, the consolidated worldwide turnover of Ballast Nedam for all products was EUR 1 206 million.<sup>59</sup> The purchases of road pavement bitumen in 2001 in the Netherlands were EUR [ $< 5$ ] million.<sup>60</sup>

#### **2.15. Dura Vermeer**

- (23) Dura Vermeer is a group of companies active in the Dutch construction industry. It is a product of the merger between Dura Bouwgroep BV and Vermeer Groep BV in 1998. The group is headed by Dura Vermeer Groep NV. The road construction activities are performed through Vermeer Infrastructuur BV<sup>61</sup>, a wholly-owned subsidiary of Dura Vermeer Infra BV.<sup>62</sup> Dura Vermeer Infra BV is in turn wholly-owned by Dura Vermeer Groep NV.<sup>63</sup> Dura Vermeer Groep NV, Dura Vermeer Infra BV, Vermeer Infrastructuur BV and their various road building subsidiaries are all part of the Dura Vermeer group of companies. This group is hereafter referred to as 'Dura Vermeer'. In 2005, the consolidated worldwide turnover of Dura Vermeer for all products was EUR 1 046 million.<sup>64</sup> The purchases of road pavement bitumen in 2001 in the Netherlands were EUR [ $< 5$ ] million.<sup>65</sup>

#### **2.16. Other actors in the industry, not subject to the proceeding**

##### **2.16.1. Asphalt plants**

- (24) Bitumen suppliers deliver road pavement bitumen as a hot liquid to asphalt plants.<sup>66</sup> The asphalt production plants then immediately mix the bitumen with sand, stones, fillings, and so forth and then deliver the asphalt as a warm substance to the road

---

<sup>56</sup> [redacted] [27059] reply of 23.9.2003 to request for information.

<sup>57</sup> Prior to October 2000, the road construction activities were centralised in Ballast Nedam Grond en Wegen BV (previously Ballast Nedam Wegenbouw BV), a 100% subsidiary of Ballast Nedam Infra BV (previously Ballast Nedam Bouw BV). Ballast Nedam Infra BV is a 100% subsidiary of Ballast Nedam Nederland BV (since February 2003 with the intermediary entity Ballast Nedam Nederland BV in between).

<sup>58</sup> In Ballast Nedam Infra BV and prior to October 2002 in its 100% subsidiary Ballast Nedam Grond en Wegen BV.

<sup>59</sup> Reply [redacted] of 22.5.2006 to request for information of 8.5.2006.

<sup>60</sup> Reply [redacted] of 22.5.2006 to request for information of 8.5.2006.

<sup>61</sup> Previously Vermeer Grond en Wegen BV.

<sup>62</sup> Until 30.9.2003. Vermeer Infrastructuur BV is now a subsidiary of Dura Vermeer Infrastructuur BV.

<sup>63</sup> Via Dura Vermeer Divisie Infra BV.

<sup>64</sup> Previously Vermeer Kunststof Applicaties BV. Since 30.9.2003, Vermeer Infrastructuur BV is wholly-owned by Dura Vermeer Infrastructuur BV. Reply of 30.6.2006 to request for information of 29.6.2006.

<sup>65</sup> See footnote 64.

<sup>66</sup> Asphalt plants are also known as asphalt production plants, mixing plants, asphalt mills, hot mix plants (HMPs), etc.

building sites. In the Netherlands, all asphalt plants are owned by road builders.<sup>67</sup> Therefore, road builders are the real counterparts to the bitumen suppliers, negotiating the commercial contracts on which the deliveries to the asphalt plants are based. In the Netherlands, the bitumen suppliers invoice the asphalt plants on a per ton basis, but commercial rebates, including the W5 rebates which are an object of this Decision, are in most cases directly settled with the road builder.<sup>68</sup> In 2002, there were 51 asphalt plants in the Netherlands.<sup>69</sup> The road builders subject to this proceeding controlled and/or participated in 36 of these 51 plants, in most cases jointly.<sup>70</sup> These asphalt plants accounted for most of the big plants in terms of quantity of bitumen usage. Only 15 asphalt plants were not controlled or participated in by the road builders subject to this proceeding.

## 2.16.2. CROW

- (25) The CROW<sup>71</sup> is a non-profit organization that publishes (*inter alia*) standard prices and later index prices of road pavement bitumen.<sup>72</sup> The standard/index price is a determining factor in the risk settlement mechanism for long term road building projects: where a road building project has been made subject to the risk settlement mechanism, the price of bitumen is not fixed for the duration of the project but can be adapted, under certain conditions, in function of the changing standard/index price. Thus, if the standard/index price for bitumen in the Netherlands increased beyond a certain threshold, road builders would, for contracts that included a risk settlement clause, be entitled to compensation from their clients for the increase in the bitumen price. *Vice versa*, if the standard/index price dropped below a certain threshold, the road builders would have to compensate, for contracts that included a risk settlement clause, their clients for the decrease in the bitumen price.<sup>73</sup>

---

<sup>67</sup> Dutch Competition Authority (Nederlandse Mededingingsautoriteit, hereafter referred to as “NMa”), Decision of 26.2.2003 (case 318), point 114 [36118].

<sup>68</sup> See Chapter IV of this Decision. In cases where a road builder owned an asphalt plant for 100%, commercial rebates could be directly given on the invoice to the asphalt plant or to the road builder owning the plant. In cases where several road builders owned the same asphalt plant, it was usual for the rebates to be granted directly to the road builder that consumed the bitumen delivered to the asphalt plant.

<sup>69</sup> NMa, Decision of 26.2.2003 (case 318), point 90 [36113].  
The number of asphalt plants has fallen from 103 in 1980, to 88 in 1989, 72 in 1994, 51 in 2002 and 46 in 2005.

<sup>70</sup> NMa, Decision of 26.2.2003 (case 318), point 115-121 [36118-36120]: According to the NMa, the common market share of the six major road builders for the production of asphalt was 52.5% in 2001. They participated in 2/3 of all asphalt plants in the Netherlands in 2002: six asphalt plants were exploited individually by a major road builder and they participated in 25 consortia, exploiting 30 asphalt plants. In these consortia, the major road builders often had the biggest participation. They controlled 16 asphalt plants for 100% and had a participation in 20 additional asphalt plants. See also [redacted] [27032] reply of 12.9.2003 to request for information: According to [redacted], the asphalt plants controlled or participated in by the major road builders represent  $\pm$  80% of total Dutch demand for road pavement bitumen.

<sup>71</sup> Centrum voor Regelgeving en Onderzoek in de Grond-, Water- en Wegenbouw en de Verkeerstechniek (Information and Technology Center for Transport and Infrastructure).

<sup>72</sup> Until 1.11.1995, ex refinery standard prices of road pavement bitumen were published by CROW after consultation with the individual asphalt producers. As from 1.11.1995, CROW published an index price that was that was calculated by the governmental organisation CBS (Centraal Bureau voor de Statistiek) on the basis of a market scan covering a number of individual asphalt plants.

<sup>73</sup> See, for instance, [redacted] [17333, 17337] - inspection documents. See also recitals (111), (149) and (151).



- (26) It is important to note is that in order to calculate the standard/index price, CROW uses gross bitumen prices as invoiced to asphalt plants, namely before any rebates. If any thresholds were to be breached, it was also important that the price of bitumen was increased (or decreased) simultaneously or at least within a short period of time by all major market players. If not, the standard/index price could creep up (or down) gradually over time without the price compensation mechanism entering into effect. Road builders therefore generally had an interest in relatively long periods of price stability followed by a significant increase in the gross price by all or most suppliers (breaching the threshold allowing them price compensation) rather than in any piecemeal price increases spread out over time. If any decreases were to take place in the price of bitumen, road builders would normally prefer such decreases in the form of increased rebates (as these did not affect the CROW standard/index price but could positively affect their relative competitive position towards road builders that did not receive equally large rebates) rather than through decreases in the gross price. To the extent that the gross price would be reduced, it was better for road builders if this were done gradually in piecemeal fashion spread out over time, rather than through a single major simultaneous decrease. In general, whatever the precise level of the gross price, road builders were mostly concerned not so much with the absolute level of the gross price as with the relative level of the net price (namely after rebates) compared to the net prices received by competitors.

### **3. SIZE, VALUE AND MARKET SHARES**

#### **3.1. The geographic scope of the road pavement bitumen business**

- (27) Road pavement bitumen must be transported and delivered as a hot liquid because a minimum temperature is required for the production of asphalt. Each point of supply (refinery or bitumen depot) can only deliver a limited geographic area in function of the transport costs. Competition occurs where parts of this geographic area may also be supplied from other points of supply. Furthermore, the suppliers cover wider geographic areas by making bitumen exchange and purchase deals with each other and thus using each others supply sources. In the Netherlands, various suppliers of bitumen are active, despite the fact that at present there is only one refinery left to produce bitumen in the Netherlands.<sup>74</sup> All other suppliers source bitumen from this refinery or from refineries relatively close to the Dutch border in neighboring countries or from a bitumen depot.<sup>75</sup>
- (28) In practice, bitumen suppliers adapt their bitumen sales organisations to the downstream markets of asphalt production and road construction. In the Netherlands, road building constitutes a homogeneous national market and asphalt is sourced almost exclusively from within this Member State.<sup>76</sup> Hence, the suppliers of road pavement bitumen equally market their product on a national basis with sales

---

<sup>74</sup> The only supplier producing bitumen in the Netherlands is Kuwait Petroleum. Shell stopped production in the Netherlands in 1995 and Esha stopped production in 2002.

<sup>75</sup> ExxonMobil, Total and Nynäs manufacture or have manufactured bitumen in Antwerp, Belgium and VebaOel/BP manufacture or have manufactured bitumen in Lingen and Gelsenkirchen in Germany. Since 2002, bitumen can also be sourced from a dedicated bitumen depot in Rotterdam, operated by Sargeant Marine and marketed by Nynäs.

<sup>76</sup> NMa Decision of 26.2.2003 (case 318), points 87, 88 and 89 [36113].

managers responsible for the Netherlands and/or selling through Dutch sales subsidiaries. Prices are set specifically for the Dutch market. The specific Dutch quality requirements relating to bitumen, the risk settlement mechanism for bitumen and the ownership structure of the asphalt plants contribute to the marketing of the product on a national basis. The anti-competitive behaviour which is the object of this Decision also pertained specifically to the Dutch market.

### 3.2. Market shares

- (29) Based on information regarding sales and purchases of road pavement bitumen in the Netherlands provided by the bitumen suppliers and road builders subject to this proceeding, the Commission's best estimates of sales and purchase values and sales and purchase market shares of road pavement bitumen in the Netherlands in 2001, the last full year of the infringement, are as shown in Tables 1 and 2:

**Table 1: Sales values and market shares in the Netherlands in 2001**

Undertaking	Sales values in EUR millions (rounded)	Market share in % (rounded)
Shell	[10-15]	[16-20]
Kuwait Petroleum	[10-15]	[15-19]
BP	[5-10]	[11-15]
ExxonMobil	[5-10]	[11-15]
Klöckner	[5-10]	[8-11]
Total	[5-10]	[8-11]
Nynäs	[5-10]	[8-11]
Esha	[5-10]	[8-11]
	[60-70]	100%

- Notes:
1. The sales values include the sales of road pavement bitumen to asphalt plants and road builders. It excludes sales of bitumen for industrial applications and sales to other bitumen suppliers on the basis of supply or exchange contracts.
  2. The sales value and market share of BP relates to the sales of Veba in the Netherlands in 2001.

3. Wintershall's sales of road pavement bitumen in the Netherlands in 1999, the last year of its activity, before transferring the bitumen business to Veba, amounted to EUR [5-10] million.<sup>77</sup> As the total market in 1999 is estimated at EUR 54 million, this corresponds to a market share of [8-11].<sup>78</sup>

Sources: The replies to requests for information of 30 June 2003 (1 July 2003 to BP) and 10 February 2004<sup>79</sup>, confirmed or corrected by the replies to the request for information of 8 May 2006.<sup>80</sup>

**Table 2: Purchase values and market shares in the Netherlands in 2001**

Undertaking	Purchase values in EUR millions (rounded)	Market share in % (rounded)
Heijmans	[5-10]	[11-15]
KWS	[5-10]	[11-15]
BAM NBM	[5-10]	[8-11]
HBG	[< 5]	[5-8]
Ballast Nedam	[< 5]	[<5]
Dura Vermeer	[< 5]	[<5]
Others	[30-40]	[50-60]
	[60-70]	100%

Notes: The total purchase value equals the total sales value of the bitumen suppliers. The road builders that are not subject to this proceeding were not asked to provide purchase data.

Sources: Replies to request for information of 30 June 2003, confirmed by the replies to the request for information of 8 May 2006.<sup>81</sup>

<sup>77</sup> [redacted] [26005] reply of 30.9.2003 to request for information of 1.7.2003, confirmed in its reply of 23.5.2006 to request for information of 8.5.2006.

<sup>78</sup> [redacted]

<sup>79</sup> [redacted] submission of 30.9.2003 [26005]; [redacted] submission of 29.12.2004 [II-881]; [redacted] submission of 12.9.2003 [23363]; [redacted] submission of 4.9.2003 [23334]. [redacted] only provided the turnover of road pavement bitumen for the Netherlands and Belgium together. As the ratio of total turnover for the Netherlands/Belgium for [redacted] is 80/20 [23333], this ratio was applied to road pavement bitumen. [redacted] submission of 25.8.2003 [38206]; [redacted] submission of 25.3.2004 [35075]; [redacted] submission of 25.8.2003 [37064]; [redacted] submission of 13.9.2003 [24164].

<sup>80</sup> [redacted] (submission of 22.5.2006), [redacted] and [redacted] (submission of [redacted] of 23.5.2006) confirmed the information provided earlier. [redacted] (submission of 23.5.2006), [redacted] (submissions of 23.5.2006 and 30.6.2006), [redacted] (submissions of 22.5.2006, 14.6.2006 and 23.6.2006), [redacted] (submissions of 23.5.2006 and 4.7.2006) and [redacted] (submissions of 23.5.2006 and 5.7.2006) provided the Commission with corrected figures, confirmed by external auditors. [redacted] (submission of 12.5.2006 [redacted]) also provided a different figure.

### III. Procedure

#### 1. THE COMMISSION'S INVESTIGATION

- (30) [redacted]<sup>82</sup>, BP informed the Commission of an alleged cartel existing with regard to road pavement bitumen in the Netherlands [redacted].<sup>83</sup> [redacted].<sup>84</sup> [redacted].<sup>85</sup> On the basis of the information provided, the Commission on 19 July 2002 granted BP conditional immunity from fines, in accordance with point 8(a) of the Leniency Notice.<sup>86</sup> Subsequently, throughout the administrative procedure, BP continued to provide the Commission with information in accordance with point 11 of the Leniency Notice.<sup>87</sup>
- (31) On 1 and 2 October 2002, the Commission carried out surprise investigations pursuant to Article 14(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty,<sup>88</sup> at the premises of the following undertakings in Belgium, the Netherlands and Germany:
- Esha (Smid & Hollander raffinaderij BV)<sup>89</sup>
  - ExxonMobil (Esso Nederland BV, Esso Belgium NV/SA and Exxon Mobil Central Europe Holding GmbH)<sup>90</sup>
  - HBG (HBG Civiel BV)<sup>91</sup>
  - Heijmans (Heijmans Infrastructuur en Milieu BV)<sup>92</sup>
  - Klöckner (Klöckner Bitumen BV)<sup>93</sup>
  - Kuwait (Kuwait Petroleum (Nederland) BV and Kuwait Petroleum Benelux BV)<sup>94</sup>
  - KWS (Koninklijke Wegenbouw Stevin BV)<sup>95</sup>
  - BAM NBM (NBM Noord-West BV)<sup>96</sup>
  - Nynäs (Nynäs NV/SA)<sup>97</sup>
  - Polypetrol GmbH<sup>98</sup>
  - Shell (Shell Nederland Verkoopmaatschappij BV)<sup>99</sup>

---

<sup>81</sup> [redacted] submission of 12.9.2003 [24007] confirmed on 23.5.2006, [redacted]' submission of 12.9.2003 [23794] confirmed on 22.5.2006, submission of [redacted] of 12.9.2003 [23872-23873] confirmed on 24.5.2006, [redacted] submission of 12.9.2003 [23703] confirmed on 22.5.2006, and [redacted] submission of 15.10.2003 [23642] confirmed on 22.5.2006.

<sup>82</sup> [redacted]

<sup>83</sup> OJ C 45, 19.2.2002, p. 3.

<sup>84</sup> [redacted]

<sup>85</sup> [redacted]

<sup>86</sup> [redacted]

<sup>87</sup> [redacted]

<sup>88</sup> (OJ 13, 21.2.1962, p. 204/62). Regulation as repealed by Regulation (EC) No 1/2003. (OJ L 1, 4.1.2003, p.1).

<sup>89</sup> [redacted] [424-900] inspection documents.

<sup>90</sup> [redacted] [13114-15258, II/3-26] inspection documents.

<sup>91</sup> [redacted] [19822-20653] inspection documents.

<sup>92</sup> [redacted] [20654-21514, II/316-321] inspection documents.

<sup>93</sup> [redacted] [15359-15616] inspection documents.

<sup>94</sup> [redacted] [15617-16492, II/27-36] inspection documents.

<sup>95</sup> [redacted] [21515-22550, II/322-325] inspection documents.

<sup>96</sup> [redacted] [19340-19821, II/314-315] inspection documents.

<sup>97</sup> [redacted] [16493-17198, II/37-42] inspection documents.

<sup>98</sup> [redacted] [6897-6977] inspection documents.

– Total (TotalFinaElf Nederland NV and TotalFinaElf België NV/SA).<sup>100</sup>

- (32) The officials authorised by the Commission noted refusals at the premises of Koninklijke Wegenbouw Stevin BV to submit to the investigation ordered by Commission decision, forcing these officials to request the assistance of the national authorities in order to enable them to carry out their investigation.<sup>101</sup>
- (33) On 30 June 2003,<sup>102</sup> the Commission sent out a first round of requests for information to which it received most replies in the period between 28 August 2003 and 2 October 2003.<sup>103</sup> On 10 February 2004<sup>104</sup> and 5 April 2004, the Commission sent out a new round of requests for information to which it received most replies in the period between 20 February 2004 and 22 May 2004.<sup>105</sup> As Klöckner and Esha became bankrupt during the investigative phase, the Commission faced serious difficulties in obtaining minimally reliable data from these undertakings.<sup>106</sup> Other requests for information were sent to third parties.<sup>107</sup>

---

<sup>99</sup> [redacted] [17199-18445, II/44] inspection documents.

<sup>100</sup> [redacted] [18615-19339, II/45-313] inspection documents.

<sup>101</sup> Official reports of refusal of 3.10.2002 [21547 and 33271]. See also Chapter VII.4.1.2. of this Decision.  
<sup>102</sup> The request for information to [redacted] was sent out on 1.7.2003. [redacted] was readdressed on 4.7.2003 and [redacted] was readdressed on 23.7.2003 when [redacted] informed the Commission that it had taken over the bitumen marketing business from [redacted].

<sup>103</sup> Replies were received from [redacted] [37052] on 28.8.2003; [redacted] [27002] on 4.9.2003; [redacted] [38358], [redacted] [23935, 38449], [redacted] [27116], [redacted] [27017], [redacted] [23935, 38449], [redacted] [27047, 38330] and [redacted] [27132] on 12.9.2003; [redacted] [37093 and II/571] on 13.9.2003; [redacted] [38185] on 16.9.2003; [redacted] [37014-37032, 38503, II/719-749] on 30.9.2003; [redacted] [36414] on 2.10.2003 and [redacted] [28406] on 30.12.2003. An additional request for information was sent to [redacted] on 7.10.2003 [13036] and replied to on 16.10.2003 [13067].

<sup>104</sup> The request for information to [redacted] was sent out on 18.2.2004 and the requests for information to [redacted] and [redacted] were sent out on 24.2.2004.

<sup>105</sup> For the request for information of February 2004 the Commission received replies from [redacted] [34453]; [redacted] [36562] on 24.2.2004; [redacted] [33736] on 25.2.2004; [redacted] [38318] on 1.3.2004; [redacted] [36581] and [redacted] [37183] on 2.3.2004; [redacted] [34583] and [redacted] [34718] on 4.3.2004; [redacted] [34983] and [redacted] [37003, 38507] on 9.3.2004; [redacted] [34242] on 12.3.2004; [redacted] [34247] on 15.3.2004; [redacted] [36517] on 25.3.2004, [redacted] [36270] on 11.6.2004 and finally from [redacted] on 3.8.2004 [37044] and 29.12.2004 [II-880].

For the request for information of April 2004, the Commission received replies from [redacted] [35642] on 20.4.2004; [redacted] [35923] on 26.4.2004; [redacted] [35757] on 27.4.2004; [redacted] [38323] on 30.4.2004, [redacted] [36086] on 22.5.2004. [redacted] and [redacted] never replied.

<sup>106</sup> A first request for information was sent to [redacted] on 30.6.2003 [12663]. [redacted] failed to submit a reply, also after being reminded of its duty to reply and the setting of new deadlines on 24.9.2003 [13032]. Eventually, a new request for information was sent to [redacted] on 26.11.2003 [28329] that was partly replied to on 30.12.2003 [37093]. A new request for information was sent to [redacted] on 10.02.04 [32954] but was not answered. On 30.3.2004 the Commission notified [redacted] of a Commission Decision based on Article 11 (5) of Regulation 17, requesting it to provide the information within a period of three weeks [33203]. [redacted] replied to some parts of the request for information on 3.8.2004 [37044], and complemented its reply on 29.12.2004 [II-880], namely after the issuing of the Statement of Objections. A third request for information was sent to [redacted] on 5.4.2004 [33223], but was never answered.

A first request for information was sent to [redacted] on 30.6.2003 [12588] with a reply on 4.9.2003 [27002]. The second request for information was sent to [redacted] and [redacted] on 10.2.2004 [33011] with a reply on 23.2.2004 [33106] from [redacted], that he was not in the position to answer the Commission's request for information. The Commission sent out a reminder to [redacted] on 11.03.2004 [33177] but [redacted] replied to the Commission on 30.3.2004 [33211] that it was not in a

- (34) Kuwait Petroleum submitted an application under the Leniency Notice on [redacted].<sup>108</sup> [redacted].<sup>109</sup> [redacted].<sup>110</sup> [redacted].<sup>111</sup> [redacted].<sup>112</sup>
- (35) Shell submitted an application under the Leniency Notice on [redacted].<sup>113</sup> [redacted].<sup>114</sup> [redacted].<sup>115</sup> [redacted].
- (36) On 18 October 2004 the Commission initiated proceedings in this case and adopted a Statement of Objections that was addressed on 19 October 2004 to Ballast Nedam, BAM NBM, BP, Dura Vermeer, HBG, Esha, ExxonMobil, Heijmans, Klöckner, Kuwait Petroleum, KWS, Nynäs, Shell, Total and Wintershall.
- (37) The undertakings had access to the Commission's investigation file [redacted].<sup>116</sup>
- (38) All undertakings to which the Statement of Objections had been addressed, with the exception of BP, Esha and Klöckner, submitted written comments in response to the objections raised by the Commission and a hearing on the case was held on 15 and 16 June 2005 in which all of these undertakings, with the exception of Klöckner and Esha took part.
- (39) After the hearing on 28 and 30 June 2005, Nynäs and Kuwait Petroleum reformulated some of their statements that had been used in the Statement of Objections, and had subsequently been contested in the hearing by other parties.<sup>117</sup> These clarifications were made accessible to all other attendees to the hearing<sup>118</sup> and many of these undertakings subsequently provided the Commission with their reaction to these

---

position to provide the Commission with answers to its questions regarding [redacted]. The Commission addressed a new request for information to [redacted] on 2.4.2004 [33213], with a reminder on 21.4.2004 [33273]. A new request for information was sent to [redacted] on 5.4.2003 [33247]. On 13.4.2004 [33275] the Commission informed [redacted] that it did not accept the explanation of 30.3.2004 [33211] that [redacted] was not able to answer the Commission request for information of 11.3.2004 [33177] and that two requests for information still had to be answered. On 17.5.2004 [36250] [redacted] provided the Commission with minimal information. The Commission sent a new request for information to [redacted] on 2.6.2004 [36259] and obtained a minimal reply on 11.6.2004 [36270].

107 [redacted] [36272-36282], [redacted] [36300-36312].

108 [redacted]

109 [redacted]

110 [redacted]

111 [redacted]

112 [redacted]

113 [redacted]

114 [redacted]

115 [redacted]

116 [redacted]

117 [redacted] initially stated that [redacted]. These statements were rephrased after the oral hearing to say that an [redacted] employee who had joined [redacted] had pre-existing knowledge about the existence of cartel meetings via his contacts with the major road builders. [redacted] had stated that [redacted]. These statements were rephrased after the oral hearing to say that in the perception of [redacted] must have been aware of the cartel arrangements via its regular contacts with the major road builders and that they had the conviction – via their contacts with the major road builders – that [redacted] deliberately adhered to the prices agreed upon.

118 [redacted]

clarifications.<sup>119</sup> KWS replied on 28 June 2005 information of 24 June 2005, which was the follow-up of an oral question at the hearing that KWS preferred to answer outside the hearing.<sup>120</sup>

- (40) A letter was sent out on 25 January 2006 to all parties to clarify an interpretation in the Statement of Objections that related to price fixing and to give the parties the opportunity to comment upon this clarification to the extent they had not yet done so. Most undertakings that commented upon this clarification answered that it did not alter their previous response to the Statement of Objections.<sup>121</sup>
- (41) Additional requests for information were sent in 2005 and 2006 to Total, HBG and Dura Vermeer with respect to their corporate structure.<sup>122</sup> Another request for information was sent to all parties on 8 May 2006 to confirm or correct their product turnover data provided before and to obtain worldwide turnover data for the year 2005. In this request for information, some individual parties were asked to provide further answers to specific questions concerning their company structure or current status.<sup>123</sup>

## **2. OTHER INVESTIGATIONS**

- (42) [redacted]. As long as the Commission could not exclude that these cartels were objectively linked, the different investigations into anticompetitive practices in the bitumen sectors in different Member States were carried out under a single case number. As soon as it became clear that a particular investigation with respect to anticompetitive practices in another Member State was not objectively linked to the present investigation regarding the Dutch bitumen sector, a separate file and case number were created for such investigation.
- (43) In the access to file procedure and/or in their responses to the Statement of Objections the road builders addressed in this Decision<sup>124</sup> claimed that the files of the other investigations potentially contained information that was relevant for their defense. They argued that these files could contain indications that the bitumen suppliers had organised a cartel that extended beyond the Netherlands and the information concerning the behaviour of bitumen suppliers in other Member States could shed a different light on the respective responsibility of bitumen suppliers and road builders for the events in the Netherlands described in this Decision. They argued that their

---

<sup>119</sup> Submissions of Kuwait Petroleum [redacted], Shell [redacted], ExxonMobil [redacted], Ballast Nedam [redacted], Dura Vermeer [redacted], Heijmans [redacted], KWS [redacted] BAM NBM and HBG [redacted].

<sup>120</sup> The reply was made accessible to all parties [redacted], together with other information (inspection documents and parts of the responses to the Statement of Objections) that the Commission intended to use in this Decision not only vis-à-vis the undertaking that provided this information.

<sup>121</sup> Submissions of Wintershall [redacted], Kuwait Petroleum [redacted], ExxonMobil [redacted], Shell [redacted], KWS [redacted], Heijmans [redacted], Nynäs [redacted], Dura Vermeer [redacted], BAM [redacted] and Ballast Nedam [redacted].

<sup>122</sup> Request for information to Total SA [redacted]; requests for information of [redacted] to Koninklijke BAM Groep NV, HBG NV and HBG Civiel BV [redacted]; request for information of [redacted] to Dura Vermeer Groep NV [redacted].

<sup>123</sup> Replies received in the period between [redacted]. Subsequently some replies had to be clarified via E-mail correspondence and the undertakings that corrected previous data were asked to have the correction confirmed by an external auditor.

<sup>124</sup> [redacted] already made this argument in the access to file procedure.

rights of defence would not be fully respected if they were not granted full access to all of the information emanating from the other bitumen investigations.

- (44) The Commission takes the view that, in principle, the right of access to the file in a particular proceeding does not extend to documents emanating from other investigations, given that such documents normally have no relation to the allegations of fact and of law in the Statement of Objections.<sup>125</sup> The Statement of Objections issued in this proceeding concerned anti-competitive activities in the bitumen market in the Netherlands only. It is clear from the facts described in Chapter IV of this Decision that the cartel did not extend to other Member States. Moreover, the parties involved in other Commission investigations have a legitimate right to the protection of information contained in those investigation files from parties that are not being investigated, as is the case for the Dutch road builders that are addressed in this Decision. As these other Commission investigations are still on-going, their successful conclusion could be undermined by any premature access to those investigation files.
- (45) In this particular case, as bitumen for the Dutch market was also sourced from Belgium and Germany, the Commission provided further access to all inspection documents of bitumen suppliers in Belgium and Germany, to the extent it had not yet done so. [redacted]<sup>126</sup> That concerned a complete descriptive list of all the documents prior to the administrative ‘splitting-up’ of the investigation and a descriptive list of those documents where the Netherlands was mentioned for the period after the administrative ‘split-up’. The Hearing Officer assured himself that those documents which were not mentioned in the descriptive lists could have no objective relation to this proceeding.
- (46) On the basis of those descriptive lists, the parties had an opportunity to argue why any specific document in the other Commission investigations could be relevant. Only Heijmans provided the Commission with its arguments for claiming further access to the individual documents mentioned in those descriptive lists. A meeting was organized between the Commission and Heijmans, in which the Hearing Officer explained the Commission’s position as to the request for further access to the other files. Following this meeting, the Commission answered in writing certain specific questions from Heijmans, thereby enabling it to ascertain that the documents in question had no objective link to the current proceeding and could thus not be relevant for Heijmans’ defense.
- (47) Some parties claim that the investigation, because it only concerned practices in the Netherlands, should have been dealt with by the Dutch Competition Authority (NMa), taking into account the case allocation system within the European Competition Network created by Regulation (EC) No 1/2003. The Commission does not accept this claim. Regulation (EC) No 1/2003 has retained the Community system of parallel competences for the application of Article 81(1) and Article 82 and has extended it to Article 81(3) of the Treaty. It has, in particular, not modified the Commission's competence to investigate any suspected infringements and to adopt decisions under

---

<sup>125</sup> Judgment of the Court of Justice in joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00, *B Aalborg Portland A/S and Others v Commission*, paragraph 126.

<sup>126</sup> [redacted].



Articles 81 and 82 of the Treaty<sup>127</sup>, including infringements that have their main effects in one Member State. The Commission Notice on cooperation within the Network of Competition Authorities<sup>128</sup> sets out principles of the division of work between the Commission and the Member States' competition authorities. Neither Regulation (EC) No 1/2003 nor the Commission Notice creates rights or expectations for undertakings to have their case dealt with by a specific competition authority. Nor is the Commission precluded from acting on a suspected breach of Articles 81 and 82 of the Treaty, including cases that are limited to the territory of a single Member State. It also has to be noted in this context that road pavement bitumen in the Netherlands is sourced from production plants and suppliers in Belgium, Germany and the Netherlands and that the investigation therefore required substantial investigative actions outside the Netherlands.

## IV. Description of events

### 1. THE ORGANISATION OF THE CARTEL

#### 1.1. General description of the cartel

- (48) For a period lasting at least between 1 April 1994 and 15 April 2002, collusion existed between and within a group of bitumen suppliers, consisting of Kuwait Petroleum, Shell, Klöckner, Wintershall, BP, Esha, Total and Nynäs, and a group of large Dutch road builders, consisting of KWS, Heijmans, BAM NBM, HBG, Ballast Nedam and Dura Vermeer, to regularly fix for sales and purchases of road pavement bitumen in the Netherlands as to the following:

- (1) the gross price;<sup>129</sup>
- (2) a uniform (minimum) rebate on the gross price for that group of road builders;
- (3) a smaller (maximum) rebate on the gross price for other road builders.

- (49) The forum in which the gross price and rebates referred to in recital 48 were fixed between the two groups was referred to as the “bitumen consultation” (“bitumenoverleg” in Dutch). Prior to the bitumen consultations, and in order to prepare them, each side (bitumen suppliers and road builders) would normally first meet separately. These meetings were referred to as “pre-meetings” for the bitumen

---

<sup>127</sup> See Article 11(6) of Regulation (EC) No 1/2003. See also Case C-344/98 *Masterfoods v HB Ice Cream*, [2000] ECR I-11369, paragraphs. 46, 47 and 48.

<sup>128</sup> OJ C 101, 27.4.2004, p. 43.

<sup>129</sup> The gross price of road pavement bitumen was the price invoiced to the asphalt plants, before any rebates. As this price was reported (initially by bitumen suppliers and later by the asphalt plants) to CROW and later to CBS in order to be published by CROW as a standard price or, later, index price, this price is sometimes also referred to as ‘list price’, ‘standard price’, ‘book price’, ‘index price’ or ‘reference price’. See also footnote 72. All prices and rebates mentioned in this Decision are per ton of bitumen, unless specifically indicated otherwise.

suppliers.<sup>130</sup> The road builders, for their part, often prepared bitumen consultations in so-called “W5 meetings”.<sup>131</sup>

- (50) [redacted] summarised the system of the bitumen consultations and pre-meetings as follows:

[redacted].<sup>132</sup>

- (51) Over time it became common practice that the road builders participating in the cartel tried to negotiate individually on top of the uniform W5 rebate an extra individual rebate, based on their purchasing volume or in order to bid for especially large projects.<sup>133</sup> These extra rebates for individual W5 members were not discussed collectively and the uniform W5 rebate therefore functioned in practice as a minimum rebate. The agreed smaller rebate to be given to the other, smaller road builders however was meant to function as a maximum rebate.<sup>134</sup>

## 1.2. Bitumen consultation

- (52) The bitumen consultation was the centre of the arrangements between the bitumen suppliers and the W5 road builders in the Netherlands that are the object of this Decision. It appears that in the early years of the cartel, agreements between the two groups were reached through bilateral contacts between the market leaders in each group, namely Shell for the group of bitumen suppliers and KWS for the W5 road builders.<sup>135</sup> As from 1996, bitumen consultation meetings took place in which usually all W5 road builders would participate, whereas the group of bitumen suppliers would normally be represented by one or a few undertakings.<sup>136</sup>

- (53) One of the regular participants for the suppliers, [redacted], describes the existence and typical content of the bitumen consultation meetings as follows:

[redacted]<sup>137</sup>

- (54) Another regular participant among the suppliers, [redacted], described the typical content of the bitumen consultation as follows:

[redacted]<sup>138</sup>

---

<sup>130</sup> Exxon Mobil, although a bitumen supplier in the Netherlands, was not found to have participated in the anti-competitive behaviour during the period of the infringement which is the object of this Decision. Further references to “the bitumen suppliers” must be understood to refer to the group of bitumen suppliers identified in recital (48), which does not include Exxon Mobil.

<sup>131</sup> Also referred to as WO5, W6 or WO6. “W” stands for “Wegenbouwers” (Road builders). “WO” stands for “Wegenbouw Overleg” (= “Road building consultation”). “5” or “6” refers to the number of participants that varied over time between five and six. Hereinafter, the group of major road builders assembled in this forum are referred to as “W5”, even if the actual number of participants may, depending on the period in question, have been five or six.

<sup>132</sup> [redacted]

<sup>133</sup> [redacted]; [redacted] [20192] Inspection document. – internal note of 23.9.1999.

<sup>134</sup> [redacted]; [redacted] [20177] Inspection document – Internal note of 28.3.1994.

<sup>135</sup> See Section IV.2.1.

<sup>136</sup> See Section IV.2.2.

<sup>137</sup> [redacted]

<sup>138</sup> [redacted]

- (55) The road builder [redacted] gave the following description:  
[redacted]<sup>139</sup>
- (56) Another road builder, [redacted], stated:  
[redacted]<sup>140</sup>
- (57) All W5 road construction companies normally participated in the bitumen consultation meetings that were organised. This concerned: KWS, HBG<sup>141</sup>, Heijmans, BAM NBM<sup>142</sup>, Vermeer and from 1996 also Ballast Nedam.<sup>143</sup> As for the bitumen suppliers, normally they would not all participate in the bitumen consultation meetings. Rather, participation in these meetings usually occurred by means of a delegation of the big suppliers.<sup>144</sup> Regular participants on behalf of the group of bitumen suppliers were: Shell, Kuwait Petroleum, Esha and Nynäs.<sup>145</sup> The other members of the group of suppliers, namely Wintershall, Veba, BP, Total and Klöckner, would only participate in the bitumen consultation meetings exceptionally or not at all.<sup>146</sup> They would, however, normally participate in the pre-meetings and be informed of the results of the bitumen consultation afterwards. A [redacted] employee, who participated in the bitumen consultation meetings, recalled [redacted]:  
[redacted]<sup>147</sup>  
[redacted]<sup>148</sup>
- (58) In the Netherlands, the gross price of road pavement bitumen for the next road building season was traditionally negotiated during the winter and the relations between the suppliers and purchasers then remained relatively stable during the rest of the year. As a consequence, the bitumen consultation in principle took place in the period between January and March of each year.<sup>149</sup> However, further meetings could be organised in the course of the year when the cost price of bitumen significantly

---

<sup>139</sup> [redacted] [27146] reply of 12.9.2003 to request for information.

<sup>140</sup> [redacted], reply of 23.5.2005 to the Statement of Objections, paragraph 105

<sup>141</sup> HBG Civiel BV previously operating as HWZ BV and since 14.11.2002 together with BAM NBM in Koninklijke BAM Groep. See Section II.2.13.

<sup>142</sup> BAM-NBM Wegenbouw BV, previously NBM-Amstelland Bouw & Infra BV. Since 14.11.2002 together with HBG in Koninklijke BAM Groep. See Section II.2.12.

<sup>143</sup> [redacted] [22527] Inspection document – Internal note of 25.7.2000 names KWS, NBM, Vermeer Infra, HBG, Heijmans Infra and Ballast Nedam Grond & Wegen (BNGW) as usual road building participants in the meetings with the bitumen suppliers. See [redacted] [19668] Inspection document – invitation for bitumen consultation of 26.3.2000. [redacted] [20139] and [redacted] [22030] Inspection documents - naming KWS, Ballast Nedam, Vermeer, Heijmans, NBM and HWZ as participating road builders in the bitumen consultation of 14.9.1999. See also [redacted], [38281-38282] reply of 16.9.2003 to request for information, [redacted]; [redacted] [36504] reply of 2.10.2003 to request for information and [redacted]

[redacted] and [redacted]

<sup>145</sup> [redacted] [20702] mentions in an inspection document employees of Shell, Nynäs, Esha and Kuwait Petroleum. [redacted] [22030] and [redacted] [20139] mention employees of Shell, Esha and Nynäs for a specific bitumen consultation. See also [redacted] [38281-38282] reply of 16.9.2003 to request for information and [redacted] and [redacted].

<sup>146</sup> [redacted]; [redacted]; [redacted]

<sup>147</sup> [redacted]

<sup>148</sup> [redacted]

<sup>149</sup> See Section IV.2.2.

increased or decreased. The frequency of the meetings therefore varied from year to year.<sup>150</sup> Not every price change resulted in a bitumen consultation.<sup>151</sup>

- (59) The meetings were organised through frequent and informal contacts between the bitumen suppliers and the W5 road builders.<sup>152</sup> No written invitations were issued and the practice was that no documents were to be distributed among participants and that no minutes were to be made.<sup>153</sup> The meetings were usually organised at the premises of KWS in the city of Utrecht, in the centre of the Netherlands. As [redacted] recalled:
- [redacted]<sup>154</sup>
- (60) Since the purpose of most meetings simply was to agree on a single new bitumen price and two rebates, one for the W5 and one for the smaller road builders, the meetings normally did not exceed one hour.<sup>155</sup> For this same reason, it was often not necessary for the participants to take extensive notes to remember what had been decided.
- (61) The normal pattern for these meetings was that the W5 road contractors would, albeit usually after some discussion, often accept the new gross price proposed by the bitumen suppliers<sup>156</sup> provided the latter showed flexibility in respect of the rebates for the W5.<sup>157</sup> Increases in the gross price were sometimes counter-balanced by higher rebates to the W5 road builders.<sup>158</sup> As a result, the level of gross bitumen prices in the Netherlands gradually increased to above the prevailing (net) price levels in neighbouring countries, while the level of W5 rebates also gradually increased. Occasionally, efforts were made to reduce the level of gross bitumen prices in the Netherlands to avoid too large discrepancies with neighbouring countries.<sup>159</sup>
- (62) Following a bitumen consultation meeting, the outcome of the agreement reached on prices and rebates would be communicated to those members of the suppliers group that did not participate in the bitumen consultation meetings (and to any member of the W5 that had missed a particular meeting).<sup>160</sup> Those suppliers that participated in the bitumen consultation meetings represented the absent members of the group of suppliers in those meetings, as previously agreed in the pre-meetings. All of the members of the suppliers group knew about the bitumen consultation meetings taking place and had usually prepared them together in pre-meetings. The absent members were aware that the agreements reached in the bitumen consultation would apply to them.<sup>161</sup> Shortly after the bitumen consultation meeting they would contact - or would

---

<sup>150</sup> [redacted]; [redacted]; [redacted].

<sup>151</sup> [redacted]

<sup>152</sup> [redacted]

<sup>153</sup> [redacted] [27155] reply of 12.9.2003 to request for information: [redacted]

<sup>154</sup> [redacted]

<sup>155</sup> See for instance [redacted] [20635] inspection document. The invitations reveal that only half an hour was scheduled for the (cancelled) bitumen consultation of 14.5.2002.

<sup>156</sup> [redacted]

<sup>157</sup> [redacted] [21818] Inspection document. Report on bitumen consultation of 29.1.2002. [redacted]

<sup>158</sup> Sometimes also the bitumen suppliers would compensate the W5 for price increases that they could not recuperate from their clients. See Kuwait Petroleum [II/791] statement of 1.10.2003, HBG [20139] Inspection document and Section IV.2. (for instance recitals (106) and (107)).

<sup>159</sup> See Section IV.2. (for instance, recitals (111) and (116)).

<sup>160</sup> [redacted]

<sup>161</sup> [redacted]

[redacted] reply of 23.5.2005 to the Statement of Objections, paragraph 105, cited in recital (56).

be contacted by - a member of either group, to be informed of the outcome, so that they could implement the result at the same time as the other suppliers.<sup>162</sup> [redacted]<sup>163</sup> [redacted]:

[redacted]<sup>164</sup>

Often these contacts took place via telephone and occurred well before the price increase or decrease was officially announced to clients in writing.<sup>165</sup>

- (63) Regarding the question whether bitumen suppliers or road builders took the initiative in organising bitumen consultation meetings, opinions differ between the two sides, each claiming that the other side took the initiative.
- (64) [redacted] stated, for instance:  
[redacted]<sup>166</sup>
- (65) [redacted] has a somewhat different recollection:  
[redacted]<sup>167</sup>
- (66) [redacted] also stated:[redacted].<sup>168</sup>
- (67) These two statements correspond to the extent that it appears that in practice it was often Shell<sup>169</sup> that approached KWS with a proposed price change. Whether Shell would then request KWS to convene the other road builders for a bitumen consultation, as KWS argues, or whether KWS did this on its own initiative, as Shell claims, remains unclear from the available statements and contemporaneous documents. However, the fact remains that both Shell and KWS took an active part in the organisation of bitumen consultation meetings and that both groups fully participated in the system of the bitumen consultation.

### 1.3. Pre-meetings

- (68) Prior to the bitumen consultation meetings with the road builders, the bitumen suppliers would usually organize a preparatory meeting among themselves, referred to as “pre-meeting”, to agree on a common position for the forthcoming meeting with the W5 road builders. All members of the group of bitumen suppliers regularly participated in these pre-meetings, including those members that would normally not subsequently participate in the bitumen consultation meeting with the W5<sup>170</sup>. In these pre-meetings, the bitumen price which the group of suppliers intended to propose to

---

<sup>162</sup> [redacted]

<sup>163</sup> [redacted]

<sup>164</sup> [redacted]

<sup>165</sup> [redacted] [II/757] reply of 13.9.2003 to request for information: [redacted]

<sup>166</sup> [redacted] [27146] reply of 12.9.2003 to request for information [redacted]

<sup>167</sup> [redacted] reply of 20.5.2005 to the Statement of Objections, paragraphs 31 and 32.

<sup>168</sup> [redacted] reply of 20.5.2005 to the Statement of Objections, paragraph 60.

<sup>169</sup> In later years, after Kuwait Petroleum had become a major supplier of bitumen in the Netherlands, it could also happen that Kuwait was the first among the suppliers to suggest a price increase. [redacted]

<sup>170</sup> [redacted], [redacted]

the road builders was agreed and the position as to the rebates to be given to the W5 and other road builders were discussed.<sup>171</sup>

(69) Pre-meetings would normally be arranged directly among bitumen managers via mobile phone.<sup>172</sup> There was no secretariat and no written agendas or documents were distributed, whether before or after the meeting.<sup>173</sup> Different hotels and restaurants in the Netherlands were used as locations<sup>174</sup>. [redacted]<sup>175</sup> [redacted]<sup>176</sup> [redacted]<sup>177</sup> [redacted]<sup>178</sup> [redacted]<sup>179</sup> [redacted]<sup>180</sup> Each time someone else would organize the meeting. The duration of the meetings varied from one to five hours in exceptional circumstances.<sup>181</sup> Occasionally, topics for discussion were illustrated on a flip-chart or blackboard. At the end of the meeting someone would make sure that any papers would disappear.<sup>182</sup>

(70) The existence of these pre-meetings and their typical content was described by participants as follows:

[redacted]<sup>183</sup> [redacted]<sup>184</sup> [redacted]<sup>185</sup>

[redacted]<sup>186</sup> [redacted]<sup>187</sup>

[redacted]<sup>188</sup> 189

[redacted]<sup>190</sup>

(71) The W5 road builders were aware that the group of bitumen suppliers prepared the bitumen consultation through pre-meetings and that the agreements reached in the bitumen consultation would apply to the entire group of suppliers.

[redacted] stated, for instance:

[redacted]<sup>191</sup>

---

<sup>171</sup> [redacted] See also [redacted]

<sup>172</sup> [redacted]

<sup>173</sup> [redacted]

<sup>174</sup> [redacted]; [redacted]

<sup>175</sup> [redacted]

<sup>176</sup> [redacted]

<sup>177</sup> [redacted]

<sup>178</sup> [redacted]

<sup>179</sup> [redacted]

<sup>180</sup> [redacted]

<sup>181</sup> [redacted]

<sup>182</sup> [redacted]; [redacted]

<sup>183</sup> [redacted]

<sup>184</sup> [redacted]

<sup>185</sup> [redacted]

<sup>186</sup> [redacted]

<sup>187</sup> [redacted]

<sup>188</sup> Cobouw is a daily newspaper for the construction sector that publishes (inter alia) tenders and tender results in the Netherlands. See [www.cobouw.nl](http://www.cobouw.nl).

<sup>189</sup> [redacted]

<sup>190</sup> [redacted]

<sup>191</sup> [redacted], Reply of 23.5.2005 to the Statement of Objections, paragraph (106).

[redacted] recalled:

[redacted]<sup>192</sup>

#### **1.4. W5 meetings**

- (72) During the period of the infringement, the five - at some stage six - largest road builders in the Netherlands used to regularly meet with each other. They referred to these meetings as “WO5” or “WO6”.<sup>193</sup> When such a meeting served exclusively to prepare a bitumen consultation meeting with the suppliers, it most often took place immediately preceding the bitumen consultation meeting. As [redacted] wrote:

[redacted]<sup>194</sup> and [redacted]<sup>195</sup>

- (73) [redacted] stated in this respect:

[redacted]<sup>196</sup>

- (74) [redacted] described it in the following way: [redacted].<sup>197</sup> The bitumen suppliers were therefore aware that the W5 road builders met each other in preparation of the bitumen consultation.<sup>198</sup>

- (75) Occasionally bitumen consultation meetings were also prepared by the W5 road builders as part of a W5 meeting with a much larger agenda, including legitimate issues such as environmental requirements, safety issues, social conditions, standardization, representations in branch organisations, and so forth.<sup>199</sup>

- (76) Like most bitumen consultation meetings, the preparatory W5 meetings usually took place at the headquarters of KWS. Invitations were sent out by telephone, but the Commission also found a written invitation: on 21 March 2000 KWS sent an invitation by fax to NBM, HBG, Ballast Nedam, Dura Vermeer and Heijmans for a bitumen consultation on 28 March 2000 at 17 hours.<sup>200</sup> This invitation mentions that the employees of KWS would like to briefly pre-discuss with the other road builders at 16h. The representatives of the W5 road builders who participated in the W5 meetings that prepared the bitumen consultation meeting were the same individuals who participated for the W5 road builders in the bitumen consultation meeting itself.

---

<sup>192</sup> [redacted] Reply of 20.5.2005 to the Statement of Objections, page 28.

<sup>193</sup> As mentioned in footnote 131, WO stands for “Wegenbouw Overleg” (= Road construction Consultation) and 5 or 6 refers to the number of participants. These meetings will hereinafter also be referred to as “W5 meetings”. Initially, there were five participants: Heijmans, HWZ (later HBG), KWS, NBM (later BAM NBM) and Vermeer. Subsequently, Ballast Nedam joined the group, HWZ became HBG and NBM became BAM NBM.

<sup>194</sup> [redacted] [27155] reply of 12.9.2003 to request for information: [redacted]

<sup>195</sup> [redacted] [27155] reply of 12.9.2003 to request for information: [redacted]

<sup>196</sup> [redacted]

<sup>197</sup> [redacted]

<sup>198</sup> See also [redacted] ; [redacted] [36498] reply of 2.10.2003 to request for information..

<sup>199</sup> The Dutch Competition Authority (NMa) concluded in 2005 that in such meetings KWS, HBG, BAM NBM, Heijmans, Ballast Nedam and Dura Vermeer also shared the Dutch market for a number of large road building projects, NMa, Decision of 29.3.2005 in case 4570-22. See [www.nmanet.nl/Images/4570\_tcm16-73912.pdf] (16.05.2006).

<sup>200</sup> [redacted] [19667] inspection documents.

## 1.5. Participants in meetings

- (77) As mentioned in recitals (68) and (72) all bitumen suppliers, with the exception of ExxonMobil, regularly participated in the pre-meetings and all W5 road builders regularly participated in the W5 meetings. As mentioned in recital (57), all W5 road builders also regularly participated in the joint bitumen consultation meetings with a delegation of the bitumen suppliers, usually Kuwait Petroleum, Shell, Esha and Nynäs. It concerned the same individuals that participated in the prior pre-meetings and W5 meetings.

### *Suppliers*

- Shell participated in bitumen consultation meetings with the W5 road builders and pre-meetings with the bitumen suppliers.<sup>201</sup> Participation in meetings and contacts took place via the [employee] of Shell Nederland Verkoopmaatschappij BV, the operating company selling bitumen in the Netherlands.<sup>202</sup>
- Kuwait Petroleum participated in the bitumen consultation meetings with the road builders and pre-meetings with the bitumen suppliers via the [employee] of Kuwait Petroleum Benelux BV and occasionally the [employee] of Kuwait Petroleum (Nederland) BV.<sup>203</sup> Kuwait Petroleum (Nederland) BV was the entity selling bitumen in the Netherlands and Kuwait Petroleum Benelux BV was a service company, operating for the Kuwait Petroleum companies that were active in the Benelux region, including Kuwait Petroleum (Nederland) BV. These companies in the Benelux had a common management and were generally referred to within the Kuwait Petroleum group as KP Benelux.
- Veba (later BP) and previously Wintershall participated in the pre-meetings of bitumen suppliers and exceptionally in a bitumen consultation meeting with the W5 road builders.<sup>204</sup> Participation took place via the [employees] responsible for (*inter alia*) the Netherlands. When Wintershall transferred its bitumen business to Veba, the bitumen sales team of Wintershall was relocated to Veba and continued to participate.<sup>205</sup> When they did not attend the bitumen consultation meeting with the W5 road builders, they would normally receive price information from competitors, in particular Kuwait Petroleum and Klöckner, and acted upon it.<sup>206</sup> They continued to receive information and to act upon it when Veba was acquired by BP.
- BP also participated in pre-meetings via BP Nederland BV until 1 January 2000, when the Dutch bitumen activities were transferred to ExxonMobil.

---

<sup>201</sup> Se for instance [redacted] [17338] Inspection documents. Internal note of 6.2.1995; [redacted] [20139] inspection document; [redacted]; [redacted].

<sup>202</sup> [redacted]; [redacted]; [redacted] [20139] inspection document.

<sup>203</sup> See for instance [redacted] [20139] inspection document; [redacted]; [redacted]; [redacted].

<sup>204</sup> [redacted].

<sup>205</sup> Participation in the meetings took place at the level of [redacted].

<sup>206</sup> [redacted]; [redacted] [38281-38282] reply of 16.9.2003 to request for information.



- Klöckner participated in pre-meetings via [employee] and later via the [employee] of Klöckner Bitumen BV.<sup>207</sup> Being a pure bitumen trader, Klöckner generally pushed for a higher bitumen price since its margin was smaller than the margin of the other bitumen manufacturers.<sup>208</sup> Still, Klöckner benefited from the cartel arrangements, as it traditionally supplied a relatively large number of small road builders.<sup>209</sup> On the basis of the cartel arrangements, these smaller road builders were given lower rebates and therefore Klöckner could still profit from a higher margin.
- Total and previously Fina participated in pre-meetings and exceptionally<sup>210</sup> in a bitumen consultation meeting. Participation took place via the [employee] of Fina Nederland BV. Following the mergers with Total (1999) and Elf (2001) this [employee] became the [employee] of TotalFina Nederland NV and TotalFinaElf Nederland NV, now Total Nederland NV, and continued the participation in cartel meetings. Total Nederland NV amended its pricing in function of the expectations of the road construction companies and the major bitumen suppliers.<sup>211</sup>
- Nynäs was represented in the pre-meetings of bitumen suppliers by the [employee] of Nynäs NV/SA and later the [employee].<sup>212</sup> The [employee] of Nynäs NV/SA was also informed, but he did not participate in the meetings.<sup>213</sup> In the meetings, Nynäs always pushed for a greater share as it was a relative newcomer on the market, but with a lot of production capacity.<sup>214</sup> Despite its relative small market share in the Netherlands, Nynäs insisted to also take part in the bitumen consultation meetings with the W5 road builders.<sup>215</sup>
- Esha participated in the pre-meetings of bitumen suppliers and as a manufacturer of bitumen in the Netherlands normally also in the bitumen consultation meetings with the W5 road builders. For Esha, participation in the meetings took place via a [employee] of the parent company Esha Holding BV, later a [employee] of Smid & Hollander BV and Smid & Hollander Raffinaderij BV (the entities marketing bitumen in the Netherlands).<sup>216</sup>

#### *W5 road builders*

---

<sup>207</sup> [redacted] [38282, II/800] reply of 16.9.2003 to request for information and [redacted]; [redacted].

<sup>208</sup> [redacted]

<sup>209</sup> [redacted]

<sup>210</sup> [redacted]

<sup>211</sup> [redacted] [37109] reply of 13.9.2003 to request for information.

<sup>212</sup> [redacted]

<sup>213</sup> See footnote 212.

<sup>214</sup> See footnote 212.

<sup>215</sup> [redacted], [redacted] [38281-38282 and II/799] reply of 16.9.2003 to request for information and [redacted], [redacted] [20139] inspection document, [redacted] [20702] inspection document.

<sup>216</sup> [redacted] See [redacted] in combination with [redacted] [28408-28409] reply of 30.12.2003 to request for information. See also [redacted]

- Heijmans participated in both the bitumen consultation meetings and the prior W5-meetings via a [employee] of the road building entity Heijmans Infrastructuur en Milieu BV (now Heijmans Infrastructuur BV).<sup>217</sup>
- KWS participated in both the bitumen consultation meetings and the prior W5-meetings via a [employee] of the road building entity Koninklijke Wegenbouw Stevin BV, where the purchasing of bitumen was centralised.<sup>218</sup>
- BAM NBM and previously NBM participated in both the bitumen consultation meetings and the prior W5-meetings.<sup>219</sup> Participation in these meetings took place via the [employee] of the operational road building entity NBM Noordwest BV (later BAM NBM Wegenbouw Noordwest BV) and continued when he became [employee] of the road building parent company BAM NBM Wegenbouw BV, where the purchasing of bitumen was centralised.<sup>220</sup>
- HBG participated in both the bitumen consultation meetings and the prior W5-meetings.<sup>221</sup> Participation in these meetings took place at the level of the road building company HBG Civiel BV (previously HWZ BV).<sup>222</sup>
- Ballast Nedam joined the cartel in 1996 when it was accepted by the others as being a major road builder and started to participate in both the bitumen consultation meetings and the prior W5-meetings.<sup>223</sup> Participation in the collusive contacts took place via a [employee] of the road building subsidiary Ballast Nedam Grond en Wegen BV and continued when he became [employee] of Ballast Nedam Infra BV, which was then formally put in charge of the central purchasing of bitumen.<sup>224</sup>
- Dura Vermeer and previously Vermeer participated in both the bitumen consultation meetings and the prior W5-meeting.<sup>225</sup> Participation took place via a [employee] of the road building subsidiary Vermeer Infrastructuur BV (previously Vermeer Grond en Wegen BV).<sup>226</sup> When he became [employee] of

<sup>217</sup> See [redacted] [II/317, II/319, 20752, 20753, 20756, 20759, 20761, II/327, II/329, 23817, 23819, 23821, 23822, 23825, 23827, 23830, 23836, 23843, 23845, 23853, 23858, 23860]; [redacted] [20702] inspection document; KWS [22030, 22527] inspection documents; [redacted] [20139] inspection document; [redacted] [19667] inspection document.

<sup>218</sup> See [redacted]; [redacted] inspection documents – internal notes and reply of 12.9.2003 to request for information [11554, 11557, 11354, 9223, 9222, 11356, 11357, 11352, 11350, 11349, 11348, 21819, 11346, 12089, 22527, 27147, 24018]; [redacted] [20139] inspection document.

<sup>219</sup> [redacted]

<sup>220</sup> See [redacted] [19667, 19665, 19666, 19688], [redacted] [22030, 22527] inspection documents; [redacted].

<sup>221</sup> [redacted] [20139].

<sup>222</sup> [redacted] See [redacted]. [II/335, 20479, 20238, 20470, 20406, 20635, 20632, II/331]. See also [redacted] [22030, 22527] and [redacted] [19667].

<sup>223</sup> [redacted]. [redacted] [20139] inspection document. The exact duration of the infringement for Ballast Nedam is explained in recital (180).

<sup>224</sup> [redacted]. See for instance [redacted] [22030, 22527] inspection document. [redacted], [redacted] [19667] inspection document [redacted] [36504] reply of 2.10.2003 to request for information. [redacted] [38369, 38384, 38399].

<sup>225</sup> [redacted] [20139] inspection document, [redacted].

<sup>226</sup> [redacted] [23722-23740] [redacted]; [redacted] [19667] inspection document; [redacted] [22527] inspection document, [redacted].

the infrastructure division head company Dura Vermeer Infra BV, he continued to participate in the cartel meetings.

- (78) In summary, the representatives of the undertakings concerned that have been identified as regular participants in the different types of meetings during the period of the infringement are as shown in Table 3:

**Table 3 – Regular participants in meetings<sup>227</sup>**

<b>Undertaking</b>	<b>Bitumen consultation</b>	<b>Suppliers' pre-meeting</b>	<b>W5 meeting</b>
Shell	[redacted]	[redacted]	N/A
Kuwait Petroleum	[redacted]	[redacted]	N/A
BP		[redacted]	N/A
Veba → BP		[redacted]	N/A
Klöckner		[redacted]	N/A
Total		[redacted]	N/A
Nynäs	[redacted]	[redacted]	N/A
Esha	[redacted]	[redacted]	N/A
Wintershall		[redacted]	N/A
Heijmans	[redacted]	N/A	[redacted]
KWS	[redacted]	N/A	[redacted]
BAM NBM	[redacted]	N/A	[redacted]
HBG	[redacted]	N/A	[redacted]
Ballast Nedam	[redacted]	N/A	[redacted]
Dura Vermeer	[redacted]	N/A	[redacted]

Sources: [redacted] [19665-19668, 19688, 23909, 20406, 20470, 20479, 20632, 20635, 23904]; [redacted] [38369, 38384, 38399, II/833]; [redacted] [II/665, II/684-685]; [redacted] [23720-23745]; [redacted] [20139, 20187]; [redacted] [20702, 38330-38352]; [redacted] [38281-38282, II/792-804, II/814]; [redacted] [19667-19668, 22030, 22527, 27147-27155]; [redacted] [36499-36504]; [redacted] [13050].

<sup>227</sup> Certain information in the Commission file also names other participants. These names are not listed as their participation could not be confirmed through other sources. See for instance [redacted] or [redacted] [22030] inspection document.

Note: Arrows (→) indicate replacements during the period of the infringement; N/A stands for “Not applicable”.

## 1.6. Implementation, monitoring and sanctions

- (79) Once changes to the gross bitumen price had been agreed through the bitumen consultation, the group of bitumen suppliers would implement these changes<sup>228</sup> by sending letters announcing the forthcoming price changes to all customers in the Netherlands. The new gross bitumen prices agreed with the W5 road builders therefore concerned all sales by these suppliers of road pavement bitumen in the Netherlands, including those to road builders that were not part of the W5.<sup>229</sup> As a justification for the price changes, developments relating to the price of oil would often be mentioned. The entry into force of the new prices would normally be virtually simultaneous.<sup>230</sup>
- (80) [redacted] remarked in this respect:  
[redacted]<sup>231</sup> and [redacted]<sup>232</sup>
- (81) As of the date of entry into force of the new gross price, that price would normally be mentioned in the invoices sent to the asphalt plants. Where W5 road builders owned their own asphalt plants, it could happen that the uniform W5 rebate would immediately be deducted on the invoices to those asphalt plants, whether as a separately mentioned deduction from the gross price or even directly in the form of a lower net price being invoiced to the asphalt plant concerned. Where, as was more often the case, a W5 road builder was a shareholder in an asphalt plant jointly owned with other road builders (whether members of the W5 or not), the invoice to the asphalt plant would normally mention the gross price without any deduction of the uniform W5 rebate. In those cases, the W5 rebate would rather (possibly together with extra discounts, such as for volumes purchased) be granted directly, often on a periodical basis, to the W5 road builder that was a shareholder in the plant and that would be using the asphalt produced from the bitumen delivered. In all cases, however, the new gross price would function as the point of departure for the calculation of the net price. Each W5 road builder would monitor that it duly received from its supplier(s) the agreed gross price and W5 rebate.

---

<sup>228</sup> See the following responses to the Commission’s requests for information of 30.6.2003 and 10.2.2004: [redacted] [37024-37026], [redacted] [27015], [redacted] [38245-38267, 38322 and II/767], [redacted] [27534-27539], [redacted] [26541, 26999-27001].

<sup>229</sup> When asked if price changes applied to all customers, the bitumen suppliers answered: [redacted] [37024] “The price changes applied to all types of bitumen for road construction” and “In principle, the price changes applied to all customers as far as road construction is concerned.”; [redacted] [26541] reply to request for information: “In the Netherlands, the ‘price list’ is sent to all addresses on the mailing list(...). Corresponding changes in net prices are communicated in writing to each individual customer”. [redacted] [37109] “The above list price changes applied only to the road building clients.” In the Dutch original: “Enkel voor de wegenbouwklanten golden bovengenoemde lijstprijs-wijzigingen.”; [redacted] [38192] “The price changes are principally the same for all clients, but due to the implementation of the rebate-system as explained in Section 6, most of the clients have different net-prices.” and [redacted]: “The list price was the same for all of the Netherlands”. In the Dutch original: “De lijstprijs die was over heel Nederland hetzelfde”.

<sup>230</sup> In annex 1 to this Decision, an overview is provided of changes by the group of suppliers to the road pavement bitumen gross prices for the period of the infringement.

<sup>231</sup> [redacted]

<sup>232</sup> [redacted]

- (82) Monitoring of the rebates granted to non-W5 road builders was, because of the non-public nature of these rebates, considerably more difficult for the W5 than monitoring of the gross bitumen price and the rebate granted to the W5. This was, therefore, the area where cheating by bitumen suppliers most often occurred. Such cheating would take the form of a bitumen supplier granting a non-W5 road builder a larger rebate than the maximum rebate for non-W5 road builders that had been agreed with the group of W5 road builders. A [redacted] report dated 4 March 1996 of a visit to Heijmans stated:
- [redacted]<sup>233</sup>
- (83) A report by [redacted] of a bitumen consultation meeting of 14 September 1999 stated:
- [redacted]<sup>234</sup>
- (84) If cheating in the form of rebates that were too large to non-W5 road builders was discovered by the W5 road builders, for instance because one of them had acquired a smaller road builder and had found a rebate that was too large for bitumen in its accounts, the W5 road builders would claim a retroactive additional rebate for themselves from the group of bitumen suppliers. This process has been described by [redacted] as follows:
- [redacted]<sup>235</sup>
- (85) [redacted] also gave a description of the system of monitoring and sanctioning:
- [redacted]<sup>236</sup>
- (86) Ultimately, individual bitumen suppliers were afraid that if they were caught granting higher rebates to non-W5 road builders than had been agreed with the W5 road builders, the latter could switch purchasing to other suppliers. For instance, [redacted] mentions that [redacted].<sup>237</sup> [redacted] stated in an internal memorandum of 1995 that [redacted].<sup>238</sup> [redacted] confirmed that [redacted].<sup>239</sup>

## 2. OPERATION OF THE CARTEL

- (87) The exact reconstruction of the day-to-day operation of the cartel between the bitumen suppliers and the W5 road builders during the time of the infringement is made difficult due to the fact that in principle no notes were taken at the meetings, no written agenda was made and invitations were usually given by telephone. Contemporaneous evidence of what exactly was discussed at each individual meeting is therefore relatively scarce. However, in principle almost all meetings (the exception being the

---

<sup>233</sup> [redacted]  
<sup>234</sup> [redacted] [20139] inspection document. [redacted]  
<sup>235</sup> [redacted]  
<sup>236</sup> [redacted]  
See also [redacted]  
<sup>237</sup> [redacted]. See also [redacted]  
<sup>238</sup> [redacted] [17339] Inspection document. [redacted]  
<sup>239</sup> [redacted]

ones where fines were discussed) followed the same pattern as described in Section I of Chapter IV. The description of the day-to-day operation of the cartel in this Section is based on such contemporaneous evidence as the Commission has been able to find, supported by statements from several bitumen suppliers that made leniency applications and replies from all parties concerned to requests for information from the Commission. Replies from parties to the Statement of Objections and clarifications given by parties at and following the oral hearing have been used to correct, where necessary, the factual description of the cartel. It should be noted that in their reply to the Statement of Objections most parties recognized the existence and essential content of the system of joint bitumen consultation meetings and preparatory meetings on the part of the bitumen suppliers and on the part of the W5 road builders, albeit not necessarily for the entire period of the infringement and with diverging views between the bitumen suppliers and the W5 road builders on the role each party played in the system.

## 2.1. Origins of the cartel

- (88) The origins of collusion on the Dutch market for bitumen have been described by [redacted] in an internal note of 6 February 1995:

[redacted]<sup>240</sup>

- (89) A subsequent [redacted] note of 9 February 1995 described:

[redacted]<sup>241</sup>

- (90) A later internal [redacted] note of 14 July 2000 stated:

[redacted]<sup>242</sup>

- (91) [redacted]<sup>243</sup>.

With respect to the period up to 1993, [redacted] stated that:

[redacted]

With respect to the period after 1993, [redacted] stated that:

[redacted]<sup>244</sup>

- (92) Another description of the early initiatives for collusion on bitumen between major purchasers and sellers in the Netherlands is provided by an internal report of [redacted]:

[redacted]<sup>245</sup>

---

<sup>240</sup> [redacted] [17338] inspection document. [redacted]

<sup>241</sup> [redacted] [17339] inspection document. [redacted]

<sup>242</sup> [redacted] [17331] inspection documents: [redacted]

<sup>243</sup> [redacted]

<sup>244</sup> [redacted]

<sup>245</sup> [redacted]

## **1994**

- (93) That those initiatives did in fact lead to concrete agreements between the W5 road builders and the group of bitumen suppliers at least as early as 1 April 1994 is clearly indicated by an internal [redacted] note of 28 March 1994:

[redacted]<sup>246</sup>

- (94) On 8 July 1994, an internal [redacted] memo reported:

[redacted]<sup>247</sup>

- (95) It is clear from these [redacted] reports of 28 March 1994 and 8 July 1994<sup>248</sup> that in this initial period the agreements concluded were identical in nature to the ones concluded later, in the sense that the agreements concerned the bitumen gross price level in the Netherlands, the rebates to be granted to the W5 road builders and the smaller rebates to be granted to non-W5 road builders. These reports also suggest that in the early years the manner in which these agreements were reached was slightly different from the bitumen consultation meetings held later. In these early years, the agreements seem to have been concluded between the two undertakings that were market leader in each group, namely Shell for the suppliers and KWS for the purchasers, on behalf of the two groups. The [redacted] report of 8 July 1994 leaves no doubt that the agreement between Shell and KWS was understood by all participants in the two groups as binding the two groups. It may be concluded, therefore, that in this initial period there was already a system of bitumen consultation between these two groups in place and operational, even if the agreements between the two groups were probably<sup>249</sup> reached through representatives rather than through direct meetings amongst all or most of the members of the two groups. Even later, the bitumen suppliers always participated in the joint bitumen consultation meetings through representatives. What matters for the Commission, however, is not the exact procedure through which agreements were concluded, but the fact that according to contemporaneous documents agreements were in place between the two groups at least from 1 April 1994 onwards.

- (96) In its reply to the Statement of Objections, [redacted] stated:

[redacted]<sup>250</sup>

- (97) In the same reply, [redacted] stated:

[redacted]<sup>251</sup>

## **1995**

---

<sup>246</sup> [redacted] [20177] inspection document.

<sup>247</sup> [redacted] [20187] inspection document.

<sup>248</sup> See also [redacted] [20196] Inspection document, [redacted]

<sup>249</sup> See the contrasting statement of [redacted]

<sup>250</sup> [redacted] reply of 20.5.2005 to the Statement of Objections, paragraph (91). [redacted]

<sup>251</sup> [redacted] reply of 20.5.2005 to the Statement of Objections, paragraph 75. [redacted]

- (98) With respect to the year 1995, the Commission's file contains no evidence of any new agreement regarding bitumen prices or rebates having been reached. But neither has any evidence been provided by any of the addressees of this Decision that the cartel arrangements were effectively terminated in that year. On the contrary, various bitumen suppliers have situated the origin of the cartel well before 1995 and have not mentioned a disruption in this or any other period.<sup>252</sup> What appears to have happened in 1995 is that the W5 rebate of NLG 50 continued to be applied throughout the year. An internal note of [redacted] of 7 July 1995 reports that [redacted].<sup>253</sup> [redacted] states:

[redacted]<sup>254</sup>

- (99) The Commission therefore concludes that the arrangements that were concluded in 1994 continued to be in force in 1995.

## **2.2. The period 1996-2002**

- (100) Throughout this period, the same basic system of bitumen consultation continued as in the period before, namely agreements were regularly concluded between the group of bitumen suppliers and the group of W5 road builders on the bitumen gross price level in the Netherlands, the uniform W5 rebate and the maximum rebate to be granted to other road builders. However, the mechanism for reaching these agreements slightly changed. No longer were Shell and KWS relied upon to reach an agreement on behalf of the two groups, but rather bitumen consultation meetings are organized in which usually all W5 members participate and at least two representatives of the bitumen suppliers.<sup>255</sup>

### **1996**

- (101) The first bitumen consultation meeting in this period took place on 19 February 1996 at KWS premises in Utrecht.<sup>256</sup> The gross bitumen price was at NGL 290<sup>257</sup> since 1 January 1996 and remained stable. Also the uniform W5 rebate remained stable at NGL 50. Later that year, on 1 November 1996, the group of bitumen suppliers simultaneously increased the gross price by NGL 50 (bringing the gross price up to NGL 340),<sup>258</sup> with the standard W5 rebate continuing at NGL 50.<sup>259</sup> However, for

---

<sup>252</sup> See for instance the reference to price stability in the period from 1994 to 1997 in [redacted]. See also [redacted], [redacted] and [redacted].

<sup>253</sup> [redacted] [20201] Inspection document.

<sup>254</sup> [redacted]

<sup>255</sup> For a list of regular participants to the bitumen consultation meetings, W5 meetings and pre-meetings in this period, see recital (77).

<sup>256</sup> [redacted] [38282] reply of 16.9.2003 to request for information and [redacted] [22196, 27147] Inspection document and reply of 12.9.2003 to request for information. [redacted] also referred to a meeting on 1.3.1996, but no further evidence as to the content of this meeting could be found.

<sup>257</sup> See replies to the request for information: [redacted] [38322], [redacted] [27535] [redacted], [redacted] [26999] [redacted], [redacted] [II/759], [redacted] [37025]. No information available from [redacted] and [redacted].

<sup>258</sup> See replies to the request for information: [redacted] [38322], [redacted] [27535] (first invoices after 1.11.1996), [redacted] [26999] [redacted], [redacted] [II/759], [redacted] [37025]. For [redacted], see inspection document [redacted] [II/13] [redacted]. [redacted] followed on 6.11.1996, and implemented the price increase on 15.11.1996 [27035]. No information was available from [redacted] and [redacted].

<sup>259</sup> [redacted] [38322] Reply of 1.3.2004 to request for information.



works that were not contractually subject to compensation, it was agreed that the W5 road builders would receive an extra rebate from the bitumen suppliers of NGL 50 to compensate for the increase in the gross price.<sup>260</sup>

## 1997

- (102) These prices and rebates continued to apply in 1997 and 1998.<sup>261</sup> Only between 1 July and 1 September 1997, the gross price was temporarily reduced by NGL 15.<sup>262</sup> According to [redacted], a pre-meeting of bitumen suppliers took place on 20 November 1997 in Mercure Hotel Postiljon in Nieuwegein, in which the level of the reduction to the contractors was discussed.<sup>263</sup> [redacted] reports that a meeting took place in its offices on 25 November 1997 but that it does not recall if it concerned a multilateral meeting or what would have been discussed.<sup>264</sup>

## 1998

- (103) [redacted] reports that a bitumen consultation meeting took place on 27 March 1998, at the start of the road building season, at KWS premises and that the price level and reductions in the Netherlands were discussed.<sup>265</sup> In 1998, the gross bitumen price level in the Netherlands decreased by NGL 40 to NGL 300 on 1 September 1998.<sup>266</sup> The uniform W5 rebate was increased from NGL 50 to NGL 55 on that day.<sup>267</sup>

## 1999

- (104) In 1999, at least two bitumen consultation meetings took place. The first one occurred on 12 March 1999. An internal [redacted] note on this meeting states:

[redacted]<sup>268</sup>

- (105) After this, the gross bitumen price started a steep rise from NGL 280 in March 1999 to NGL 610 in April 2000.<sup>269</sup> The beginning of this price movement is reflected in an internal [redacted] note, dated 22 March 1999:

---

<sup>260</sup> [redacted] [II/13] inspection document. [redacted].

<sup>261</sup> [redacted] [14827] inspection document. [redacted].

<sup>262</sup> See replies to the request for information. [redacted] [26999], [redacted] [37025], [redacted] [27535], [redacted] [II/759], [redacted] [38322], [redacted] [27015]. Please note that [redacted] reported for this period an extra price decrease of NGL 1.75 ( $15 + 1.75 = 16.75$ ) and an extra rebate of NGL 1.75 ( $50 + 1.75 = 51.75$ ).

<sup>263</sup> [redacted]

<sup>264</sup> [redacted] [27147] reply of 12.9.2003 to request for information.

<sup>265</sup> [redacted] [38282] reply of 16.9.2003 to request for information.

<sup>266</sup> In their replies to the request for information, [redacted] [37025], [redacted] [27535], [redacted] [II/759], [redacted] [38322] and [redacted] [27035] mention a price decrease of NGL 25, but also report price changes on 1.3.1998, 1.4.1998 and 1.6.1998. [redacted] [26999] can only confirm the date of the price change. [redacted] followed on 4.9.1998 [27035].

<sup>267</sup> [redacted]

<sup>268</sup> [redacted] [22027] inspection document, [redacted]

<sup>269</sup> 1.5.1999:  $280+40=320$ ;  
13.6.1999:  $320+30=350$ ;  
1.9.1999:  $350+90=440$ ;  
18.10.1999:  $440+40=480$ ;  
1.2.2000:  $480+50=530$ ;  
01.04.2000:  $530+80=610$ .

[redacted]<sup>270</sup>

- (106) A second bitumen consultation meeting took place on 14 September 1999. Internal notes of this meeting by [redacted] state:

[redacted]<sup>271 272</sup>

- (107) In a report [redacted], found during the Commission inspections at [redacted] outlined all gross price and rebate agreements of 1999:

[redacted]<sup>273</sup>

- (108) At the end of 1999, in an internal memorandum, [redacted] had the following reflections on the bitumen consultation:

[redacted]<sup>274</sup>

## **2000**

- (109) For the year 2000, the Commission found evidence of at least five bitumen consultation meetings, an exceptionally high number, linked to unrest in the market. These meetings were held on 18 January 2000, 28 March 2000, 12 April 2000, 19 April 2000 and 16 December 2000. The first meeting on 18 January 2000, which was the normal annual meeting at the start of the road building season, was held at KWS premises.<sup>275</sup> An internal [redacted] meeting report states:

[redacted]<sup>276</sup>

- (110) This rather steep announced price increase of 1 April 2000 appears to have caused a lot of unrest. First, on 11 February 2000, the bitumen suppliers organised a pre-meeting in Hotel Engelandershof in Beekbergen.<sup>277</sup> Subsequently, Shell asked KWS to organise a new bitumen consultation meeting at short notice. This bitumen consultation meeting took place on 28 March 2000, at KWS premises. Immediately preceding this meeting the W5 road builders came together in a W5 meeting.<sup>278</sup> It appears that at this bitumen consultation meeting the road builders did not accept the price increase of 1 April 2000. HBG sent out a letter on the same day as the W5/bitumen consultation meeting itself, addressed to Kuwait Petroleum, refusing the

---

See annex 1.

<sup>270</sup> [redacted] [22028] inspection document, [redacted]

<sup>271</sup> HSL is the High Speed Rail Line.

<sup>272</sup> [redacted] [22030] inspection document, [redacted]

This document also lists the individuals participating from the W5 road builders and the oil companies.

<sup>273</sup> [redacted] [20139] inspection document: [redacted]

<sup>274</sup> [redacted] [20192-20193] Inspection document, [redacted]

<sup>275</sup> [redacted] [II/329] agenda; [redacted] [23723] agenda.

<sup>276</sup> [redacted] [21826-21827] inspection documents. [redacted]

<sup>277</sup> [redacted] [38282] reply of 16.9.2003 to request for information.

<sup>278</sup> 16-17 h WO-5 meeting; 17-18h. bitumen consultation meeting. Apart from Shell, KWS invited NBM, HWZ, Ballast Nedam, Dura Vermeer and Heijmans. See inspection documents [redacted] [19668] [redacted] [19667]; see also extracts from agendas [redacted] [38341] and [redacted] [23724] of 28.3.2000.

announced price increase.<sup>279</sup> The bitumen suppliers then discussed again among each other in a new pre-meeting on 4 April 2000 in Mercure Hotel Postiljon in Nulde, focusing, according to [redacted], on the level of rebates to the W5.<sup>280</sup> On that same day, the W5 road builders gathered for a W5 meeting at NBM premises.<sup>281</sup>

- (111) A new bitumen consultation meeting took place on 12 April 2000, at HBG (then HWZ) premises.<sup>282</sup> The bitumen suppliers annulled the already announced price increase of NGL 80 as of 1 April and a price level of NGL 530 with a W5 discount of NGL 85 and a discount for smaller road builders of NGL 65 was proposed.<sup>283</sup> The report also mentions that even after the NGL 85 rebate for the W5 road builders, the bitumen price level in the Netherlands was still NGL 25 higher than that in Belgium. This apparently led to a discussion about how gross prices in the Netherlands (at the level of NGL 530) could be brought closer to the prevailing price level in Belgium (with a – net – price level of NGL 420). The report registers the concerns of the W5 road builders about any decrease in the gross price of bitumen in the Netherlands. It estimates that a decrease of the gross price to NGL 480 would cost road builders NGL 7,5 million. It states that the W5 had no interest in a war leading to a decrease in the [CROW] risk arrangement index. [redacted] noted down the question [redacted]<sup>284</sup>
- (112) Finally, the [redacted] report of the bitumen consultation meeting of 12 April 2000 mentions a fine of NGL 1.5 million. In the report, this fine has been calculated by multiplying 50 000 tonnes of bitumen by NGL 30. The note goes on to calculate that with a W5 bitumen purchase volume of 150 000 tonnes, each W5 road builder would be entitled to an additional rebate of NGL 10/ton.
- (113) One week later, on 19 April 2000, yet another bitumen consultation meeting took place, at the premises of KWS or HBG (then HWZ).<sup>285</sup> According to the [redacted] notes of this meeting, the suppliers informed the W5 that they had discussed among themselves the fine demanded by the W5. As a result, the suppliers could accept a tonnage of 42 000 (instead of 50 000) and an amount of NGL 1 050 000 (instead of NGL 1.5 million). They also indicated how this amount would be split up among the suppliers. Finally, the notes indicate how much of the total amount each of the W5 road builders should receive.<sup>286</sup> Settlement occurred in 2001 in the form of an extra rebate. For instance, [redacted] issued an invoice to [redacted] for [redacted].<sup>287</sup> [redacted] settled with [redacted] by giving an extra discount of [redacted] for the volumes delivered to two asphalt plants.<sup>288</sup>

---

<sup>279</sup> [redacted] [16135] inspection documents. [redacted]

<sup>280</sup> [redacted] [38282] reply of 16.9.2003 to request for information.

<sup>281</sup> [redacted] [23319] agenda 4.4.2000: [redacted]

<sup>282</sup> [redacted] [38342] agenda [redacted]; [redacted] [23726] agenda [redacted], [redacted] [38282] reply of 16.9.2003 to request for information.

<sup>283</sup> [redacted] [21828-21830] inspection document, notes on the bitumen consultation meeting of 12.4.2000. [redacted]

<sup>284</sup> [redacted] [21829] inspection document, notes on the bitumen consultation meeting of 12.4.2000. [redacted]

<sup>285</sup> [redacted] [38343] agenda 19.4.2000; [redacted] [38281] reply of 16.9.2003 to request for information.

<sup>286</sup> [redacted] [21824-21825] inspection document. This event is also mentioned by [redacted]; [redacted] [27564-27565, 27790 and 36501-36502] in the reply of 2.10.2003 to request for information and [redacted].

<sup>287</sup> [redacted] [27565 and 27790] reply of 2.10.2003 to request for information.

<sup>288</sup> [redacted].

- (114) In October 2000, [redacted] referred to another forthcoming bitumen consultation meeting to discuss a planned price increase.<sup>289</sup> A bitumen consultation meeting took place on 19 December 2000 at HBG premises.<sup>290</sup>

## 2001

- (115) In 2001, the annual bitumen consultation meeting at the start of the road building season took place on 16 February 2001 at KWS premises.<sup>291</sup> The meeting was immediately preceded by a meeting of the W5 road builders.<sup>292</sup> Contemporaneous handwritten notes from [redacted] and [redacted] indicate that the W5 road builders proposed to keep the gross price at NGL 530, with a W5 rebate of NGL 100.<sup>293</sup> The [redacted] notes also indicate as starting points for the discussion a retroactive NGL 20 rebate for the volumes of 1999; the pressure caused by the low price level in Germany and Belgium; a maximum rebate of NGL 35 for third parties; and the finding that CBS figures (for the price index adjustment) were too low.<sup>294</sup> These notes also state that [redacted].<sup>295</sup>
- (116) The group of bitumen suppliers had a new pre-meeting in Hotel Mooi Veluwe in Putten on 19 February 2001.<sup>296</sup> The subsequent bitumen consultation meeting with the W5 road builders took place on 1 March 2001. According to [redacted] notes of the meeting it was agreed that as of 15 March 2001 the gross price would be reduced to NGL 510 and the W5 rebate to NGL 80. It was also agreed to have the next consultation round in three months' time.<sup>297</sup> [redacted] notes of this meeting stated the necessity on the part of the suppliers to reduce the gross price from NGL 530 to NGL 510.<sup>298</sup> These notes indicate that initially a rebate of NGL 30 was discussed for smaller road builders and of NGL 50 for the W5. This is confirmed by the HBG notes of the same meeting: [redacted].<sup>299</sup> The final gross price agreed was NGL 510, with a W5 rebate of NGL 80. [redacted] explains this necessity to occasionally lower the gross price of bitumen in the Netherlands as follows:

[redacted]<sup>300</sup>

- (117) On 4 May 2001, another pre-meeting of bitumen suppliers took place at Hotel Mooi Veluwe in Putten.<sup>301</sup> It was followed by a bitumen consultation meeting on 8 May

---

<sup>289</sup> [redacted] [20198] inspection document.

<sup>290</sup> [redacted] [9467/20756/23833] agenda 19.12.2000

<sup>291</sup> [redacted] [21822-21823] handwritten meeting notes; [redacted] [20702] fax to KWS of 5.2.2001; [redacted] [38347] agenda; [redacted] [23732] agenda; [redacted] [20479-20480] handwritten meeting notes; [redacted] [38281] reply of 16.9.2003 to the request for information. Participants Shell, Nynäs, Esha, KWS, NBM, HBG, Heijmans, Ballast Nedam, Dura Vermeer.

<sup>292</sup> [redacted] [23732] agenda [redacted]

<sup>293</sup> [redacted] [21822-21823] inspection document, handwritten meeting notes, [redacted] [20479-20480] inspection document, meeting notes.

<sup>294</sup> [redacted] [20479] handwritten meeting notes: [redacted]

<sup>295</sup> [redacted] [20479] handwritten meeting notes: [redacted]

<sup>296</sup> [redacted]

<sup>297</sup> [redacted] [20238] inspection document. Internal memo of 2.3.2001. [redacted]. See also [redacted] [20479] handwritten meeting notes. [redacted]; [20481] handwritten meeting notes. [redacted]

<sup>298</sup> [redacted] [21821] inspection document, handwritten meeting notes. [redacted]

<sup>299</sup> [redacted] [20481] inspection document. [redacted]

<sup>300</sup> [redacted]

2001 with the W5 road builders at KWS premises.<sup>302</sup> A W5 meeting took place probably just before the bitumen consultation meeting.<sup>303</sup> The contemporaneous [redacted] notes of the bitumen consultation meeting report as follows:

[redacted]<sup>304</sup>

- (118) [redacted] reports that [redacted] was sanctioned by the W5 road builders when it appeared that the (non W5) road builder [redacted] managed to win the public tender contract for [redacted], because of a very low bitumen price from [redacted].<sup>305</sup>
- (119) In another bitumen consultation meeting of 23 May 2001, a gross price reduction of NGL 20 was proposed to enter into force on 1 July 2001. This reduced the gross price from NGL 510 to NGL 490. The W5 rebate was kept stable at NGL 80, reducing the net price for the W5 to NGL 410.<sup>306</sup>
- (120) [redacted] states that the bitumen suppliers gathered again for a pre-meeting on 14 November 2001 in Hotel Engländerhof in Beekbergen. The participants named are Shell, Veba, Kuwait Petroleum, Klöckner and Total.<sup>307</sup> [redacted] indicates that the purpose of this meeting was as follows:

[redacted]<sup>308</sup>

- (121) Contemporaneous evidence from [redacted] confirms the occurrence of a bitumen consultation meeting towards the end of 2001, where the price as of 1 January 2002 was agreed.<sup>309</sup> The [redacted] notes read:

[redacted]<sup>310</sup>

## 2002

- (122) In 2002, the annual bitumen consultation meeting between the W5 road builders and representatives of the group of bitumen suppliers at the start of the road building

---

<sup>301</sup> [redacted], [redacted] [38281] reply of 16.9.2003 to request for information. Hotel accounts were found at [redacted] premises [16481-16483] and a visa expense report at [redacted] premises [17375]. The room is paid by Kuwait Petroleum. Participants mentioned: Kuwait Petroleum, Nynäs, Shell, Esha, Total (TFE), Klöckner, Veba.

<sup>302</sup> [redacted] [19665] agenda; [redacted] [38348] agenda ; [redacted] [21820] inspection document, internal note of 8.5.2001 and [redacted]; [redacted]. The participants mentioned for the bitumen consultation meeting are: Kuwait, Shell, Nynäs, Esha, KWS, NBM, HBG, Heijmans, Ballast Nedam and Dura Vermeer.

<sup>303</sup> [redacted] [19665] agenda. [redacted]

<sup>304</sup> [redacted] [21820] inspection document. [redacted]

<sup>305</sup> [redacted]

<sup>306</sup> [redacted] [21819] inspection document, internal note of 23.5.2001 and [27150] reply of 12.9.2003 to request for information, p.18, [redacted] [19666] agenda; [redacted] [23736] agenda; [redacted] [38349] agenda.

<sup>307</sup> [redacted]

<sup>308</sup> [redacted]

<sup>309</sup> [redacted] [21736] inspection document and [redacted] [27148] reply of 10.10.2003 to request for information.

<sup>310</sup> [redacted] [21736] inspection document. [redacted]

season took place on 29 January 2002.<sup>311</sup> The day before this meeting, the group of bitumen suppliers had coordinated its position towards the W5 road builders in a pre-meeting in Bunnik.<sup>312</sup> [Redacted] notes of the bitumen consultation meeting make it clear that after discussion a gross bitumen price of EUR 205 as of 1 February 2002 was confirmed. A comparison was made with the bitumen price in Germany (EUR 162), Belgium (EUR 158) and France (EUR 162). As for the level of the W5 rebate, initially EUR 22 was mentioned, after which a counter-proposal of EUR 30 was made. After discussion, a W5 rebate was agreed of EUR 27, bringing the net price for the W5 to EUR 178. The next evaluation was scheduled to take place not later than 1 June 2002.<sup>313</sup> The agreed new gross price of EUR 205 was in fact applied until 15 April 2002 as the gross price increased again on that day.<sup>314</sup>

- (123) [redacted] reports that a pre-meeting of bitumen suppliers took place in Hotel Engländerhof in Beekbergen on 14 February 2002 to discuss the level of the rebates. According to [redacted], this meeting was followed by a bitumen consultation meeting on 21 February 2002 at KWS premises.<sup>315</sup> [redacted] claims in its response to the Statement of Objections that in all likelihood this alleged bitumen consultation meeting was a bilateral meeting [redacted]. No contemporaneous evidence of these two meetings has been found.
- (124) On 26 April 2002, HBG informed Ballast Nedam, Dura Vermeer, Heijmans and BAM NBM about an forthcoming bitumen consultation meeting and preceding W5 meeting, both on 14 May 2002.<sup>316</sup> [redacted].<sup>317</sup> However, agenda references seem to indicate that the bitumen consultation meeting (not the W5-meeting) was later annulled.<sup>318</sup>
- (125) [redacted].<sup>319</sup> [redacted].<sup>320</sup> All suppliers effectively implemented this price increase on 16 September 2002.<sup>321</sup>
- (126) After the inspections by the Commission on 1 and 2 October 2002, no indications exist that any further bitumen consultation meetings took place.<sup>322</sup>

---

<sup>311</sup> [redacted] [38369] agenda; [redacted] [38350] agenda, [redacted] [23737] agenda, [redacted] [21818 and 23737]; [redacted] [38281] reply of 16.9.2003 to request for information.

<sup>312</sup> [redacted] [38281] reply of 16.9.2003 to request for information.

<sup>313</sup> [redacted] [21818] inspection document, meeting notes of 29.1.2002 and [27150] reply of 12.9.2003 to request for information. As this price decrease was agreed upon on 29.1.2002 and entered into force already on 1.2.2002, customers were formally informed only just before or after the price decrease: for instance, [redacted] informed customers on 31.1.2002 [19082], [redacted] informed customers on 4.2.2002 [17289], and [redacted] only on 20.2.2002 [626].

<sup>314</sup> See the replies to request for information of [redacted] [37026], [redacted] [27035], [redacted] [27015], [redacted] [38245-38267], [redacted] [27538], [redacted] [27000]. [redacted] followed on 17.4.2002 [II/759].

<sup>315</sup> [redacted] [38281] reply of 16.9.2003 to request for information.

<sup>316</sup> [redacted] [20634-20635] inspection document, e-mails of 26.4.2002.

<sup>317</sup> [redacted]

<sup>318</sup> [redacted] [20632], inspection document, E-mail of 2.5.2002 ; see also agenda extracts from [redacted] [38384] and [redacted] [23740] of 14.5.2002.

<sup>319</sup> [redacted]

<sup>320</sup> [redacted]

<sup>321</sup> See the replies to request for information of [redacted] [27035], [redacted] [27015], [redacted] [38322], [redacted] [27538], [redacted] [27001] and [redacted] [II/759].

<sup>322</sup> [redacted]

## V. Application of Article 81 of the Treaty

### 1. THE NATURE OF THE INFRINGEMENT

#### 1.1. Principles concerning agreements and concerted practices

- (127) Article 81(1) of the Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production and markets, or share markets or sources of supply.
- (128) An ‘*agreement*’ within the meaning of Article 81(1) of the Treaty can be said to exist when the parties adhere to a common plan, which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The fact of an agreement may be express or implicit by the behavior of the parties. Furthermore, it is not necessary, in order for there to be an infringement of Article 81 of the Treaty for the participants to have agreed in advance upon a comprehensive common plan. The concept of *agreement* in Article 81(1) of the Treaty would apply to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement.
- (129) In its judgment in the PVC II case<sup>323</sup>, the Court of First Instance stated that: “It is well established in the case-law that for there to be an agreement within the meaning of Article 85(1) [now Article 81(1)] of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way [...]”.
- (130) An agreement for the purposes of Article 81(1) of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract in civil law. Moreover, in the case of a complex cartel of long duration, the term ‘agreement’ can properly be applied not only to any overall plan or to terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose. As the Court of Justice, upholding the judgment of the Court of First Instance, has pointed out in case *Commission v Anic Partecipazioni SpA*<sup>324</sup>, it follows from the express terms of Article 81(1) of the Treaty that an agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.
- (131) Although Article 81(1) of the Treaty distinguishes between ‘agreements between undertakings’ and ‘concerted practices’, the object is to bring within the prohibition of that Article a form of co-ordination between undertakings which, without necessarily

---

<sup>323</sup> Judgment of the Court of First Instance, joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and Others v Commission* (PVC II), [1999] ECR II-00931, paragraph 715.

<sup>324</sup> Case C-49/92 P [1999] ECR I - 4125, paragraph 81.

having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition.<sup>325</sup>

- (132) The criteria for co-ordination and co-operation laid down by the case law of the Community Courts, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the commercial policy which it intends to adopt in the common market. Although that requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.<sup>326</sup>
- (133) Thus conduct may fall under Article 81(1) of the Treaty as a ‘*concerted practice*’ even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behavior.<sup>327</sup> Furthermore, the process of negotiation and preparation culminating effectively in the adoption of an overall plan to regulate the market may well also (depending on the circumstances) be correctly characterised as a concerted practice.
- (134) Although in terms of Article 81(1) of the Treaty the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period. Such a concerted practice is caught by Article 81(1) of the Treaty even in the absence of anti-competitive effects on the market.<sup>328</sup>
- (135) It is not necessary, particularly in the case of a complex infringement of long duration, for the Commission to characterise behavior as exclusively belonging to one or the other of these forms of illegal behavior. The concepts of agreement and concerted practice are fluid and may overlap. Indeed, it may not even be possible realistically to make any such distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while considered in isolation some of its manifestations could accurately be described as one rather than the other. It would, however, be artificial analytically to sub-divide what is clearly a continuing

---

<sup>325</sup> Case 48/69 *Imperial Chemical Industries v Commission*, [1972] ECR 619, paragraph 64.

<sup>326</sup> Joined Cases 40-48/73 etc. *Suiker Unie and Others v Commission*, [1975] ECR 1663, paragraphs 173 and 174.

<sup>327</sup> See judgment of the Court of First Instance in Case T-7/89 *Hercules v Commission* [1991] II ECR 1711, paragraphs 255-261.

<sup>328</sup> See the judgment of the Court of Justice in Case C-199/92P *Hüls AG v Commission*, [1999] ECR I-4287, paragraphs 158-167.



common enterprise having one and the same overall objective into several distinct forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time. Article 81 of the Treaty lays down no specific category for a complex infringement of the present type.<sup>329</sup>

- (136) In its PVC II judgment<sup>330</sup>, the Court of First Instance stated that: “In the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article 85 [now Article 81] of the Treaty”.
- (137) It is also well-settled case law that the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose is not such as to relieve it of full responsibility for the fact that it participated in the cartel, if it has not publicly distanced itself from what was agreed in the meetings.<sup>331</sup> Such distancing should take the form of an announcement by the company, for instance, that it would take no further part in the meetings (and therefore did not wish to be invited to them).

## 1.2. Principles concerning single and continuous infringement

- (138) A complex cartel like the one which is the subject of this proceeding may properly be viewed as a *single and continuous infringement* for the time frame in which it existed. This is the case, in particular, where the activities of a cartel formed part of an overall scheme which laid down the lines of action by the cartel members in the market and restricted their individual commercial conduct with the aim of pursuing an identical anti-competitive economic aim.<sup>332</sup> The Commission considers that it would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was in reality a single infringement which manifested itself in a series of anti-competitive activities throughout the period of operation of the cartel.<sup>333</sup> The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. The validity of this assessment is not affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute a violation of Article 81(1) of the Treaty.
- (139) Although a cartel is a joint enterprise, each participant in the agreement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries or cheating may occur, but will not however prevent the

<sup>329</sup> See judgment of the Court of First Instance in Case T-7/89 *Hercules v Commission*, [1991] II ECR 1711, paragraph 264.

<sup>330</sup> Judgment of the Court of First Instance, Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and Others v Commission* (PVC II), ECR [1999] II-00931, paragraph 696.

<sup>331</sup> See, inter alia, Case T-141/89 *Tréfileurope Sales SARL v Commission*, [1995] ECR II-791, paragraph 85; Case T-7/89 *Hercules Chemicals v Commission*, [1991] ECR II-1711, paragraph 232; and Case T-25/95 etc *Cimenteries CBR and Others v Commission*, [2000] ECR II-491, paragraph 1389.

<sup>332</sup> See the judgment of the Court of First Instance of 15 March 2000 in Joined Cases T-25/95 etc. *Cimenteries CBR and Others v Commission*, [2000] ECR II-491, paragraph 3699.

<sup>333</sup> See the judgment of the Court of First Instance of 24 October 1999 in case T-1/89 *Rhône-Poulenc S.A. v Commission*, [1991] ECR II-867, paragraphs 125-126.

arrangement from constituting an agreement/concerted practice for the purposes of Article 81(1) of the Treaty where there is a single common and continuing objective.

- (140) The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and the same anti-competitive effect. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. This is certainly the case where it is established that the undertaking in question was aware of the unlawful behavior of the other participants or could have reasonably foreseen or been aware of it and was prepared to take the risk.<sup>334</sup>
- (141) As the Court of Justice stated in its judgment in *Commission v Anic Partecipazioni*<sup>335</sup>, the agreements and concerted practices referred to in Article 81(1) of the Treaty necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged. It follows, as reiterated by the Court in the *Cement* cases, that an infringement of article 81 of the Treaty may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves and taken in isolation an infringement of that provision. When the different actions form part of an ‘overall plan’, because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringements considered as a whole.<sup>336</sup>

### **1.3. Application of those principles to the behaviour of the addressees**

#### **1.3.1. Agreements and concerted practices**

- (142) The facts described in Chapter IV of this Decision demonstrate that the arrangements in force between the group of bitumen suppliers and the W5 road builders throughout the period from at least 1 April 1994 to 15 April 2002 constitute “agreements” within the meaning of Article 81(1) of the Treaty. In the description of the facts, references to “agreements” are manifold.<sup>337</sup> The usual procedure was that first each group (bitumen suppliers and W5 road builders) separately prepared its position in a preparatory meeting. These preparatory meetings served to coordinate positions among the members of each group and thereby to lay the basis for the subsequent agreements between the two groups. Each side knew that the other side prepared its collective position through preparatory meetings. Following the preparatory meetings, the two

---

<sup>334</sup> See the judgment of the Court of Justice in Case C-49/92 P *Commission v Anic Partecipazioni*, [1999] ECR I-4235, paragraph 83.

<sup>335</sup> Case C-49/92, paragraphs 78-81, 83-85 and 203.

<sup>336</sup> Judgment of the Court of Justice of 7 January 2004 in Joint Cases C-204/00 etc., *Aalborg Portland A/S and Others v Commission*, paragraph 258.

<sup>337</sup> See, for example, recitals (54), (65), (85), (86), (89), (93), (94), (107) and (108).

groups would meet together in a bitumen consultation and would agree on the gross price of road pavement bitumen in the Netherlands, a uniform rebate on the gross price for the W5 road builders and a smaller maximum rebate on the gross price for other road builders. Precise dates for the entry into force of these prices and rebates were also agreed. The agreements were implemented and correct implementation was monitored. Bitumen suppliers that were found not to implement the arrangements were sometimes sanctioned individually or collectively.

- (143) In coming to these agreements, both groups expressed their joint intention to behave in the market in a certain way. The arrangements constituted a common plan among all participants, which determined the lines of their mutual actions in the market and limited the commercial autonomy of each participant, whether bitumen supplier or road builder. Through the system of preparatory meetings followed by the bitumen consultation, bitumen suppliers committed themselves, both towards each other and towards the W5 road builders, to charge a certain gross price for road pavement bitumen in the Netherlands, to grant a certain uniform rebate to W5 builders and to grant another, smaller maximum rebate to other road builders. The W5 road builders committed themselves, both to each other and to the group of bitumen suppliers, to accept a certain gross price for road pavement bitumen and to accept a certain uniform W5 rebate (even if in practice an additional individual rebate could be granted based on the volume of purchase). The W5 road builders also got the group of bitumen suppliers to commit themselves to granting other road builders smaller rebates than the W5. By agreeing on this package of measures pertaining to the road pavement bitumen market in the Netherlands, all members of the two groups knowingly substituted practical cooperation between themselves for the risks of competition.
- (144) In their submissions to the Commission, certain addressees have used more cautious language than the term “agreements”. KWS and Ballast Nedam, for example, refer to “consultation” and “discussions”.<sup>338</sup> However, it is clear from the facts described in chapter IV that these discussions did in practice lead to operational conclusions that were accepted by the undertakings participating in the system, namely that they did lead to agreements. Even if this had been different, this kind of “consultation” about prices and rebates would still have amounted to a concerted practice within the meaning of Article 81(1) of the Treaty, in the sense that the participants coordinated their commercial behaviour by means of such “consultation” and that this led to subsequent conduct on the market. In any case, as mentioned in recital (135), it is not necessary for the Commission, particularly in the case of a complex infringement of long duration, to characterize conduct as exclusively one or other of these two forms of behaviour, as both are caught by the prohibition in Article 81(1) of the Treaty.

### 1.3.2. *Single and continuous infringement*

- (145) The Commission considers that this entire system of preparatory meetings and the bitumen consultation, with the ensuing agreements between the group of bitumen suppliers and the W5 road builders on gross prices and rebates for road pavement bitumen in the Netherlands in the period between at least 1 April 1994 and 15 April 2002 constitutes a single and continuous infringement of Article 81 of the Treaty. All members of the cartel knowingly adhered, over at least this period of time, to an

---

<sup>338</sup> “Overleg”, “discussie” en “gesproken” in the Dutch original, see recitals (55) and (56).

overall scheme, which was regularly prepared, re-negotiated and confirmed between the two groups and which laid down the lines of their action in the market and restricted their individual commercial conduct. The participants in this scheme pursued a single anti-competitive economic aim: to regulate the price formation of road pavement bitumen in the Netherlands. All of the concrete anti-competitive activities agreed fit within that overall aim, be it the fixing of gross bitumen prices, the agreements on the W5 rebates or the agreements on the smaller rebates to other road builders. Through this entire set of measures, participants aimed to avoid the rigours and uncertainties of free competition for road pavement bitumen in the Netherlands. It would be artificial to split up such continuous inter-related conduct by treating it as consisting of several separate infringements, when what was involved was in reality a single complex and continuous infringement that all participants were fully aware of and in which they all participated.

- (146) A peculiar feature of the arrangements which are the object of this Decision is that the collusion occurred not only among sellers, as is usually the case, but among sellers and buyers together. This has led many of the addressees to argue that the arrangements described in Chapter IV of this Decision should not be considered a single infringement, but rather, if an infringement existed at all, two separate infringements, one concerning the sellers and another one concerning the purchasers. Each of these infringements would be focused on the coordination that took place within each group in the preparatory meetings prior to the bitumen consultation, whereas the agreements between the two groups reached in the bitumen consultation meetings should in their view be seen as normally negotiated commercial agreements between two sides having opposing commercial interests.
- (147) The Commission does not share this relatively innocent interpretation of the events described in this Decision. Firstly, the coordination within each group went well beyond the preparation of a negotiating position. The agreements reached in the bitumen consultation constituted not just agreements between sellers and purchasers, but at the same time agreements among the members of the W5 as well as agreements among the members of the group of suppliers. Secondly, the scheme was not restricted to commercial relations between the sellers and purchasers involved in it. The gross price that was fixed for road pavement bitumen applied to all such bitumen sold by the group of bitumen suppliers in the Netherlands, including to other road builders than the W5. The participants also fixed the maximum rebates for road builders other than the W5. This shows that the scope of the scheme went well beyond that of a simple sales negotiation between (groups of) sellers and purchasers. The Commission therefore considers that no valid reasons have been put forward to change its view that since all members of the cartel agreed to the same overall anti-competitive scheme of fixed gross prices, uniform W5 rebates and lower rebates for other road builders, in pursuance of the same overall anti-competitive economic aim, the behaviour in question constitutes a single complex and continuous infringement.
- (148) It may well be, as many addressees have argued, that the interests each group had in participating in this scheme were different and to some extent even opposing. Indeed, this is often the case in infringements of Article 81 of the Treaty. For example, two undertakings that collude on the allocation of clients have the opposing interest that each would like to get most clients. The essence of the infringement is precisely that rather than competing for those clients through autonomous conduct, thereby ensuring the best choice at the lowest price, the undertakings negotiate and agree among

themselves who should get which clients.<sup>339</sup> The same applies to the scheme which is the object of this Decision. It may well be that the two groups had, in particular, opposing interests when it came to the size of the rebate to be granted to the W5. But in respect of this rebate the infringement resides precisely in the fact that the two groups collectively negotiated and agreed to a uniform amount for this rebate, rather than that each undertaking, whether supplier or purchaser, individually and autonomously competed for a smaller or larger rebate.

- (149) Nor should one exaggerate the degree to which the interests between the two groups were opposed. The W5 road builders had no strong interest in a significant decrease of the gross bitumen price. The fact that a number of their ‘running’ contracts were coupled to the price index mechanism, which used the gross price of bitumen for the calculation of the index, meant that such a decrease in the gross price of bitumen could oblige road builders to compensate their clients for the price decrease.<sup>340</sup> To obtain a larger W5 rebate was therefore normally more interesting for the W5 road builders than a decrease in the gross price of bitumen. Similarly, increases in the gross price could be accepted if these were coupled to an increase in the rebate or another compensation mechanism. In the words of one KWS employee: *“Increases of the standard price were not a problem, as long as the rebates did not remain behind”*.<sup>341</sup>
- (150) Fundamentally, the scheme served the interest each side had in maintaining a negotiated and relatively high degree of price stability for bitumen in the Netherlands. This was of interest to the suppliers that were party to the scheme because it eliminated the risk of a ruinous price war among them.<sup>342</sup> Moreover, since gross prices and rebates were directly negotiated with the W5 as a group, the risk was small that a new entrant into the supply market would be able to obtain a significant market share among the W5. Also, the suppliers group benefited from the fact that the prevailing price level in the Netherlands, even after deduction of the W5 rebate, was usually at a higher level than that in neighbouring countries.<sup>343</sup> This would, therefore, normally be

---

<sup>339</sup> Compare Joined Cases C-29/83 and C-30/83 *CRAM and Rheinzink GmbH v Commission*, [1984] ECR 1679, paragraph 26: *“In order to determine whether an agreement has as its object the restriction of competition, it is not necessary to inquire which of the two contracting parties took the initiative in inserting any particular clause or to verify that the parties had a common intent at the time when the agreement was concluded. It is rather a question of examining the aims pursued by the agreement as such, in the light of the economic context in which the agreement is to be applied.”* This approach was confirmed in Joined Cases T-67/00, T-68/00, T 71/00 and T-78/00 *JFE Engineering Corp a.o. v Commission* of 8 July 2004, paragraph 185, where the Court of Justice noted that: *“It must be observed, in that regard, that, as far as the existence of the infringement is concerned, it would not matter whether or not the conclusion of the agreement with an anti-competitive purpose referred to by the Commission in Article 1 of the contested decision was in the commercial interests of the Japanese applicants if it were established, on the basis of evidence contained in the Commission's file, that they in fact concluded that agreement.”* Moreover, the Court of First Instance noted in Joined Cases C-204/00 P etc. *Aalborg Portland A/S and Others v. Commission* of 7 January 2004, paragraph 335: *“Furthermore, the fact that commercial reasons led Cementir to participate in the anti-competitive agreement is irrelevant when the agreement had the effect of restricting competition. Since its participation in the agreement is demonstrated, there is no need to examine whether it had any interest in participating in it.”*

<sup>340</sup> See recital (111) for an example.

<sup>341</sup> [redacted] reply of 20.5.2005 to the Statement of Objections, annex 2, point 17. [redacted]

<sup>342</sup> See recital (88).

<sup>343</sup> See recitals (111), (122).

even more the case for prices after smaller rebates to other road builders in the Netherlands.<sup>344</sup>

- (151) But the W5 road builders also had an interest in the scheme. Stability of gross prices was generally in their interest, given that major road construction works were often long term projects. Secondly, the system of gross prices linked to rebates allowed the W5 road builders to limit the disadvantages to them of the price index mechanism and to maximize the advantages thereof: a substantial and simultaneous increase in the gross price by suppliers could – through its effect on the CROW index - create a right of compensation in those contracts that contained such a compensation clause. Increases in the gross price could also be coupled to negotiated increases in the level of the W5 rebate.<sup>345</sup> Such increase in the gross price coupled to a parallel increase in the W5 rebate could even result in profit for the W5, as a number of their running contracts were linked to the price index mechanism and would thus result in extra payments from clients as well.<sup>346</sup> The alternative to a general increase in the W5 rebate was sometimes a commitment from the suppliers to compensate the price increase specifically for contracts that were not linked to the price index mechanism.<sup>347</sup> This compensation mechanism served to neutralise the financial impact on the W5 of increases in the gross price. Decreases in the gross price, which were sometimes inevitable to stay more or less in line with bitumen price developments in neighbouring countries, reduced the purchase costs of the W5, if they succeeded, as they often did, in maintaining<sup>348</sup> or even increasing<sup>349</sup> the W5 rebate. Only part of this decrease in gross prices had to be passed on to customers, namely only in those contracts that contained a compensation clause.
- (152) Another advantage to the W5 of the W5 rebate was that it was uniform. This limited the uncertainties of competition for their bitumen purchases among the W5 road builders, even if it did not completely eliminate competition because of individual volume or project rebates that they received on top of the W5 rebate.
- (153) The final advantage to the W5 of the scheme was the fact that road builders not belonging to the W5 should, according to the W5's agreement with the group of suppliers, receive a smaller rebate than the W5 themselves. This strengthened the competitive position of the W5 in bids for road construction works relative in relation to other road builders active in the Netherlands.<sup>350</sup> What was important to the W5 was not so much the absolute level of the net price of bitumen as the fact that they would have a relative advantage compared to road builders that were not part of the W5.<sup>351</sup> This relative advantage could allow them to win bids for public tenders for works with

---

<sup>344</sup> In an internal analysis of 1995 [17340] [redacted] predicted that in the case of unhindered competition in the Netherlands the price of road pavement bitumen would decrease in the short term by NGL 95/ton (on a price level at that time of NGL 340/ton).

<sup>345</sup> See for example recital (105) or (107).

<sup>346</sup> [redacted] observes in this respect:[redacted]. [redacted] letter of 27 July 2005, page 4. These statements are contested by road builders, see for instance [redacted] letter of 12 June 2006 and [redacted] letter of 12 June 2006.

<sup>347</sup> See for example recitals (101), (106), (107).

<sup>348</sup> See for example recitals (102), (119).

<sup>349</sup> See for example recital (103).

<sup>350</sup> See recital (70). See also [redacted] reply of 20.5.2005 to the Statement of Objections, paragraph 48: [redacted]

<sup>351</sup> So also the analysis in 1995 of [redacted] [17339] : [redacted]

a relatively high consumption of bitumen and would thus allow the W5 to further strengthen their already strong position on the Dutch market.

- (154) These considerations show that the interests of both groups, bitumen sellers and W5 purchasers, overlapped to a considerable degree and that the scheme as it had been developed was sufficiently attractive for both sides to continue operating in this anti-competitive manner. As an internal note of [redacted] on a meeting with the W5 road builder [redacted] in 2001 states: [redacted]<sup>352</sup>

## **2. RESTRICTION OF COMPETITION**

### **2.1. Application of Article 81(1) of the Treaty**

- (155) The anti-competitive behavior in the present case had the object of restricting competition. Article 81(1) of the Treaty expressly mentions as examples of restriction of competition agreements which:

- directly or indirectly fix selling prices, purchase prices, or any other trading conditions;
- apply dissimilar conditions to equivalent transactions with other parties, thereby placing them at a competitive disadvantage.<sup>353</sup>

- (156) These are precisely the essential characteristics of the arrangements under consideration in the present case. The agreements on the gross price of road pavement bitumen in the Netherlands qualify both as a fixing, whether directly or indirectly, of the selling price (from the point of view of the suppliers) and of the purchase price (from the point of view of the W5) of road pavement bitumen in the Netherlands. The agreements on the uniform W5 rebate also fixed, whether directly or indirectly, the selling price (from the point of view of the suppliers) and the purchase price (from the point of view of the W5) of road pavement bitumen for the W5 group of buyers. The agreements on the maximum rebates to non-W5 road builders fixed, whether directly or indirectly, the selling price (from the point of view of the suppliers) and the purchase price (from the point of view of the W5) of road pavement bitumen for non-W5 road builders active in the Netherlands. The agreements to apply lower rebates to non-W5 road builders than to W5 road builders were also agreements to apply dissimilar conditions to equivalent transactions with other parties, thereby placing those other parties at a competitive disadvantage.

- (157) The argument has been made by W5 road builders that these transactions with other parties (namely the non-W5 road builders) were not “equivalent”. In their view, members of the W5 merited a higher rebate than smaller road builders because W5 members purchased a higher annual volume of bitumen than the smaller road builders. The Commission does not accept this argument. If an individual W5 road builder succeeds in negotiating for itself a higher rebate than a smaller competitor obtained in its negotiation with that supplier, because the former purchases a larger volume, this is entirely non-objectionable. Factually speaking, it is not necessarily true, however, that

---

<sup>352</sup> [redacted]

<sup>353</sup> The list is not exhaustive.

each W5 member always purchased a higher volume of bitumen from each individual supplier than each non-W5 road builder. It may well be that for a particular supplier a non-W5 road builder is a more important client than a particular W5 road builder. If so, there is no commercial reason whatsoever for that supplier to grant a higher rebate to the W5 client than to the non-W5 client. Secondly, as the W5 road builders have argued, additional rebates based on volumes purchased, or in the case of building projects on the basis of volumes anticipated, were in fact granted on top of the uniform W5 rebate.<sup>354</sup> The uniform W5 rebate therefore served not so much to take account of higher volumes purchased as to ensure that W5 road builders always obtained better purchase conditions than non-W5 road builders. It is precisely this intent to place non-W5 road builders at a competitive disadvantage that is an important objectionable aspect of the arrangements for the W5. This is well illustrated by the fact that when the W5 found out that a non-W5 road builder had received a higher rebate than what it was “allowed”, they did not try to individually negotiate better purchase conditions for themselves for the future, as a rational autonomous actor might have done, but rather they insisted, by way of a ‘fine’, as a group on a retroactive increase in the W5 rebate for all past deliveries of the entire group of suppliers to all W5 members in the period concerned<sup>355</sup>. The objective was always to ensure that every W5 member always received better conditions than every non-W5 member, irrespective of the volume of bitumen purchased.

- (158) Some bitumen suppliers, for their part, have argued that they cannot be held responsible for the application of dissimilar conditions to equivalent transactions with other parties. The Commission does not accept this argument either. It may be that the initiative for this treatment of non-W5 road builders came from the W5 and that it served their interests most. But the group of suppliers agreed to this treatment as part of the overall anti-competitive scheme. It is not necessary that each element of an overall scheme equally benefits each individual member participating in the scheme. Moreover, even if suppliers occasionally cheated by granting a higher rebate to a non-W5 member than they were supposed to, on the whole the fact that they all agreed among themselves to grant lower rebates to non-W5 members had the effect of increasing their profit margin in sales of bitumen to non-W5 members, to the benefit of the entire group of suppliers.
- (159) Various undertakings also tried to explain and mitigate their responsibility for the anti-competitive arrangements by pointing to the specific features of the Dutch market, in particular the risk settlement arrangements with the contracting authorities for long term contracts on the basis of the standard or index price, the joint ownership of the asphalt plants by the road builders and the bitumen quality requirements. The Commission considers, however, that the undertakings were not precluded by any binding national regulations from engaging in autonomous conduct on the market for the sale and purchase of road pavement bitumen. Article 81 of the Treaty fully applies in this case.<sup>356</sup>
- (160) It is settled case-law that for the purpose of the application of Article 81 of the Treaty there is no need to take into account the actual effects of an agreement when it has as

---

<sup>354</sup> See recital (51).

<sup>355</sup> See recital (84).

<sup>356</sup> See Case T-66/99 *Minoan Lines v Commission*, [2003] ECR II-5515, paragraphs 177-179 and the jurisprudence cited.



its object the prevention, restriction or distortion of competition within the common market. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved.<sup>357</sup>

- (161) In the present case, however, the Commission considers that, on the basis of the elements which are put forward in this Decision<sup>358</sup>, it has also proven that the anti-competitive agreements were generally implemented in their key elements, namely gross price and rebates for W5 and non-W5 undertakings and that therefore actual anti-competitive effects of the cartel arrangements have taken place. Monitoring of the agreements took place to ensure that they were effectively implemented.

## **2.2. Application of Article 81(3) of the Treaty**

- (162) The W5 road builders have argued that their participation in the arrangements was limited to the collective negotiation of rebates and therefore amounts to “collective purchasing”, falling within the scope of Article 81(3) of the Treaty and authorised by the Commission Notice on Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements<sup>359</sup> (hereinafter referred to as the ‘Guidelines’). This argument cannot be accepted.
- (163) Firstly, the Guidelines do not “authorise” any particular behaviour. They merely provide principles for the assessment of horizontal cooperation agreements under Article 81 of the Treaty.<sup>360</sup>
- (164) Secondly, as point 2 of the Guidelines immediately makes clear, “Horizontal cooperation may lead to competition problems. This is for example the case if the parties agree to fix prices [...]” Point 18 of the Guidelines goes on to state: “In some cases the nature of cooperation indicates from the outset the applicability of Article 81(1). This is the case for agreements that have as their object a restriction of competition by means of price fixing, output limitation or sharing of markets or customers.[...]”
- (165) It should be recalled, in this respect, that the consequences of the arrangements which are the object of this Decision were not limited to the parties involved in them: gross prices were set for all purchases of road pavement bitumen from the group of suppliers in the Netherlands, including by undertakings that were not members of the W5. Smaller rebates than those for the W5 were agreed for other road builders than the W5. This behaviour is aimed at the restriction of competition. It is not collective purchasing, but rather cartel behaviour.
- (166) Thirdly, even if the behaviour of the W5 members had been limited to their own relations with the group of suppliers, it would not have qualified as collective purchasing. The W5 agreed with a group of suppliers the level of prices and rebates for future (and sometimes retroactive) individual purchases made by W5 members. The W5 therefore did not “purchase” anything, nor did its members subsequently

---

<sup>357</sup> Case T-62/98 *Volkswagen AG v Commission*, [2000] ECR II-2707, paragraph 178 and case law cited therein.

<sup>358</sup> See in particular Chapter IV.1.6 and annex 1 to this Decision.

<sup>359</sup> OJ C 3, 6.1.2001, p. 2.

<sup>360</sup> Point 1 of the Guidelines.

purchase “collectively”.<sup>361</sup> By agreeing gross prices and W5 rebates for all future individual purchases of its members with a group of suppliers that covered more than 80% of bitumen supply in the Netherlands<sup>362</sup>, the W5 significantly restricted competition among its members. This also qualifies as cartel behaviour, not collective purchasing<sup>363</sup>. Moreover, these agreements were concluded with a group of sellers which were themselves also involved in cartel behaviour. The W5 therefore also contributed to the restriction of competition between the suppliers. Some W5 road builders have argued that the W5 chose to negotiate as a group with an allegedly pre-existing sellers’ cartel merely in order to defend its legitimate interests. It has already been said<sup>364</sup> that in reality an important objective for the W5 of the agreements concluded was to disadvantage non-W5 road builders. But even if the W5’s intention had merely been to defend itself against a sellers’ cartel, the appropriate action would have been to inform the authorities, not to join and strengthen the cartel.

- (167) Finally, even if the behaviour of the W5 were to qualify as genuine collective purchasing, the agreements in question could not satisfy the conditions of Article 81(3) because they imposed restrictions on other parties (namely the gross price and rebate level applicable to non-W5 members) which are not indispensable to any economic benefits gained from the agreements.<sup>365</sup>
- (168) Apart from the argument regarding collective purchasing, the parties have not raised any other arguments to suggest that the conditions of Article 81(3) of the Treaty would be fulfilled in this case and the Commission considers that this is not the case.

### 3. EFFECT UPON TRADE BETWEEN MEMBER STATES

- (169) The Community Courts have consistently held that, in order that an agreement between undertakings may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that it may have an influence, direct or indirect, actual or potential on the pattern of trade between Member States and as such might prejudice the realisation of the aim of a single market between Member States.<sup>366</sup> Article 81 of the Treaty does not require that agreements have actually affected trade between Member States, but it

<sup>361</sup> Compare point 115 of the Guidelines, which talks about “joint buying”. Point 116 of the Guidelines goes on to say that “Purchasing agreements are often concluded by small and –medium-sized enterprises to achieve volumes and discounts similar to their bigger competitors. These agreements between small- and medium-sized enterprises are therefore normally pro-competitive”. The agreements concluded by the W5, the five or six largest road builders in the Netherlands, with the group of suppliers represent the opposite of this description.

<sup>362</sup> See table 1 in recital (29).

<sup>363</sup> Compare point 124 of the Guidelines : “Purchasing agreements only come under Article 81(1) by their nature if the cooperation does not truly concern joint buying, but serves as a tool to engage in a disguised cartel, i.e. otherwise prohibited price fixing, output limitation or market allocation.”

<sup>364</sup> See recitals (153) and (157).

<sup>365</sup> See point 133 of the Guidelines.

<sup>366</sup> See the judgment of the Court of Justice in Case 56/65 *Société Technique Minière*, [1966 ECR 282, paragraph 7; judgment of the Court of Justice in Case 42/84 *Remia and Others v Commission*, [1985] ECR 2545, paragraph 22; judgment of the Court of first Instance in Joined Cases T-25/95 etc. *Cimenteries CBR and Others v Commission*, [2000] ECR II-491, paragraph 3930.

does require that it be established that the agreements are capable of having that effect.<sup>367</sup>

- (170) The arrangements which are the object of this Decision had such an effect on trade between Member States.
- (171) Road pavement bitumen sold in the Netherlands is to a considerable degree imported from neighbouring Member States. Only Shell, Esha and Kuwait Petroleum had a production site in the Netherlands and Shell and Esha have stopped producing road pavement bitumen in the Netherlands. All other suppliers import from Belgium and Germany or purchase/exchange bitumen from the producer(s) in the Netherlands. However, this does not mean that the infringement of Article 81 of the Treaty is limited to that part of the cartel members' sales and purchases that actually involved the transfer of goods from one Member State to another. Nor is it necessary for Article 81 of the Treaty to apply to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States.<sup>368</sup>
- (172) Various road pavement bitumen suppliers also operate on a trans-national level, invoicing Dutch customers from another Member State (for example, Nynäs from Belgium and Veba from Germany).<sup>369</sup>
- (173) The agreements and concerted practices covered the entire territory of the Netherlands and were applied by almost all road pavement bitumen suppliers and all major road pavement bitumen purchasers active on the Dutch market. Such agreements or concerted practices extending over the whole territory of a Member State have, by their very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about.<sup>370</sup>
- (174) The bitumen suppliers applied different prices for the same product, depending on the market of destination of the product.<sup>371</sup> The price level in the Netherlands, even after rebates, was usually well above that in neighbouring countries<sup>372</sup> and the suppliers concerned refrained from competing on the Dutch market at the lower price level they applied in other countries. Nor did W5 road builders try through their subsidiaries in neighbouring countries to purchase bitumen at lower prices for consumption in the Netherlands.<sup>373</sup> The situation in the neighbouring countries was however taken into

---

<sup>367</sup> See the judgment of the Court of Justice in Case C-306/96 *Javico*, [1998] ECR 1983, paragraphs 16 and 17 and judgment of the Court of First Instance in Case T-374/94 *European Night Services*, [1998] ECR II-3141, paragraph 136.

<sup>368</sup> See the judgment of the Court of first Instance in Case T-13/89 *Imperial Chemical Industries v Commission*, [1992] ECR II-1021, paragraph 304.

<sup>369</sup> For the investigation of the cartel on the Dutch market, the Commission carried out inspections in the Netherlands, Belgium and Germany.

<sup>370</sup> This principle was confirmed by the Court of Justice in its judgment in Case C-309/99 *Wouters*, [2002] ECR I-1577, paragraph 95. See also the earlier judgment of the Court of Justice in Case 8/72 *Vereeniging van Cementhandelaren v Commission*, [1972] ECR 977, paragraph 29 and the judgment of the Court of First Instance in Case T-29/92 *SPO e.a. v Commission*, [1995] ECR II-289, paragraph 229.

<sup>371</sup> See also recital (28).

<sup>372</sup> [redacted]; [redacted] [21818, 21828] inspection documents - notes on the bitumen consultation of 12.4.2000 and 29.1.2002; [redacted] [17340] inspection document – internal market analysis 1995.

<sup>373</sup> [redacted]

account when discussing the level of the Dutch road pavement bitumen price.<sup>374</sup> Moreover, Kuwait Petroleum explained that additional rebates had to be given to a road builder with an asphalt plant in a border region in order to allow this road builder to compete abroad and to avoid the import of cheap asphalt from abroad.<sup>375</sup> In practice, for such an asphalt plant active on both sides of the border, two different prices had to be applied for the projects in the Netherlands and the projects across the border.<sup>376</sup> All of these measures had the effect of closing off the Dutch bitumen market from competition from abroad and thereby of partitioning the Community's Internal Market.

#### 4. DURATION OF THE INFRINGEMENT AND INDIVIDUAL INVOLVEMENT OF UNDERTAKINGS

##### 4.1. Start of the infringement

- (175) Whilst there are indications that collusion may already have occurred between the suppliers of road pavement bitumen in the Netherlands, between the (major) road builders and/or between both in the 1980s, clear evidence exists that at least from 1 April 1994 onward anti-competitive arrangements were in place within and between the two groups. The documents found at [redacted] dated 28 March 1994 and 8 July 1994<sup>377</sup> refer to agreements between “*the WO-5*” (represented by KWS) and “*the oil companies*” (represented by Shell) that entered into force on 1 April 1994.<sup>378</sup>
- (176) That anti-competitive arrangements were in place in and between those two groups at least as early as 1 April 1994 also finds support in the documents found at Shell dated 6 February 1995 and 9 February 1995, which describe the arrangements in place in the period up to 1995.<sup>379</sup> [redacted] earlier formal arrangements between bitumen suppliers (through Nabit) were terminated in 1993, but that the W5 and the group of bitumen suppliers “found a different method to avoid disruptions” in the period after 1993.<sup>380</sup> While the internal [redacted] notes of 1995 suggest that the author believed that “*the greatest unrest*” existed in 1994, due to the termination in 1993 of the suppliers’ collusion in Nabit, the documents from 1994 found at [redacted] in fact demonstrate that a Shell representative<sup>381</sup> was instrumental, at least as early as 1994, in reaching, on behalf of the group of suppliers, anti-competitive arrangements with the W5.

<sup>374</sup> [redacted] See also HBG [20643] inspection documents: Internal e-mail of 19.06.2000 on a meeting with Veba, where the latter informed HBG that they had discussed with Shell the effect of an forthcoming price increase in Germany on the price in the Netherlands.

<sup>375</sup> [redacted] and see also [II/34-35] inspection documents: internal e-mails regarding the extra efforts to be made for an asphalt plant near Germany.

<sup>376</sup> [redacted] In practice, such asphalt plant/road builder received an extra rebate for its projects carried out abroad. See, for example, [redacted].

<sup>377</sup> See recitals (93) and (94).

<sup>378</sup> In fact, these documents strongly suggest that similar arrangements were already in force in 1993.

<sup>379</sup> See recitals (88) and (89). The [redacted] internal note of 6 February 1995 relates that in 1993, [redacted] had [redacted]

<sup>380</sup> See recital (91). The internal [redacted] note of 14 July 2000 quoted in recital (90) makes no mention of any absence of anti-competitive activities, whether by [redacted] or anyone else, in 1994.

<sup>381</sup> This was the same person as mentioned in the [redacted] internal note of 6 February 1995.

- (177) This is also confirmed by [redacted], which in its reply to the Statement of Objections has stated that Shell and KWS had contacts in 1993 and discussed “*for the first time*” a special W5 rebate. [redacted]<sup>382</sup> [redacted] confirms that “Before, in any case in 1994, a collective W5 rebate was already applied”.<sup>383</sup> [redacted] already refers to initiatives between KWS and Shell to set up anti-competitive arrangements “between the bitumen suppliers and the five major Dutch customers”.<sup>384</sup> Finally, three bitumen suppliers have made statements confirming that the arrangements were in place at least as early as 1 April 1994.<sup>385</sup>
- (178) Together, these contemporaneous documents and statements prove not only that the anti-competitive arrangements which are the object of this Decision were in place and operational at least as early as 1 April 1994, but also that the entire group of suppliers and all members of the W5 were parties to them. The argument by many parties that the infringement only started with the first bitumen consultation meeting in 1996 is therefore rejected.<sup>386</sup> Anti-competitive agreements were in place between the two groups well before the first bitumen consultation meeting for which evidence has been found.
- (179) Wintershall has denied any participation in the anti-competitive behaviour. There is, however, no reason to accept Wintershall’s argument that there is insufficient evidence of its participation in the anti-competitive arrangements described in this Decision. [redacted]<sup>387</sup> [redacted] from the beginning Wintershall considered itself to be a member of the group of “the bitumen suppliers” and intended to take part in a discussion with other suppliers in March 1992 (presumably within the Nabit framework) on the idea of collaborating with the W5. Contrary to, for instance, the case of [redacted], which dismissed its bitumen representative in September 1992 for having colluded with other suppliers, there is no indication that Wintershall took any action, either at the start of the collusion with the W5 or at any time afterward, to distance itself from the agreements reached between the two groups. An internal [redacted] note of 7 July 1995 refers to Wintershall and the “normal” [namely the W5] rebate it gave to HBG.<sup>388</sup> [redacted]<sup>389</sup> [redacted] Wintershall was aware of the arrangements agreed with the W5 and generally complied with them. [redacted]<sup>390</sup> [redacted].<sup>391</sup> Moreover, some undertakings participating in the meetings have expressly recognized that Wintershall participated in the arrangements.<sup>392</sup> Finally, Wintershall did not provide any evidence to support the allegation that it did not participate in the cartel. While it may have occasionally cheated, by providing non-W5 road builders with higher rebates than those which they were entitled to under the arrangements, such occasional cheating is normal behaviour in cartels. The secrecy with which Wintershall surrounded such occasional cheating, to hide it in particular

---

<sup>382</sup> See recitals (97) and (96).

<sup>383</sup> See recital (96).

<sup>384</sup> See recital (92).

<sup>385</sup> [redacted]

<sup>386</sup> See, for instance, [redacted] reply of 20.5.2005 to the Statement of Objections, points 29 and 30.

<sup>387</sup> See recital (92).

<sup>388</sup> See recital (98).

<sup>389</sup> See recitals (98) and (82).

<sup>390</sup> [redacted]

<sup>391</sup> [redacted]

<sup>392</sup> [redacted], [redacted] [36502] reply of 2.10.2003 to request for information.

from the W5, suggests more that Wintershall considered itself a party bound by the arrangements than by anything else.<sup>393</sup>

- (180) Only Ballast Nedam is accepted to have been a latecomer to the cartel, due to the fact that until 1996 Ballast Nedam was not a major road builder in the Netherlands and not a member of the W5. Ballast Nedam reorganised its road building business in 1995 and subsequently started purchasing bitumen centrally.<sup>394</sup> In May 1995 it acquired the road builder Eemsmond Wegenbouw BV and in November 1995 the road builder Bruil Infrastructuur BV. Ballast Nedam states in its reply to the Statement of Objections that with the acquisition of Bruil it acquired a place among the major road builders in the Netherlands and some time afterward was admitted to the W5 and the bitumen consultation meetings, namely in the spring of 1996.<sup>395</sup> In the absence of clear evidence of any earlier participation, the Commission holds Ballast Nedam liable for participating in the cartel as of 21 June 1996.

#### **4.2. End of the cartel**

- (181) As mentioned in recital (122), the price change of 1 February 2002 had been agreed during a bitumen consultation on 29 January 2002. This price change was in force until 15 April 2002.<sup>396</sup> Whilst there are certain indications, mentioned in recitals (123) to (125), that the simultaneous price increases of 15 April 2002 and 16 September 2002 may also have been agreed upon, and that the collusive arrangements therefore only stopped at the time of the Commission inspections of 1 October 2002, the Commission, for the purpose of this Decision, considers that the infringement came to an end on 15 April 2002. The Commission therefore concludes that the collusive arrangements between the suppliers of road pavement bitumen in the Netherlands and the W5 road builders lasted at least until 15 April 2002, the day when the price that had been agreed in the cartel meeting of 29 January 2002 changed.
- (182) As far as Wintershall is concerned, its participation in the infringement ended with the sale of its oil business to Veba on 31 December 1999.

#### **4.3. Individual involvement in the case of undertakings that changed ownership during the period of infringement**

- (183) BP Nederland BV participated in the infringement from 1 April 1994 to 1 January 2000, when BP's Dutch bitumen activities were transferred to ExxonMobil. BP Refining & Chemicals GmbH participated in the infringement from 31 December 1999 onwards. First, it did so as legal and economic successor of Veba Oil Refining & Petrochemicals GmbH, which started its participation in the infringement when its parent company Veba Oel AG took over Wintershall's downstream oil activities on 31 December 1999. Subsequently, between 1 February 2002 and 15 April 2002, it did so directly, when Veba Oel AG was acquired by and incorporated into BP Fuels Deutschland GmbH and Veba Oil Refining & Petrochemicals GmbH became BP

---

<sup>393</sup> See for instance [redacted]

<sup>394</sup> In January 1995 Ballast Nedam Wegenbouw BV changed its name to Ballast Nedam Grond en Wegen BV and the road building activities of Ballast Nedam were centralized in this entity in March 1995. Ballast Nedam purchased bitumen centrally via Ballast Nedam Grond en Wegen BV and since October 2000, following an internal restructuration, via Ballast Nedam Infra BV.

<sup>395</sup> [redacted] reply of 23.5.2005 to the Statement of Objections, paragraph 112.

<sup>396</sup> See Annex 1 to this Decision.

Refining & Chemicals GmbH. As a consequence, BP plc, as ultimate parent company both of BP Nederland BV and of BP Refining & Chemicals GmbH, participated in the infringement from 1 April 1994 until 15 April 2002.<sup>397</sup>

- (184) Klöckner Bitumen BV participated in the infringement from 1 April 1994 to 15 April 2002. Sideron Industrial Development BV participated in the infringement from 1 January 2000, when Sideron had acquired Klöckner Bitumen BV and its parent KHM International BV.<sup>398</sup>
- (185) Total Nederland NV, the legal successor of Fina Nederland BV, participated in the infringement from 1 April 1994 to 15 April 2002. Total SA participated in the infringement from 1 November 1999, when Total acquired Fina, to 15 April 2002.<sup>399</sup>
- (186) BAM NBM Wegenbouw BV, the legal successor of NBM Wegenbouw BV, participated in the infringement from 1 April 1994 to 15 April 2002. Koninklijke BAM Groep NV participated in the infringement from 1 November 2000, when BAM acquired NBM, to 15 April 2002.<sup>400</sup>
- (187) Vermeer Infrastructuur BV, the legal successor of Vermeer Grond en Wegen BV, participated in the infringement from 1 April 1994 to 15 April 2002. Dura Vermeer Groep NV participated in the infringement from 13 November 1998, when Dura merged with Vermeer. Dura Vermeer Infra BV participated from 30 June 2000 when [employee] of Vermeer Infrastructuur BV who participated in the cartel meetings became [employee] of Dura Vermeer Infra BV (at that time still named Vermeer Kunststof Applicaties BV) and continued to participate in the collusive actions.<sup>401</sup>

#### **4.4. Period of infringement of each undertaking**

- (188) The period of infringement of each respective undertaking involved in the cartel is therefore as follows:
- Ballast Nedam: from 21 June 1996 to 15 April 2002;
  - BAM NBM: BAM NBM Wegenbouw BV from 1 April 1994 to 15 April 2002; Koninklijke BAM Groep NV from 1 November 2000 to 15 April 2002;
  - BP: BP plc from 1 April 1994 to 15 April 2002; BP Nederland BV from 1 April 1994 to 1 January 2000; BP Refining & Chemicals GmbH from 31 December 1999 to 15 April 2002;
  - Dura Vermeer: Vermeer Infrastructuur BV from 1 April 1994 to 15 April 2002; Dura Vermeer Groep NV from 13 November 1998 to 15 April 2002; Dura Vermeer Infra BV from 30 June 2000 to 15 April 2002;
  - Esha: from 1 April 1994 to 15 April 2002;

---

<sup>397</sup> See recitals (231) to (235).

<sup>398</sup> See recitals (236), (237) and (238).

<sup>399</sup> See recitals (239) to (251).

<sup>400</sup> See recitals (286) to (290).

<sup>401</sup> See recitals (298) to (305).

- HBG: from 1 April 1994 to 15 April 2002;
- Heijmans: from 1 April 1994 to 15 April 2002;
- Klöckner: Klöckner Bitumen BV from 1 April 1994 to 15 April 2002; Sideron Industrial Development BV from 1 January 2000 to 15 April 2002;
- Kuwait Petroleum: from 1 April 1994 to 15 April 2002;
- KWS: from 1 April 1994 to 15 April 2002;
- Nynäs: from 1 April 1994 to 15 April 2002;
- Shell: from 1 April 1994 to 15 April 2002;
- Total: Total Nederland NV from 1 April 1994 to 15 April 2002; Total SA from 1 November 1999 to 15 April 2002;
- Wintershall: from 1 April 1994 to 31 December 1999.

## VI. Addressees of this Decision

### 1. GENERAL PRINCIPLES ON LIABILITY

- (189) The Commission considers that the addressees of this Decision must be held liable for the anti-competitive behaviour described in this Decision. As a general consideration, the subject of Community competition rules is the “undertaking”, a concept that has an economic scope and that is not identical with the notion of corporate legal personality in national commercial or fiscal law. The “undertaking” that participated in the infringement is therefore not necessarily the same entity as the precise legal entity within a group of companies whose representatives actually took part in the cartel meetings. The term “undertaking” is not defined in the Treaty. However, in *Shell International Chemical Company v. Commission*, the Court of First Instance held that “in prohibiting undertakings *inter alia* from entering into agreements or participating in concerted practices which may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the common market, Article 85(1) [now Article 81(1)] of the EEC Treaty is aimed at economic units which consist of a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision”.<sup>402</sup>
- (190) Despite the fact that Article 81 of the Treaty is applicable to undertakings and that the concept of undertaking has an economic scope, only entities with legal personality can be held liable for infringements. This Decision should therefore be addressed to legal

<sup>402</sup>

Case T-11/89, [1992] ECR II-757, paragraph 311. See also the judgment of the Court of First Instance in Case T-352/94 *Mo Och Domsjö AB v Commission*, [1998] ECR II-1989, paragraphs 87-96.



entities.<sup>403</sup> It is accordingly necessary for each undertaking that is to be held accountable for its infringement of Article 81 of the Treaty in this case to identify one or more legal entities that represent the undertaking. According to the case law, “Community competition law recognises that different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Articles 81 EC and 82 EC if the companies concerned do not determine independently their own conduct on the market”.<sup>404</sup> If a subsidiary does not determine its own conduct on the market independently, the company which directed its market strategy forms a single economic entity with that subsidiary and may be held liable for an infringement on the ground that it forms part of the same undertaking.

- (191) According to the settled case-law of the Court of Justice and the Court of First Instance, the Commission can generally assume that a wholly-owned subsidiary essentially follows the instructions given to it by its parent company without needing to check whether the parent company has in fact exercised that power.<sup>405</sup> However, the parent company and/or subsidiary can reverse this presumption by producing sufficient evidence that the subsidiary “*decided independently on its own conduct on the market rather than carrying out the instructions given to it by its parent company and such that they fall outside the definition of an ‘undertaking’*”.<sup>406</sup>
- (192) Where an infringement of Article 81 of the Treaty is found to have been committed, it is necessary to identify a natural or legal person who was responsible for the operation of the undertaking at the time when the infringement was committed so that it can answer for it.
- (193) When an undertaking that has committed an infringement of Article 81 of the Treaty subsequently disposes of the assets which contributed to the infringement and withdraws from the market in question, it continues to be answerable for the infringement if it has not ceased to exist.<sup>407</sup> If the undertaking which has acquired the assets carries on the violation of Article 81 of the Treaty, liability for the infringement should be apportioned between the seller and the acquirer of the infringing assets, each undertaking being responsible for the period of infringement in which it participated through these assets in the cartel. However, if the legal person initially answerable for the infringement ceases to exist and loses its legal personality, being purely and simply absorbed by another legal entity, that latter entity must be held answerable for the

---

<sup>403</sup> Although an ‘undertaking’ within the meaning of Article 81(1) of the Treaty is not necessarily the same as a company having legal personality, it is necessary for the purposes of applying and enforcing decisions to identify an entity possessing legal or natural personality to be the addressee of the measure. See Case T-305/94 *PVC*, [1999] ECR, p. II-0931, paragraph 978.

<sup>404</sup> Court of Justice in Case 48/69 *Imperial Chemical Industries v. Commission*, [1972] ECR 619, paragraphs 132-133; Case 170/83 *Hydrotherm*, [1984] ECR 2999, paragraph 11 and Court of First Instance in Case T-102/92 *Viho v Commission*, [1995] ECR II-17, paragraph 50, cited in Case T-203/01 *Michelin v Commission*, [2003] ECR II-4071, paragraph 290.

<sup>405</sup> Court of First Instance in Joined Cases T-71/03 etc. *Tokai Carbon and Others v Commission*, 15 June 2005, paragraph 60; Case T-354/94 *Stora Kopparbergs Bergslags v Commission*, [1998] ECR II-2111, paragraph 80, upheld by Court of Justice in Case C-286/98P *Stora Kopparbergs Bergslags v Commission*, [2000] ECR I-9925, paragraphs 27, 28 and 29; and Court of Justice in Case 107/82 *AEG v Commission*, [1983] ECR 3151, paragraph 50.

<sup>406</sup> Court of First Instance in Joined Cases T-71/03 etc. *Tokai Carbon and Others v Commission*, 15 June 2005, paragraph 61.

<sup>407</sup> Case T-6/89 *Enichem Anic v Commission (Polypropylene)*, [1991] ECR II-1623; Case C-49/92P *Commission v Anic Partecipazioni*, [1999] ECR I-3125, paragraphs 47, 48 and 49.

whole period of the infringement and thus liable for the activity of the entity that was absorbed.<sup>408</sup> The mere disappearance of the person responsible for the operation of the undertaking when the infringement was committed does not allow it to evade liability.<sup>409</sup> Liability for a fine may thus pass to a successor where the corporate entity, which committed the violation, has ceased to exist in law.

## 2. LIABILITY IN THIS CASE

- (194) It has been established in recitals (57) and (77) and Section IV.2 of this Decision that all bitumen suppliers and W5 road builders to whom this Decision is addressed participated in the cartel that is the object of this Decision.
- (195) The Commission applies the general principles referred to in this Chapter on the liability of legal entities within undertakings to this case by addressing this Decision in principle to those legal entities within the undertakings that were directly involved in the anti-competitive activities and/or that were responsible for the production, sales or purchases of bitumen in the Netherlands; and secondly, to those legal entities within the undertakings that manage the undertaking as a whole and thus carry ultimate responsibility for the undertaking's infringement. Together those entities form part of the respective undertakings that committed the infringement of Article 81 of the Treaty and they are held jointly and severally liable for their undertaking's participation in the cartel.
- (196) The majority of bitumen suppliers active in the Netherlands were part of European or global petrochemical multinationals. These international groups of companies are generally organised in product clusters and/or geographic zones. Their internal business organisation is usually not reflected in the legal organisation of the group: management reporting lines may differ depending on the product involved or the geographic zone, and may involve entities that are not a direct parent company of the reporting operating subsidiary. All these entities generally form part of a single economic entity whose top parent company ultimately determines the strategic decisions of the group. It is normally only in this top parent company that the business reporting lines and legal ownership relations within the undertaking converge. Often, the legal entities and business units within the undertaking operate under the same commercial names, contribute to the pursuit of the business objectives of the group, adhere to the group policies and implement the strategic decisions of the business organisation that is imposed on all subsidiaries of the group. In this respect, the Court of First Instance stated, for instance with regard to Shell International Chemical Company, the highest parent company held liable by the Commission in the *Polypropylene* case, that: "*The Court holds that Shell and the Shell group operating companies which produce and market chemical products constitute a single unitary organisation of personal, tangible and intangible elements which pursues, on a long-*

---

<sup>408</sup> See Case C-279/98 P *Cascades v Commission*, [2000] ECR I-9693, paragraphs 78-79: "*It falls, in principle, to the natural or legal person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the Decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking ... Moreover, those companies were not purely and simply absorbed by the appellant but continued their activities as its subsidiaries. They must, therefore, answer themselves for their unlawful activity prior to their acquisition by the appellant, which cannot be held responsible for it*".

<sup>409</sup> See Court of First Instance in Case T-305/94 *PVC II*, [1999] ECR II-931, paragraph 953.

*term basis, the objective inter alia of producing and selling polypropylene with a view to maximising profits, even, in some cases, to the detriment of the individual profits of its various components. In that organisation, each company plays a specific role. The operating companies produce or sell polypropylene, while the applicant plays a stimulating and coordinating role between the various operating companies of the group. Consequently, Shell and the Shell group operating companies constitute a single undertaking.*<sup>410</sup> The same reasoning applies to the entire petrochemical group.

- (197) The subsidiaries within the large petrochemical undertakings that manufacture and/or sell road pavement bitumen in the Netherlands in practice cannot act on an independent basis. Firstly, this is because bitumen is merely a by-product in the production of fuel, as explained in recital (4). The bitumen business cannot, therefore, be an independent business in its own right but will always depend on more important decisions taken within the group in respect of the production of fuel. Those decisions are taken at higher levels within the undertaking. Secondly, as explained hereafter on an individual basis per undertaking, group structures are in place within petrochemical undertakings to supervise the local operations and to exercise decisive influence over the business decisions of subsidiaries. The decision on the closure or relocation of a bitumen production plant is, for instance, never taken on an autonomous basis by the local subsidiary, but requires the agreement of a higher group entity. It is ultimately at the highest group level that the business reporting lines and legal ownership relations converge and the group management sets a strategic framework and general orientations for the commercial strategy and operations on the market of its subsidiaries. All operations of the group, including those relating to bitumen, take place under the same commercial name. Lastly, for all petrochemical groups, turnover is consolidated at group level.
- (198) As regards the W5 road builders in the Netherlands, they were all part of large conglomerates involved in the construction sector. These conglomerates are usually organised in business clusters, where road building forms part of the ‘infrastructure cluster’<sup>411</sup>, and/or geographic zones. The Commission considers that such business clusters are not autonomous commercial actors but that rather the entire group of companies within the conglomerate forms a single undertaking. Turnover is consolidated at group level for the entire conglomerate. All operational subsidiaries within the conglomerate usually operate under the same or similar commercial group name. Operational subsidiaries adhere to the group policies set by central management and implement the strategic decisions of the business organisation that is imposed on all subsidiaries of the group.<sup>412</sup> The group parent company ultimately determines the strategic decisions of the group and exercises decisive influence over the conduct of its subsidiaries. The group parent company is also often responsible for horizontal tasks such as personnel, legal affairs and group financial management.
- (199) Various parent companies have argued in their response to the Statement of Objections that the Commission should have proved that they were directly involved in the infringement, or at least were aware of the infringement. The Commission does not

---

<sup>410</sup> Judgment of the Court of first Instance in Case T-11/89 *Shell International Chemical Company Ltd v Commission of the European Communities*, ECR 1992 II-757, para. 312.

<sup>411</sup> Other clusters usually consist of building activities (residential and non-residential) and civil engineering.

<sup>412</sup> See also the case law referred to in recital (196).

accept this argument because it does not take into account that, in the words of the Court of Justice: “*It falls, in principle, to the natural or legal person managing the undertaking in question when the infringement was committed to answer for that infringement, [...]*”.<sup>413</sup> Proof of direct involvement of the parent company in or awareness of the anti-competitive activities is not necessary. It suffices that both the parent and its subsidiary form part of a unitary organisation which pursues a specific economic aim on a long-term basis, and which can contribute to an infringement of competition law. This conclusion is supported by abundant case law<sup>414</sup>, which consistently refers to an absence, on the part of the subsidiary, of autonomy in determining its course of action in the market and not, more specifically, with respect to the infringement.

- (200) Various parent companies have tried to rebut the presumption of liability created by the fact that they directly or indirectly owned 100% (or close to 100%) of the subsidiaries that were directly involved in the anti-competitive activities. These parent companies did so by submitting that the day-to-day operations of their subsidiaries are carried out independently from any precise instructions of the parent company. The Commission does not accept this argument. That subsidiaries perform day-to-day operations without precise instructions from the group management is entirely normal in any well-run group and does not prove that the subsidiary in question is an autonomous actor on the market. It is not, in respect of normal day-to-day operations, that the subsidiary has to rebut the presumption by proving its autonomy, but precisely in respect of the most important strategic decisions a company can face, such as what line of business to be in, whether to merge with or acquire other companies, when and where to invest, from whom to buy inputs, to whom to sell outputs, what is to be done with the profits the subsidiary generates, who is to be appointed to lead the subsidiary, whether the subsidiary has a reporting obligation to other group entities, whether the subsidiary must operate within strategic objectives set by group management. General assertions of commercial autonomy unsupported by convincing evidence regarding such key types of commercial decisions are not sufficient in this regard.<sup>415</sup>
- (201) Secondly, various parent companies claimed in their responses to the Statement of Objections that they did not exercise decisive influence over the road pavement bitumen activities (selling or purchasing) in the Netherlands, because this activity was marginal in comparison to the group turnover for which they are responsible. The Commission also does not accept that argument. The financial results of the subsidiaries (including road pavement bitumen selling and/or purchasing) are consolidated with those of the group, implying that the bitumen profits or losses, however small they might be compared to the total results of the group, are considered to be part of group turnover and thus a concern of the group management. Moreover, as indicated in the recital (200), the exercise of decisive influence does not necessarily translate into the issuing of any direct instructions regarding the generation of that precise portion of the turnover of the group, but is more likely to show itself in the setting of objectives and structures of the group which prevent the subsidiary in question from operating truly autonomously on the market.

---

<sup>413</sup> Case C-279/98 P *Cascades v Commission*, [2000] ECR I-9693, paragraph 78.

<sup>414</sup> See, for instance, Case 48/69 *ICI v Commission*, [1972] ECR 619, in particular paragraph 134 or Case 107/82 *AEG v Commission*, [1983] ECR 3151, paragraph 50.

<sup>415</sup> Case C-286/98 P *Stora Kopparbergs Bergslags AB v Commission*, [2000] ECR I-9925, paragraphs 27, 28 and 29.

- (202) The Commission further observes that the fact that the parent company was not itself involved in the production and sale of bitumen or in the purchasing of bitumen for the purpose of asphalt production and road building is not determinant as regards the question whether it should be considered to constitute a single economic unit with the operational units in the group that were directly involved in such bitumen activities in the Netherlands. The division of tasks is a normal phenomenon within a group of companies. An economic unit by definition performs all of the main functions of an economic operator within the legal entities of which it is composed. Group companies and business clusters that are dependent on a corporate centre for the basic orientation of their commercial strategy and operations, for their investments and finances, for their legal affairs and for their leadership cannot be considered to constitute an economic unit in their own right.
- (203) Various parent companies have argued in their responses to the Statement of Objections that the Commission's express reference in the Statement of Objections to the judgment of the Court of First Instance in *Shell International Chemical Company Ltd v Commission*<sup>416</sup> contradicts the Commission's finding in this proceeding that the ultimate parent companies of petrochemical undertakings can be held liable for the infringement. However, the Commission notes that the fact that in a previous case an intermediary entity of a group and its subsidiary, which were found to form part of a single undertaking and were addressed in a Decision, does not exclude that the group's ultimate parent company also forms part of the undertaking that committed the infringement and may also be addressed in a later Decision.<sup>417</sup> The Commission enjoys a margin of discretion in deciding which entities of an undertaking it holds liable for an infringement. The fact that in a previous Decision the Commission chose not to hold the ultimate parent company within a group responsible does not mean that the Commission is prevented from doing so now.
- (204) The liability of each undertaking is explained in more detail in recitals (205) to (305) on an individual basis, in the same order as in Chapter II, Section 2.

#### *Bitumen suppliers*

### **2.1. Shell**

- (205) Throughout the period of infringement, participation in the collusive contacts took place via an employee of Shell Nederland Verkoopmaatschappij BV.<sup>418</sup>
- (206) Shell Nederland Verkoopmaatschappij BV is 100% owned by Shell Nederland BV. The latter is 100% owned by Shell Petroleum NV, one of the main group holding companies of the Shell group. During the period of the infringement, Shell Petroleum NV was jointly controlled by the two ultimate parent companies of the Shell Group, Koninklijke Nederlandsche Petroleum Maatschappij NV (60%) and The "Shell" Transport and Trading Company plc. (40%). Together, these two companies owned the entire share capital of Shell Petroleum NV.

---

<sup>416</sup> Paragraph 283 of the Statement of Objections ; Case T-11/89 *Shell International Chemical Company Ltd v Commission*, [1992] ECR II-757, paragraph 312.

<sup>417</sup> Compare Case T-203/01 *Michelin v. Commission* [2003] ECR 4071, paragraph 290.

<sup>418</sup> See recital (77).

- (207) The centre of the decision making process in the Shell group is the Committee of Managing Directors. This is a joint committee established by the boards of the group holding companies, among which Shell Petroleum NV and the ultimate parent companies, to help them operate effectively. Each member of this committee – also known as ‘Group Managing Director’ – is on the board of one of the two ultimate parent companies and of Shell Petroleum NV.<sup>419</sup> The Committee of Managing Directors is not a legal entity.
- (208) The bitumen business was between 1998 and 2002 part of the class of market ‘Construction’ of the oil products business organisation of Shell in Europe, namely Shell Europe Oil Products (SEOP). The Construction Marketing Manager for Europe and his staff were responsible for the results of the bitumen business.<sup>420</sup> SEOP was not a legal entity itself, but an organisation comprising the oil product activities of various operating companies in Europe. The President of SEOP reported as Executive VP Europe to the CEO Oil Products, who was also a Group Managing Director.<sup>421</sup> Geographically, a Benelux Commercial organisation was in place, which again was an organisation without a separate legal identity.<sup>422</sup> Prior to the establishment of SEOP in 1998, reporting within the Shell group was more on a country by country basis. The Manager Bitumen of Shell Nederland Verkoopmaatschappij BV reported to the local General Manager Commercial Sales, who reported to the Country General Manager.<sup>423</sup> The Country General Manager reported to the Coordinator Europe, who worked for Shell International Petroleum Maatschappij NV, the shares of which were held by Shell Petroleum NV. He and his staff had responsibility for the development and maintenance of a “regional perspective” (namely cross business) on all group business activities, including the bitumen business. He reported directly to one or more Group Managing Directors.<sup>424</sup> Shell International Petroleum Maatschappij NV was not a direct parent company of Shell Nederland Verkoopmaatschappij BV, but, like Shell Nederland BV, a subsidiary of Shell Petroleum NV.
- (209) Based on these facts, the Commission has addressed the Statement of Objections to the following entities:
- Shell Nederland Verkoopmaatschappij BV;
  - Shell Petroleum NV;
  - Koninklijke Nederlandsche Petroleum Maatschappij NV and The “Shell” Transport and Trading Company plc.
- (210) After the Statement of Objections was issued, the double structure of the Shell group was unified. Since 20 July 2005 the group is owned by a single parent company, Royal

---

<sup>419</sup> [redacted] [33737] reply of 25.2.2004 to request for information.

<sup>420</sup> [redacted] [33738] reply of 25.2.2004 to request for information.

<sup>421</sup> Legally, the President of SEOP is an employee of Shell UK Oil Products Ltd., a subsidiary of Shell Holdings (UK) Ltd., a subholding of The Shell Petroleum Company Limited, one of the Group Holding Companies.

<sup>422</sup> [redacted] [26554] reply of 25.8.2003 to request for information.

<sup>423</sup> [redacted] [26522 and 26554] idem. The managers responsible for production and logistics reported to the General Manager Refining who also reported to the Country General Manager.

<sup>424</sup> For this purpose, the Regional Co-ordinator and his staff performed inter alia appraisals of the Country Business Plans which were issued by Shell’s national organisations in each European country. The Regional Co-ordinator Europe worked for Shell International Petroleum Maatschappij NV, a subsidiary of Shell Petroleum NV.

Dutch Shell plc, which has acquired all of the shares in Koninklijke Nederlandsche Petroleum Maatschappij NV and in The “Shell” Transport and Trading Company plc. Koninklijke Nederlandsche Petroleum Maatschappij NV has been absorbed by Shell Petroleum NV<sup>425</sup> and no longer exists as a separate legal entity. The other former group parent company, The “Shell” Transport and Trading Company plc, has been transformed into The Shell Transport and Trading Company Ltd, a (nearly) 100% subsidiary of Shell Petroleum NV. Under the new structure Royal Dutch Shell plc holds (nearly) all shares in Shell Petroleum NV and Shell Petroleum NV holds (nearly) all shares in The Shell Transport and Trading Company Ltd. This corporate restructuring was completed on 21 December 2005.

- (211) In its reply to the Statement of Objections, Shell has contested the attribution of liability to Shell Petroleum NV and to Koninklijke Nederlandsche Petroleum Maatschappij NV and The “Shell” Transport and Trading Company plc. In the specific circumstances of this case, the Commission has chosen to address this Decision, in addition to the operational subsidiary Shell Nederland Verkoopmaatschappij BV, to those legal entities within the Shell group that received the Statement of Objections and that still exist as legal entities within the Shell group. These are Shell Petroleum NV, whose name has remained unchanged, and The Shell Transport and Trading Company Ltd, which had the name The “Shell” Transport and Trading Company plc at the time the Statement of Objections was issued to it.

*The Shell Transport and Trading Company Ltd*

- (212) With respect to The “Shell” Transport and Trading Company plc, the legal predecessor of The Shell Transport and Trading Company Ltd, this company and Koninklijke Nederlandsche Petroleum Maatschappij NV were together the ultimate parent companies within the Shell group during the period of the infringement. Together they controlled 100% of the shares of Shell Petroleum NV and, through it, 100% of the shares of Shell Nederland Verkoopmaatschappij BV. Shell has submitted insufficient arguments to rebut the presumption that through these shareholdings Koninklijke Nederlandsche Petroleum Maatschappij NV and The “Shell” Transport and Trading Company plc together exercised decisive influence over Shell Petroleum NV and Shell Nederland Verkoopmaatschappij BV.
- (213) Shell refers to the Commission’s *PVC* Decision of 27 July 1994, which did not impute liability at the Shell group level, but at the intermediate level of Shell International Chemical Company Ltd.<sup>426</sup> The Commission does not accept this argument. As mentioned in recital (203), the *PVC* Decision and the subsequent ruling by the Court of First Instance made it clear that the intermediate Shell company formed part of the single undertaking Shell, which committed the infringement, even if at that time the Commission chose not to address the Decision to the group parent companies. That decision therefore cannot lead to the conclusion that the Commission must refrain from addressing the Shell parent companies in any other Decision involving entities of the Shell group. The Commission has a margin of discretion in imputing liability and the fact that it has not done so in a previous case does not prevent it from doing so in

---

<sup>425</sup> A statutory merger has taken place between Koninklijke Nederlandsche Petroleum Maatschappij NV and Shell Petroleum NV, whereby Shell Petroleum NV was the acquiring company and consequently Koninklijke Nederlandsche Petroleum Maatschappij NV has ceased to exist.

<sup>426</sup> Commission Decision in Case IV/31.865 *PVC*, (OJ L 239, 14. 9.1994, p. 14)..

this Decision.<sup>427</sup> In any case, as mentioned in recitals (207) and (208) and contrary to the factual situation at the time of the *PVC* case, in this proceeding no single legal entity that played a coordinating and strategic planning role within the group could be identified for the entire duration of the infringement at a level below that of the top parent companies. The Commission cannot address its Decision to business organisations which have an informal structure and no legal identity, like the Committee of Managing Directors, Shell Europe Oil Products or the Benelux commercial organization within the Shell group.

- (214) As mentioned in recital (199), the argument that Shell has not found evidence that apart from the employee who participated in the cartel meetings anyone else within the Shell group was aware of the alleged infringement, does not exclude that other entities in the Shell group form part of the undertaking that committed the infringement and may be held liable for that infringement. In this respect, the Commission notes that Shell itself has stated publicly in a report filed on 13 March 2006 with the U.S. Securities and Exchange Commission that “*All operating activities have been conducted through the subsidiaries of Royal Dutch and Shell Transport which have operated as a single economic enterprise.*”<sup>428</sup> The Commission also notes that the turnover of Shell Nederland Verkoopmaatschappij BV was, at the time of the infringement, consolidated within the total turnover of Koninklijke Nederlandsche Petroleum Maatschappij NV and The “Shell” Transport and Trading Company plc. Finally, both customers and competitors are used to referring to the entire undertaking and each of its legal entities as “Shell”, because the external perception is clearly that Shell Nederland Verkoopmaatschappij BV forms an integral part of the Shell concern.<sup>429</sup>

#### *Shell Petroleum NV*

- (215) Since Shell Petroleum NV (indirectly) owns 100% of Shell Nederland Verkoopmaatschappij BV, there is a presumption that Shell Petroleum NV exercised decisive influence over Shell Nederland Verkoopmaatschappij BV. In its reply to the Statement of Objections, Shell argues that there is no legal basis to consider Shell Petroleum NV an appropriate addressee of this Decision. The arguments Shell has submitted in this respect are, however, insufficient.
- (216) The argument that Shell Petroleum NV is a mere holding company that does not generate turnover and therefore cannot be held liable for the infringement does not take into account the specificities of the Shell group and in particular the role of its Committee of Managing Directors, all members of which are on the board of Shell

---

<sup>427</sup> See Case T-347/94 *Mayr-Melnhof Kartongesellschaft mbH v Commission*, ECR [1998] II-1751, paragraphs 367-368. Although this covers mitigating circumstances, the principle that the Commission is not bound to follow a particular exercise of discretion in a previous Decision is equally applicable. See also Case T-203/01, *Michelin v. Commission*, 2003 ECR II-4071, at paragraph 290.

<sup>428</sup> Page 6 of this report.

<sup>429</sup> See notably judgment of the Court of First Instance in case T-66/99 *Minoan Lines V. Commission*, ECR [2003] 0000; at paragraph 129 the Court stated that “*the criteria used in earlier cases to establish whether or not an agent and its principal form a single economic unit are satisfied in the present case because ETA did business on the market only in the name of and for the account of Minoan, it took on no financial risk in connection with that business and, lastly, the two companies were perceived by third parties and on the market as forming one and the same economic entity, namely Minoan*” (emphasis added).]



Petroleum NV. This Committee of Managing Directors was at the centre of the decision making process in the Shell Group and ultimately steered the conduct of the subsidiaries of the group. The Committee of Managing Directors advised Shell Petroleum NV on its investments and on the exercise of shareholder rights for the companies the latter controls. Among those companies was Shell Nederland BV, which in turn controlled Shell Nederland Verkoopmaatschappij BV. The fact that Shell Petroleum NV did not generate any turnover itself shows precisely that it was not an autonomous economic actor in its own right, but rather performed supervisory functions within the Shell group which makes it an essential link within the chain of command stretching from the two top parent companies to the operational sales company Shell Nederland Verkoopmaatschappij BV.

- (217) Directors of Shell Petroleum NV were nominated by Koninklijke Nederlandsche Petroleum Maatschappij NV and The “Shell” Transport and Trading Company plc., in proportion to their ownership interests. The Board of Shell Petroleum NV, supported by the Committee of Managing Directors, sets expectations as to how Shell Nederland BV is to be run, by providing guidance on policy and strategy. Shell Petroleum NV exercises its shareholder rights in Shell Nederland BV, including the right to appoint directors, express views and seek assurance as to how Shell Nederland BV is run. Shell Nederland BV in turn exercises its shareholder rights in Shell Nederland Verkoopmaatschappij BV in a similar manner. The group appoints and dismisses the managing directors of the operating companies. The Managing Director of the group parent company Koninklijke Nederlandsche Petroleum Maatschappij NV and Principal Director of the group holding company Shell Petroleum NV was also Supervisory Director of Shell Nederland BV, the direct parent company of Shell Nederland Verkoopmaatschappij BV.

### *Conclusion*

- (218) In the specific circumstances of this case, the Commission takes the view that it is appropriate to address this Decision to Shell Nederland Verkoopmaatschappij BV, Shell Petroleum NV and The Shell Transport and Trading Company Ltd, the legal successor to The “Shell” Transport and Trading Company plc. Together those entities form part of the undertaking Shell that committed the infringement and the Commission holds them jointly and severally liable for the infringement.

## **2.2. Kuwait Petroleum**

- (219) Kuwait Petroleum (Nederland) BV, the entity selling bitumen in the Netherlands, is a wholly-owned subsidiary of KPC International NV (Curaçao), which is a wholly-owned subsidiary of KPC Holdings (Aruba) AEC, which is a wholly-owned subsidiary of Kuwait Petroleum Corporation (Kuwait), the ultimate group parent company. KPC Holdings (Aruba) AEC and KPC International NV are “pure holding companies and do not have turnover of their own.”<sup>430</sup>
- (220) Within the Kuwait Petroleum group of companies, Kuwait Petroleum International Ltd. (London, UK), a sister company of Kuwait Petroleum (Nederland) BV, was designated to play a coordinating role over the operations of the undertaking outside Kuwait, including the conduct of Kuwait Petroleum (Nederland) BV.

<sup>430</sup>

[redacted] [38319] reply of 1.3.2004 to request for information.

- (221) Based on these facts, the Commission has addressed the Statement of Objections to the following entities:
- Kuwait Petroleum (Nederland) BV;
  - Kuwait Petroleum International Ltd.; and
  - Kuwait Petroleum Corporation.
- (222) Kuwait Petroleum has contested the attribution of liability to Kuwait Petroleum Corporation and to Kuwait Petroleum International Ltd.<sup>431</sup>

*Kuwait Petroleum Corporation*

- (223) Kuwait Petroleum Corporation indirectly owns 100% of the shares of Kuwait Petroleum (Nederland) BV, which was directly involved in the cartel activities. Because of the 100% ownership, there is a presumption that Kuwait Petroleum Corporation exercised decisive influence over Kuwait Petroleum (Nederland) BV. Kuwait Petroleum Corporation argues that while it actively manages its subsidiaries in Kuwait, it takes a passive role with respect to its subsidiaries outside of Kuwait. All companies involved in downstream refining and marketing activities outside Kuwait are grouped in KPC Holdings (Aruba) AEC which exercises its supervisory powers through Kuwait Petroleum International Ltd. The group management reporting structure is distinct from its shareholding structure and would prevent Kuwait Petroleum Corporation from exercising broad supervisory powers over its investments in companies outside of Kuwait, including Kuwait Petroleum (Nederland) BV. This lack of control is, according to Kuwait Petroleum Corporation, supported by the fact that there is no single reference in the file to any kind of instruction given by Kuwait Petroleum Corporation to KPC Holdings (Aruba) AEC regarding operational decisions and by the fact that the periodic reports Kuwait Petroleum Corporation receives on its business outside Kuwait do not refer to the bitumen business in the Netherlands.
- (224) The Commission considers that it is evident from the corporate structure of the Kuwait group itself that the economic unit producing and selling bitumen in the Netherlands must include Kuwait Petroleum Corporation. The only possible basis upon which Kuwait Petroleum International Ltd can exercise supervisory functions over its sister company Kuwait Petroleum (Nederland) BV, with which it has no direct corporate link, is that a legal entity higher within the group than both of these sister companies has instructed Kuwait Petroleum (Nederland) BV to accept and comply with the supervision by Kuwait Petroleum International Ltd. As KPC Holdings (Aruba) AEC, which owns both of these sister companies, is a pure holding company, the ultimate source of and responsibility for such instruction lies with Kuwait Petroleum Corporation, the 100% owner of KPC Holdings (Aruba) AEC.<sup>432</sup> Kuwait Petroleum International Ltd and Kuwait Petroleum (Nederland) BV together cannot form a complete autonomous economic actor, precisely because they are sister companies and depend for their cooperation on instructions from Kuwait Petroleum Corporation.

---

<sup>431</sup> See separate responses to the Statement of Objections from Kuwait Petroleum Corporation, Kuwait Petroleum International Ltd. and Kuwait Petroleum (Nederland) BV.

<sup>432</sup> Kuwait Petroleum Corporation appoints directors to the board of KPC Holdings (Aruba) AEC, requires periodic reports from it and approves its major decisions. KPC Holdings (Aruba) AEC is a holding company with no operational management. See [redacted] reply of 20.5.2005 to the Statement of Objections, pages 8-9.

- (225) Kuwait Petroleum Corporation is therefore not simply an investment vehicle which outside Kuwait merely serves to invest capital in companies, and withdraw capital as soon as it considers that an investment in other companies would provide a better return. Kuwait Petroleum Corporation has played an essential role in structuring the operation of the group's business outside Kuwait and maintains the power to change that structure if and when it wants to do so. Kuwait Petroleum Corporation receives financial reports concerning the operations of the group outside Kuwait via KPC Holdings (Aruba) AEC and receives copies of the reports made by Kuwait Petroleum International Ltd. to KPC Holdings (Aruba) AEC. These reports confirm that there were reporting lines to the ultimate parent company of the group in place and that Kuwait Petroleum Corporation closely monitors the operations of its subsidiaries abroad.
- (226) In the case of a 100% shareholding structure, it is up to the parent company or subsidiary to adduce evidence that the parent company did not exercise decisive influence over the subsidiary. The Commission considers that in this case, insufficient evidence has been supplied to rebut the presumption, based on the 100% ownership, that Kuwait Petroleum Corporation exercised decisive influence over its direct or indirect subsidiaries. The argument that there is no single reference in the file to any kind of instruction given by Kuwait Petroleum Corporation to KPC Holdings (Aruba) AEC regarding operational decisions is without force, since KPC Holdings (Aruba) AEC is a pure holding company without operational responsibilities. Nor is the argument persuasive that Kuwait Petroleum Corporation never gave instructions to Kuwait Petroleum (Nederland) BV. Coordinating and supervising the business activities of Kuwait Petroleum (Nederland) BV was the responsibility of Kuwait Petroleum International Ltd, which was in turn controlled by Kuwait Petroleum Corporation.

*Kuwait Petroleum International Ltd.*

- (227) Kuwait Petroleum International Ltd. argued that it cannot be held liable for the conduct of Kuwait Petroleum (Nederland) BV because it is not a parent company of Kuwait Petroleum (Nederland) BV and does not exercise effective control over the conduct of the bitumen activities Kuwait Petroleum (Nederland) BV. The Commission observes that this very argument shows that, in terms of corporate structure, the Commission is entirely justified in holding Kuwait Petroleum Corporation liable.
- (228) As to whether Kuwait Petroleum International Ltd. really was not in a position to exercise effective control over Kuwait Petroleum (Nederland) BV, the mere fact that Kuwait Petroleum International Ltd. was not the parent company of Kuwait Petroleum (Nederland) BV does not necessarily mean that the former could not exercise decisive influence over the latter. Kuwait Petroleum Corporation has stated that KPC Holdings (Aruba) AEC exercises its broad supervisory powers over the international business of Kuwait Petroleum “*through Kuwait Petroleum International (“KPI”), a management company that provides management services to various companies owned by Aruba*”.<sup>433</sup> The website of Kuwait Petroleum International Ltd. mentions that “*During the early 1980's KPC (Kuwait Petroleum Corporation) also expanded its foreign operations, creating three new subsidiary companies. (...) Kuwait Petroleum*

---

<sup>433</sup> [redacted] reply of 20.5.2005 to the Statement of Objections, page 9.

*International (KPI) runs KPC's downstream marketing operations in Europe and Asia and manages the Q8 retail brand.*"<sup>434</sup> Kuwait Petroleum International Ltd. itself stated that *"KPI only exercises broad management responsibility with respect to the companies owned by Aruba. KPI's control over the companies owned by Aruba is limited to ensuring that these companies perform within certain general parameters. KPI receives information and gives instructions only with regard to major operations that may affect the profitability of the companies to a significant extent"*.<sup>435</sup> Kuwait Petroleum (Nederland) BV reported its activities on a monthly and a quarterly basis to Kuwait Petroleum International Ltd.<sup>436</sup> The President of Kuwait Petroleum International Ltd. was equally the Chairman of the board of KPC Holdings (Aruba) AEC and a Supervisory Director of Kuwait Petroleum (Nederland) BV.<sup>437</sup> The Commission considers that, taken together, these facts clearly indicate that Kuwait Petroleum International Ltd. exercised decisive influence over the commercial behaviour of Kuwait Petroleum (Nederland) BV and that the latter was not an autonomous actor on the market.

- (229) Based on this supervising role over the conduct of Kuwait Petroleum (Nederland) BV, and taking into account the 100% shareholding link between Kuwait Petroleum International Ltd. and Kuwait Petroleum Corporation, the Commission considers that Kuwait Petroleum International Ltd. forms part of the undertaking that is responsible for the sale of bitumen in the Netherlands and that it should be held jointly and severally liable for the infringement.
- (230) Accordingly, this Decision is addressed to Kuwait Petroleum (Nederland) BV, Kuwait Petroleum International Ltd and Kuwait Petroleum Corporation.

### **2.3. BP**

- (231) BP is answerable for the infringement in the period from 1 April 1994 until 1 January 2000, because its Dutch subsidiary BP Nederland BV participated in the cartel until 1 January 2000, when BP's Dutch bitumen activities were transferred to ExxonMobil. Between October 1996 and 1 January 2000, BP's bitumen operations in the Netherlands were operated as a joint venture with Mobil. In this joint venture BP held 70% of the shares and was in charge of the daily business operations. The Commission therefore considers that BP remained responsible for the behaviour of BP Nederland BV in that period.
- (232) BP is also answerable for the infringement in the period after 31 December 1999 because of its acquisition of Veba Oel AG on 1 February 2002 and the latter's continuation of the Wintershall bitumen business, including the participation in the cartel, since 31 December 1999. Liability for this infringement by Wintershall, later Veba and eventually BP should be apportioned between Wintershall AG, Veba Oel AG and BP plc. The liability of Wintershall AG is dealt with separately. The liability of Veba Oel AG has been passed on to BP, because Veba Oel AG and its subsidiaries were acquired by BP Fuels Deutschland on 1 February 2002 and Veba Oel AG ceased to exist as a separate legal entity, its business becoming part of Deutsche BP Fuels

---

<sup>434</sup> [www.q8.com/company/company.htm](http://www.q8.com/company/company.htm) (8.5.2006).

<sup>435</sup> Reply of [redacted] to the Statement of Objections, page 6.

<sup>436</sup> Reply of [redacted] to the Statement of Objections, page 9.

<sup>437</sup> [redacted] [38319-38320] reply of 1.3.2004 to request for information.

Deutschland GmbH.<sup>438</sup> After the acquisition of Veba Oel AG, BP carried on the infringement of Veba via its subsidiary BP Refining and Chemicals GmbH. BP is therefore answerable for the infringement in the entire period between 31 December 1999 and the end of the period of infringement on 15 April 2002.

- (233) BP plc ultimately controls the entire capital of BP Nederland BV and BP Refining & Chemicals GmbH, the entities selling bitumen in the Netherlands in the period of the infringement and the Commission presumes the exercise of decisive influence of BP plc over the conduct of its subsidiaries. This presumption is illustrated by the fact that BP described itself as a global brands business.<sup>439</sup> Its decision making process for the production and sale of bitumen in the Community is shaped and influenced by the supply and demand considerations in the different geographic business regions in which BP is present.<sup>440</sup> BP plc coordinated its various subsidiaries supplying bitumen in Europe via a European Bitumen Performance Unit. This business unit at European level 'straddles' the legal entities involved in supply/sales and marketing.<sup>441</sup> It was not itself a legal entity. The regional bitumen sales manager reported to an asset manager, responsible for a series of countries. The latter reported to the general manager of the European Bitumen Performance Unit. The different legal or functional entities all operate under the BP brand names and their turnover is consolidated at BP group level. BP plc has acted as the Commission's sole interlocutor during the administrative procedure concerning the infringements in question for the different entities of the BP Group.
- (234) Based on those facts, the Commission has addressed the Statement of Objections and addresses this Decision to the following entities:
- BP Nederland BV;
  - BP Refining & Chemicals GmbH;
  - BP plc.
- (235) Together, those entities form part of the undertaking that is responsible for the sale of bitumen in the Netherlands and the Commission holds them liable for the undertaking's participation in the infringement as follows: BP Nederland BV for the period from 1 April 1994 until 1 January 2000, BP Refining & Chemicals GmbH for the period from 31 December 1999 until 15 April 2002 and BP plc for the entire duration of the infringement from 1 April 1994 until 15 April 2002.

## **2.4. Klöckner**

- (236) Klöckner participated in cartel meetings through a [employee] and later through the [employee] of Klöckner Bitumen BV. This legal entity was therefore an addressee of the Statement of Objections.
- (237) The Commission also addressed the Statement of Objections to Sideron Industrial Development BV, because it controlled since 1999 the majority of the capital of KHM

---

<sup>438</sup> Veba Oil Refining & Chemicals GmbH became BP Refining & Chemicals GmbH.

<sup>439</sup> <http://www.bp.com/home.do?categoryId=1&contentId=2006973> (18.10.2004)

<sup>440</sup> Idem.

<sup>441</sup> [redacted] [37015, II/719] reply of 30.9.2003 to request for information.

International BV, the entity controlling the entire capital of Klöckner Bitumen BV<sup>442</sup>. All three legal entities were located at the same address<sup>443</sup> and had the same managing director. On this basis, the Commission presumes the exercise of decisive influence by Sideron Industrial Development BV over the conduct of its subsidiaries, at least since 1 January 2000.

- (238) In its reply to the Statement of Objections, Klöckner did not submit any arguments that were capable of rebutting the presumption of the liability of Sideron Industrial Development BV. This Decision is accordingly addressed to Klöckner Bitumen BV for the infringement during the period between 1 April 1994 and 15 April 2002. This Decision is also addressed to Sideron Industrial Development BV, which the Commission holds jointly and severally liable for the infringement during the period between 1 January 2000 and 15 April 2002.

## **2.5. Total**

- (239) Throughout the period of the infringement, participation in the collusive contacts took place via an employee of Fina Nederland BV, which became TotalFina Nederland NV, which became TotalFinaElf Nederland NV, which has, following the end of the period of the infringement, been renamed Total Nederland NV.<sup>444</sup> The Commission considers that Total Nederland NV, previously TotalFinaElf Nederland NV, took on liability as the legal successor of Fina Nederland BV and TotalFina Nederland NV and should be an addressee of this Decision for the participation of its legal predecessors in the infringement throughout the period of the infringement.
- (240) After Total had acquired Fina on 1 November 1999, and Fina Nederland BV's name had been changed into TotalFina Nederland NV, Total SA, as the parent company of the Total group, became liable itself for the continued participation of its operational subsidiary in the cartel meetings.
- (241) Like the other bitumen suppliers, the undertaking Total consists of all group companies, which together act as a single economic unit producing and selling fuel and, as a by-product, bitumen. Within this undertaking, Total SA (its predecessor being named TotalFina SA) ultimately controls the entire capital of all operating companies of the group, including Total Nederland NV (and its predecessor TotalFina Nederland NV). Taking into account the 100% shareholding structure between these legal entities, the Commission presumes that Total SA exercised decisive influence over Total Nederland NV. The Commission therefore considers that Total SA forms part of the undertaking that is responsible for the sale of bitumen in the Netherlands and that committed the infringement. Together with Total Nederland NV, the Commission considers Total SA jointly and severally liable for participation in the cartel for the period between 1 November 1999 and 15 April 2002.
- (242) In its reply to the Statement of Objections, Total SA argues that it cannot be held liable for the conduct of Total Nederland NV and its legal predecessor TotalFina Nederland NV for various reasons:

---

<sup>442</sup> Until 1999 Klöckner Bitumen operated as a division of KHM International B.V. [23321].

<sup>443</sup> After the termination of the cartel, KHM International BV and Sideron Industrial Development BV changed address.

<sup>444</sup> See recitals (13) and (77).

- The presumption of liability does not apply because Total SA only holds 51% of Total Holdings Europe, the entity that holds 100% of the capital of Total Holdings Nederland BV which holds 100% of Total Nederland NV.
- The presumption of exercising decisive control over the conduct of its affiliates is not sufficient in cartel cases. In cartel cases the Commission looks back to past behaviour and must be able to establish the effective exercise of such control.
- The presumption is rebutted because Total SA was not able to exercise decisive control over the conduct of Total Nederland NV and did not exercise such control. The group Total is a decentralised organization. Total SA only acts as a holding company and Total Nederland was an autonomous entity. Total SA did not have a coordination function, as described by the Commission in the Statement of Objections.

- (243) The Commission does not accept the first argument because the remaining 49% of Total Holdings Europe is owned by Elf Aquitaine (31.088%) and Elf EP (17.537%). Since Total SA owns 99.5% of Elf Aquitaine and the latter is the 100% shareholder of Elf EP, it must be concluded that Total SA directly or indirectly owns close to 100% of Total Holdings Europe. Total admitted that all subsidiaries are placed under the control of the group and that the group is headed by Total SA. This ownership structure allows the Commission to rely on the presumption that Total SA exercised decisive control over the conduct of Total Nederland NV and forms part of the undertaking that participated in a violation of Article 81 of the Treaty.
- (244) The Commission does not accept the second argument because it is established case law that the Commission may rely on the presumption that the parent company has exercised decisive control over its wholly-owned subsidiaries, unless that presumption is rebutted by the parent company or subsidiary producing sufficient evidence to the contrary.<sup>445</sup>
- (245) As to the third argument, namely the elements put forward by Total SA to rebut the presumption of liability, the Commission does not consider these arguments to be convincing. Total Nederland NV forms part of a large multinational and integrated undertaking that is headed by the entity Total SA. Total Nederland's website explicitly mentions that "*Total bitumen is coordinated centrally in Europe.*"<sup>446</sup> Bitumen production and sales of the various production and sales subsidiaries are allocated by a central production department and a central Bitumen Marketing Department, on the basis of information provided by and discussed with the operating companies. The operational subsidiaries in Europe systematically report sales volumes, gross margin, operational result, budget, etc. to Marketing Europe, the central marketing department

<sup>445</sup> See Court of First Instance in Joined Cases T-71/03 etc. *Tokai Carbon v Commission*, 15 June 2005, paragraph 60; Court of First Instance in Case T-354/94 *Stora Kopparbergs Bergslags v Commission*, [1998] ECR II-2111, paragraph 80, upheld by Court of Justice in Case C-286/98 P *Stora Kopparbergs Bergslags v Commission*, [2000] ECR I-9925, paragraphs 27, 28 and 29; and Court of Justice in Case 107/82 *AEG v Commission*, [1983] ECR 3151, paragraph 50.

<sup>446</sup> See website [www.total.nl/NL/SiteNL.nsf/V\_S\_OPM/DCCF056C4B6FAB20C1256E980045E13F?OpenDocument] (11.5.2006). In the Dutch original: "*Total bitumen in Europa centraal gecoördineerd.*"

for Europe of the Refining and Marketing Branch of the Total group.<sup>447</sup> This central marketing department, which is not a legal entity, has a clear overview over the different bitumen markets and their specific characteristics and provides central services with respect to research and development, promotion and advertising, development of business tools, communication of market information reports, and so forth.

- (246) Since the coordination of Marketing Europe formally takes place at Total France SA, Total SA argued that it played no role in this coordination function for bitumen sales in the Netherlands. However Total France SA is not a parent company of Total Nederland NV, but is linked economically and legally to Total Nederland NV only via the group parent company Total SA. This shows that Total SA must necessarily be part of the undertaking that produces bitumen and markets it in the Netherlands.
- (247) It is the group management at the level of Total SA that takes the important strategic decisions and shapes the coordination functions within the group that affect the production and sales of bitumen in the various sales and production subsidiaries. The Executive Committee (COMEX - Comité Exécutif) is Total's primary decision-making body in matters of overall strategy and has investment authority. The Management Committee (CODIR – Comité Directeur) facilitates coordination among the various Group units, monitors the results of the operational divisions and reviews the reports of the functional divisions.<sup>448</sup> Total SA, as head of the Total group, cannot escape liability by formally delegating certain coordinating functions to another legal entity within the group. The argument that these responsibilities only relate to the group as a whole is not relevant as the decisions at group level (for instance on the delegation of coordinating functions) necessarily have an impact on the conduct of the subsidiaries.
- (248) Total SA further claimed that it only acted as a holding company for the group and that its functions were limited to: 1) the general human resource policy of the group; 2) consolidation of the turnover of the group and the fiscal policy of the group; 3) supervision of issues such as institutional relations, industrial security, environment and sustainable development, insurance, financial and legal functions of the group; and 4) review of the major investment projects of the subsidiaries. The Commission considers that the fact that the parent company Total SA was not itself involved in the production and sale of road pavement bitumen in the Netherlands is not determinant for the question whether it should be considered to constitute a single economic unit with the operational units in the group that were directly involved in the production and sale of road pavement bitumen in the Netherlands. The functions mentioned by Total SA in support of its argument that it only acted as a holding company are exactly the kind of indications that demonstrate that the Total group operates as a single undertaking, headed by Total SA, and that the latter exerts decisive influence as regards the basic orientations of the subsidiaries' operations on the market.
- (249) On that basis the Commission considers that Total SA has not rebutted the presumption of having exercised decisive influence over the conduct of Total Nederland NV<sup>449</sup> and its legal predecessor TotalFina Nederland NV. Other elements

---

<sup>447</sup> [redacted] [37184-37185] reply of 2.3.2004 to request for information.

<sup>448</sup> See website [[www.total.com/en/group/presentation/organization](http://www.total.com/en/group/presentation/organization)] (11.5.2006).

<sup>449</sup> Previously TotalFinaElf Nederland NV.



like the fact that the various operating subsidiaries of the Total group operate under the same brand name and that their turnover is consolidated at group level strengthen this presumption.

- (250) Apart from the elements relating to the group structure, the influence of Total SA over Marketing Europe, and the latter's influence over the conduct of the various sales and production entities, including Total Nederland NV, was further strengthened by personal links. The Director of Marketing Europe of the Refining and Marketing Branch of the Total group is a member of the Management Committee of the group parent company, Total SA. He was also supervisory director of Total Nederland NV and its direct parent company.<sup>450</sup> Total SA argued in this respect that the Management Committee of Total SA has no executive powers, but the Commission considers that the public statements on the function of this Management Committee establish that it has considerable influence on the conduct of the subsidiaries of the group. Total SA also argued that this person was not responsible for bitumen and was only appointed as a member of the Management Committee in February 2002. However, the Commission considers that this argument does not answer the Commission's point that this personal link confirms that the Total group, headed by Total SA, exercised decisive influence over the conduct of its affiliates. The argument that the function of supervisory director of Total Nederland NV does not entail the exercise of effective control over the daily business of Total Nederland NV is not material because it belongs to the core function of a supervisory board to exercise control over the strategic commercial and operational behaviour on the market of the company it supervises. Moreover, the supervisory director in question also used to be the managing director of Fina Nederland BV in the years 1991-1993.
- (251) This Decision is accordingly addressed to Total Nederland NV, as legal successor of subsequently Fina Nederland BV, TotalFina Nederland NV and TotalFinaElf Nederland NV, for the infringement during the period between 1 April 1994 and 15 April 2002. This Decision is also addressed to Total SA, which the Commission holds jointly and severally liable for the infringement during the period between 1 November 1999 and 15 April 2002.

## 2.6. Nynäs

- (252) Nynäs participated in cartel meetings through the [employee] for the Benelux and France of Nynäs NV/SA and later the [employee] for the Netherlands of Nynäs NV/SA.
- (253) After the end of the infringement, early in 2003, the bitumen marketing activities for continental Europe of Nynäs NV/SA were transferred to and continued from Belgium through Nynäs Belgium AB, a Swedish subsidiary of AB Nynäs Petroleum. Immediately after this transaction, Nynäs NV/SA (namely the legal entity and the remaining refining activities) was divested to Petroplus. On this basis, the Commission considers Nynäs Belgium AB to be the economic successor of Nynäs NV/SA and therefore liable for the conduct of Nynäs NV/SA.<sup>451</sup>

<sup>450</sup>

<sup>451</sup>

[redacted] [37290], annex 5 of reply of 2.3.2004 to request for information.

See also Judgment of the Court of Justice in Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 B *Aalborg Portland A/S and Others v Commission*, paragraphs 357

(254) AB Nynäs Petroleum controlled the entire capital of Nynäs NV/SA and the entire capital of the current Nynäs Belgium AB.<sup>452</sup> These entities did not operate as autonomous entities. Taking into account the 100% shareholding structure, the Commission presumes that AB Nynäs Petroleum has exercised decisive influence over its subsidiary and therefore holds it jointly and severally liable for the infringement. The presumption that decisive influence was exercised by AB Nynäs Petroleum is supported by structural elements showing that AB Nynäs Petroleum was involved in the business of the subsidiary. Operationally the Nynäs group of companies is organised in businesses and a number of corporate functions and coordinators. Within the group, Nynäs NV/SA (and now Nynäs Belgium AB) carries out the function of a Continental/European main office. But it has no authority to cover capital expenditure over a specific threshold and it cannot enter or negotiate sales and purchase agreements that exceed specific thresholds in value or length.<sup>453</sup> It needs the approval of AB Nynäs Petroleum for the granting of credit to customers over specific thresholds or for scrapping plant and machinery worth specific amounts.<sup>454</sup> AB Nynäs Petroleum formulates the overall corporate objectives, strategies, policies and guidelines for the Nynäs group as a whole.<sup>455</sup> Its Executive Committee takes the high-level decisions in relation to overall group strategy, budget and planning, major projects and functional co-ordination.<sup>456</sup> The Managing Director and the Chief Refining Officer of AB Nynäs Petroleum are two of the three members of the board of Nynäs Belgium AB. The third member of this board is the managing director of Nynäs NV/SA (later of Nynäs Belgium AB). He is also a member of the board of AB Nynäs Petroleum.<sup>457</sup>

(255) Based on these facts, the Commission has addressed the Statement of Objections to the following entities:

- Nynäs Belgium AB; and
- AB Nynäs Petroleum.

(256) In its reply to the Statement of Objections, Nynäs argues that the Commission should not hold AB Nynäs Petroleum, the group's parent company, liable for the infringement.

#### *AB Nynäs Petroleum*

(257) Nynäs tried to rebut the presumption of liability of AB Nynäs Petroleum by emphasizing the relative autonomy of Nynäs Belgium AB and previously Nynäs NV/SA. Nynäs recognises that Nynäs Belgium AB and previously Nynäs NV/SA carried out the function of a Continental/European main office for the bitumen business and therefore exercised decisive influence over the conduct of various subsidiaries of the Nynäs Group, but Nynäs argues that this responsibility was

---

– 360. It is further noted that Nynäs Belgium AB accepted in a letter of 15.7.2003 to be the appropriate addressee of proceedings and any subsequent Decision that may be issued [12858].

<sup>452</sup> Nynäs Belgium AB was purchased by AB Nynäs Petroleum in 2002. It is a Swedish company with a Belgian branch. It acquired the bitumen business of Nynäs NV before Nynäs NV was disposed of in early 2003. At the time of purchase it was a dormant company known as AB Grundstenen. AB Nynäs Petroleum changed the company's name upon purchase.

<sup>453</sup> [redacted] [36521 and 36522] reply of 25.3.2004 to request for information.

<sup>454</sup> [redacted] [36522] See footnote 453.

<sup>455</sup> [redacted] [36523] See footnote 453.

<sup>456</sup> [redacted] [36522] See footnote 453.

<sup>457</sup> [redacted] [36535-36537] See footnote 453.

entrusted to Nynäs NV/SA by the autonomous subsidiaries and was not imposed by the parent company AB Nynäs Petroleum. The latter is allegedly a pure holding company that does not exercise decisive influence over the conduct of the bitumen business. Reporting obligations to the parent company relate essentially to financial reports and forecasts.

- (258) The Commission considers that these arguments are insufficient to rebut the presumption of liability. Nynäs is an integrated group of entities that are involved in the petrochemical sector, with bitumen as one of the core products that it produces and sells as part of its product portfolio, in the Netherlands as in other countries. Nynäs has not only developed a common vision, mission and objectives for the group, but has also set out detailed rules on the organisation of the group. The Executive Committee represents the highest level of business and legal responsibility and the Corporate Management Committee is the highest level of group co-ordination and control. Nynäs itself stated: *“Each business is managed by a Chief Business Executive who reports directly to the President/CEO [= AB Nynäs Petroleum]. The Business is the organisational unit where the commercial operations and the main part of the strategic development of existing local business take place. (...) These business units can be located in different legal units and countries. ... Overall coordination of the businesses is the responsibility of the President but the task of day-to-day coordination is delegated to Corporate Functional Managers or Coordinators.”*<sup>458</sup> This statement proves that the delegation of tasks is top down and is not entrusted from certain autonomous subsidiaries to another autonomous subsidiary.
- (259) Nynäs also tried to rebut the presumption of liability by pointing to the fact that AB Nynäs Petroleum was not itself involved in the production and sale of road pavement bitumen. However, the Commission considers that this fact is not determinant for the question whether it should be considered to constitute a single economic unit with the operational units in the group that were directly involved in the production and sale of road pavement bitumen. It may indicate that Nynäs Belgium AB (and previously Nynäs NV/SA) had responsibilities of its own, but does not establish that AB Nynäs Petroleum was not exerting a decisive influence over the conduct of Nynäs Belgium AB (and previously Nynäs NV/SA), at least as regards the basic orientations of its commercial strategy and operations on the market.<sup>459</sup> Indeed, the division of tasks is a normal phenomenon within a group of companies. Nynäs Belgium AB operates the bitumen business of Nynäs, but can only fulfill this task pursuant to the “rules of the game” set out by AB Nynäs Petroleum and under the control of AB Nynäs Petroleum.
- (260) Additional elements on which the Commission relies to establish that Nynäs Belgium AB (and previously Nynäs NV/SA) essentially followed the instructions given to it by AB Nynäs Petroleum, such as the positions of certain Nynäs personnel within various entities of the group, are rejected by Nynäs as being insufficient to establish the liability of AB Nynäs Petroleum. Nynäs claims that the composition of the boards has no commercial significance as they have no executive function in the business. This function lies with the executive management team of each company that is usually very different from the board.

---

<sup>458</sup> [redacted] [35123-35124] reply of 25.3.2004 to request for information.

<sup>459</sup> Case C-286/98 P *Stora Kopparbergs Bergslags AB v. Commission*, [2000] ECR I-9925, paragraph 28.

- (261) The Commission does not accept those arguments. The executive management of a company may be different from its statutory board, but the executive management operates under the immediate control of the board. Moreover, in the case of Nynäs, it has not only been established that members of the board of AB Nynäs Petroleum were members of the board of Nynäs Belgium AB, but also the managing director of AB Nynäs Petroleum was a member of the board of Nynäs Belgium AB and the managing director of Nynäs Belgium AB was also a member of the board of AB Nynäs Petroleum. These elements support the conclusion that AB Nynäs Petroleum exercised decisive influence over Nynäs Belgium AB (previously Nynäs NV/SA) as regards its basic orientations of commercial strategy and operations on the market.
- (262) Lastly, Nynäs also argues that the Commission is relying on two separate theories for imputing liability to the parent company: (a) a theory of participation in the infringement by the (presumed) exercise of decisive influence; and (b) a theory of the single undertaking.
- (263) Those theories are, however, not separate. Since the subject of Article 81 of the Treaty is the “undertaking”, the presumption that a wholly-owned subsidiary essentially follows the instructions given to it by its parent company without needing to check whether the parent company has in fact exercised that power is not different from saying that, for the purposes of Article 81 EC, it can be presumed that a wholly-owned subsidiary and its parent company are part of the same undertaking and may be held liable for the infringement committed by that undertaking. The fact that the proceedings are not addressed to the parent company of the group alone, does not contradict the concept of a single undertaking but forms part of the Commission’s discretion to hold different entities within an undertaking jointly and severally liable for the infringement.
- (264) This Decision is accordingly addressed to Nynäs Belgium AB and AB Nynäs Petroleum. Together they form part of the undertaking that participated in the infringement and the Commission considers that these legal entities within the undertaking should be held liable for the infringement.

## **2.7. Esha**

- (265) Esha Holding BV, Smid & Hollander BV and Smid & Hollander Raffinaderij BV, later renamed as Esha Port Services Amsterdam BV were all three directly involved in the cartel activities. The [employee] of these entities attended pre-meetings among suppliers and bitumen consultation meetings with the W5 road builders.
- (266) Smid & Hollander BV and Smid & Hollander Raffinaderij BV, the entities producing and selling bitumen in the Netherlands, are wholly owned by Esha Holding BV. The Managing Director of Esha Holding BV initially participated in the cartel meetings and the Managing Director of Smid & Hollander Raffinaderij BV who later participated in the cartel meetings was also the Managing Director of Esha Holding BV. All three legal entities are therefore liable as being directly involved in the cartel activities. Moreover, Esha Holding BV, including through its own cartel involvement, exercised decisive influence over the conduct of its subsidiaries marketing bitumen in the Netherlands and forms part of the undertaking that participated in the cartel.

(267) Based on those facts, the the Commission has addressed the Statement of Objections and addresses this Decision to the following entities:

- Smid & Hollander BV;
- Esha Port Services Amsterdam BV;
- Esha Holding BV.

Together, these entities form part of the undertaking that is responsible for the sale of bitumen in the Netherlands and the Commisison considers that these three legal entities within the undertaking should be held jointly and severally liable for the infringement.

## **2.8. Wintershall**

(268) Wintershall AG participated in cartel meetings through [employee] responsible for, *inter alia*, the Netherlands. It did so until 31 December 1999, when it disposed of its oil business, including bitumen, and withdrew from the bitumen market. Wintershall AG however continues to be answerable for the infringement it has committed since it has not ceased to exist.<sup>460</sup>

(269) In its response to the Statement of Objections, Wintershall argued that this Decision should not be addressed to Wintershall AG since Veba (now BP) is the economic and legal successor of Wintershall's bitumen business.

(270) The Commission does not accept that argument. Wintershall disregards the fact that, as a general rule, the 'economic continuity' test can only apply where the legal person responsible for running the undertaking has ceased to exist in law after the infringement has been committed.<sup>461</sup> The infringement has been proven in relation to Wintershall AG on the basis of its own actions. When transferring the bitumen business to Veba, Wintershall AG continued to exist and it falls in principle to the legal person managing the undertaking at the time when the infringement was committed to answer for that infringement.<sup>462</sup> Wintershall has not provided any valid reasons why this principle should not apply in its respect.

(271) This Decision is accordingly addressed to Wintershall AG.

### *Road builders*

(272) The W5 group of road builders on the Dutch market originally consisted of KWS, Heijmans, HBG, BAM NBM and Dura Vermeer. In 1996, Ballast Nedam joined and the W5 became the W6. The Directors of their operational road building entities participated in the bitumen consultation meetings and prior W5-meetings.<sup>463</sup>

## **2.9. Heijmans**

(273) Heijmans participated in cartel meetings through a [employee] of the road building entity Heijmans Infrastructuur BV (previously Heijmans Infrastructuur en Milieu BV).

---

<sup>460</sup> Case T-6/89 *Enichem Anic v Commission (Polypropylene)*, [1991] ECR II-1623, paragraphs 235-238.

<sup>461</sup> Case C 49/92 P *Commission v Anic Partecipazioni*, [1999] ECR I-4125, paragraph 145.

<sup>462</sup> Case 279/98 P *Cascades v Commission*, [2000] ECR I-9693, paragraphs 78, 79 and 80.

<sup>463</sup> See Chapter 'IV.1.5. Participants in meetings'.

- (274) During the period of the infringement Heijmans NV indirectly controlled the entire capital of Heijmans Infrastructuur BV.<sup>464</sup> Taking into account the 100% shareholding structure, the Commission presumes the exercise of decisive influence by Heijmans NV over Heijmans Infrastructuur BV.
- (275) Apart from the shareholder links, elements relating to the structure of the undertaking constitute additional evidence for the existence of a single undertaking, headed by Heijmans NV. The latter's articles of incorporation state *inter alia* that it is one of the purposes of the company to manage other companies in the field of road building and tendering.<sup>465</sup> The group is organised in a building, infrastructure, technical and international divisions. The infrastructure division is headed by Heijmans Infrastructuur BV. The articles of incorporation of Heijmans Infrastructuur BV state, *inter alia*, that any loans exceeding EUR 50 000 must be approved by the shareholders, namely by Heijmans Nederland BV, which is in turn 100% controlled by Heijmans NV. The same applies to the creation of - or participation in - any other companies, the initiation of new entrepreneurial activities and the opening or closure of any agencies or regional offices. The same articles of incorporation oblige the management of Heijmans Infrastructuur BV to comply with the directions of the shareholders (therefore indirectly Heijmans NV) regarding the general lines of the financial, social, economic and personnel policies to be followed.<sup>466</sup> With respect to personnel links between the different legal entities within the group, the Commission notes that a director of Heijmans Infrastructuur BV was at the time of the infringement also a director of Heijmans NV. Heijmans Infrastructuur BV and Heijmans NV are located at the same address. All of these elements show that Heijmans Infrastructuur BV was not an autonomous economic actor and that Heijmans NV (indirectly) exercised decisive influence over it.
- (276) Heijmans NV, Heijmans Infrastructuur BV and Wegenbouwmaatschappij J. Heijmans BV argue in their joint response to the Statement of Objections that the Commission failed to prove that Heijmans Infrastructuur BV and its subsidiary Wegenbouwmaatschappij J. Heijmans BV are not autonomous in their conduct on the market. References to the general strategic commercial policy, in their view, are not sufficient to establish the liability of the parent company and the existence of control over the infringement has not been established. Heijmans also argues that the Commission's reasoning boils down to holding Heijmans NV responsible for not ensuring compliance with the Community competition rules by lower legal entities within the undertaking which, in itself, is not a violation of Article 81 of the Treaty.
- (277) The Commission does not accept these arguments. The undertaking that committed the infringement is Heijmans, including Heijmans NV and Heijmans Infrastructuur BV. The infringement arises from the fact that the undertaking participated in a cartel. Whether or not Heijmans has an effective internal compliance programme within the undertaking is not part of the infringement for which Heijmans is being held responsible. In order to determine which legal entities within the undertaking Heijmans should be held liable for concerning the infringement, the Commission can

---

<sup>464</sup> Heijmans Infrastructuur BV, previously Heijmans Infrastructuur en Milieu BV, owns 100% of Wegenbouwmaatschappij J. Heijmans BV and is 100% owned by Heijmans Nederland BV. The latter is 100% owned by Heijmans NV.

<sup>465</sup> [redacted] [34795] Article 2.

<sup>466</sup> [redacted] [34789 and 34790], Article 8.

rely on the presumption of liability based on the 100% shareholding structure and it does not have to prove that the subsidiaries are not autonomous in their conduct. This presumption is not rebutted by the argument that Heijmans NV was not aware of the infringement.

- (278) This Decision is accordingly addressed to Heijmans NV and Heijmans Infrastructuur BV as they form part of the undertaking that participated in the infringement and as the Commission considers that these legal entities within the undertaking should be held liable for the infringement.

## **2.10. KWS**

- (279) KWS participated in cartel meetings through a [employee] of the road building subsidiary Koninklijke Wegenbouw Stevin BV.
- (280) During the period of the infringement Koninklijke Volker Wessels Stevin NV indirectly controlled the entire capital of Koninklijke Wegenbouw Stevin BV, via the intermediary holding companies Volker Wessels Stevin Infra BV and Volker Wessels Stevin Verkeersinfra BV.<sup>467</sup> Taking into account the 100% shareholding structure, the Commission presumes the exercise of decisive influence by Koninklijke Volker Wessels Stevin NV over Koninklijke Wegenbouw Stevin BV.
- (281) Apart from the shareholding links, elements relating to the structure of the undertaking constitute additional evidence for the existence of a single undertaking, headed by Koninklijke Volker Wessels Stevin NV and the absence of autonomy of Koninklijke Wegenbouw Stevin BV. The articles of association of Koninklijke Volker Wessels Stevin NV explicitly refer *inter alia* to the activity of road building.<sup>468</sup> The important commercial decisions of Koninklijke Wegenbouw Stevin BV, including decisions concerning major tenders or the investment budget, are subject to the approval of its Supervisory Board. This Supervisory Board is composed of three members of the management of Koninklijke Volker Wessels Stevin NV (and also of the intermediary holding companies Volker Wessels Stevin Infra BV and Volker Wessels Stevin Verkeersinfra BV).<sup>469</sup> Koninklijke Volker Wessels Stevin NV also controls (via its intermediaries) important strategic decisions like the appointment and dismissal of the directors of the operating companies.
- (282) Those elements confirm that Koninklijke Wegenbouw Stevin BV is not autonomous in its commercial policy, but is subject to the close supervision and direction of Volker Wessels Stevin Verkeersinfra BV, Volker Wessels Stevin Infra BV and ultimately Koninklijke Volker Wessels Stevin NV, all these legal entities acting together as a single economic actor.
- (283) Koninklijke Volker Wessels Stevin NV and Volker Wessels Stevin Infra BV argue in their joint response to the Statement of Objections that the presumed liability based on 100% control of the capital is insufficient to hold them effectively liable for the conduct of Koninklijke Wegenbouw Stevin BV and that the additional elements

---

<sup>467</sup> [redacted] [34842] Volker Wessels Stevin Infra BV and Volker Wessels Stevin Verkeersinfra BV are pure (intermediary) holding companies with no independent activity.

<sup>468</sup> [redacted] [34899] Article 2.a.

<sup>469</sup> [redacted] [34843] reply of 2.3.2004 to the request for information of 10.2.2004, p. 3.

referred to by the Commission only relate to the exercise of decisive control over the market conduct of its subsidiaries but fail to prove that decisive control was exercised over the alleged cartel infringement. By relying on a presumption of liability the Commission changed the burden of proof and allegedly disregards the presumption of innocence of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

- (284) The Commission does not accept that argument. It is established case law that in order to identify the legal entities within the undertaking that should be held liable for the infringement, the Commission may rely on the presumption of liability based on the 100% shareholding structure and is not obliged to provide facts establishing the exercise of control of the parent company over the infringement. It is for the legal entities that are addressed in the Statement of Objections to rebut the presumption of liability by demonstrating that the subsidiary in question was effectively autonomous in its commercial behaviour. KWS has failed to do so in its reply to the Statement of Objections. The presumption of liability is not rebutted by the argument of KWS that the parent company was not aware of the infringement or was not involved in the purchasing of bitumen.
- (285) The Decision is accordingly addressed to Koninklijke Wegenbouw Stevin BV and Koninklijke Volker Wessels Stevin NV as they form part of the undertaking that committed the infringement and as the Commission considers that these legal entities within the undertaking should be held liable for the infringement.

## **2.11. BAM NBM**

- (286) Throughout the period of infringement, participation in the collusive contacts took place via the [employee] within the undertaking. This task was carried out by [employee] of NBM Noordwest BV, later renamed as BAM NBM Wegenbouw Noordwest BV following the acquisition of NBM-Amstelland Bouw en Infra BV<sup>470</sup> by Koninklijke BAM Groep NV on 1 November 2000. As from 1 January 2001, the [employee] of BAM NBM Wegenbouw Noordwest BV equally became [employee] of the central road building entity BAM NBM Wegenbouw BV, a 100% parent company of BAM NBM Wegenbouw Noordwest BV. He continued to participate in the cartel meetings. BAM NBM Wegenbouw BV is the legal successor of NBM Wegenbouw BV, the previous 100% parent company of NBM Noordwest BV.<sup>471</sup>
- (287) The Commission has chosen to hold BAM NBM Wegenbouw BV liable for the infringement during the period between 1 April 1994 and 15 April 2002. First, BAM NBM Wegenbouw BV (as legal successor of NBM Wegenbouw BV) participated in the cartel as parent company of the legal entity whose employee participated in the cartel meetings. The Commission presumes that in the period until 1 January 2001, NBM Wegenbouw BV exercised decisive influence over NBM Noordwest BV as 100% parent company. BAM NBM has not submitted any arguments that would be capable of rebutting this presumption. As from 1 January 2001, BAM NBM Wegenbouw BV participated directly in the cartel meetings. Throughout the whole period, the person that participated in the cartel meetings remained the same.

---

<sup>470</sup> The construction activities of NBM Amstelland NV.

<sup>471</sup> See recitals (20) and (77).



- (288) Koninklijke BAM NBM NV, the parent company of the BAM NBM group, became liable for the participation of BAM NBM Wegenbouw BV in the cartel meetings as from the acquisition of NBM-Amstelland Bouw en Infra BV and all of its subsidiaries on 1 November 2000. Taking into account the 100% shareholding structure between BAM NBM Wegenbouw BV and the group parent company Koninklijke BAM NBM NV (renamed Koninklijke BAM Groep NV since 14 November 2002), the Commission presumes that the latter exercised decisive influence over BAM NBM Wegenbouw BV.
- (289) Apart from the shareholding links, elements relating to the structure of the undertaking constitute additional evidence for the existence of a single undertaking, headed by Koninklijke BAM NBM NV (now Koninklijke BAM Groep NV). The instructions of Koninklijke BAM NBM NV for the companies of the group included: *“The company is bound by the general policy instructions, as formulated in the strategy, respectively the group business plan casu quo the linked business plans of the group companies, with respect to financial, economic and social policy, as well as concerning specialisation, division of tasks between group companies, regional divisions, internal supplies, etc.”*<sup>472</sup> Moreover, Koninklijke BAM NBM NV was, between January 2002 and February 2003, an institutional member of the managing board of BAM NBM Wegenbouw BV.<sup>473</sup> Within Koninklijke BAM Groep NV every board member takes care of a specific segment of the market. This way the group remains manageable for both the group management board and the management of the operational divisions. The CEO and CFO of Koninklijke BAM Groep NV discuss the business of every operational division in all aspects at least every quarter.<sup>474</sup>
- (290) This Decision is accordingly addressed to BAM NBM Wegenbouw BV for the infringement during the period between 1 April 1994 and 15 April 2002. This Decision is also addressed to Koninklijke BAM Groep NV, as legal successor of Koninklijke BAM NBM NV, which the Commission holds jointly and severally liable for the infringement during the period between 1 November 2000 and 15 April 2002.

## 2.12. HBG

- (291) Throughout the period of the infringement, HBG participated in the collusive contacts through a [employee] of the road building subsidiary HBG Civiel BV (previously HWZ BV).
- (292) This Decision is accordingly addressed to HBG Civiel BV as it forms part of the undertaking that committed the infringement and as the Commission considers that this legal entity within the undertaking should be held liable for the infringement.

---

<sup>472</sup> [redacted] [34469] [redacted]

<sup>473</sup> From 2.1.2002 until 28.2.2003. See [redacted] [34456]. [redacted]

<sup>474</sup> [www.iex.nl/communitycall/ccdetail.asp?selCC=128](http://www.iex.nl/communitycall/ccdetail.asp?selCC=128) (22.12.2005) *“Binnen de raad van bestuur zijn de verantwoordelijkheden zodanig verdeeld dat elk van de bestuursleden zich bezighoudt met een bepaald marktgebied. Op deze manier blijft de groep te overzien voor zowel de raad van bestuur als werkmaatschappijdirecties. [CEO] en [CFO] houden bovendien financieel de vinger aan de pols van het bedrijf door tenminste elk kwartaal bij alle werkmaatschappijen de gang van zaken in volle breedte te bespreken.”*

### 2.13. Ballast Nedam

- (293) Ballast Nedam joined the W5 and the cartel not later than 21 June 1996.<sup>475</sup> The participation in the collusive contacts took place via employees of the road building operational subsidiary, Ballast Nedam Grond en Wegen BV. Since 1 October 2000, the regular participant in the collusive contacts became a [employee] of Ballast Nedam Infra BV, the 100% parent company of Ballast Grond en Wegen BV, and continued his participation in cartel meetings.
- (294) The Commission has chosen to hold Ballast Nedam Infra BV liable for the infringement in the period between 21 June 1996 and 15 April 2002. Ballast Nedam Infra BV<sup>476</sup> was the parent company of Ballast Nedam Grond en Wegen BV, the legal entity that initially participated in the cartel meetings from at least 21 June 1996. But following an internal reorganization in 2000, the road building activities of Ballast Nedam Grond en Wegen BV were phased out and as from 1 October 2000 Ballast Nedam Infra BV became itself actively involved in the road building works and participated itself directly in the collusive action until the end of the period of infringement.<sup>477</sup> The Commission presumes that in the period until 2000, as 100% parent company of Ballast Nedam Grond en Wegen BV, Ballast Nedam Infra BV exercised decisive influence over Ballast Nedam Grond en Wegen BV, whose employee participated in cartel meetings. The arguments submitted by Ballast Nedam in its reply to the Statement of Objections are insufficient to rebut this presumption.
- (295) During the period of the infringement Ballast Nederland NV controlled the entire capital of Ballast Nedam Infra BV and its 100% subsidiary Ballast Nedam Grond en Wegen BV.<sup>478</sup> Taking into account the 100% shareholding structure, the Commission presumes the exercise of decisive influence by Ballast Nedam NV over Ballast Nedam Infra BV and Ballast Nedam Grond en Wegen BV.
- (296) Apart from the shareholding links, elements relating to the structure of the undertaking constitute additional evidence for the existence of a single undertaking, headed by Ballast Nedam NV and the absence of commercial autonomy of Ballast Nedam Infra BV and Ballast Nedam Grond en Wegen BV. The board of management of Ballast Nedam NV consists of two people. Together with the general directors of the big ‘clusters’ they form the ‘concern council’. The managing director of Ballast Infra BV who participated since 2000 in the cartel meetings with the other large road builders and the bitumen suppliers was one of the members of this concern council. Ballast Nedam NV and Ballast Nedam Infra BV are located at the same address. The internal reorganisation of the road building business in 2000 - whereby the central road building activity of Ballast Nedam Grond en Wegen BV is phased out and taken over by its parent company Ballast Nedam Infra BV- also demonstrates the exercise of decisive influence by the parent company over its subsidiaries, and therefore the fact

---

<sup>475</sup> See recitals (77) and (180).

<sup>476</sup> Previously Ballast Nedam Bouw BV.

<sup>477</sup> Ballast Nedam Grond en Wegen BV still exists as a separate entity, but its business activities have been cut back severely. It does not take new projects since 1.10. 2000 and continues to exist primarily for reason of liabilities related to projects that were taken on board before 1.10. 2000. The road building activities are now carried out directly by its parent company Ballast Nedam Infra BV.

<sup>478</sup> Since 14.2.2003 (therefore after the infringement) via the intermediary entity Ballast Nedam Nederland BV.

that they belong to the same undertaking. Ballast Nedam NV had the same institutional power to re-organise the tasks of the different legal entities within the undertaking throughout the period of infringement.

- (297) This Decision is accordingly addressed to Ballast Nedam Infra BV and Ballast Nedam NV as they form part of the undertaking that committed the infringement and as the Commission considers that these legal entities within the undertaking should be held liable for the infringement.

#### **2.14. Dura Vermeer**

- (298) From the beginning of the period of the infringement, participation in the collusive contacts took place via a [employee] of Vermeer Grond en Wegen BV, which was renamed Vermeer Infrastructuur BV on 5 May 1997. Following an internal reorganization in 2000, Dura Vermeer Infra BV became the 100% parent company of Vermeer Infrastructuur BV as from 29 December 2000.<sup>479</sup> The [employee] of Vermeer Infrastructuur BV who participated in the cartel meetings became [employee] of Dura Vermeer Infra BV (at that time still named Vermeer Kunststof Applicaties BV) as of 30 June 2000 and continued to participate in the collusive actions.
- (299) The Commission has chosen to hold Vermeer Infrastructuur BV liable for the infringement during the period between 1 April 1994 and 15 April 2002 and its parent company Dura Vermeer Infra BV for the period between 30 June 2000 and 15 April 2002. As from 30 June 2000, Dura Vermeer Infra BV participated directly in the collusive actions.
- (300) After the merger of the undertakings Dura and Vermeer on 13 November 1998, Dura Vermeer Groep NV, the parent company of the Dura Vermeer group, became liable itself for the participation of Vermeer Infrastructuur BV and, since 30 June 2000, Dura Vermeer Infra BV in the cartel meetings.
- (301) Dura Vermeer Groep NV indirectly controls the entire capital of Vermeer Infrastructuur BV and of Dura Vermeer Infra BV. Taking into account the 100% shareholding structure between these entities, the Commission presumes the exercise of decisive influence by Dura Vermeer Groep NV over Dura Vermeer Infra BV and Vermeer Infrastructuur BV. The arguments submitted by Dura Vermeer in its reply to the Statement of Objections were insufficient to rebut this presumption.
- (302) Apart from the shareholder links, elements relating to the structure of the undertaking constitute additional evidence for the existence since 13 November 1998 of a single undertaking, headed by Dura Vermeer Groep NV. The articles of incorporation of Dura Vermeer Groep NV explicitly refer to road building as one of its activities.<sup>480</sup> The management of Dura Vermeer Infra BV met, every three months, the operational subsidiaries, including Vermeer Infrastructuur BV, to discuss the general strategy and every month to discuss the monthly results. A member of the management of the group parent company, Dura Vermeer Groep NV, was present.<sup>481</sup> Equally, the management of the group parent company Dura Vermeer Groep NV met Dura

---

<sup>479</sup> Before 29.12. 2000, Dura Vermeer Infra BV was Vermeer Kunststof Applicaties BV.

<sup>480</sup> [redacted] [34589] Article 2.c. of the articles of association of Dura Vermeer Groep NV.

<sup>481</sup> [redacted] [34704] reply of 2.3.2004 to request for information.

Vermeer Infra BV every three months to discuss the general strategy and the quarterly results.<sup>482</sup> The instructions of the Dura Vermeer Groep NV to operational companies are clear as to the general policy lines to be followed.<sup>483</sup> A [employee] of Vermeer Infrastructuur BV (1986-1993) became [employee] of the then group parent company Vermeer Groep BV (1993-1998) and later Dura Vermeer Groep NV (1998-2003).

- (303) Dura Vermeer Groep NV and Dura Vermeer Infra BV argue in their joint response to the Statement of Objections that the assessment of liability based on 100% control of the capital is insufficient to hold them liable for the conduct of Vermeer Infrastructuur BV and that the other elements referred to by the Commission to support the exercise of decisive influence fail to prove that the group parent company effectively exercised such influence over the alleged cartel activity of Vermeer Infrastructuur BV.
- (304) The Commission however considers that the elements referred to in this Section establish that Dura Vermeer Infra BV and, through the latter, Dura Vermeer Groep NV exercised decisive influence over the conduct of Vermeer Infrastructuur BV as regards its basic orientations of commercial strategy and operations on the market. These elements show that these entities form part of a single undertaking that committed the infringement. The presumption of liability created by the 100% shareholding cannot be rebutted by referring to examples of other cases where the Commission referred to structural element or facts establishing the exercise of control by the parent company over the infringement itself.
- (305) This Decision is accordingly addressed to Vermeer Infrastructuur BV, as legal successor of Vermeer Grond en Wegen BV, for the infringement during the period between 1 April 1994 and 15 April 2002. This Decision is also addressed to Dura Vermeer Infra BV, which the Commission holds jointly and severally liable for the infringement during the period between 30 June 2000 and 15 April 2002 and to Dura Vermeer Groep NV which the Commission holds jointly and severally liable for the infringement during the period between 13 November 1998 and 15 April 2002.

## VII. Remedies

### 1. ARTICLE 7 OF REGULATION (EC) No 1/2003

- (306) Where the Commission finds that there is an infringement of Article 81 of the Treaty it may require the undertakings concerned to bring such infringement to an end in accordance with Article 7 of Regulation (EC) No 1/2003.
- (307) While it appears from the facts that in all likelihood the infringement ended at the latest in October 2002, when the Commission inspected the undertakings involved, it is necessary to ensure that the infringement has been effectively terminated and is not re-commenced in the future. It is therefore indispensable for the Commission to require the undertakings to which this Decision is addressed to bring the infringement

---

<sup>482</sup> [redacted] [34703] See footnote 481.

<sup>483</sup> [redacted] [34676] [redacted]

to an end (if they have not already done so) and henceforth to refrain from any agreement, concerted practice or decision of an association of undertakings which would have the same or a similar object or effect.

## **2. ARTICLE 23(2) OF REGULATION (EC) No 1/2003**

- (308) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose fines on undertakings where, either intentionally or negligently, they infringe Article 81 of the Treaty. Under Article 15(2) of Regulation No 17, which was applicable at the time of the infringement, the fine for each undertaking participating in the infringement could not exceed 10% of its total turnover in the preceding business year. The same limitation results from Article 23(2) of Regulation (EC) No 1/2003.
- (309) Pursuant to Article 15(2) of Regulation No 17 and Article 23(3) of Regulation (EC) No 1/2003, the Commission must, in fixing the amount of the fine, have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in those Regulations. In doing so, the Commission will set the fines at a level sufficient to ensure deterrence. Moreover, the role played by each undertaking party to the infringement will be assessed on an individual basis. In particular, the Commission will reflect in the fines imposed any aggravating or mitigating circumstances pertaining to each undertaking. Finally, the Commission will apply, as appropriate, the provisions of the Leniency Notice.<sup>484</sup>

## **3. THE BASIC AMOUNT OF THE FINES**

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

### **3.1. Gravity**

- (311) 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.

#### *3.1.1. Nature of the infringement*

- (312) The infringement in this case consisted of the direct or indirect fixing of selling and purchase prices and the application of dissimilar conditions to equivalent transactions with other parties, thereby placing them at a competitive disadvantage. These kinds of restrictions are, by their very nature, among the worst kinds of infringements of Article 81 of the Treaty. The case law has confirmed that agreements or concerted practices involving the kinds of restrictions that were found in this case may warrant the classification “very serious” solely on the basis of their nature, without it being

---

<sup>484</sup>

See footnote 83.

necessary for such conduct to cover a particular geographical area or to have a particular impact.<sup>485</sup>

- (313) Both groups involved in this infringement were or should have been aware of the illegal nature of their activities. Among the suppliers, the internal Shell notes of 1995 and again in 2000<sup>486</sup> show that Shell was fully aware that it was involved in a cartel. Indeed, when suppliers representing 80% of the Dutch market come together to fix the price of road pavement bitumen in the Netherlands, it is difficult to imagine that they could not be aware that they are involved in an illegal activity. As for the members of the W5, they should have realized that by joining the group of suppliers in a cartel and agreeing as a group a uniform W5 rebate with them, they restricted competition among themselves for purchases of road pavement bitumen. Moreover, by agreeing with the group of suppliers that rebates for non-W5 road builders must always be smaller than their own, they knowingly and deliberately put their non-W5 competitors at a competitive disadvantage. The secrecy arrangements that both groups put in place both for the preparatory meetings and the bitumen consultation meetings<sup>487</sup> also indicate awareness of the illegal nature of the agreements reached in the meetings.

### 3.1.2. Actual impact on the market

- (314) It is not possible to measure the actual impact on the market of this cartel, due *inter alia* to insufficient information on likely bitumen net price developments in the Netherlands in the absence of the arrangements. The Commission is not required to precisely demonstrate the actual impact of the cartel on the market and to quantify it; it can confine itself to estimates of the probability of such an effect. In this case, it is clear from the facts described in Chapter IV, in particular Section 1.6, that the cartel arrangements regarding gross prices and the W5 rebates were effectively implemented.<sup>488</sup> Indeed, their implementation depended solely on the cartel participants themselves. These same facts show that the smaller rebates to non-W5 road builders were also implemented, even if cheating occurred occasionally. Cheating was, however, countered through strict monitoring and through sanctions. This implementation of gross prices and two different types of rebates over a period lasting at least eight years could not fail to have an influence on the market for road pavement bitumen in the Netherlands, as it created artificial market conditions. This influence is illustrated by the fact that, as reported by the cartel participants themselves, the price level in the Netherlands for road pavement bitumen was often higher than that in neighbouring countries, even after deduction of the W5 rebates granted.<sup>489</sup> The fact that through cheating it was sometimes possible for a non-W5 road builder to win a tender for a typical asphalt work shows that the competitive edge artificially created for the W5 by the system of agreed differentiated discounts was a real one, at least for works with a high proportion of asphalt.<sup>490</sup> That being said, the Commission notes that its determination of the gravity of the infringement and the calculation of the fine

---

<sup>485</sup> Joined Cases T-49/02 to T-51/02 *Brasserie nationale a.o. v Commission*, 27.7.05, paragraphs 178 and 179; Case T-38/02 *Groupe Danone v Commission*, in particular paragraphs 147-148 and 152 and Case T-241/01 *SAS v Commission*, in particular paragraphs 84, 85, 122, 130-131.

<sup>486</sup> See recitals (88) (89) and (90).

<sup>487</sup> See recitals (59), (62), (69), (76).

<sup>488</sup> See also annex 1 to this Decision.

<sup>489</sup> For examples of such references, see recitals (89), (111), (115), (116), (120), (122).

<sup>490</sup> See recital (70).

amounts in this case, are not dependent on the impact or degree of implementation in the market.

### 3.1.3. *Size of the relevant geographic market*

- (315) It is not disputed that the infringement at issue relates to road pavement bitumen sold in the Netherlands. Various parties have argued that the Commission should take into account that the size of the geographic market is rather small and that the infringement therefore cannot be classified as “very serious”. The Commission does not accept this conclusion. While it may be true that the geographic market concerned is relatively small compared to the size of the Internal Market, the Netherlands still forms a substantial part of that Internal Market.<sup>491</sup> As to the classification of the infringement as very serious or serious, as already mentioned, in cases of manifest violations of the competition rules such as this one, which jeopardize the proper functioning of the Internal Market, this classification is determined primarily by the nature of the infringement, even if the geographic market concerned may be limited and the impact on that market not measurable.<sup>492</sup> The relatively small volume of the market concerned, on the other hand, can be taken into account by the Commission in setting the starting amount for the infringement, after it has determined whether the infringement was very serious or serious.

### 3.1.4. *Conclusion on gravity*

- (316) Taking into account the nature of the infringement committed, the Commission considers that Ballast Nedam, BAM NBM, BP, Dura Vermeer, Esha, HBG, Heijmans, Klöckner, KWS, Kuwait Petroleum, Nynäs, Shell, Total and Wintershall have committed a very serious infringement of Article 81 of the Treaty. This conclusion is irrespective of whether the cartel had a measurable impact on the market. It also takes account of the fact that the collusion concerned only the Dutch market.
- (317) The likely starting amount for very serious infringements is in excess of EUR 20 million. However, in this case the Commission will take into account that the infringement was limited to the road pavement bitumen sold in a single Member State, as well as the relatively low market value concerned and the relatively high number of participants. In the last full year of the infringement, 2001, the value of the Dutch market for road pavement bitumen was EUR [60-70] million. On this basis, the starting amount for the calculation of the fines is set at EUR 15 million. The Commission notes that even if the value of the Dutch market for road pavement bitumen had been somewhat less than EUR [60-70] million, for instance through the exclusion of specialty bitumen products, it would still have set the starting amount at EUR 15 million taking into account the very serious nature of the infringement.

---

<sup>491</sup> Case C-322/81 *Michelin/Commission*, [1983] ECR-3461, paragraph 28 and Case T-229/94 *Deutsche Bahn/Commission*, [1997] ECR-1689, paragraph 58.

<sup>492</sup> Joined Cases T-49/02 to T-51/02 *Brasserie nationale a.o. v Commission*, 27.7.05, paragraphs 178-179; Case T-38/02 *Groupe Danone v Commission*, in particular paragraphs 147,-148 and 152 and Case T-241/01 *SAS v Commission*, in particular paragraphs 84-85, 122, 130-131.

### 3.2. Differential treatment

- (318) 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 differences in their effective economic capacity to cause significant damage to competition. For this purpose, the undertakings concerned can be divided into different categories, established according to their relative importance in the relevant market.
- (319) In order to determine the individual weight of the participants in the infringement, the market shares based on sales value, respectively purchase value for road pavement bitumen in the Netherlands in 2001, the last full year of the infringement, will be used.<sup>493</sup> The only exception is for Wintershall, which stopped its bitumen activities in the Netherlands on 31 December 1999. Wintershall's market share in 1999 was [10-15] %. This figure will be used to determine its relative weight as regards participation in the infringement.
- (320) The Commission considers that in this case, which concerns a cartel between sellers, between purchasers, and between sellers and purchasers of the same product in the same business area, namely road pavement bitumen in the Netherlands, it is appropriate to make a single ranking of the relative weight of each undertaking involved. All undertakings concerned participated in the same infringement which concerned the same turnover amount of the product concerned.<sup>494</sup> Free competition for this turnover amount was affected both from the sales side and the purchase side, as described in this Decision. It is therefore reasonable to rank all the undertakings concerned based on their relative weight as regards participation in this single and continuous infringement.
- (321) The 2001 market share figures show that Shell was the largest operator, with a market share of [16-20] %. It is placed in a first category. Kuwait Petroleum, with a market share of [15-19] % is placed in a second category. BP, Heijmans and KWS, with market shares between [11-15] % and [11-15] % are placed in a third category. Klöckner, Wintershall, BAM NBM, Total, Nynäs and Esha with market shares between [8-11] % and [8-11] % are placed in a fourth category. HBG, with market a share of [5-8] % is placed in a fifth category. Finally, Ballast Nedam and Dura Vermeer, with market shares between [<5] % and [<5] %, are placed in a sixth category.
- (322) On this basis, the appropriate starting amounts for each undertaking for which a fine is to be calculated in this proceeding, are as follows:
- |   |                  |
|---|------------------|
| - First category: Shell   | EUR 15 million;  |
| - Second category: Kuwait Petroleum   | EUR 12 million;  |
| - Third category: BP, Heijmans and KWS                                      | EUR 9.5 million; |
| - Fourth category: Klöckner, Wintershall, BAM NBM, Total,<br>Nynäs and Esha | EUR 7.5 million; |
| - Fifth category: HBG   | EUR 4 million;   |
| - Sixth category: Ballast Nedam and Dura Vermeer                            | EUR 3 million.   |

---

<sup>493</sup> See recital (29).

<sup>494</sup> Compare recital (29).



### 3.3. Sufficient deterrence

- (323) 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 to be fined. The Commission notes that in this proceeding all undertakings, with the exception of Kuwait Petroleum, Total, BP and Shell, had worldwide turnovers in the financial year 2005, the most recent financial year preceding this Decision, of less than EUR 10 000 million. For these undertakings with worldwide turnovers of less than EUR 10 000 million, the Commission considers that, given the circumstances of the case, no multiplier is necessary to ensure the sufficient deterrent effect of the fines. The worldwide turnover of Kuwait Petroleum in the financial year 2005 was EUR 37 053 million. As Kuwait Petroleum is a considerably larger undertaking than the undertakings with worldwide turnovers of less than EUR 10 000 million, the Commission considers that in order to ensure that the fine imposed on it has a sufficient deterrent effect, and given the circumstances of the case, a multiplier of 1.1 (increase of 10 %) is necessary. The world-wide turnover of Total in the financial year 2005 was EUR 143 168 million, which is much higher than that of Kuwait Petroleum. The Commission considers that, in order to ensure a sufficient deterrence in respect of such a large undertaking, and given the circumstances of the case, a multiplier is necessary of 1.5 (increase of 50 %). BP's turnover in the financial year 2005 was EUR 203 589 million. This makes it a considerably larger undertaking than Total. The Commission therefore considers that in order to ensure sufficient deterrence in respect of BP, and given the circumstances of the case, a multiplier is needed of 1.8 (increase of 80 %). Finally, Shell's turnover in the financial year 2005 was EUR 246 606 million, which is considerably higher than that of BP. The Commission therefore considers that in order to ensure a sufficient deterrence in respect of Shell, and given the circumstances of the case, a multiplier is needed of 2 (increase of 100 %).
- (324) In the case of Total, the multiplier has been calculated on the basis of Total's worldwide turnover in the financial year 2005. The purpose of the multiplier is to deter similar illegal behaviour in the future by the undertaking concerned and by other undertakings of similar size. The multiplier ensures that the amount of the fine to be paid by the undertaking concerned is in line with its overall size at a time shortly before the fine is actually imposed on it. Total's size in 2005, the most recent reliable point in time used to calculate the multiplier, justifies the multiplier used for it.
- (325) On this basis, the appropriate starting amounts for each undertaking for which a fine is to be calculated in this proceeding, are as shown in the table in this recital:

All amounts are in EUR million

Ballast Nedam	3
BAM NBM	7.5
BP	17.1
Dura Vermeer	3
Esha	7.5
HBG	4
Heijmans	9.5

Klöckner	7.5
Kuwait Petroleum	13.2
KWS	9.5
Nynäs	7.5
Shell	30
Total	11.25
Wintershall	7.5

### 3.4. Duration of the infringement

- (326) As mentioned in recital (188), Esha, HBG, Heijmans, Klöckner, Kuwait Petroleum, KWS, Nynäs and Shell all participated in the infringement from 1 April 1994 until 15 April 2002, therefore a period of eight years. All these undertakings committed an infringement of more than five years, namely an infringement of long duration. The starting amounts of the fines should consequently be increased by 10 % for each full year of the infringement. This leads to a percentage increase of the starting amount for each undertaking of 80 %.
- (327) Wintershall participated in the infringement until 31 December 1999. This period of five years and nine months is still an infringement of long duration that leads to a percentage increase of the starting amount of 55%, namely a 10% increase for each full year of the infringement and 5% increase for any remaining period of six months or more but less than a year.
- (328) The liability of Ballast Nedam relates to its participation in the period between 21 June 1996 and 15 April 2002, therefore a period of five years and nine months. This infringement of long duration leads to an increase of the starting amount of 55%, namely 10% increase for each full year of the infringement and 5% increase for any remaining period of six months or more but less than a year.
- (329) With respect to those undertaking which had ownership changes during the period of the infringement, distinctions have to be made according to the legal entities involved in the infringement.
- (330) BAM NBM: BAM NBM Wegenbouw BV participated in the infringement from 1 April 1994 to 15 April 2002, therefore a period of eight years, leading to an increase of its starting amount of 80%. During this period, Koninklijke BAM Groep NV participated in the infringement from 1 November 2000 to 15 April 2002, therefore a period of two years and five months, leading to an increase of its starting amount of 20%.
- (331) BP: BP plc participated in the infringement from 1 April 1994 until 15 April 2002, therefore a period of eight years, leading to an increase of its starting amount of 80%. During this period, BP Nederland BV participated in the infringement from 1 April 1994 to 1 January 2000, therefore a period of five years and nine months, leading to an increase of its starting amount of 55%. BP Refining & Chemicals GmbH participated

in the infringement from 31 December 1999 to 15 April 2002, therefore a period of two years and three months, leading to an increase of its starting amount of 20%.

- (332) Dura Vermeer: Vermeer Infrastructuur BV participated in the infringement from 1 April 1994 to 15 April 2002, therefore a period of eight years, leading to an increase of its starting amount of 80%. During this period, Dura Vermeer Groep NV participated in the infringement from 13 November 1998 to 15 April 2002, therefore a period of three years and four months, leading to an increase in its starting amount of 30 %. Dura Vermeer Infra BV participated from 30 June 2000 until 15 April 2002, therefore a period of one year and nine months leading to an increase of its starting starting amount of 15 %.
- (333) Klöckner: Klöckner Bitumen BV participated in the infringement from 1 April 1994 to 15 April 2002, therefore a period of eight years, leading to an increase of its starting amount of 80%. During this period, Sideron Industrial Development BV participated in the infringement from 1 January 2000 to 15 April 2002, therefore a period of two years and three months, leading to an increase of its starting amount of 20%.
- (334) Total: Total Nederland NV participated in the infringement from 1 April 1994 to 15 April 2002, therefore a period of eight years, leading to an increase of its starting starting amount of 80%. During this period, Total SA participated in the infringement from 1 November 1999 to 15 April 2002, therefore a period of two years and five months, leading to an increase of its starting amount of 20%.

### 3.5. Conclusion on the basic amounts

- (335) The basic amounts of the fines for each undertaking are therefore as shown in the table set out in this recital:

All amounts are in EUR million

Ballast Nedam	4.65
BAM NBM:	
– BAM NBM Wegenbouw BV	13.5
– of which Koninklijke BAM Groep NV is jointly and severally liable for	9
BP:	
– BP plc.	30.78
– of which BP Nederland BV is jointly and severally liable for	26.505
– and BP Refining & Chemicals GmbH is jointly and severally liable for	20.52
Dura Vermeer:	
	5.4

– Vermeer Infrastructuur BV	3.9
– of which Dura Vermeer Groep NV is jointly and severally liable for	3.45
– and Dura Vermeer Infra BV is jointly and severally liable for	
Esha	13.5
HBG	7.2
Heijmans	17.1
Klöckner:	
– Klöckner Bitumen BV	13.5
– of which Sideron Industrial Development BV is jointly and severally liable for	9
Kuwait Petroleum	23.76
KWS	17.1
Nynäs	13.5
Shell	54
Total:	
– Total Nederland NV	20.25
– of which Total SA is jointly and severally liable for	13.5
Wintershall	11.625

#### 4. AGGRAVATING AND ATTENUATING CIRCUMSTANCES

##### 4.1. Aggravating circumstances

##### 4.1.1. *Recidivism*

- (336) The Commission mentioned in its Statement of Objections in this case that it would take into account as an aggravating circumstance previous findings of similar infringements by the same undertakings. At the time this infringement took place Shell (through its subsidiary Shell International Chemicals Co. Ltd.) had already been subject to previous Commission prohibition Decisions, one in 1986 and one in 1994, for cartel activities.<sup>495</sup> The fact that Shell repeated cartel behaviour, albeit in a different

<sup>495</sup> Commission Decision (case IV/31.149- polypropylene), (OJ, L 230, 18.8.1986); Commission Decision (Case IV/31.865 – PVC-II), (OJ L 239, 14.9.1994, p.14).

sector from those in which it had previously incurred penalties, shows that the first penalties did not prompt it to change its 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 Shell. A 50 % rate is the normal rate employed by the Commission in cases involving recidivism.

- (337) Shell argues that coherence is required between the different infringements in which it was involved and that those previous Decisions cited are not relevant to the Decision at hand. In particular, the legal entities addressed and the business/product involved in the previous Decisions referred to in recital (336) are different from the road pavement bitumen business in the Netherlands. Shell also points to the time which has elapsed between those previous Decisions and the present one. The Commission rejects these arguments. Recidivism implies that a person has committed fresh infringements after having been penalised for similar infringements.<sup>496</sup> It is in that respect irrelevant if the infringement is committed in a different business sector or in respect of a different product. The requirement that the infringements must be “similar” is satisfied by the fact that those previous Decisions and the present Decision all concern very serious infringements of Article 81 of the Treaty, in particular through collusion on prices. As for the requirement that the “person” must be the same, this requirement is satisfied when the same undertaking commits the infringements concerned. There is no requirement that the legal entities within the undertaking, products and personnel are the same between decisions.<sup>497</sup> This latter requirement is satisfied in this proceeding since it has been established in the chapter on liability that the legal entities of Shell that took part in the current infringement are part of the same undertaking that participated in the previous infringements.
- (338) The argument that those previous Decisions are too old to constitute precedents for recidivism is also not accepted. The Commission’s PVC-II Decision was taken in 1994, the same year that Shell started participating in the cartel which is the object of the current Decision. As for the 1986 Decision, that was only eight years before the start of the current infringement in 1994. In *Danone v. Commission*, the Court of First Instance ruled that Article 15 of Regulation 17 does not specify any maximum period for repeat offences.<sup>498</sup>
- (339) With respect to the construction companies which are the addressees of this Decision, in 1992 the Commission found that certain agreements for private and public tendering to which they all adhered via membership of their associations of building companies, infringed article 81 of the Treaty.<sup>499</sup> However, this Decision was not addressed to the individual construction companies, but to their associations.
- 4.1.2. *Refusal to cooperate with or attempts to obstruct the Commission in carrying out its investigations*
- (340) As mentioned in recital (32), KWS refused to submit to the investigation ordered by Commission Decision of 26 September 2002, as it was required to do under Article

---

<sup>496</sup> Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, paragraph 284. See also case T-38/02 *Groupe Danone v Commission*, paragraphs 353, 354 and 355.

<sup>497</sup> Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, paragraph 290.

<sup>498</sup> Case T-38/02 *Groupe Danone v Commission*, paragraphs 353, 354 and 355.

<sup>499</sup> Commission Decision (Case IV/31752 and IV/32751 – SPO), (OJ L 92, 07.04.1992, p. 1).

14(3) of Regulation No 17. The Commission was not allowed to enter the undertaking's premises or to talk to a KWS employee in a management position and to serve the Decision. Pursuant to Article 14(6) of Regulation No 17, the officials authorised by the Commission to conduct the inspection had to invoke the assistance of the national authorities (national competition authority and police) to enable them to proceed with their investigation.<sup>500</sup> Later during the same inspection, the officials authorised by the Commission were equally refused entry to an office of a KWS Director, thus necessitating another call for assistance of the national authorities.<sup>501</sup>

- (341) The Commission considers that these actions on the part of KWS constitute refusals to cooperate and/or attempts to obstruct the Commission in carrying out its investigations. They constitute for the Commission an aggravating circumstance, justifying an increase of 10 % in the basic amount of the fine to be imposed on KWS.

#### 4.1.3. *Role of instigator and leader*

##### *Role of instigator*

- (342) In order to be classified as an instigator of a cartel, an undertaking must have persuaded or encouraged other undertakings to establish the cartel or to join it.<sup>502</sup> The Commission considers that Shell within the group of bitumen suppliers and KWS within the group of W5 road builders bear a special responsibility for their respective role in instigating the cartel. [redacted]<sup>503</sup> indicates that KWS told [redacted] that it had approached Shell as market leader among the suppliers and asked for suggestions for future cooperation between the bitumen suppliers and the five major road builders. [redacted] has stated that in 1993 Shell, for the first time, made a proposal to KWS for a special W5 rebate, which KWS passed on to the other W5 road builders.<sup>504</sup> Together, these initiatives were at the origin of the cartel. They were instrumental in persuading other undertakings, both W5 road builders and bitumen suppliers, to establish the cartel together with the market leader from each group. Shell also took an initiative in March 1993 in informing [redacted], which did not become a member of the cartel, of a price increase it intended to introduce in the Netherlands. The Commission considers that in this manner Shell attempted to encourage [redacted] to join the cartel or at a minimum to follow the price changes agreed in the cartel.<sup>505</sup>

##### *Role of leader*

- (343) The Commission considers that Shell and KWS should also bear special responsibility for exerting leadership within the cartel during the period of its operation. It is clear from the [redacted] note of 8 July 1994 that in the initial years of the infringement agreements were concluded between the group of W5 road builders and the group of bitumen suppliers through contacts between the two undertakings that were market

---

<sup>500</sup> Official report of refusal of 3.10.2002 [21547].

<sup>501</sup> Official report of refusal of 3.10.2002 [33271].

<sup>502</sup> Case T-15/02, *BASF AG v. Commission*, paragraph 321.

<sup>503</sup> See recital (92).

<sup>504</sup> See recitals (97) and (177).

<sup>505</sup> See [15252 and 15253] [redacted] inspection documents.

leader in each group, namely KWS for the road builders and Shell for the bitumen suppliers.<sup>506</sup>

- (344) As of 1996, when bitumen consultation meetings took place between the two groups, Shell was often the first to approach KWS for a price change.<sup>507</sup> [redacted]<sup>508</sup> [redacted]<sup>509</sup>
- (345) Contemporaneous evidence from [redacted] on the activities of its management secretariat mentions that [redacted].<sup>510</sup> Those bitumen consultation meetings, as well as the preceding W5 meetings, were often organised by KWS and took place at its premises.<sup>511</sup> While it may be true, [redacted], that those premises are conveniently located in the centre of the Netherlands, this does not diminish the initiative taken by KWS in organising those cartel meetings and in making its premises available for them.
- (346) [Redacted] stated in respect of KWS: [redacted]<sup>512</sup> In respect of the bitumen consultation, [redacted] stated: [redacted].<sup>513</sup> The facilitating role of KWS in setting up cartel meetings also appears, for example, from the invitations for the bitumen consultation of 28 March 2000 sent out by KWS<sup>514</sup> and a letter from Heijmans to KWS complaining about the lack of consultation KWS displayed in organising the meeting: [redacted].<sup>515</sup>
- (347) In April 2001, when there were discussions on the settlement of rebates, [redacted] mentions in an internal contemporaneous document: [redacted].<sup>516</sup> [Redacted].<sup>517</sup> Shell also participated on behalf of the group of bitumen suppliers in the bitumen consultation meetings with the W5, even if did so normally together with Kuwait Petroleum and one or two other suppliers. [redacted] recalls that during the bitumen consultation meetings, KWS performed a kind of chairmanship, at least until the year 2000, when KWS appointed a new bitumen representative, whereas Shell would give the introduction on behalf of the bitumen suppliers and rather play the part of opponent (thereby taking the lead within the group of suppliers).<sup>518</sup>
- (348) The Commission considers that from these different elements together, taken from contemporaneous documents and statements from several sources, a pattern emerges which shows that Shell and KWS were driving forces in the operation of the cartel, strongly so in the initial years of the cartel and still notably so in later years. This pattern remains, on the whole, intact even considering that as a major market player in later years and as a regular participant in bitumen consultation meetings, Kuwait

---

<sup>506</sup> See recital (94).

<sup>507</sup> [redacted] reply of 20.5.2005 to the Statement of Objections, pages 13 and 33.[redacted]

<sup>508</sup> [redacted] See also [redacted]

<sup>509</sup> [redacted]

<sup>510</sup> [redacted] [22527] inspection documents. [redacted]

<sup>511</sup> For example, [redacted] [38281-38282] reply of 16.9.2003 to request for information, [redacted]

<sup>512</sup> [redacted]

<sup>513</sup> [redacted] See also [redacted] and [redacted]

<sup>514</sup> See recital (110).

<sup>515</sup> [redacted] [20702] [redacted]

<sup>516</sup> [redacted] [20638] inspection document. [redacted]

<sup>517</sup> [redacted]

<sup>518</sup> [redacted]

Petroleum would have an interest in understating its own role on the side of the suppliers.

*Conclusion on instigation and leadership*

- (349) Taking all these different elements in the respective roles of Shell and KWS as instigators and leaders of the cartel into account, the Commission concludes that the basic amount for the individual fine for each undertaking should be increased by 50 %.

**4.2. Attenuating circumstances**

4.2.1. *Passive or “follow my leader” role*

- (350) Both bitumen suppliers and W5 road builders allege that the other group was the driving force behind the cartel. The bitumen suppliers claim that they were reluctant followers on a market subject to tight control by road builders and that the arrangements were part of a larger network of arrangements within the Dutch construction industry. Total, for instance, claims that it participated in the system because it was made clear repeatedly by its customers that Total was expected to follow the market.<sup>519</sup> For their part, the W5 road builders claim that they had to organise themselves in protection against a pre-existing suppliers cartel that foreclosed the Dutch market. They argue that the Commission investigation relied primarily on information obtained from the bitumen suppliers and is therefore unilateral and unbalanced. In their view, the Commission wrongly does not take into account that the bitumen suppliers were already in a cartel since the 1980s and that the bitumen gross price was fixed between the suppliers in their pre-meetings and was not open for discussion in the bitumen consultation meetings. Discussion with the road builders only took place with respect to the rebates and the date of effective implementation of the new price.
- (351) First of all, with respect to the W5 road builders’ argument that the body of evidence relied upon is unilateral and unbalanced, it has to be recalled that most W5 road builders were inspected by the Commission on 1 and 2 October 2002 and were therefore involved in the Commission investigation very early on from the start. All W5 road builders received requests for information, explicitly asking for factual information with respect to the pricing of road pavement bitumen and contacts with competitors and bitumen suppliers. However, in contrast to several bitumen suppliers who decided to cooperate with the Commission, the W5 road builders did not generally cooperate actively with the Commission, but rather tried to play down as much as possible their role in the arrangements. The Commission therefore cannot be held responsible for the fact that the majority of the evidence in the form of statements in this proceeding originates with bitumen suppliers. As such statements were made by several undertakings among the bitumen suppliers, independently from each other, and as they have been corroborated by contemporaneous documents (found both at road

---

<sup>519</sup> [redacted] [37115] reply to request for information of 30.06.03. Other bitumen suppliers made similar arguments. [redacted], for instance, stated that as a reseller, it was “*stuck between the bitumen producers and the road builders*”, see [redacted] reply of 20.5.2005 to the Statement of Objections, point 201. [redacted] stated that it joined the cartel to “*avoid being isolated from the Dutch market*”, see reply of [redacted] of 20.5.2005 to the Statement of Objections, point 45.



builders' and suppliers' premises), there is no reason why the Commission should not rely on this evidence.

- (352) On substance, the Commission does not accept the arguments of either group that the arrangements were forced upon them by the other group and that they had no choice but to follow. Neither group reported the anti-competitive activities of the other group to the public authorities, as they could have done. On the contrary, the evidence described in Chapter IV of this Decision shows that both groups (bitumen suppliers and W5 road builders) participated actively in creating and operating the arrangements. The entire system of preparatory pre-meetings among suppliers, preparatory W5 meetings among road builders and finally bitumen consultation meetings in which agreements between the two groups were negotiated and concluded indicates active and voluntary participation by both groups. As mentioned in recitals (145) to (154), both groups had their own interests in participating in the overall plan to restrict competition for road pavement bitumen in the Netherlands. The group of suppliers may have had a relatively higher interest in the level of gross prices and the W5 may have had a relatively higher interest in the level of the W5 and non-W5 rebates. This explains why the W5 would often (but not always) accept the gross prices proposed by suppliers and why negotiation would be more intense on the level of rebates. But the overall plan clearly benefited both groups. There is no evidence that either of the two sides were forced into anything. Although “fines” were occasionally imposed by the W5 road builders on the suppliers for granting too large rebates to non-W5 undertakings, it was inherent in the agreements concluded that any cheating would occur on the side of the suppliers rather than the W5 road builders. It was the former, after all, who applied the prices and rebates agreed in respect of the non-W5 road builders. Moreover, the suppliers accepted (sometimes even a collective) responsibility for such ‘trespasses’. Shell described one penalty as “*Correct punishment for suppliers going out of line.*”<sup>520</sup> This is not the kind of statement a reluctant follower would make, but rather that of an enthusiastic believer in the system. Nor, obviously, is the imposition of such penalties by the W5 the behaviour of a group of reluctant followers.
- (353) Some smaller bitumen suppliers that did not take part in the bitumen consultation meetings with the W5 road builders argued that they were only reluctant followers and that their role in the cartel was very limited. The Commission also does not accept this claim. The non-participation in the bitumen consultation meetings with the W5 road builders does not relieve the bitumen suppliers concerned of their full responsibility for the infringement of Article 81 of the Treaty. All undertakings belonging to the group of bitumen suppliers subscribed to the overall scheme that was implemented over a period of many years employing the same mechanisms and pursuing the same common objective of restricting competition. It has been established that all suppliers in the group regularly participated in the pre-meetings where a common position was agreed vis-à-vis the W5 road builders in the subsequent bitumen consultation meetings. It was agreed that the bitumen suppliers should be represented by a delegation of the most important suppliers on the market in the meetings with the W5 road builders. All suppliers in the group accepted this, knew that meetings with the W5 road builders took place and informed themselves or were informed about the

---

<sup>520</sup>

[redacted] [21819] inspection document. In the Dutch original: “*Terecht straf voor leveranciers die buiten hun boekje gaan*”.

outcome of these meetings. All suppliers in the group then implemented the results as agreed in the bitumen consultation meeting.

- (354) Nynäs argued in its response to the Statement of Objections that the Commission ignored the existence of a third layer of cartel activity. Evidence in the file would suggest that there were “core bitumen supplier meetings” in the period 1992 – 1998, attended by Shell, Kuwait Petroleum and Esha, where they conspired to hold Nynäs back in the market. Nynäs indeed encountered difficulties when entering the Dutch market. But it has not been proven that these difficulties were caused by a secret conspiracy of its competitors. Other factors, such as a lack of customer relationships or the quality of the bitumen supplied could explain the difficulties. Moreover, Nynäs informed the Commission that it believed that it started attending meetings with its competitors in 1992 and that it also was a regular attendee at the bitumen consultation meetings with the road builders in the period 1992 – 2002.<sup>521</sup> Throughout the period of the infringement, Nynäs was therefore a member of the group of bitumen suppliers and there is no evidence that these suppliers met in different settings in this period than in pre-meetings and bitumen consultations. But even if such meetings of a group within the group would have existed, to which Nynäs was not invited, it would concern an additional infringement and does not amount to an attenuating circumstance for Nynäs for the infringement which is the object of this Decision.

#### 4.2.2. *Non-implementation of the agreements and absence of benefit*

- (355) Several bitumen suppliers and road builders claim that the prices and rebates agreed upon were not effectively implemented. The W5 road builders would approach the bitumen suppliers after a bitumen consultation meeting in order to obtain an individual extra rebate and the bitumen suppliers would secretly try to give the smaller road builders the same or sometimes even a higher rebate than the W5 road builders. Total argued that it officially pretended to adhere to the arrangements, but in practice did everything to follow a different course. Several suppliers and W5 road builders also argue that they did not obtain any artificial benefits from the agreements in the sense that profit margins have not become substantially different following the termination of the cartel. They argue that this factor should be considered an attenuating circumstance.<sup>522</sup>
- (356) The Commission does not accept those claims. With respect to the claim of non-implementation or only partial implementation, as already mentioned in recital (314), the agreements between the bitumen suppliers and the W5 road builders were in fact generally implemented in their key elements, namely gross price and rebates for W5 and non-W5 undertakings. Throughout the duration of the cartel, the parties exchanged sensitive commercial information, agreed to implement the price and rebate changes simultaneously and discussed the correct implementation of the agreements during the pre-meetings and the subsequent bitumen consultation meetings. The overview of price changes in Annex 1 to this Decision shows that the implementation reflected the agreed price changes throughout the period of the infringement.

---

<sup>521</sup>

[redacted]

<sup>522</sup>

See, for instance, the reply of [redacted] to the Statement of Objections, points 60-61 or the reply of [redacted] to the Statement of Objections, points 207-211.

- (357) In the implementation, the Commission accepts that the agreements did not exclude all further competition between the participants. It acknowledges that the W5 road builders individually tried to obtain an extra rebate from the bitumen suppliers for annual volumes purchased or especially large projects. The Commission also acknowledges that bitumen suppliers would sometimes give non-W5 road builders higher rebates than agreed. But the existence of rivalry among the W5 undertakings in respect of certain remaining price elements does not alter the conclusion that the agreements were implemented and did restrict, even if they did not completely eliminate, competition among the W5 road builders for the purchasing of road pavement bitumen. Moreover, the fact that higher uniform rebates had been agreed for W5 road builders than for non-W5 road builders distorted competition with non-W5 road builders, even if both types of road builders may have tried to obtain additional or higher rebates. In any such negotiations, the W5 undertakings simply started from a higher level of already agreed rebates than non-W5 road builders.
- (358) The same restriction and distortion of competition applies from the perspective of the group of suppliers. Bitumen prices were artificially high for all buyers, as is evident from repeated references by cartel members to higher bitumen prices in neighbouring countries, even after W5 rebates. As for non-W5 rebates, while non-W5 road builders may have tried to negotiate higher rebates with suppliers, any such negotiations started from the relatively low rebate level the suppliers had set for non-W5 undertakings.
- (359) None of the participants have claimed that they avoided all implementation in practice of the unlawful agreements. In particular, no participant has provided evidence that it avoided implementing the agreements by adopting competitive conduct or, at the very least, that it clearly and substantially breached the obligations relating to the implementation of the cartel to the point of disrupting its very operation.<sup>523</sup> Incidental non-implementation, or cheating, never led to a complete and total denial of the arrangements made, but always started by taking into account the arrangements agreed and was only possible to the extent that it did not destroy the arrangements. Evidence of incidental non-implementation was in fact carefully monitored during the cartel meetings and was used to bring the parties back in line. Cheating was even occasionally sanctioned via extra retroactive rebates. Small suppliers such as Wintershall and later BP/Veba, which participated in the collusion, but occasionally cheated when they thought they could get away with it, simply tried to secretly exploit the cartel to maximise their own benefit.<sup>524</sup>
- (360) With respect to the argument of absence of benefit, while it may or may not be true that the margins of some suppliers have not changed following the termination of these cartel activities in the Netherlands, this factor cannot lead to any reduction in the fine. In this respect, it suffices for the Commission to note that for an undertaking to be classified as a perpetrator of an infringement it is not necessary for it to have derived any economic advantage from its participation in the cartel in question.<sup>525</sup> The fact that an undertaking has derived no profit from the infringement cannot prevent it from being fined, as otherwise the fine would lose its deterrent effect. It follows that the Commission is not required, for the purpose of fixing the amount of fines, to

---

<sup>523</sup> Case T-26/02 *Daiichi Pharmaceutical v Commission*, 15.03.2006, paragraph 113.

<sup>524</sup> Case T-308/94 *Cascades v Commission* [1998] ECR II-925, paragraph 230.

<sup>525</sup> See judgment of the Court of First Instance, Case T-304/94 *Europa Carton v Commission*, [1998] ECR II-869, at paragraph 141.

establish that the infringement secured an improper advantage for the undertakings concerned, or to take into consideration, where it applies, the fact that no profit was derived from the infringement in question.<sup>526</sup> Therefore, the absence of any benefit from the agreements, even if this could be proven by the parties that make this claim, would not be a reason for the Commission to mitigate the level of the fine to be imposed on these undertakings.

#### 4.2.3. *Early termination of the infringement*

- (361) It is claimed (by Shell) that the fact that the infringement was terminated before the Commission initiated an investigation should be taken into account as an attenuating circumstance.
- (362) The Commission does not accept that claim. Cartel infringements are by their very nature very serious infringements of Article 81 of the Treaty. Participants in these infringements normally realise very well that they are engaged in illegal activities. In the Commission's view, in such cases of deliberate illegal behaviour, the fact that a company terminates this behaviour before any intervention of the Commission does not merit any particular reward other than that the period of infringement of the company concerned is shorter than it would otherwise have been. Indeed, if the infringement had continued after the intervention of the Commission, this would have constituted an aggravating circumstance. In its *Graphite Electrodes* judgment, the Court of First Instance confirmed that the fact that an undertaking voluntarily puts an end to the infringement before the Commission has opened its investigation is sufficiently taken into account in the calculation of the duration of the infringement period and does not constitute an attenuating circumstance.<sup>527</sup>
- (363) Moreover, as mentioned in recital (181), the Commission has, for the purpose of this Decision, limited the duration of the infringement to the period ending on 15 April 2002, thus giving the cartel members the benefit of the doubt with respect to possible later agreed price changes. However, this does not mean that it has been proven that the cartel ended on 15 April 2002. There are various indications, mentioned in recitals (123), (124) and (125), that the cartel may have lasted until the date of the Commission inspections. None of the cartel participants has provided the Commission with contemporaneous evidence that it actually and effectively ended its participation in the cartel before the date of the Commission inspections. The argument, raised by Shell, that its employee who used to participate in the cartel meetings, retired in March 2002 and that his successor is mentioned by Kuwait Petroleum as not having participated in cartel meetings is also only an indication and not proof that the cartel arrangements effectively ended.<sup>528</sup> On this basis, the Commission does not consider the early and complete termination to be proven.
- (364) Equally, the argument of Ballast Nedam that its participation is limited in time deserves no other reward than the shortening of the duration of the infringement.

---

<sup>526</sup> See judgment of the Court of First Instance Case T-241/01, *Scandinavian Airlines System AB v. Commission*, at paragraph 146.

<sup>527</sup> Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-242/01, *Tokai Carbon Co. Ltd and Others v Commission*, 29 April 2004, at paragraph 341.

<sup>528</sup> [redacted]

4.2.4. *Existence of a reasonable doubt on the part of the undertaking as to whether the restrictive conduct constituted an infringement*

- (365) The W5 road builders have claimed that they were not aware that their conduct constituted an infringement. They claim that the coordination must be explained by the fact that they were joint owners of many asphalt plants, requiring the bitumen suppliers to apply the same gross price on the invoices to these jointly owned asphalt plants and competition to take place at the level of the rebates. Towards the bitumen suppliers they only tried to collectively negotiate a higher rebate. They considered this to be justified on the basis of their large purchase volumes. If there was an infringement at all, in their view, it could not be a very serious infringement.
- (366) That claim lacks credibility. When the five or six largest road builders in the Netherlands came together to agree with a group of major bitumen suppliers that their competitor road builders in the Netherlands must get lower rebates for bitumen than them, and insisted on retro-active additional rebates whenever a supplier disregarded this agreement and a non-W5 road builder consequently succeeded in gaining a tender for a project with a high bitumen content, there would or should have been no uncertainty on the part of these undertakings that what they were doing was illegal. Moreover, given the size of the W5 undertakings and the overall resources – including legal resources - available to them, there can be no excuse for these undertakings if they were not actually aware that their behaviour was illegal. At the very least, it was incumbent upon them to seek legal advice in respect of this behaviour. Speaking more generally, for very serious infringements, such as cartel infringements, the Commission does not accept the claim that participants were not aware of the illegal nature of their behaviour. These infringements are among the most serious ones of Article 81 of the Treaty and undertakings ought to have known that such behaviour is illegal.

4.2.5. *Effective co-operation outside the Leniency Notice*

- (367) Various undertakings (namely Shell, Nynäs, Total) have argued that their effective co-operation during the inspection, when answering the requests for information and/or by acknowledging (most of) the facts should be regarded as an attenuating circumstance.
- (368) Those arguments cannot be accepted. First of all, the cooperation during the inspection cannot constitute an attenuating circumstance as the undertakings are required to submit to inspections ordered by decision and are subject to penalties in case they do not submit to the inspection.<sup>529</sup>
- (369) Secondly, the Commission has assessed the value of evidence concerning the infringement provided on a voluntary basis by different undertakings under the Leniency Notice, irrespective of whether it was supplied by means of a formal leniency application or in the form of voluntary self-incriminating information provided in reply to a request for information. To the extent that such cooperation merited a reduction, it has been granted under the Leniency Notice.<sup>530</sup> Taking into account all the facts of this case, the Commission considers that there are no

---

<sup>529</sup> Article 20(4) and Article 23(1)c of Council Regulation No 1/2003.

<sup>530</sup> See recitals (379) to (399).

exceptional circumstances present in this case that could justify granting a reduction for effective cooperation falling outside the Leniency Notice.

- (370) The fact that Shell, Total and Nynäs, after receiving the Statement of Objections, informed the Commission that they did not substantially contest the facts (Shell only for the period between February 1996 and February 2002) does not constitute an attenuating circumstance for the Commission.
- (371) Various undertakings (namely Nynäs, Shell) also argued that they should receive a reduction for having taken disciplinary measures against employees involved in the infringement and/or for having (introduced) a compliance programme and for increasing staff awareness in that respect and/or for issuing a press release expressing their concern and regret about the undertaking's involvement in this case. Whilst the Commission welcomes measures taken by undertakings to avoid the recurrence of cartel infringements in the future, such measures cannot change the reality of the infringement and the need to sanction it in this Decision, the more so as the infringement concerned is a manifest breach of Article 81 of the Treaty.<sup>531</sup>

#### 4.2.6. *Proceedings of other competition authorities*

- (372) Several W5 road builders [redacted] claim that the Commission should, for the setting of the fines, take into account that they have already received fines from the NMa for cartel activity on the downstream markets in the Netherlands. Heijmans, for its part, claims that the Commission cannot sanction the behaviour of the road builders, as their behaviour is already covered by the leniency applications filed by the road builders with the NMa concerning bid rigging practices and because the joint ownership agreements for asphalt plants were exonerated under national law as from the date of notification (1998) until the decision of the NMa (2003) in this respect. Heijmans argues that the Commission cannot impose a penalty for behaviour that is exonerated under national law. Heijmans further argues that it stopped purchasing bitumen collectively with other road builders in jointly owned asphalt plants and that this qualifies as a mitigating circumstance.
- (373) The Commission does not accept those claims. With respect to the first argument, namely that the W5 road builders have already been fined by the NMa, the Commission observes that the current proceeding concerns an infringement of the bitumen suppliers and the W5 road builders on the Dutch market for road pavement bitumen, as described in this Decision. That infringement is not the same as infringements of the road builders on the Dutch downstream markets for asphalt production or road building. Both the product concerned and the arrangements and practices concerned are different. Moreover, the participants in the infringement on road pavement bitumen included the group of bitumen suppliers, which was not the case for any downstream infringements. Several road builders (for example, Ballast Nedam, KWS) also stressed in their responses to the Statement of Objections that the practices that were the object of the Commission's Statement of Objections had nothing to do with the facts that were investigated by the NMa.<sup>532</sup> The fact that cartel behaviour takes place simultaneously on upstream and downstream markets does not

---

<sup>531</sup> See Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-242/01 *Tokai Carbon Co. Ltd and Others v Commission*, paragraph 343.

<sup>532</sup> [redacted] reply of 23.5.2005, paragraph 195, [redacted] reply of 20.5.2005, paragraph 198.

justify any reduction of the fine for undertakings that participated in those different infringements. Indeed, any such reduction would encourage undertakings to participate in several simultaneous cartels. In order to deter such simultaneous cartel behaviour, each separate infringement deserves its own fine based on the facts of the case.

- (374) With respect to Heijmans' argument that the Commission is stopped from fining the W5 road builders, the Commission observes that whatever the W5 road builders may or may not have said in their leniency applications to the NMa, the NMa's proceedings do not cover the sales and purchases of bitumen in the Netherlands, but only downstream markets. The Commission is not prevented from opening an investigation and sanctioning an infringement on the mere ground that other competition authorities may have been informed of the same facts. Indeed, this would remain true even if another competition authority had granted immunity for those facts. It also has to be taken into account that Heijmans was aware of the Commission investigation even before it decided to make a leniency application to the NMa. As for the joint ownership agreements for asphalt plants, these are not the object of the Commission's proceeding and not an element of the infringement described in this Decision. For the same reason, the termination of such joint ownership agreements and therewith the termination of purchasing of bitumen by jointly owned asphalt plants in the Netherlands cannot be a mitigating circumstance. Such behaviour simply was not an element of the infringement that is the object of this Decision, leaving even aside the fact that such termination occurred after the end of the infringement in this proceeding.<sup>533</sup>

#### **4.3. Conclusion on aggravating and attenuating circumstances**

- (375) As a result of aggravating and attenuating circumstances, the basic amount of the fine to be imposed on Shell and KWS should be increased with 100 % for Shell to EUR 108 million and with 60 % for KWS to EUR 27.36 million.

#### **4.4. Application of the 10% turnover limit**

- (376) 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”*.<sup>534</sup>
- (377) The world-wide annual turnover achieved by Esha in 2004, the last year before it went into bankruptcy, was EUR 115 million.<sup>535</sup> The fine imposed on Esha must therefore not exceed EUR 11.5 million. The world-wide annual turnover achieved by Klöckner

---

<sup>533</sup> NMa, Decision of 26.2.2003, point 27 [36102].

<sup>534</sup> See Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-242/01 *Tokai Carbon Co. Ltd and Others v Commission*, paragraph 390.

<sup>535</sup> See recital (15).

in the last years before the bankruptcy was approximately EUR 100 million. The fine imposed on Klöckner must therefore not exceed EUR 10 million.<sup>536</sup>

- (378) The world-wide annual turnover achieved by HBG Civiel BV in 2005 was EUR [redacted], less than 5% of what it was in 2002, the year at the end of which the HBG group was acquired by the BAM group.<sup>537</sup> This financial result was not caused by market forces or other events beyond the control of the BAM Group, but was the result of internal reorganisations within the BAM Group. Since 14 November 2002, when the BAM Group acquired the HBG Group, the latter has been gradually integrated within the BAM group. As of 1 July 2003, HBG Civiel BV has transferred all roadbuilding and asphalt activities to a sister company within the BAM Group, BAM NBM Wegenbouw BV. Since that date HBG Civiel BV has not contracted any new roadbuilding or asphalt works. In May 2004, HBG Civiel BV transferred all infrastructural concrete works contracted since 1 January 2003 to a new company within the BAM Group, BAM Civiel BV, remaining itself responsible only for the infrastructural concrete works it had contracted before 1 January 2003. The number of personnel employed by HBG Civiel BV has become zero as of 1 January 2004.<sup>538</sup> Given that through these internal reorganisations the turnover of HBG Civiel BV in 2005 has become a mere fraction of what it used to be in 2002, the last full year of normal economic activity of HBG Civiel BV, the Commission considers that the 2002 turnover of HBG Civiel BV should be used for the purpose of applying the 10% turnover limit. This limit is not exceeded.<sup>539</sup> Nor is the 10% turnover limit exceeded if regard is had to the turnover of the undertaking of which HBG Civiel BV formed part in 2005.

## 5. APPLICATION OF THE LENIENCY NOTICE

- (379) As indicated in Chapter III, section 1, BP, Kuwait Petroleum and Shell applied at different stages of the investigation for leniency under the Leniency Notice.<sup>540</sup> Kuwait Petroleum, Nynäs and Total also claim that they have provided the Commission with self-incriminating information on a voluntary basis in their replies to the Commission's requests for information. These applications and claims are evaluated in this Section.

### 5.1. BP

- (380) BP was the first to inform the Commission about a secret cartel in respect of sales and purchases of road pavement bitumen in the Netherlands. [redacted], BP applied for immunity from fines and submitted evidence in respect of the alleged cartel. [redacted]. Prior to the application, the Commission had not undertaken an investigation into the alleged cartel activities, nor did it have sufficient evidence to order an investigation in respect of those activities. On the basis of the information

---

<sup>536</sup> See recital (12).

<sup>537</sup> Reply of 24.5.2006 to request for information of 8.5.2006.

<sup>538</sup> Reply of 6.7.2006 to request for information of 29.6.2006. The annual accounts of the still existing HBG legal entities within the BAM group are, moreover, no longer published separately, but are consolidated within the annual financial statement of Koninklijke BAM Groep NV.

<sup>539</sup> See Case T-33/02, *Britannia Alloys & Chemicals Ltd v Commission*, 29 November 2005, paragraphs 33-51.

<sup>540</sup> See footnote 83



provided, the Commission was able to adopt a decision to carry out surprise inspections. On 19 July 2002, the Commission therefore granted BP conditional immunity from fines, in accordance with point 8(a) of the Leniency Notice. The surprise inspections took place on 1 and 2 October 2002.

- (381) BP continued to cooperate fully with the Commission throughout the administrative procedure in accordance with point 11 of the Leniency Notice. BP ended its involvement in the infringement no later than the time when it submitted evidence under point 8(a) of the Leniency Notice and had not taken steps to coerce other undertakings to participate in the infringement. The Commission therefore grants BP immunity from any fines that would otherwise have been imposed on it.

## **5.2. Kuwait Petroleum**

- (382) Kuwait Petroleum was the second undertaking to approach the Commission under the Leniency Notice. [redacted].
- (383) The evidence provided by Kuwait Petroleum [redacted] strengthened by its very nature the Commission's ability to prove the facts in question, and therefore represented added value with respect to the evidence in the Commission's possession at that time. This added value was significant because it corroborated the existing information and, together with the information already in the Commission's possession, enabled the Commission to prove the infringement. It must be taken into account that BP was not a regular attendant of the bitumen consultation meetings and Kuwait Petroleum was the first to give direct evidence on this central element of the cartel's functioning. At the time Kuwait Petroleum provided its evidence, it was unclear if and to what extent the contemporaneous documents in the Commission's file, in combination with the information provided by BP, were in themselves sufficient to prove the infringement. [redacted], the Commission did not have at its disposal the voluntary information later provided by Shell, Total and Nynäs. In accordance with point 23 of the Leniency Notice, Kuwait Petroleum therefore qualified at that time for a reduction of the fine between 30% and 50%.
- (384) Kuwait Petroleum announced in its application [redacted] that it would continue its cooperation by providing further details. [redacted].
- (385) Kuwait Petroleum terminated its participation in the infringement no later than the time when it first submitted evidence under the Leniency Notice. In determining, in accordance with point 23 of the Leniency Notice, what percentage reduction of the fine Kuwait Petroleum merits within the band of 30% to 50%, the Commission notes, firstly, that Kuwait Petroleum's leniency application was made more than eleven months after the Commission had conducted inspections and only after the Commission had sent the parties a request for information asking for detailed factual information about the events. Secondly, with respect to the added value of the further evidence Kuwait Petroleum provided on [redacted], this must be assessed in the light of the information that the Commission had in its possession at that time, therefore including the evidence provided by Total on [redacted]. For the assessment of the added value of the evidence provided on [redacted], the voluntary evidence provided by Nynäs on [redacted] must also be taken into account. On this basis, the Commission considers that this further evidence provided by Kuwait Petroleum strengthened by its level of detail the Commission's ability to prove the facts in

question. [redacted]. However, certain important statements Kuwait Petroleum had made in respect of the alleged participation in the cartel of ExxonMobil were later reformulated by Kuwait Petroleum. The Commission considers it serious that Kuwait Petroleum had initially made apparently unsubstantiated statements in this respect. The fact that these statements could no longer be used in evidence against ExxonMobil also diminished the value of the evidence voluntarily provided by Kuwait Petroleum. The Commission concludes that, taking all these elements into account, Kuwait Petroleum is entitled to a 30% reduction of the fine that would otherwise have been imposed.

### **5.3. Total**

- (386) On [redacted], Total provided the Commission with a reply to the Commission's request for information of 30 June 2003. In this reply, Total recognised the existence of contacts between suppliers and customers to discuss concerted increases in the gross price. Total claims that to the extent that the answer went beyond replying to the factual questions of the Commission and explained the object of the contacts it should be qualified as self-incriminating evidence given on a voluntary basis.
- (387) Whether the information in question should be considered to have been provided voluntarily or not, the Commission considers that, taken into account the lack of any further details in Total's reply and the information the Commission already had in its possession at that time, this evidence did not in any case significantly strengthen by its very nature or its level of detail the Commission's ability to prove the facts in question. Total made no mention of agreements between suppliers and W5 road builders on rebates or of the existence of pre-meetings among suppliers in which it was later found to have participated. No details on the system of bitumen consultation meetings or the duration of the activities were provided and Total emphasized its passive role in contacts among suppliers.
- (388) In conclusion, the information provided by Total does not contain significant added value on the basis of which the Commission should grant a reduction of the fine in application of the Leniency Notice. It should be noted that Total did not ask for treatment of its reply as an application for leniency, but merely claimed in response to the Statement of Objections that its cooperation should be rewarded as an attenuating circumstance. As already mentioned in recital (369), the value of evidence on the infringement provided on a voluntary basis is only assessed under the Leniency Notice.

### **5.4. Nynäs**

- (389) On [redacted], Nynäs provided the Commission with a reply to the Commission's request for information. Nynäs did not at that time express its wish to benefit from a reduction of a fine. Only in its response to the Statement of Objections, did Nynäs claim that it was not obliged to answer the request for information as fully as it had done so and that the fact that it had none the less provided this information must be regarded as voluntary collaboration justifying a reduction in Nynäs' fines.

- (390) The Commission acknowledges that Nynäs provided detailed responses to the Commission's request for information. [redacted]<sup>541</sup> [redacted]. The Commission therefore agrees with Nynäs that this general account of the system of meetings must be considered as having been given on a voluntary basis and can in principle give rise to a reduction of fine, despite the absence of a formal application for a reduction of a fine, provided it represents significant added value with respect to the evidence already in the Commission's possession at that time.
- (391) On substance, the Commission considers that the evidence provided by Nynäs on [redacted] did not strengthen by its nature the Commission's ability to prove the facts. At that time, the Commission had already received leniency applications from BP and Kuwait Petroleum admitting the infringement and other replies to the request for information confirming the existence of a system of meetings. On the basis of the incriminating information provided by BP and Kuwait Petroleum, in combination with the inspection documents and the other replies to the Commission's request for information already received, the existence of an infringement could be established and the main features of the cartel were already known to the Commission.
- (392) Nynäs' voluntary submission of [redacted] did contain added value in that through its level of detail it strengthened the Commission's ability to prove the facts in question. This added value was, however, not significant. The evidence in the Commission's possession at the time Nynäs submitted its voluntary information already allowed the Commission to prove the infringement in all its main elements. The evidence provided by Nynäs did not allow the Commission to prove any new important features of the cartel. In particular, one important statement Nynäs had made regarding ExxonMobil was later reformulated by Nynäs. The Commission considers it serious that Nynäs had initially made an apparently unsubstantiated statement in this respect. The fact that this statement could no longer be used in evidence against ExxonMobil also diminished the value of the evidence voluntarily provided by Nynäs.
- (393) Taking all those elements into account, the Commission considers that the information provided by Nynäs does not constitute significant added value on the basis of which the Commission should grant a reduction of the fine in application of the Leniency Notice.

## **5.5. Shell**

- (394) Shell applied for leniency and provided the Commission with [redacted]. At that time, the information provided by Shell did not constitute significant added value with respect to the evidence already in the Commission's possession, as the Commission was already able to prove the infringement in all its main elements and as the information voluntarily provided by Shell did not allow the Commission to prove any new significant elements of the infringement.
- (395) Shell claims that certain of its replies to the Commission's various requests for information should be regarded as voluntary cooperation. But Shell failed to make clear to what extent it considers that it was not under an obligation to reply to the questions asked by the Commission in its requests for information and therefore what information it would have provided on a voluntary basis. In any case, none of the

---

<sup>541</sup> [redacted]

information provided by Shell constitutes evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession.

- (396) In conclusion, the information provided by Shell does not constitute significant added value on the basis of which the Commission should grant a reduction of the fine in application of the Leniency Notice.

## **5.6. Wintershall**

- (397) Wintershall claims that it is covered by the immunity application of BP, based on the economic succession of the bitumen business from Wintershall to Veba and eventually to BP, which filed the application for immunity on [redacted].
- (398) The Commission does not accept that argument. As already explained in recital (270) the economic continuity test can only apply where the legal person responsible for running the undertaking has ceased to exist in law. Wintershall still exists as a separate undertaking from BP and it was BP, not Wintershall, which decided to apply for immunity to the Commission. Nowhere in its application for immunity does BP claim that its application should cover Wintershall AG.

## **5.7. Conclusion**

- (399) In conclusion, the Commission grants BP and Kuwait Petroleum the following reductions of the fines that would otherwise have been imposed on them:
- BP a reduction of 100 %;
  - Kuwait Petroleum a reduction of 30 %.

## **6. THE AMOUNTS OF THE FINES IMPOSED IN THIS PROCEEDING**

- (400) The fines to be imposed pursuant to Article 15(2) of Regulation No 17 and Article 23(2) of Regulation (EC) No 1/2003 should therefore be as follows:

All amounts are in EUR millions

Ballast Nedam	4.65
BAM NBM:	
– BAM NBM Wegenbouw BV	13.5
– of which Koninklijke BAM Groep NV is jointly and severally liable for	9
BP:	
– BP plc.	0
– of which BP Nederland BV is jointly and severally liable for	0

– and BP Refining & Chemicals GmbH is jointly and severally liable for	0
Dura Vermeer:	
– Vermeer Infrastructuur BV	5.4
– of which Dura Vermeer Groep NV is jointly and severally liable for	3.9
– and Dura Vermeer Infra BV is jointly and severally liable for	3.45
Esha	11.5
HBG	7.2
Heijmans	17.1
Klöckner:	
– Klöckner Bitumen BV	10
– of which Sideron Industrial Development BV is jointly and severally liable for	9
Kuwait Petroleum	16.632
KWS	27.36
Nynäs	13.5
Shell	108
Total:	
– Total Nederland NV	20.25
– of which Total SA is jointly and severally liable for	13.5
Wintershall	11.625

HAS ADOPTED THIS DECISION:

*Article 1*

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

- (a) Ballast Nedam: Ballast Nedam NV and Ballast Nedam Infra BV from 21 June 1996 to 15 April 2002;
- (b) BAM NBM: BAM NBM Wegenbouw BV from 1 April 1994 to 15 April 2002 and Koninklijke BAM Groep NV from 1 November 2000 to 15 April 2002;
- (c) BP: BP plc from 1 April 1994 to 15 April 2002, BP Nederland BV from 1 April 1994 to 1 January 2000 and BP Refining & Petrochemicals GmbH from 31 December 1999 to 15 April 2002;
- (d) Dura Vermeer: Vermeer Infrastructuur BV from 1 April 1994 to 15 April 2002, Dura Vermeer Groep NV from 13 November 1998 to 15 April 2002 and Dura Vermeer Infra BV from 30 June 2000 to 15 April 2002;
- (e) Esha: Esha Holding BV, Smid & Hollander BV and Esha Port Services Amsterdam BV from 1 April 1994 to 15 April 2002;
- (f) HBG: HBG Civiel BV from 1 April 1994 to 15 April 2002;
- (g) Heijmans: Heijmans NV and Heijmans Infrastructuur BV from 1 April 1994 to 15 April 2002;
- (h) Klöckner: Klöckner Bitumen BV from 1 April 1994 to 15 April 2002 and Sideron Industrial Development BV from 1 January 2000 to 15 April 2002;
- (i) Kuwait Petroleum: Kuwait Petroleum Corporation, Kuwait Petroleum International Ltd and Kuwait Petroleum (Nederland) BV from 1 April 1994 to 15 April 2002;
- (j) KWS: Koninklijke Volker Wessels Stevin NV and Koninklijke Wegenbouw Stevin BV from 1 April 1994 to 15 April 2002;
- (k) Nynäs: AB Nynäs Petroleum and Nynäs Belgium AB from 1 April 1994 to 15 April 2002;
- (l) Shell: Shell Petroleum NV, The Shell Transport and Trading Company Ltd and Shell Nederland Verkoopmaatschappij BV from 1 April 1994 to 15 April 2002;
- (m) Total: Total Nederland NV from 1 April 1994 to 15 April 2002 and Total SA from 1 November 1999 to 15 April 2002;
- (n) Wintershall AG from 1 April 1994 to 31 December 1999.

## Article 2

For the infringements referred to in Article 1, the following fines are imposed:

- (a) Ballast Nedam: Ballast Nedam NV and Ballast Nedam Infra BV, jointly and severally: EUR 4.65 million;
- (b) BAM NBM: BAM NBM Wegenbouw BV: EUR 13.5 million, of which Koninklijke BAM Groep NV is jointly and severally liable for EUR 9 million;
- (c) BP: BP plc: EUR 0 million, of which BP Nederland BV is jointly and severally liable for EUR 0 million and BP Refining & Chemicals GmbH is jointly and severally liable for EUR 0 million;
- (d) Dura Vermeer: Vermeer Infrastructuur BV: EUR 5.4 million, of which Dura Vermeer Groep NV is jointly and severally liable for EUR 3.9 million and Dura Vermeer Infra BV is jointly and severally liable for EUR 3.45 million;
- (e) Esha: Esha Holding BV, Smid & Hollander BV and Esha Port Services Amsterdam BV, jointly and severally: EUR 11.5 million;
- (f) HBG: HBG Civiel BV: EUR 7.2 million;
- (g) Heijmans: Heijmans NV and Heijmans Infrastructuur BV, jointly and severally: EUR 17.1 million;
- (h) Klöckner: Klöckner Bitumen BV: EUR 10 million, of which Sideron Industrial Development BV is jointly and severally liable for EUR 9 million;
- (i) Kuwait Petroleum: Kuwait Petroleum Corporation, Kuwait Petroleum International Ltd and Kuwait Petroleum (Nederland) BV, jointly and severally: EUR 16.632 million;
- (j) KWS: Koninklijke Volker Wessels Stevin NV and Koninklijke Wegenbouw Stevin BV, jointly and severally: EUR 27.36 million;
- (k) Nynäs: AB Nynäs Petroleum and Nynäs Belgium AB, jointly and severally: EUR 13.5 million;
- (l) Shell: Shell Petroleum NV, The Shell Transport and Trading Company Ltd and Shell Nederland Verkoopmaatschappij BV, jointly and severally: EUR 108 million;
- (m) Total: Total Nederland NV: EUR 20.25 million, of which Total SA is jointly and severally liable for EUR 13.5 million;
- (n) Wintershall AG: EUR 11.625 million.

The fines shall be paid in Euros, within three months of the date of the notification of this Decision, to the following account:

Account No:

**375-1017300-43 of the European Commission with:**

**ING - Agence Bruxelles-Européenne, Rond-Point Schuman, 5 B-1040 Brussels**

**(Code SWIFT BBRUBEBB – Code IBAN BE66 3751 0173 0043)**

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points, namely 6.5 percentage points.

### *Article 3*

The undertakings listed in Article 1 shall immediately bring to an end the infringements referred to in that Article, insofar as they have not already done so.

They shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or similar object or effect.

### *Article 4*

This Decision is addressed to:

AB NYNÄS PETROLEUM  
Lindetorpsvägen 7  
SE – 12129 Stockholm

BALLAST NEDAM INFRA BV  
Ringwade 1  
NL – 3439 LM Nieuwegein

BALLAST NEDAM NV  
Ringwade 1  
NL – 3439 LM Nieuwegein

BAM NBM WEGENBOUW BV  
Winthontlaan 28  
NL – 3526 KV Utrecht

BP NEDERLAND BV  
Rivium boulevard 301  
NL – 2909 LK Capelle a/d IJssel

BP plc  
1 St James's Square  
UK – SW1 Y 4PD London

BP REFINING & PETROCHEMICALS GmbH  
Alexander von Humboldt Strasse  
DE – 45896 Gelsenkirchen



DURA VERMEER INFRA BV  
Kruisweg 835  
NL – 2132 NG Hoofddorp

DURA VERMEER GROEP NV  
Blaak 333  
NL – 3011 GB Rotterdam

ESHA HOLDING BV  
Hoendiep 316  
NL – 9744 TC Groningen  
Via: Overes Advocaten  
Ubbo Emmiusingel 23  
NL-9711 BB Groningen

ESHA PORT SERVICES AMSTERDAM BV  
Sextantweg 10-12  
NL-1042 AH Amsterdam  
Via: Overes Advocaten  
Ubbo Emmiusingel 23  
NL-9711 BB Groningen

HBG CIVIEL BV  
H.J. Nederhorstlaan 1  
NL - 2801 SC Gouda

HEIJMANS INFRASTRUCTUUR BV  
Graafsebaan 65  
NL-5248 JT Rosmalen

HEIJMANS NV  
Graafsebaan 65  
NL-5248 JT Rosmalen

KLÖCKNER BITUMEN BV  
De Horst 4  
NL-2592 HA 's-Gravenhage  
p/a Dengerink en Kremer advocaten  
Laan van Meerdervoort 151  
NL-2517 AX 's-Gravenhage

KONINKLIJKE BAM GROEP NV  
Runnenburg 9  
NL – 3981 AZ Bunnik

KONINKLIJKE VOLKER WESSELS STEVIN NV  
Oostmaaslaan 71  
NL-3063 AN Rotterdam

KONINKLIJKE WEGENBOUW STEVIN BV  
Lange Dreef 9  
NL – 4131 NJ Vianen

KUWAIT PETROLEUM CORPORATION  
Oil Sector Complex  
Arabian Gulf Street  
Shuwaikh  
KUWAIT

KUWAIT PETROLEUM INTERNATIONAL Ltd  
Duke's Court  
Duke Street  
Woking  
UK – Surrey GU21 5BH

KUWAIT PETROLEUM (NEDERLAND) BV  
Prinsenlaan 633  
NL-3067 TZ Rotterdam

NYNÄS BELGIUM AB  
Excelsiorlaan 87  
BE – 1930 Zaventem

SHELL NEDERLAND VERKOOPMAATSCHAPPIJ BV  
Rivium Boulevard 156  
NL -2909 LK Capelle aan den IJssel

SHELL PETROLEUM NV  
Carel van Bylandtlaan 30  
NL – 2596 HR's-Gravenhage

SIDERON INDUSTRIAL DEVELOPMENT BV  
K.P. van der Mandelelaan 100  
NL – 3062 MB Rotterdam  
p/a Dengerink en Kremer advocaten  
Laan van Meerdervoort 151  
NL-2517 AX 's-Gravenhage

SMID & HOLLANDER BV  
Sextantweg 10-12  
NL-1042 AH Amsterdam  
Via: Overes Advocaten  
Ubbo Emmiusseingel 23  
NL-9711 BB Groningen

THE SHELL TRANSPORT AND TRADING COMPY Ltd  
Shell Centre  
UK - London, SE1 7NA

TOTAL NEDERLAND NV  
Nieuwe Havenstraat 2  
NL-2272 AD Voorburg

TOTAL SA  
2, Place de la Coupole

La Défense 6  
FR – 92400 Courbevoie

VERMEER INFRASTRUCTUUR BV  
Kruisweg 835  
NL-2132 NG Hoofddorp

WINTERSHALL AG  
Friedrich Ebert Strasse 160  
DE – 34119 Kassel

This Decision shall be enforceable pursuant to Article 256 of the Treaty.

Done at Brussels,

*For the Commission*  
*Charlie McCreevy*  
*Member of the Commission*

**ANNEX 1: ROAD PAVEMENT BITUMEN GROSS PRICE CHANGES IN THE NETHERLANDS**  
(amounts in NLG. In EUR as from 1.1.2000)

Date	Amount	Implementation
1.4.1994	- 10	Implemented by [redacted] and [redacted]. [redacted] decreased its price with 15. <sup>542</sup> No data available from [redacted], [redacted] and [redacted].
1.8.1994	+ 40	Implemented by [redacted] <sup>543</sup> , [redacted] and [redacted]. No data available from [redacted], [redacted] and [redacted], [redacted] and [redacted].
4.12.1994	+ 50	Implemented by [redacted] <sup>544</sup> and [redacted]. [redacted] followed on 12/12/94. No data available from [redacted].
1.4.1995	- 30	Implemented by [redacted] and [redacted]. No data available from [redacted], [redacted] and [redacted]. [redacted] decreased its price on 03/04/95 with 40.
1.1.1996	- 10	Implemented by [redacted] <sup>545</sup> , [redacted] and [redacted]. [redacted] followed on 15/03/96. No data available from [redacted].
1.11.1996	+ 50	Implemented by [redacted], [redacted], [redacted] <sup>546</sup> , [redacted], [redacted] and [redacted].
1.7.1997	- 15	Implemented by [redacted], [redacted], [redacted], [redacted], [redacted] and [redacted].
1/9/1997	+ 15	Implemented by [redacted], [redacted], [redacted], [redacted], [redacted] and [redacted].
1.9.1998	- 40	Implemented by [redacted], [redacted], [redacted] <sup>547</sup> , [redacted] and [redacted].
1.3.1999	- 20	Implemented by [redacted], [redacted], [redacted] and [redacted]. [redacted] did not decrease its price, but increased its rebate for W5 road builders with the same amount.
1.5.1999	+ 40	Implemented by [redacted], [redacted], [redacted] <sup>548</sup> , [redacted], [redacted] and [redacted].
14.6.1999	+ 30	Implemented by [redacted], [redacted], [redacted], [redacted], [redacted] and [redacted].

<sup>542</sup> The price change appears on the first invoice to a W5 road builder after 1/4/1994.  
<sup>543</sup> The price change appears on the first invoice to a W5 road builder after 1/8/1994.  
<sup>544</sup> The price change appears on the first invoice to a W5 road builder after 4/12/1994.  
<sup>545</sup> The price decrease of NGL 10 applies to first invoice after 1/1/1996 to W5 road builder (customer F).  
<sup>546</sup> The price change appears on the first invoice to a W5 road builder after 1/11/96.  
<sup>547</sup> [redacted] only confirmed the date of the price change.  
<sup>548</sup> This price increase appears on the first invoices after 1.5.1999 to W5 road builders (3.5.1999).

1.9.1999	+ 90	Implemented by [redacted], [redacted], [redacted], [redacted], [redacted] and [redacted].
18.10.1999	+ 40	Implemented by [redacted], [redacted], [redacted], [redacted] and [redacted]. [redacted] followed on 20/10/99.
1.2.2000	+ 50	Implemented by [redacted], [redacted], [redacted], [redacted], [redacted] and [redacted].
1.4.2000	+ 80 - 80	Implemented by [redacted], [redacted] and [redacted]. As the price change was cancelled afterwards retro-actively, [redacted], [redacted] and [redacted] do not report this price change.
19.3.2001	- 20	Implemented by [redacted], [redacted], [redacted] and [redacted]. [redacted] followed on 01/04/01. [redacted] already invoiced the new price on 01/03/01.
1.7.2001	- 20	Implemented by [redacted], [redacted], [redacted], [redacted], [redacted] and [redacted].
1.2.2002	- 17	Implemented by [redacted], [redacted] and [redacted]. [redacted] and [redacted] adapted to the new price on 04/02/02. [redacted] followed on 15/02/02.
15.4.2002	+ 30	Implemented by [redacted], [redacted], [redacted], [redacted], [redacted]. [redacted] followed on 17/04/02.

- Source of the information: responses to the Commission's request for information of 30.6.2003 and 10.2.2004: [redacted] [37024-37026], [redacted] [27015], [redacted] [38245-38267 and 38322], [redacted] [27534-27539], [redacted] [26999-27001] and [redacted] [37187]. [redacted].<sup>549</sup> See also Chapter IV.2.
- Esha could not be taken into account for this analysis, as it only provided the Commission (on 29.12.2004, i.e. after the issuing of the Statement of Objections) with price information [II/879-899] that contained monthly prices without date of implementation.

<sup>549</sup>

The [redacted] data taken into account for this exercise are the invoices issued to the representative W5 road builder (F). Where no data for this representative customer were available, data of prices charged to other customers were used.