Brussels, 11 November 2009
C(2009)8682 final

COMMISSION DECISION

of 11.11.2009

relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement

(COMP/38589 – HEAT STABILISERS)

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

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

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[1], and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission decision of 17 March 2009 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

1 OJ L 1, 4.1.2003, p.1.

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[2],

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

Having regard to the final report of the hearing officer in this case[3],

Whereas:

[2] OJ L 123, 27.4.2004, p. 18.
[3] OJ

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1 INTRODUCTION

(1) This Decision concerns agreements and concerted practices related to two product categories: tin stabilisers and ESBO/esters.

(2) This Decision is addressed to the following companies:

- Akzo Nobel N.V.;
- Akzo Nobel Chemicals GmbH;
- Akzo Nobel Chemicals B.V.;
- Akcros Chemicals Ltd;
- Elementis plc;
- Elementis Holdings Limited;
- Elementis UK Limited;
- Elementis Services Limited;
- Elf Aquitaine S.A.;
- Arkema France;
- CECA SA;
- MRF Michael Rosenthal GmbH;
- Baerlocher GmbH;
- Baerlocher Italia S.p.A.;
- Baerlocher UK Limited;
- GEA Group AG;
- Chemson Polymer-Additive AG;
- Aachener Chemische Werke Gesellschaft für glastechnische Produkte und Verfahren mbH;
- Chemson GmbH;
- Chemtura Corporation;
- Chemtura Vinyl Additives GmbH;
- BASF Specialty Chemicals Holding GmbH;
- BASF Lampertheim GmbH;
- Faci S.p.A.;
- Reagens S.p.A.; and
- AC-Treuhand AG.

2 THE INDUSTRY SUBJECT TO THE PROCEEDINGS

2.1 The products

(3) Heat stabilisers – in solid or liquid form – are added to Polyvinyl chloride (PVC) products in order to improve their thermal resistance. They also increase the plasticity, rigidity and transparency of final PVC products and protect them from decolouring. Heat stabilisers can be composed of salts of metals like lead, barium, zinc, calcium, cadmium or organotin compounds. However, there are also metal-free chemical substances, such as epoxidised soybean oil, that are used in the PVC industry as co-

stabilisers/plasticisers together with heat stabilisers. This Decision concerns two categories of products that are additives to PVC products: (a) tin stabilisers, and (b) epoxidised soybean oil ("ESBO") and esters. Although, ESBO/esters are not strictly speaking heat stabilisers, they have been referred to as heat stabilisers for the purposes of this Decision.

(4) Tin stabilisers are organotin derivatives. The raw material for tin stabilisers can be subdivided into octyl, butyl and methyl tin-based organic compounds which are also called tin intermediates.[4] In PVC production, tin stabilisers are mainly used as a heat stabiliser (see recital (3)). Tin stabilisers are particularly used when transparency in the final product is desired.[5] Their two main applications relevant for this case were in rigid PVC (packaging, credit cards, pipes, fittings, profiles and bottles) and plasticised PVC (coatings, flooring and car interiors).[6]

(5) ESBO/esters are a sub-category of epoxy plasticisers/stabilisers. They are metal-free organic substances that result from an epoxidation reaction of soybean oil. ESBO/esters are commodity products with a wide range of applications. In PVC production, ESBO/esters are used as a co-stabiliser, associated with a primary additive, such as mixed metals[7] in order to increase the latter's effectiveness so as to achieve enhanced flexibility and stability in the final PVC product.[8] The PVC products for which ESBO/esters are used include food packaging materials, medical products, different kinds of film gaskets, sheet materials, tubing, refrigerator sealing strips, artificial leather, plastic wallpaper, electrical wires and cables, floor coverings and other plastic products for everyday use.[9] It should be mentioned that although ESBO and esters are different products, the participants to the anti-competitive arrangements treated them as one and the same. Section 4 of this Decision clearly shows that the participants treated ESBO/esters as one "product/group" named "epoxisidised soya bean oil and esters" ("ESBO/esters") both within the context of the AC Treuhand meetings (thereafter "AC Treuhand meetings") as well as at other cartel meetings. For this reason, and for the purposes of this Decision, the approach of the participants to the anti-competitive arrangements is applied; ESBO and esters are treated as one product group. Indeed, it is established case law that the definition of the product market is the result not of an arbitrary decision of the Commission, but rather of the behaviour of the participants to the anti-competitive arrangements and who have "*deliberately concentrated their anti-competitive conduct*" on certain products, namely, ESBO and esters.[10]

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4 The basic forms of the intermediates are tetra-butyl-tin (TBT) and tetra-octyl-tin (TOT).

5 Commission Decision of 29 April 1993 in Case No IV/M310 – *Harrisons & Crosfield/AKZO*, OJ C 128, 8.5.1993, paragraph 22.

6 Inspection document, [*], undated, [*].

7 The commonly used metallic salts are Ca/Zn and Ba/Zn.

8 Commission Decision of 29 April 1993 in Case No IV/. M310 – Harrison's & Crosfield/AKZO, OJ C 128, 8.5.1993, paragraph 22.

9 Inspection document, [*], undated, [*] and http://www.made-in-china.com/showroom/txjiaao/product-detailxMwERNUbOJca/China-Epoxy-Soybean-Oil-ESO-.html. [*]. See also [*].

10 See Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and others* v *Commission* [2005] ECR II-10, paragraph 90.

(6) Apart from tin stabilisers and ESBO/esters, which are the products relevant to this Decision, it is possible to distinguish two other groups of stabilisers: lead stabilisers and mixed metal stabilisers (hereinafter referred to as "MM" in both liquid and solid form).[11] Those two categories of stabilisers contain toxic heavy metals, such as lead, barium and cadmium. Since the early 1990s, there has been a move to switch from heavy metal stabilisers to more environmentally acceptable alternatives.[12] The Commission adopted a Green Paper on Environmental Issues of PVC on 26 July 2000.[13] To meet the criteria of sustainable development, the PVC industry phased out cadmium-based heat stabilisers in March 2001 and continues to seek alternatives to lead-based heat stabilisers.[14] In recent years, knowledge on the toxicity of certain organotin substances has much increased and their use is restricted in many applications.[15]

(7) A description of the market for tin stabilisers and ESBO/esters is made in sub-section 2.3.

(8) In response to the Statement of Objections, several parties pointed to the different characteristics of tin stabilisers and ESBO/esters and argued that the anti-competitive arrangements for those products should be considered as two separate infringements.[16] Those arguments are considered in the assessment of the infringement in section 5.4.3.

2.2 The market players

2.2.1 Akzo

(9) Akzo Nobel N.V. has its principal place of business at Strawinskylaan 2555, Amsterdam, the Netherlands. It is the ultimate parent company of a group of companies established and operating worldwide ("the Akzo Group"). Akzo Nobel Chemicals GmbH (previously named Akzo Chemie GmbH and Akzo Chemicals GmbH), Akzo Nobel Chemicals B.V.(previously named Akzo Chemie Nederland BV and Akzo Chemicals Nederland BV) and Akzo Nobel Chemicals International BV (previously named Akzo Chemicals BV and Akzo Chemicals International BV) are all part of Akzo's Chemical division and are all wholly-owned subsidiaries of Akzo Nobel N.V. The "Nobel" name was assumed following Akzo NV´s acquisition of

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11 [*].

12 Commission Decision of 29 April 1993 in Case No IV/M.310 – *Harrisons & Crosfield/Akzo* OJ C, 8.5.1993, paragraph 31.

13 Green Paper - Environmental issues of PVC/* COM/2000/0469 final */.

14 According to a "*Voluntary Commitment*", members of European PVC industry associations, such as ESPA, have committed to phase out and replace lead stabilisers in the EU-15 by 2015 for environmental reasons. The Commitment entailed interim targets of a 15% reduction by 2005 and a 50% reduction by 2010. The commitment of 100% phase out by 2015 was extended to the all the 27 Member States in 2007. http://www.vinyl2010.org/images/stories/vinyl2010_voluntary_commitment.pdf.

15 Commission Decision of 28 May 2009 amending Council Directive 76/769/EEC as regards restrictions on the marketing and use of organnostannic compounds for the purpose of adapting its Annex I to technical progress, OJ L 138, 4.6.2009, p. 11.

16 [*],[*], [*],[*], [*],[*], [*],[*], [*],[*], [*],[*]and [*],[*].

Nobel Industrier AB in 1993.[17] In this Decision, and unless otherwise specified, the name "Akzo" refers to both "Akzo" and "Akzo Nobel".

(10) The Akzo Group manufactures and sells tin stabilisers and ESBO/esters.[18] According to Akzo, prior to the establishment of the joint venture Akcros Chemicals in 1993 (see sub-section 2.2.3), Akzo Nobel Chemicals International BV was the entity within the Akzo Group that dealt with heat stabilisers.[19] Thereafter the heat stabiliser business in the EEA was centralised in the joint venture structure Akcros Chemicals. The joint venture had no legal personality in its own right but consisted of a number of partnerships and legal entities. In 1998, the business carried out under the U.K. Partnership established in 1993 was transferred to Akcros Chemicals Ltd (a wholly-owned subsidiary of Akzo Nobel N.V., see recital (22)).[20]

(11) Tinstab SA was a company incorporated in France in 1981. In 1989 it was acquired by Akzo Chemicals GmbH and Harcros Chemicals France SARL (each holding approximately 50% of the shares). Tinstab supplied tin-based organic compounds exclusively to its shareholders. Tinstab was subsequently transferred into the joint venture Akcros and was renamed Akcros Chemicals France SA.[21]

(12) In this Decision, and unless otherwise specified, companies of the Akzo Group which participated in the cartels will be collectively referred to as "Akzo". The individuals representing Akzo and who are relevant for the purpose of this Decision are:[22]

Table 1: Individuals representing Akzo

Name	Employing legal entity	Position
[employee]	Akzo Nobel Chemicals GmbH [23] (until 1 July 1993)	[*]
[employee]	Akzo Nobel Chemicals GmbH (1986 – August1993)	[*]
[employee]	Akzo Nobel Chemicals International B.V./ Akzo	[*]

[17] See Commission Decision of 10 January 1994 in Case No IV/M.390 - *AKZO / NOBEL INDUSTRIER,* OJ C 19, 21.1.1994.
[*], and [*]and [*].

[18] [*].

[19] [*].

[20] On 15 March 2007, GIL Investments Ltd purchased Akcros Chemicals Ltd from the Akzo Group, see [*]. See also [*].

[21] [*]. Commission Decision of 29 April 1993 in case No IV/M310 – *Harrisons & Crosfield/Akzo,* OJ C 128, 8.5.1993.

[22] [*]. See also [*].

[23] Akzo did not provide full information about the employing legal entity of [employee]. It is noted that [employee] participated in Fides/AC Treuhand meetings under the name of Akzo, or Akzo Germany, (see Annex I) and that Akzo indicated that [employee] had [*] job title and responsibilities at Akzo Chemie GmbH. ([*]).

	Nobel Chemicals GmbH [24]	

(13) In 1999, the world-wide turnover of the Akzo Group was EUR 12 190 million.[25]

2.2.2 *Harcros / Elementis*

(14) The principal place of business of Elementis UK Ltd (previously Harcros Chemicals UK Ltd) is 10 Albemarle Street, London, United Kingdom. In the period 1988-1998 Harcros Chemicals UK Ltd was an almost wholly-owned (indirect) subsidiary of Harrisons & Crosfield plc, which, at the time, was the ultimate parent company of the group.[26] In 1997, the group decided to focus mainly on the chemicals business under the new name Elementis. The companies of the Harrisons & Crosfield (now Elementis) group are hereafter referred to as “the Harcros/Elementis Group”.[27]

(15) On 1 January 1998, Harcros Chemicals UK Ltd was renamed Elementis UK Limited and the parent company Harrisons & Crosfield plc was renamed Elementis plc. On 23 February 1998, Elementis plc became a wholly-owned subsidiary of a new ultimate parent company. The new ultimate parent company assumed the same name Elementis plc. Its subsidiary, previously named Harrisons & Crosfield plc and subsequently Elementis plc (during the period from 1 January 1998 to 23 February 1998) assumed the name Elementis Holdings Limited.[28] Within the current group structure, Elementis UK Limited is still a wholly-owned (indirect) subsidiary of Elementis Holdings Limited. The latter company is a wholly-owned (indirect) subsidiary of Elementis plc.[29]

(16) As stated in recital (11), Harcros Chemicals France Sarl, together with Akzo Chemicals GmbH held the entirety of the shares in the French company Tinstab SA.

(17) In this Decision, unless otherwise specified, companies of the Harcros/Elementis Group which participated in the cartels will be collectively referred to as “Harcros”. The individuals representing Harcros and who are relevant for the purpose of this Decision are:[30]

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24 Akzo did not provide full information about the employing entity of [employee] (see [*] and [*]). It is noted that [employee] participated in Fides/AC Treuhand meetings for "Akzo" (see Annex I) and that [employee] signed the Umbrella Joint Venture Agreement "[*]" Akzo Chemicals International BV ([*]). See also [*].

25 [*].

26 A few individuals held very small parts of the shares, see [*].

27 In the period 1988-1997 the Harcros/Elementis Group was active in a range of businesses. The annual reports present the following Divisions: Chemicals & Industrial, Timber & Building Supplies, Food and Agriculture as well as Plantations. See for instance annual reports of 1988 and 1989. [*].

28 [*]. See also [*].

29 [*].

30 Elementis did not provide full information about the employing entities. It is noted that in the period until 1993, [employee], [employee] and [employee] all participated in Fides/AC Treuhand meeting under the name of "Harcros", see Annex I. [*]. See also [*]. As regards the information of the employing entities, it should be noted that [*] alerted the Commission that [*] did not have information further than that already submitted. See also [*].

Table 2: Individuals representing Harcros

Name	Employing legal entity	Position
[employee]	Lankro Chemicals Ltd[31]/Harcros Chemicals UK Ltd	[*]
[employee]	Harcros Chemicals France SARL/Harcros Chemicals UK Ltd[32]	[*]
[employee]	Lankro Ltd/Harcros Chemicals UK (27 February1984-31 October1994)	[*]

(18) In 1997, the world-wide turnover of the Harcros/Elementis Group was EUR 2 773.2 million.[33]

2.2.3 Akcros

(19) The principal place of business of Akcros Chemicals Ltd is at Lankro Way, Eccles, Manchester, United Kingdom. Akcros Chemicals Ltd is currently owned by GIL Investments Ltd. In 1998, Akcros Chemicals Ltd acquired the business carried out under the U.K. Partnership of Akcros Chemicals. Akcros Chemicals was created, in 1993, as a 50/50 joint venture between the Akzo Group and the Harcros/Elementis Group. Through the joint venture the two groups fused their operations relating to the development, manufacture, and sale of primarily PVC processing additives (including tin stabilisers and ESBO/esters) in Europe and in the United States.

(20) The Akcros Chemicals joint venture had no legal personality in its own right but consisted of a number of partnerships and jointly-owned legal entities. On 19 March 1993, Akzo Chemicals International BV (a wholly-owned subsidiary of Akzo Nobel N.V.) and Harcros Chemicals UK Ltd (an almost wholly-owned subsidiary of Harrisons & Crosfield plc) signed the Umbrella Joint Venture Agreement (an agreement setting out the framework for the formation and regulation of the joint venture). On 28 June 1993, the U.K. Partnership Agreement (an agreement which governed the partnership in the United Kingdom – hereafter "the U.K. Partnership" - between the Akzo Group and the Harcros/Elementis Group) was signed between Pure Chemicals Ltd (a wholly-owned subsidiary of Akzo Nobel N.V.) and Harcros Chemicals UK Ltd. On 2 July 1993, Akcros Services Ltd (a wholly-owned subsidiary of Harrisons & Crosfield plc, now named Elementis Services Limited) assumed

31 Lankro Chemicals became part of Harcros Chemicals UK Ltd in February 1988. [*]. [*]. It is noted that [employee] participated in Fides/AC Treuhand meetings for "Harcros" in the period until 1993. See also [*].

32 It is noted that [employee] participated in Fides/AC Treuhand meetings for "Harcros", see [*].

33 The turnover figure includes the share of revenue from the Akcros joint venture. [*] also provides figures that exclude the share of revenue from the Akcros joint venture. [*].

Harcros Chemicals UK Ltd's role as partner in the U.K. Partnership. The U.K. Partnership had its principal place of business in Manchester, United Kingdom.[34]

(21) Akzo Nobel N.V. was the ultimate parent company of the Akzo Group's 50% share in Akcros Chemicals.[35] Harrisons & Crosfield plc (now Elementis Holdings Limited) was the ultimate parent company of the Harcros/Elementis Group's 50% share in Akcros Chemicals (via several wholly, or almost wholly, owned subsidiaries) until 23 February 1998. From that date Elementis plc became the ultimate parent company of Harcros' 50% share in Akcros Chemicals.[36]

(22) In 1998, Akzo Nobel N.V. acquired sole control of Akcros Chemicals. According to the Umbrella Acquisition Agreement, dated 15 July 1998, between Akzo Nobel N.V. and Elementis plc, the latter company sold its 50% share of the joint venture to Akzo Nobel N.V. By an agreement dated 2 October 1998, Pure Chemicals Ltd (a wholly-owned indirect subsidiary of Akzo Nobel N.V.) acquired the entirety of the interests in the U.K. Partnership.[37] The partnership's business was transferred into Pure Chemicals Ltd (now named Akcros Chemicals Ltd).[38] On 15 March 2007, GIL Investments Ltd purchased Akcros Chemicals Ltd from the Akzo Group.[39]

(23) In this Decision, unless otherwise specified, Akcros Chemicals and Akcros Chemicals Ltd will be collectively referred to as "Akcros". The individuals representing Akcros and who are relevant for the purpose of this Decision are:[40]

Table 3: Individuals representing Akcros

Name	Employing legal entity	Position
[employee]	Akcros Chemicals[41]	[*]
[employee]	Akcros Chemicals	[*]
[employee]	Akcros Chemicals France SA	[*]
[employee]	Akcros Chemicals	[*]
[employee]	Akzo Nobel Chemicals Inc.	[*]

[34] [*]. See also [*] . Commission Decision of 29 April 1993 in case no IV/M310 – *Harrison & Crosfield/Akzo* OJ C 128, 8.5.1993. See also [*] and [*].

[35] [*]. See also organisation charts of 1993 – 1998, [*]. See also [*].

[36] [*], See also recital (15) and [*].

[37] [*]. [*] to [*]. See also [*].

[38] See [*]. See also [*] and [*].

[39] See footnote 20.

[40] The individuals concerned participated in Fides/AC Treuhand meetings under the name of "Akcros" or "Akcros Chemicals", see Annex I. [*]. [*]and its [*]. See also [*].

[41] Akcros Chemicals refers to both the Akcros Chemicals joint venture and to the legal entity Akcros Chemicals Ltd. As to the Akcros Chemicals joint venture, Akzo explains that the employing legal entity of [employee], [employee] and [employee] was first Harcros Chemicals UK Ltd and, subsequently, Akcros Services Limited ([*]). See also [*]. See also the U.K. Partnership Agreement [*], the Deed of Assignment and Novation, [*] and the Secondment Agreement, [*], according to which staff was seconded to the U.K. Partnership. See also [*].

[employee]	Akcros Chemicals	[*][42]
[employee]	Akzo Nobel Nederland BV	[*]

(24) The world wide turnover of the Akzo Group in 1999 is indicated in recital (13).

2.2.4 *Elf Aquitaine, Arkema France and CECA*

(25) CECA SA (CECA) has its principal place of business at 89 Boulevard National, La Garenne Colombes, France. It produces and sells speciality chemicals. Since 23 January 1988, CECA is a 99,9% direct subsidiary of Arkema France ("Arkema France").[43]

(26) Arkema France produces and sells industrial, performance and vinyl chemical products. Arkema France has been renamed several times since 1986 following changes of parent companies. Thus, the same legal entity has been named Atochem, Elf Atochem, Atofina, Arkema and, as from 18 April 2006, Arkema France.[44]

(27) In the period relevant for the present case, the parent companies of Arkema France have been the following: Elf Aquitaine S.A. (Elf Aquitaine), Total and Arkema SA. Elf Aquitaine owned 97, 6% of Arkema France from 1 January 1986 to 13 December 2000. Total was the ultimate parent company of Arkema France in the period 13 December 2000 – 18 May 2006. As from 18 May 2006, Arkema France is no longer part of the Total/Elf Aquitaine Group. A new parent company, Arkema SA, holds 99,9% of Arkema France.[45]

(28) In this Decision, unless otherwise specified, the company that participated in the cartels will be referred to as “CECA”. CECA refers, in this regard, to both CECA and Arkema France (or its predecessors). However, when reference is made to information submitted by the leniency applicant, the name Arkema France will be used. The individuals representing CECA (including Arkema France and its predecessors) and who are relevant for the purpose of this Decision are[46]:

42 [*].
43 [*] and [*].
44 [*] and [*] [*].
45 [*]. By Commission Decision of 9 February 2000 in Case No COMP/M.1628 — *TotalFina/Elf,* OJ L 143, 29.5.2001, p. 1 the Commission declared (subject to certain conditions) the Totalfina – Elf Aquitaine merger compatible with the common market.
46 [*].

Table 4: Individuals representing CECA

Name	Employing legal entity	Position
[employee]	CECA	[*]
[employee]	Elf Atochem SA	[*]
[employee]	CECA	[*]
[employee]	CECA	[*]
[employee]	CECA	[*]
[employee]	CECA	[*]
[employee]	CECA	[*]
[employee]	CECA	[*]

(29) The world-wide turnover of Elf Aquitaine in 1999 was EUR 35 548 million.[47] The turnover of Arkema France during that year was within the range of EUR 10 million-20 million.[48]

2.2.5 Baerlocher

(30) MRF Michael Rosenthal GmbH has its principal place of business at Freisinger Strasse 1, Unterschleissheim, Germany. It is a holding company and the ultimate parent company of the Baerlocher Group established and operating worldwide. The Baerlocher Group produces and sells tin stabilisers. It purchases ESBO/esters to add it as raw material to MM-based heat stabilisers and for resale.[49]

(31) The individual [*] is the principal shareholder of MRF Michael Rosenthal GmbH. Since 12 October 1990, MRF Michael Rosenthal GmbH is the ultimate parent company of the Baerlocher Group and the 100% parent company of Baerlocher GmbH. Prior to 12 October 1990, Baerlocher GmbH was owned by [*], [*][50]

(32) Baerlocher GmbH's principal place of business is at Freisinger Strasse 1, Unterschleissheim, Germany. Baerlocher GmbH produces and sells heat stabilisers, conducts research and development, and manages the activities of the Baerlocher Group.

(33) Baerlocher GmbH is the immediate parent company of the following wholly or almost wholly owned subsidiaries: Baerlocher Italia S.p.A., Baerlocher UK Limited and BIKSA Baerlocher International Quimica SA (BIKSA). BIKSA was liquidated in 2004.[51]

47 [*].
48 [*].
49 [*]. [*].
50 [*]and [*].
51 Baerlocher GmbH was formerly named Chemische Werke München Otto Baerlocher GmbH. [*]. [*].

(34) Comtin S.r.l was a joint venture (active in the tin stabiliser business) held by Baerlocher Italia S.p.A. (named Commer S.p.A. prior to 1991) and Schering S.p.A. The joint venture was terminated in 1992 by Baerlocher acquiring Schering's share and the business of the joint venture was incorporated into the tin stabilisers division of Baerlocher Italia S.p.A.[52]

(35) In this Decision, and unless otherwise specified, companies of the Baerlocher Group which participated in the cartel will be collectively referred to as "Baerlocher".

(36) The individuals representing Baerlocher and who are relevant for the purpose of this Decision are:[53]

Table 5: Individuals representing Baerlocher

Name	Employing legal entity	Position
[employee]	Baerlocher GmbH	[*]
[employee]	Baerlocher GmbH	[*]
[employee]	Baerlocher GmbH	[*]
[employee]	Baerlocher GmbH	[*]
[employee]	Baerlocher Italia S.p.A	[*]
[employee]	Baerlocher UK Ltd	[*]
[employee]	Baerlocher Italia S.p.A.	[*]
[employee]	BIKSA, Baerlocher Spain	[*]

(37) Baerlocher's world-wide turnover in 1999 was within the range of EUR 150 million – 300 million.[54]

2.2.6 Chemson

(38) Chemson Gesellschaft für Polymer-Additive mbH, Frankfurt, Germany, was a company active in the trade of ESBO/esters in the period 1991 to 17 May 2000. In order to distinguish between the different companies concerned by the buy-out presented in recital (41), this legal entity is hereinafter referred to as "the old Chemson Germany".

(39) In the period 1991 – 17 May 2000, the old Chemson Germany was a wholly-owned subsidiary of Metallgesellschaft AG, the ultimate parent company of a group of companies active in speciality chemicals ("the Metallgesellschaft Group"). Metallgesellschaft AG owned the old Chemson Germany via several wholly-owned intermediate subsidiaries, notably Dynamit Nobel AG and Chemetall GmbH. Chemson Polymer Additive Produktions- und Vertriebs Gesellschaft mbH,

52 [*].

53 [*] , [*]. [*].

54 The turnover concerns the business year 1 April 1999 – 31 March 2000. [*].

Arnoldstein, Austria was another company in the Metallgesellschaft Group, active in the production and distribution of solid heat stabilisers (not in the ESBO/esters trade). In order to distinguish between the different companies concerned by the buy-out presented in recital (41), it is hereinafter referred to as "the old Chemson Austria". In the period 1991 – 17 May 2000 the old Chemson Austria was also ultimately wholly-owned by Metallgesellschaft AG and – for different periods – it was the old Chemson Germany's sister company and immediate parent company. The old Chemson Austria was the immediate parent company of the old Chemson Germany from 30 September 1995 until 30 September 1999. Thereafter, until the buy-out in 2000 (see recital (41)), the ownership structure was the following: Metallgesellschaft AG owned 100% of Dynamit Nobel AG, which owned 100% of Chemetall GmbH, which owned 100% of the old Chemson Germany, which in turn owned 100% of the old Chemson Austria.[55]

(40) After the notification of the Statement of Objections, the parties submitted information on the corporate structure that differed from what was available at the time of the Statement of Objections (see recitals (634) and (635)).

(41) On 17 May 2000, the PVC additives business of the Metallgesellschaft Group (operated by the Chemson companies) was sold in its entirety. The purchasing companies were Herkules 64 Verwaltungsgesellschaft mbH (hereinafter "Herkules 64") and SEHA Holding GmbH. The purchase and sale agreement[56] for this transaction consisted of several parts and a number of corporate changes followed

(a) The major assets (including the ESBO/esters business) of the old Chemson Germany were acquired by Herkules 64. Herkules 64 took over the name of Chemson Germany[57] and continued the ESBO/esters business with the acquired assets under that name. This acquiring entity is hereinafter referred to as "the new Chemson Germany".

(b) On 10 February 2005, the new Chemson Germany merged with another company and assumed the name Chemson GmbH**.**

(c) The old Chemson Germany remained a subsidiary of Metallgesellschaft and Chemetall (see recital (43)) and assumed the name CM Gesellschaft für Funktions-Additive mbH. It is today named Aachener Chemische Werke Gesellschaft für glastechnische Produkte und Verfahren mbH (hereinafter referred to as "ACW" unless otherwise specified).[58]

(d) The old Chemson Austria was dissolved and its business merged into the company Chemson Polymer-Additive AG. This transaction involved several steps:

(*i)* First, the old Chemson Austria (Chemson Polymer Additive Produktions- und

55 [*], [*].
56 See "[*]", [*].
57 That is Chemson Gesellschaft für Polymer-Additive mbH.
58 [*]. [*]. See "[*]", [*].

Vertriebs Gesellschaft mbH) changed its legal form and name to Chemson Polymer-Additive AG.
(*ii)* The shares of Chemson Polymer-Additive AG were acquired by the company SEHA Holding GmbH.
(*iii)* In June 2000, SEHA Holding GmbH was renamed Chemson-Polymer Additive GmbH.
(*iv)* On 30 June 2000, the company Chemson Polymer-Additive AG was transferred to Chemson Polymer-Additive GmbH and the legal entity Chemson-Polymer Additive AG was deleted in the corporate register.[59]
(v) On 30 August 2000, Chemson Polymer-Additive GmbH changed its legal form and name to Chemson Polymer-Additive AG (also seated in Arnoldstein, Austria, hereinafter referred to as "the new Chemson Austria").[60]

(42) After the buy-out on 17 May 2000, and until 18 December 2000, the new Chemson Germany (now Chemson GmbH) was wholly-owned by the new Chemson Austria (Chemson Polymer-Additive AG). On 1 July 2002, the ESBO/esters business was sold to ChemTrade Roth GmbH and its owner [*].[61] In the period during 17 May 2000 to August 2008, the new Chemson Austria was owned by Chemson International SA, now named Addichem SA. Addichem SA is currently in voluntary liquidation.[62]

(43) The new Chemson Austria is now wholly owned by Atterbury SA, Luxembourg, which in turn is wholly owned by Buy-Out central Europe II Beteiligungs-Invest AG ("BOCE"), Austria.[63] The previous ultimate parent company of the Chemson companies, Metallgesellschaft AG (see recital (39)), merged in 2005 with the company GEA and changed its name to GEA Group AG. The previous intermediate parent companies, Chemetall GmbH and Dynamit Nobel AG, have been subsidiaries of the American company Rockwood Holdings Inc since 2004. The old Chemson Germany (now ACW) is a subsidiary of Chemetall.[64]

(44) In this Decision, and unless otherwise specified, companies of the Chemson group (as it was structured before and after 17 May 2000) which participated in the cartel will be collectively referred to as "Chemson".

(45) The individuals representing Chemson and who are relevant for the purposes of this Decision are:[65]

59 [*].
60 [*]. [*].
61 [*] and [*]. [*], [*].
62 [*] and [*].
63 [*] and [*].
64 [*]. [*].
65 [*].

Table 6: Individuals representing Chemson

Name	Employing legal entity	Position
[employee]	1993 - 2000 Formally employed by the old Chemson Germany 2000-2004 Formally employed by the new Chemson Germany	[*] [*]
[employee]	1986 – 2000 The old Chemson Germany 2000 – 2002 The new Chemson Germany	[*]

(46) Chemson explains that, although [employee] was formally employed by Chemson Germany (both "old" and "new"), [employee] also held positions in and acted for other legal entities of the Chemson group. In particular, [employee] was [*] of the old Chemson Austria (prior to the transfer on 17 May 2000) and [*] of the new Chemson Austria.[66]

(47) For the financial year ending on 30 September 2000, Metallgesellschaft AG (now GEA Group AG) had a world wide turnover of EUR 7 456 million.[67]

2.2.7 Chemtura

(48) Chemtura Vinyl Additives GmbH has its principal place of business at Chemiestrasse 22, Lampertheim, Germany, and produces and sells tin stabilisers and ESBO/esters. Since a swap arrangement on 28 and 29 May 1998 (see recitals (50) and (55)), Chemtura Vinyl Additives GmbH is a wholly-owned (indirect) subsidiary of Chemtura Corporation.

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66 [*] and [*].

67 [*].

(49) Chemtura Corporation, based in the United States, is a publicly listed company and the ultimate 100% parent company of the Chemtura Group. Chemtura Corporation was previously named Witco Corporation, CK Witco Corporation and Crompton Corporation.[68]

(50) As referred to in recital (48), Chemtura Vinyl Additives became part of the Chemtura Group through a swap arrangement on 28 and 29 May 1998. Through this arrangement, the Chemtura Group (at the time under the name Witco), sold its epoxy business to the CIBA Group, which, in return, sold its vinyl additives business to Chemtura.[69] In practice, this was accomplished by Witco GmbH[70] transferring all shares in Witco Kunstharze GmbH to CIBA Spezialitäten Chemie Lampertheim GmbH. In return, CIBA Spezialitäten Chemie Lampertheim GmbH transferred all shares in Vinyl Additives GmbH (its vinyl additives business) to Witco GmbH. Consequently, Vinyl Additives GmbH became a wholly-owned subsidiary of Witco Corporation.[71] The name of Witco's newly acquired legal entity - Vinyl Additives GmbH - was changed several times following name changes of parent companies.[72] Thus, the same legal entity has been named Witco Vinyl Additives, CK Witco Vinyl Additives, Crompton Vinyl Additives and Chemtura Vinyl Additives. For consistency, and unless otherwise specified, when reference is made in this Decision to that legal entity, the current name, Chemtura Vinyl Additives, will be used.

(51) In this Decision, and unless otherwise specified, companies of the Chemtura Group which participated in the cartels will be collectively referred to as "Chemtura".

(52) The individuals representing Chemtura and who are relevant for the purpose of this Decision are: [73]

68 [*], [*] and [*].
69 [*].
70 [*].
71 [*].
72 [*].
73 [*], [*], [*] and [*].

Table 7: Individuals representing Chemtura

Name	Employing legal entity	Position
[employee]	Chemtura Corporation	[*]
[employee]	Chemtura Vinyl Additives GmbH	[*]
[employee]	Chemtura Vinyl Additives GmbH	[*]
[employee]	Chemtura Vinyl Additives GmbH	[*]
[employee]	Chemtura Vinyl Additives GmbH	[*]
[employee]	Witco GmbH, CK Witco GmbH	[*]

(53) Chemtura's world-wide turnover in 1999 was EUR [*].[74]

2.2.8 Ciba

(54) Ciba Geigy Marienberg GmbH had its principal place of business in Lautertal, Germany (until 1994) and thereafter in Lampertheim, Germany. During the period 1986 – May 1998 it manufactured and sold tin stabilisers and ESBO/esters. The legal entity Ciba Geigy Marienberg GmbH has been renamed several times. It has been named Ciba Additive GmbH, Ciba Spezialitätenchemie GmbH, Ciba Spezialitätenchemie Lampertheim GmbH and, in 2007, it was named Ciba Lampertheim GmbH.[75] On 3 November 2009, Ciba Lampertheim GmbH was renamed BASF Lampertheim GmbH.[76] To clarify, it is BASF Lampertheim GmbH which is the addressee of this Decision, but in the text of the Decision the old name, Ciba Lampertheim, will be used. Thus, in this Decision, and unless otherwise specified, BASF Lampertheim GmbH (previously Ciba Lampertheim GmbH) will be referred to as "Ciba Lampertheim".

(55) Vinyl Additives GmbH was established on 12 December 1997, in preparation for the Chemtura-CIBA swap (see recital (50)) as a direct wholly-owned subsidiary of Ciba Lampertheim GmbH. Vinyl Additives GmbH contained all of Ciba Lampertheim's assets located in Germany related to the vinyl additives business. As part of the swap

74 [*].
75 [*] and [*]. [*].
76 [*].

arrangement Ciba Lampertheim transferred all its shares in Vinyl Additives GmbH to Witco GmbH on 29 May 1998 (see recital (50)).[77]

(56) In the period relevant for the present case, the ultimate parent companies of Ciba Lampertheim GmbH have been the following: Ciba-Geigy AG, Novartis AG and Ciba Holding AG. Ciba-Geigy AG was the ultimate 100% parent company of Ciba Lampertheim in the period 1986 – December 1996. On 20 December 1996, Ciba-Geigy AG merged with Sandoz into Novartis AG. Since 1 January 1997, following a spin-off from the Novartis Group, Ciba Holding AG is the ultimate 100% parent company of Ciba Lampertheim (via intermediate parent companies).[78] On 23 June 2009, Ciba Holding AG was merged into BASF Specialty Chemicals Holding GmbH and ceased to exist in law.[79] BASF Specialty Chemicals Holding GmbH is the successor of Ciba Holding AG and therefore replaces Ciba Holding AG as the addressee of this Decision. Ciba Lampertheim GmbH also became part of the BASF Specialty Chemicals group. Ciba Lampertheim GmbH continued to exist as legal entity.[80]

(57) In this Decision, and unless otherwise specified, companies of the Ciba Group which participated in the cartels will be collectively referred to as "Ciba".

(58) The individuals representing Ciba and who are relevant for the purpose of this Decision are:[81]

77 [*].

78 Ciba Holding AG was previously named Ciba Spezialitätenchemie Holding AG and Ciba SC Holding AG. [*]. Ciba and Sandoz merged their business in health-care products, plant protection products, animal health products and seeds. It was agreed already from the outset that Ciba's speciality chemicals business would not be part of the Novartis business and was to be spun-off as soon as possible. The effective date of the spin-off agreement was 1 January 1997. [*] (merger agreement) (The Rights Offering) and [*], (spin-off agreement) and Commission Decision of 17 July 1996 in Case No IV/M.737 – *Ciba-Geigy/Sandoz*, OJ L 201, 29.7.1997, p. 1.

79 [*].

80 [*].

81 [*] and [*]. [*]. It is understood that [employee] and [employee] started their employment with Vinyl Additive GmbH at the time that company was created, that is in December 1997.

Table 8: Individuals representing Ciba

Name	Employing legal entity	Position
[employee]	Ciba Lampertheim and Vinyl Additive GmbH (1971- May1998)	[*]
[employee]	Ciba Lampertheim (April 1969 – April 1991)	[*]
[employee]	Ciba Lampertheim (April 1972 - December 1997)	[*]
[employee]	Ciba Lampertheim (July 1990 – April 1992)	[*]
[employee]	Ciba Lampertheim and Vinyl Additive GmbH (until May 1998)	[*]
[employee]	Ciba Lampertheim (February 1996 – February 1998) Vinyl Additive GmbH (December 1997 – February 1998)	[*]

(59) Ciba's worldwide turnover in 1997 was CHF 7 822 million.[82]

2.2.9 *Faci*

(60) Faci S.p.A. ("Faci") has its principal place of business at Via Privata Devoto, 36, Carasco, Italy. It is the ultimate parent company of a group of companies established and operating worldwide. Faci manufactures and sells ESBO/esters.83

82 [*].

83 [*]. See also www.faci.it.

(61) The individuals representing Faci and who relevant for the purposes of this Decision are:[84]

Table 9: Individuals representing Faci

Name	Employing legal entity	Position
[employee]	Faci S.p.A.	[*]
[employee]	Faci S.p.A.	[*]
[employee]	Faci S.p.A.	[*]

(62) Faci's world-wide turnover in 1999 was within the range of EUR 0 – 150 million.[85]

2.2.10 Reagens

(63) Reagens S.p.A. ("Reagens") has its principal place of business at Via Codronchi, 4, San Giorgio di Piano (Bologna), Italy. It is the ultimate parent company of a group of companies established and operating worldwide. Reagens manufactures and sells tin stabilisers. It purchases ESBO/esters for use as a raw material and for resale.

(64) The individuals representing Reagens and who relevant for the purposes of this Decision are:[86]

Table 10: Individuals representing Reagens

Name	Employing legal entity	Position
[employee]	Reagens S.p.A.	[*]
[employee]	Reagens S.p.A.	[*]
[employee]	Reagens S.p.A.	[*]

(65) The world-wide turnover of Reagens in 1999 was EUR 0 – 150 million.[87]

2.2.11 AC Treuhand

(66) AC-Treuhand AG ("AC Treuhand") has its principal place of business at Tödisstrasse 47, Zürich, Switzerland. It is a consulting company which offers "[*]".[88] AC Treuhand describes its services in a presentation sent to its clients as follows: "[*]"[89]

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84 [*].

85 [*].

86 [*].

87 [*].

88 www.actreu.ch, see [*].

89 "[*]" See [*].

(67) AC Treuhand was established in November 1993 and registered on 28 December 1993. It was created as a result of a management buy-out of a division of Fides Trust AG ("Fides"). Before the management buy-out, activities of AC Treuhand were carried out by Fides. AC Treuhand continued "[*]"[90] to provide the same services to its members and was bound by "[*]".[91]

(68) Fides and AC Treuhand organised a series of meetings relating to the cartels at issue in this Decision (hereinafter referred to as "Fides meetings" or "AC Treuhand meetings" respectively). The last AC Treuhand meeting took place in 2000.[92] Throughout the entire period of the anti-competitive arrangements, the individual representing both Fides and AC Treuhand was [employee].

(69) AC Treuhand refused to provide a reply to the Commission's request for information pursuant to Article 18 of Regulation (EC) No 1/2003[93] (hereinafter referred to as "Article 18 request for information") regarding its financial data and, in particular, its worldwide turnover.[94] Upon further request, AC Treuhand only re-sent its reply filed with the Commission in case COMP/E-2/37.857 – Organic Peroxides.[95] In that reply, AC Treuhand's turnover in 1999 for organic peroxides was indicated. It is noted that the participating companies paid fees to AC Treuhand for its services. Those services concerned the organisation of meetings and other arrangements relating to the infringement. Evidence from the minutes of the meetings show that the fees were split equally amongst the participants of the cartels from 1997 onwards.[96] In 1999, the participant companies paid AC Treuhand [*][97] for services in the tin stabiliser sector and [*][98] for services in the ESBO/esters sector.

(70) In response to the Statement of Objections, AC Treuhand provided supplementary information on the fees collected during the period 1995-2000.[99]

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90 [*], Removal advice from AC Treuhand, [*].

91 [*], Removal advice from AC Treuhand, [*].

92 The last meeting of the PVC Tin Stabilisers Group (the group for tin stabilisers) took place on 21 March 2000. The last meeting of the ESBO and Ester Group (the group for ESBO/esters) was foreseen to take place on 23 January 2001 when the ESBO and Ester Group was to approve its dissolution. The last minutes of the ESBO and Ester Group AC Treuhand meeting in the possession of the Commission are dated 26 September 2000.

93 OJ L 1, 4.1.2003, pp. 1–25.

94 Commission's Article 18 request for information of 5 June 2008, [*]; [*].

95 Commission Decision of 10 December 2003 in case No COMP/E-2/37.857 – Organic Peroxides, OJ L 110, 30.4.2005, p. 44.

96 For both tin stabilisers and ESBO/esters. See minutes of the PVC Tin Stabilisers Group of 11 February 1998, [*]See minutes of the meeting of the ESBO and Ester Group on 22 March 2000, point 6, [*]: "[*]"; minutes of the AC Treuhand meeting of the PVC Tin Stabilisers Group on 21 March 2000, point 5, [*] "[*]"; [*]. Confirmed by the data provided by Akzo, Chemson and Faci (for ESBO/esters), Baerlocher and Reagens (for tin stabilisers). See [*]; [*]; [*], [*] and [*].

97 [*] and [*].

98 [*]; [*] and [*].

99 [*].

2.2.12 Other undertakings on the European market for heat stabilisers

(71) In addition to the addressees of this Decision, there are also other players on the European Economic Area market (hereafter "EEA market") for stabilisers (or co-stabilisers).[100] Those include Cognis GmbH & Co. KG,[101] Henkel KGaA,[102] IKA Innovative Kunstoffaufbereitung GmbH & Co. KG,[103] Hebron, and the Rohm & Haas group (which in 1999 acquired Morton, another producer of specialty chemicals).[104]

2.2.13 CEFIC

(72) The European Chemical Industry Council ("CEFIC") is a trade association for the chemical industry. It was incorporated in 1972 as an international association. It is based in Brussels, Belgium.[105]

(73) In the period 1986-1997 there was one CEFIC sub-group for stabilisers: the European Lead Stabilisers Association ("ELSA"). The following additional stabiliser groups were established thereafter:

ESPA	European Stabilisers Producers Association, an umbrella group for the stabiliser sub-groups (including ELSA; effective as of 1 January 1998)
ETINSA	European Tin Stabilisers Association
ECOSA	European Calcium Organic Stabilisers Association (replaced by EMMSSA as of 22 November 2001)
EMMSSA	European Mixed Metal Solid Stabilisers Association
ELISA	European Liquid Stabilisers Association
EEVA	European Epoxydized Vegetable Oils Association (established in November 2000; a sub-group of ELISA)

(74) The addressees of this Decision are or have been members of CEFIC and of a number of CEFIC sub-groups.[106]

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100 See the parties' replies to the Commission's Article 18 request for information of 8 October 2007, [*], [*], [*], [*], [*]and [*], [*].

101 www.cognis.com

102 www.henkel.com

103 www.ika-wolfen.de

104 www.rohmhaas.com

105 According to CEFIC, it represents, directly or indirectly, about 29 000 large, medium and small chemical companies which employ about 1.3 million people and account for nearly a third of world chemical production. See www.cefic.be. There are also other sub-groups of CEFIC and other international trade associations such as Vinyl 2010 and Ortepa.

2.3 Description of the market

(75) On the supply side, during the period relevant for these proceedings, the four major producers of tin stabilisers and ESBO/esters were Harcros/Akzo/Akcros, Arkema France/CECA, Baerlocher and Ciba/Chemtura. Baerlocher manufactured tin stabilisers (not ESBO/esters), whereas the other three major suppliers manufactured both tin stabilisers and ESBO/esters. During the same period, there have been a number of major changes concerning those undertakings (such as the swap agreement between Ciba and Chemtura, in 1998 (see recitals (50) and (55)); the joint venture between Akzo and Harcros, in 1993 and Akzo's takeover of Akcros, in 1998 (see recitals (19) to (22)). On the demand side, tin stabilisers and ESBO/esters are mainly purchased by producers of plastic compounds and PVC items.

(76) During the period relevant for this case, Akzo/Harcros/Akcros, Arkema France/CECA, Ciba and Chemtura all supplied both tin stabilisers and ESBO/esters. Baerlocher and Reagens produced tin stabilisers and Chemson and Faci supplied ESBO/esters. The producers of tin stabilisers purchased the raw material for their production (tin intermediates, see recital (4)) mainly from Ciba and another market player, Schering, and subsequently from Chemtura.[107] Furthermore, there were supply arrangements between the suppliers of ESBO/esters and the suppliers of tin stabilisers.[108] Baerlocher, for instance, purchased ESBO/esters from ESBO/esters suppliers for use as a raw material and for resale (see recital (30)).

(77) The Commission estimates that the total size of the EEA market in 1999 for tin stabilisers was approximately EUR 77 million and that the total size of the EEA market in 1999 for ESBO/esters was approximately EUR 44 million. Tables 11 and 12 set out the estimated relevant sales values and market shares in the EEA in 1999, based on information provided by the addressees of this Decision.[109]

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106 Replies to the Commission's Article 18 request for information show that the companies concerned are/were members of the following CEFIC sub-groups: Akcros: ESPA; ELSA; ELISA, ETINSA, ECOSA (EMMSSA) and EEVA, see [*]; Arkema France: ESPA, ETINSA and EEVA, see reply of [*]; Baerlocher: ESPA, ELSA, ELISA, ETINSA and ECOSA (EMMSSA), see [*]; Chemtura: EEVA, ELISA; ELSA; EMMSSA, ESPA and ETINSA, see [*]; Chemson: ESPA, ELSA, and ECOSA (EMMSSA), see [*]; Faci: EEVA, see [*]; Reagens: ESPA, ELSA, ELISA, ETINSA and ECOSA (EMMSSA), see [*]. Ciba explained that Ciba-Geigy Marienberg GmbH (or possibly another company of the Ciba-Geigy Group), at some time was a member in a trade organization for tin and in a trade organization for ESBO, see [*]. Elementis explained that [employee] was requested to sit in the CEFIC group on tin stabilisers towards the end of [employee] period of employment with Akcros (June 1999). [*].

107 [*], [*]. [*] response to the Statement of Objections, [*].

108 For instance, Faci supplies ESBO/esters to Akcros, [*], CECA supplies ESBO/esters to Reagens, [*] and Chemson supplies ESBO/esters to Baerlocher, [*].

109 The figures in Tables 11 and 12 are based on the replies to questions 2 (sales value) and 4 (best estimate of total EEA market) of the relevant Article 18 requests for information. See [*] ([*]), [*] ([*]), [*] ([*]), [*], see also [*], ([*]), [*] ([*]). For Faci: see [*]. For Akcros: see [*].

Table 11: EEA tin stabilisers sales and market shares in 1999		
Undertaking	Sales value in EUR million	Market shares in %
Akcros	[*]	[5-15]
Arkema France	[*]	[5-15]
Baerlocher	[*]	[15-25]
Chemtura	[*]	[35-45]
Reagens	[*]	[5-15]
Others	6.56	9.3
TOTAL	77	100

Table 12: EEA ESBO/esters sales and market shares in 1999		
Undertaking	Sales value in EUR million	Market shares in %
Akcros	[*]	[20-30]
Arkema France	[*]	[15-25]
Chemson	[*]	[15-20]
Chemtura	[*]	[15-25]
Faci	[*]	[10-20]
Others	8.676	19.7
TOTAL	44	100

2.4 Trade between Member States and Contracting Parties to the EEA Agreement

(78) The major suppliers of tin stabilisers and ESBO/esters are present in several Member States, with significant market shares and relatively low transport costs.[110] There is a high level of intra-community shipments of those products. During the relevant period, the cartel participants sold tin stabilisers and ESBO/esters to customers established in several Member States or Contracting Parties to the EEA Agreement (hereinafter referred to as "EEA countries"). The sales figures of the parties show that

110 Commission Decision of 29 April 1993 in case No IV/M310 – *Harrisons & Crosfield/Akzo,* OJ C 128, 8.5.1993, paragraph 26.

customers can be found in virtually the whole of the EEA.[111] Accordingly, there is a substantial volume of trade in the products covered by these proceedings between Member States and the EEA countries.

3 PROCEDURE

(79) [*], Chemtura Corporation submitted an application[112] under the 2002 Commission Notice on immunity from fines and reduction of fines in cartel cases (hereinafter referred to as "the 2002 Leniency Notice").[113]

(80) Chemtura's first application was followed by four oral statements and the submission of supporting documents.[114] [*], the Commission notified Chemtura of its decision to grant it conditional immunity.[115]

(81) On 12 and 13 February 2003, the Commission carried out investigations at the premises of CECA (France), Baerlocher (Germany, France, Italy and the United Kingdom), Reagens (Italy), Akcros (the United Kingdom) and Rohm and Haas (France) pursuant to Article 14(3) of Regulation No. 17.[116] During the investigation at Akcros, Akcros' representatives claimed that certain documents were covered by legal professional privilege.

(82) [*], Arkema France submitted a Leniency application, which was supplemented [*].[117] [*], Baerlocher submitted a leniency submission, which was supplemented [*].[118]

(83) [*], Akzo submitted a Leniency application.[119] With regard to certain improper discussions between competitors, Akzo explained that "[*]".[120] Those are two sets of documents ('Set A' and 'Set B') that Akzo and Akcros claimed to be covered by legal professional privilege (see recitals (81) and (87)) and were the object of an application before the Court of First Instance of the European Communities.

(84) By application lodged at the Registry of the Court of First Instance on 11 April 2003, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd brought an action seeking, first, the annulment of the investigation Decisions. Second, Akzo and Akcros also sought the return of the disputed documents (Case T-125/03). On 17 April 2003, Akzo

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111 In reply to the Commission's Article 18 request for information of 8 October 2007 the parties provided estimations of the volume and value of the market for the relevant products as well as estimations of the turnover and market share (in volume and in tons) for themselves and their competitors for the relevant products in the EEA. See [*], [*]; [*], [*], [*], [*] and [*].

112 [*].

113 OJ C 45, 19.2.2002, p. 3.

114 [*].

115 [*].

116 EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 13, 21.2.1962, p. 204/62.

117 [*].

118 [*].

119 [*].

120 [*].

and Akcros lodged an application for interim relief on the basis of Article 242 of the Treaty and Article 243 of the Treaty, in particular for suspension of the operation of the investigation Decisions (Case T-125/03 R).

(85) On 8 May 2003, the Commission adopted a Decision addressed to Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd concerning a claim of legal privilege in the context of an investigation pursuant to Article 14(3) of Council Regulation No 17 in Case No COMP/E-1/38.589, C(2003) 1533 final In that Decision, the Commission rejected the request for the return of the Set A and Set B documents and gave notice of its intention to add them to the file. However, the Commission stated that it would not undertake this before expiry of the time-limit for bringing an action against the Decision.

(86) By application lodged at the Court of First Instance on 4 July 2003, Akzo brought an action for the annulment of the Commission's Decision of 8 May 2003 (Case T-253/03). In addition, on 11 July 2003, they lodged an application for interim relief seeking, in particular, suspension of the operation of that Decision (Case T-253/03 R).

(87) The application for interim relief in Case T-125/03 R (relating to the investigation Decisions) was dismissed by order of the President of 30 October 2003, while the application for interim relief in Case T-253/03 R (related to the privilege claim) was granted in part. Accordingly, the Rejection Decision of 8 May 2003 was suspended as regards Set A documents.[121] The President ordered those documents to be kept by the Court Registry pending the Court’s judgment in the main action (point 5 of the order). The President took formal note of *"[t]he Commission’s statement that it will not permit third parties access to Set B documents pending judgment in the main action in Case T-253/03[…]."* (point 3 of the order).[122]

(88) By order of 27 September 2004, the President of the Court of Justice of the European Communities, on appeal by the Commission, annulled points 6[123] and 7[124] of the operative part of the President of the Court of First Instance's order dated 30 October 2003.[125] Formal note was taken of the Commission’s declaration that "[would] not allow third parties to have access to the Set A documents until judgment is given in the main action in Case T-253/03 […]."[126] Following the order of the President of the Court of Justice in Case C-7/04 P (R), Commission v Akzo and Akcros and as a result of the annulment of point 7, the Registry of the Court of First Instance returned the

[121] Order of the President of the Court of First Instance of 30 October 2003 in Joined Cases T-125/03 R and T-253/03 R, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission*, [2003], ECR II-4771.

[122] Order of the President of the Court of First Instance of 30 October 2003 in Joined Cases T-125/03 R and T-253/03 R, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission*, [2003], ECR II-4771.

[123] Paragraph 6 stated: In Case T-253/03 R, the operation of Article 2 of the Commission’s Decision of 08.05.2003 concerning a claim of legal privilege (Case COMP/E-1/38.589) is suspended pending the judgment of the Court in the main proceedings. Article 2 of the Commission’s Decision of 8.05.2003 states the following: “[*]”.

[124] Paragraph 7 stated: [*].

[125] Case C-7/04 P(R), *Commission v Akzo and Akcros* [2004], ECR I-8739.

[126] See Case C-7/04 P(R), *Commission v Akzo and Akcros* [2004], ECR I-8739, paragraph 53 point 2 of the recitals of the order.

sealed envelope containing the Set A documents to the Commission by letter of 15 October 2004.

(89) [*], Akzo supplemented its first leniency submission by an additional leniency submission.[127]

(90) On 17 September 2007, the Court of First Instance dismissed the action in Case T-125/03 as inadmissible and the action in Case T-253/03 as unfounded.[128]

(91) On 8 October 2007, the Commission sent out Article 18 requests for information to Akzo, Arkema France, Baerlocher, Chemson, Faci, Reagens and AC Treuhand. On the same day, Chemtura received a Commission Article 18 request for information.

(92) In 2008,[129] the Commission sent to the undertakings involved several other Article 18 requests for information.

(93) In its replies to the Commission's Article 18 requests for information, AC Treuhand referred to several documents, as well as to its reply to the Statement of Objections, which are in the case file of the case COMP/37.857 – Organic Peroxides.[130]

(94) [*], Ciba submitted a Leniency application, which was supplemented on [*].[131]

(95) On 17 March 2009, the Commission adopted a Statement of Objections which was sent to the parties on 18 March 2009. All parties requested and received a CD-Rom containing the accessible documents in the Commission's case file.[132] All parties also consulted the documents and statements that were accessible at Commission premises only.

(96) All addressees of the Statement of Objections submitted written comments. An Oral Hearing was held on 17 and 18 June 2009.

(97) After the Oral Hearing, on 24 June 2009, Ciba submitted a follow-up statement answering certain questions asked by the Commission at the Oral Hearing.[133] On 24 and 26 June 2009, Arkema France, Akzo, Baerlocher, AC Treuhand, Chemson, Elementis and GEA submitted comments on a statement made by the Commission during the Oral Hearing.[134] On 26 June 2009, Faci submitted comments on a

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127 [*].

128 Judgment of the Court of First Instance (First Chamber, extended composition) of 17 September 2007 in Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission* [2007], ECR II-3523.

129 January, February, May, June, July, August, September, October and November 2008.

130 [*]. [*]. Commission Decision of 10 December 2003 in case No COMP/E-2/37.857 – Organic Peroxides, OJ L 110, 30.4.2005, p. 44.

131 [*].

132 [*].

133 [*].

134 [*],[*]; [*],[*]; [*],[*]; [*],[*]; [*],[*]; [*],[*] and [*],[*].

document submitted by Arkema France.[135] ACW and GEA also submitted additional statements relating to liability.[136] On 2 July 2009, the Commission communicated the follow-up statements to other parties allowing them to comment thereon. The statements of ACW and GEA relating to liability were circulated amongst ACW, GEA and Chemson. Baerlocher submitted an additional response to the Statement of Objections on 13 July 2009.[137]

4 DESCRIPTION OF THE EVENTS

4.1 Evidence

(98) The evidence on which this chapter is based consists, firstly, of numerous contemporaneous documents found during the Commission's inspections (agendas, minutes of meetings and/or notes thereof, internal notes, internal reports, tables) and, secondly, of corporate statements and other documents provided by the immunity and leniency applicants and, finally, of replies to the Commission's Article 18 requests for information.

(99) [*][138], [*][139], [*][140], [*],[141] [*][142], [*][143] and [*][144] [*] acknowledge having participated in anti-competitive arrangements at certain points in time in the tin stabiliser and/or ESBO/esters sectors. [*] does not exclude that anti-competitive arrangements took place, but maintains that it was not involved in anti-competitive activities.[145] In response to the Statement of Objections, [*] acknowledges having participated in an "[*]" as described in the Statement of Objections.[146]

4.2 The cartels

(100) The cartel for tin stabilisers started on 24 February 1987[147] at the latest and lasted until 21 March 2000. The objective of the anti-competitive arrangements was to increase and maintain prices in the EEA for tin stabilisers[148] above normal competitive levels and to sustain this objective through customer and sales volume allocation in those products. The cartel for ESBO/esters started on 11 September 1991 at the latest and

135 [*].
136 [*].
137 [*] additional reply of 13 July 2009 to the Statement of Objections, [*].
138 [*],.
139 [*] referred to the meetings organised by AC Treuhand.
140 [*].
141 [*].
142 [*].
143 [*]
144 [*] reply of 31 October 2007 to Commission's Article 18 request for information of 8 October 2007, [*].
145 [*] reply of 10 June 2008 to the Commission's Article 18 request for information of 23 May 2008, [*].
146 [*].
147 The first meeting organized under the auspices of Fides; [*].
148 [*].

lasted until 26 September 2000.[149] The anti-competitive arrangements had the same objective, for both ESBO/esters,[150] and for tin stabilisers. In order to achieve their objectives, the participants in the cartels fixed prices, agreed on price increases, shared the markets through volume quotas, allocated customers, agreed on a reporting and monitoring system in order to ensure implementation of the restrictive agreements. They also exchanged and disclosed commercially sensitive information, such as pricing policies, production capacities and sales volumes. In both cartels, the anti-competitive arrangements took place at EEA level.

(101) [*].[151] [*].[152]

(102) [*][153] [*].[154]

(103) [*]

(104) [*].

(105) [*].

(106) The cartel participants had different types of contacts and meetings concerning tin stabilisers, as well as ESBO/esters. The meetings can be divided into the following categories:

(i) AC Treuhand meetings (see section 4.3);

(ii) meetings that took place on the occasion of the meetings of the CEFIC sub–groups (see section 4.4); and

(iii) other meetings (see section 4.5): multilateral meetings at Community/EEA level (recitals (268), (269) (ESBO/esters) and recital (154) (tin stabilisers)); meetings at Member State/EEA country level (recitals (188), (224), (225) and (238) (tin stabilisers) and recitals (183)-(184) (ESBO/esters)); and bilateral meetings and contacts (recital (135) (tin stabilisers and ESBO/esters), recitals (243), (249), (263), (265) (tin stabilisers)).

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149 See Annex I, corroborated by the inspection document found at [*],[*]dated 28 February 2000 and [*] dated 5 June 2000. See also [*].

150 [*] confirms the objective by saying: "[*].

151 See, in particular, [*].

152 [*].

153 [*].

154 [*].

(107) The following sections describe the different categories of meetings. This will be followed by a more detailed chronology of events.

4.3 AC Treuhand's role

(108) AC Treuhand[155] played a similar role in both of the cartels. This is described in sections 4.3.1 to 4.3.4.

4.3.1 The role of AC Treuhand

(109) AC Treuhand organised meetings and dinners for the cartel participants. It attended and actively participated in those meetings. AC Treuhand collected data on sales of tin stabilisers and ESBO/esters, produced statistics (including calculations of the deviations from agreed market shares) and supplied such information to the participating undertakings. In addition, AC Treuhand offered to act and acted as a moderator in case of tensions between the participants and encouraged the parties to find compromises.[156]

(110) As a service agent[157], AC Treuhand was charged by the participants with collecting the individual sales volumes in tonnage and prices – on a monthly basis for tin stabilisers and on a quarterly basis for ESBO/esters.[158] AC Treuhand charged fees for its services, first on a yearly basis and later on a six-month basis.[159]

(111) AC Treuhand was created in 1993 as a result of a management buy-out of a division of Fides (see recital (67)). The meetings with respect to the tin stabilisers cartel organised by Fides started in February 1987.[160] The initial participants were Akzo, Baerlocher and Ciba.[161] [*],[162] [*],[163] [*],[164] [*],[165] [*][166], [*][167] and [*][168] [*] describe the activities of Fides and AC Treuhand in the same way and often refer to Fides and AC Treuhand interchangeably.[169]

155 [*].

156 AC Treuhand defines this action as follows: " [*]." (Translation: "[*]"). [*], 10 June 2008, [*], Letter from AC Treuhand of 18 December 1995, [*]. [*], [*]. [*].

157 In original "Dienstleistungsunternehmen"; [*].

158 See also inspection document [*],[*]. [*].

159 [*] explains that it "[*]" [*], 10 June 2008, [*].

160 This applies to the PVC Tin Stabilisers Group. [*] states that [*]. Therefore they agreed to entrust "[*]". See [*]. For the reasons mentioned in recitals (103)-(105), it is concluded that February 1987 should be the beginning of the tin infringement and September 1991 should be the beginning of the ESBO/esters infringement.

161 [*].

162 [*].

163 [*].

164 [*].

165 [*].

166 [*] reply of 31 October 2007 to the Commission's Article 18 request for information of 8 October 2007, [*].

167 [*] reply to the Commission's Article 18 request for information of 23 May 2008, [*].

168 [*]

169 [*] refers to "[*]" and "[*]". [*] reply of 31 October 2007 to the Commission's Article 18 request for information of 8 October 2007, [*] (reply to question 15).

4.3.2 Characteristics of the AC Treuhand meetings

(112) Regular meetings were often held at the offices of AC Treuhand in Zürich. Some meetings took place elsewhere.[170] An inspection document from early 2000 shows that the meetings were organised in Switzerland because it was seen as outside the area where the Commission could carry out inspections:

"[*]"[171]

(113) The meetings at the offices of AC Treuhand were usually preceded by a dinner the night before.[172] Prior to the meeting (and the preceding dinner), AC Treuhand would send out an invitation and an agenda for each meeting with an attendance form to be filled in by the participants. It also made hotel and restaurant reservations for the participants.[173] The two groups for the two product categories are referred to as the PVC Tin Stabilisers Group and the ESBO and Ester Group.

(114) The Commission possesses evidence of around 160 meetings and dinners relating to the two cartels organised by Fides/AC Treuhand in the period 1987 – 2000. The general thrust of those dinners and meetings relating to the tin stabiliser cartel is described as follows [*] (the summary provided fits with the evidence of discussions in the ESBO/esters cartel) :

"[*]"[174]

4.3.3 Quota and price arrangements and monitoring

(115) The initial participants[175] in the tin stabiliser cartel agreed to divide the market between them. For that purpose, each undertaking was allocated a specific quota based on its sales figures of the preceding year.[176] As to the participants of the ESBO/esters cartel, they agreed and allocated specific quotas amongst themselves.[177]

(116) AC Treuhand administered a monitoring system designed for those quota arrangements concerning both cartels. It collected the unaudited sales data from the

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170 On occasion meetings were held in Lugano and Lausanne. The last meeting was held in Italy.

171 Inspection document, found at [*],[*]. The notes were drafted by [employee] in early 2000. See also recital (317) where [employee]explains that the minutes of the AC Treuhand meetings were not distributed, but were kept in AC Treuhand's files which were "[*]" as Switzerland was not a member state.

172 See [*] reply dated 31 October 2007 to the Commission's Article 18 request for information dated 8 October 2007, [*]. AC Treuhand attended some of the dinners surrounding the official meetings of the respective groups; [*] reply of 20 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*].

173 See for instance, [*] 15 November 2007, reply to the Commission's Article 18 request for information of 8 October 2007, [*].

174 [*] describes the dinners and meetings in the PVC Tin Stabilisers Group, [*]. According to [*], the meetings took place twice a year, starting in the morning and lasting until lunch time, [*] reply of 31 October 2007 to the Commission's Article 18 request for information of 8 October 2007, [*]. See also [*].

175 Akzo, Baerlocher, Ciba.

176 [*].

177 [*].

participants, monitored the implementation of the agreed volumes and reported the individualised deviations from the arrangements on a regular (quarterly/monthly) basis back to all the participants. It also carried out checks, or "audits", of the data delivered by the parties involved, approximately on a yearly basis.[178] In 1996, the participants agreed to no longer carry out the audits (see recitals (254), (255)). As a result, the fees paid to AC Treuhand for its services decreased in 1996.[179] That concerned both anti-competitive arrangements on tin stabilisers and ESBO/esters.

(117) The participants reported their individual sales figures (expressed in tonnes) for each country to [employee]. [Employee] task was to record statistically the individual sales figures of the participants in order to enable the participants to monitor compliance with the agreed quotas. AC Treuhand calculated the market shares of the participants each month as well as the deviations from the agreed quota for both tin stabilisers and ESBO/esters.[180]

(118) With respect to major customers, the participants agreed to implement the quota system via sales quotas which were specifically discussed, set and agreed at separate multilateral meetings (either immediately after the AC Treuhand meetings or at the country meetings – see recital (132)). The supply volumes for the customers operating in several Member States were determined on a country-by-country basis.[181] [*] explains that participants in the tin stabilisers cartel were obliged to respect the allocated market share: "[*]"[182]

(119) The monitoring mechanism mentioned in recital (116) enabled the participant undertakings to check on a regular basis whether or not the agreements were adhered to. In case of deviations from the approved quotas, the undertaking whose sales figures exceeded its quota had either to reduce its supplies to a specific customer or give up the customer in favour of the undertaking whose sales figures were negative as compared to the agreed quota (see recitals (235) and (244)). [*] refers to the applied compensation system as a means of "[*]".[183]

(120) In addition to the quota arrangements, the involved parties agreed upon and implemented an elaborate mechanism for price-fixing.

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178 As part of these audits [employee] visited the premises of the participant undertakings. See [*]. Also confirmed by [*], see [*] reply dated 31 October 2007 to the Commission's Article 18 request for information dated 8 October 2007, [*]in the reply. [*] explains that as a small market player, it was able to disguise its growth such that it did not incur difficulties with other Fides/AC Treuhand members. Confirmed also by [*].

179 Fees, however, continued to be paid for the other services provided by AC Treuhand.

180 [*] states, that for an initial period and until 1990/1991, Spain was not included in the quotas for Western EEA, but was treated separately, at least as regards ESBO/esters. [*].

181 [*].

182 [*] reply dated 31 October 2007 to the Commission's Article 18 request for information dated 8 October 2007, [*].

183 "[*]"", see [*].

(121) [*],[184] the participant undertakings developed and applied several rules to establish an effective mechanism for price fixing for the tin stabiliser cartel and the ESBO/esters cartel. Thus, firstly, "[*]" (general target prices) were agreed upon for particular EEA countries. Those general target prices served as the basis for setting prices for individual companies. Secondly, to ensure an effective implementation of price-fixing, the participant undertakings adhered to the rule of "*protective prices*". As part of that, certain customers were allocated to specific suppliers, the so-called, designated suppliers. The participant undertakings agreed on the minimum price that suppliers other than the designated supplier should quote to that customer. That price was the "*protective price*".[185] Thirdly, to underpin the agreed and applied "[*]" rule, the participant undertakings agreed upon general minimum prices for particular EEA countries. The general minimum prices were lower than the agreed "[*]" and they were used only when the agreed "[*]" failed to be implemented.[186]

(122) As to price arrangements, [*][187] corroborates the existence of target prices for the tin stabiliser cartel. It explains that agreements on prices covered price increases in general and – at the beginning of the cartel – agreements on target prices. At the beginning of the cartel, the agreements applied to specific large customers in the EEA, usually one or two per country.

(123) [*][188] confirms the existence of fixed minimum prices for the tin stabiliser cartel; it claims that the fixed minimum prices applied to key customers.

(124) [*][189] explains that in the context of the Fides/AC Treuhand meetings concerning both tin stabilisers and ESBO/esters, competitors had discussions concerning price levels and customers in the EEA.

4.3.4 "Red" and "pink papers" and other means of information exchange

(125) In order to conceal the traces of both infringements and incriminating evidence relating to the meetings, AC Treuhand generated "*red*" and "*pink papers*". They were produced, distributed and collected by AC Treuhand during the meetings. At the end of each meeting, the papers were collected and destroyed; the participants could however take notes of their contents.[190] Because of their colour, they were easily distinguishable from other meeting documents. They were not allowed to be taken outside the premises of AC Treuhand.[191]

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184 [*] provided evidence concerning both the tin stabilisers cartel and the ESBO/esters cartel.

185 [*] provides an example of the price negotiations for particular EEA countries during a meeting held on 21 March 1995, in Zürich: " [*].

186 The discussion during the meeting on 12 March 1998 serves as an example [*].

187 [*].

188 [*] reply dated 31 October 2007 to the Commission's Article 18 request for information dated 8 October 2007, [*] (reply to question 15).

189 [*], where [*] confirms information contained in inspection documents found at [*] premises.

190 [*].

191 [*] confirms (i) the existence of the various colour papers, (ii) their anti-competitive contents, (iii) that Fides/AC Treuhand was their author and (iv) the implementation of the ban on carrying the "*Red/Pink*

(126) The "*pink papers*" indicated the development of individual quotas and quantity of sales of the participants. The information contained therein was similar to the information provided by [employee] to each participant (see recitals (233) and (234)). They also contained detailed figures of the deviations (in tonnage) that each participant had from the agreed quotas.[192] During the inspections of February 2003, the Commission copied a contemporaneous document referring to the "*pink papers*" (see recital (276)).

(127) The "*red papers*" contained the minutes of the meetings on tin stabilisers and ESBO/esters, detailing group discussions to raise prices and stabilise market shares. Specific customers were also discussed.[193] The "*red papers*" were kept at the premises of AC Treuhand in the same manner as the "*pink papers*".[194] During its inspection, the Commission copied contemporaneous documents referring to the "*red papers*" (see recital (317)).

(128) The *official* minutes of the AC Treuhand meetings reveal which participants attended the meetings. The official minutes of the AC Treuhand meetings were referred to as the "*white papers*". [*] explains that the "*white papers*" only referred to the "lawful" discussions during the meetings and that price-fixing discussions were not included in those minutes. [*] also explains that documents and issues, which in reality had not been discussed in the meetings, were added to the official minutes on a regular basis in order to make them seem legitimate (see for instance recital (197)).[195] Contrary to the "*red*" and "*pink* papers", the "*white papers*" were distributed to the participants as a means of disguising the actual anti-competitive arrangements.[196] During the inspections of February 2003, the Commission copied a number of official minutes of AC Treuhand meetings. Copies of the official minutes of such meetings were also submitted [*](see Annex I).[197]

(129) The main results of the statistics were displayed on boards in the room throughout the entire AC Treuhand meetings.[198] In addition to the information circulated during the sessions of AC Treuhand meetings, the cartel participants could request the latest

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Papers" outside the meeting room. According to [*] the "*Red Papers*" and "*Pink Papers*" were used interchangeably as reference to documents containing agreements on prices and supply volumes ("[*]") including the supply figures provided by the participant undertakings ("[*]"). The "*Red Papers*" and "*Pink Papers*" were the base for discussions on new price and supply agreements. See [*]

192 [*].

193 Inspection document, found [*],[*].

194 [*], where [*] confirms information contained in inspection documents found at [*] premises.

195 It is with this knowledge in mind that it should be highlighted that the AC Treuhand minutes (the so-called *"white papers"*) have been drafted in order to exclude anti-competitive references. By way of contrast, the handwritten notes taken by the participants ([employee], [employee], [employee]) show clearly what was in fact taking place at the meeting. For instance, please see the difference between the official minutes of the AC Treuhand meeting of 12 March 1998 ([*]) and the notes taken by [employee]and [employee], participants of the meeting (recital (279)).

196 "[*] See [*].

197 [*]. [*] explains that it does not have any "red" or "pink" papers and that it only received from AC Treuhand "white" papers which provided industry wide statistics. [*] reply of 2 July 2008 to the Commission's Article 18 request for information of 27 June 2008, [*].

198 [*].

market data via telephone, including deviations from the agreed quotas (see for instance recitals (233) and (234)). Moreover, sales figures were sent by post to the parties involved.[199]

4.4 Meetings on the occasion of CEFIC's sub-groups meetings

(130) In addition to the AC Treuhand meetings, the cartel participants were also members of CEFIC and its sub-groups and took part in around 47 meetings organized by CEFIC sub-groups in the period between 1986 and 2000.

(131) The CEFIC sub-groups (see section 2.2.13) were used as a "[*]" or a "[*]"[200]. CEFIC-meetings, and in particular the ESPA-meetings, were a perfect setting for negotiations and discussions on prices, sales volumes and customers regarding tin stabilisers and ESBO/esters, although CEFIC did not sanction such discussions, or even knew they were going on (see for instance recital (317) and (318)).[201]

4.5 Other meetings and arrangements

(132) The cartel participants[202] met regularly[203] at regional or national level, the so-called "country meetings", to implement the quotas agreed upon at the AC Treuhand meetings. At those meetings, they discussed how to put into effect in the specific regions the quotas and the general price increases agreed upon. If necessary, further price agreements were made (see for instance recitals (188), (224), (225) and (238) for tin stabilisers and recitals (183), (184) for ESBO/esters). The first such country meeting took place in 1989.[204]

(133) [*] confirms the existence of such multilateral meetings. In particular, it states that, other than the AC Treuhand meetings, the cartel participants met in various EEA countries to discuss the local market situation. Such meetings were often attended also by the participant undertakings' lower ranking employees responsible for the implementation of the arrangements at the local level.[205] [*] evidence showing that there was such a meeting concerning tin stabilisers on 17 March 1987 (see recital (142)).[206]

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199 [*].

200 Inspection document, found at [*],[*]; see also [*]. Confirmed by [*] which states that "[*]". See [*].

201 [*]in which [*] confirms information contained in inspection documents.

202 [*] specifies that "Ato" (now Arkema France) did not participate in all country meetings, Tinstab was only represented at the meetings regarding France, Belgium, Netherlands and Luxembourg, and Reagens participated only in the meetings concerning Italy. The meetings in Germany and Italy took place on the initiative of Ciba and Baerlocher. The meetings in England were jointly organised by Harcros (later: Akcros) and the UK subsidiary of Baerlocher. [*].

203 According to [*] twice a year, see [*].

204 [*], however, does not specify the country where the meeting took place.

205 [*]. For an example of local implementation of the price increase agreed upon during an AC Treuhand meeting see also the AC Treuhand meeting of 26 November 1991, [*].

206 [*].

(134) The cartel participants also met on a number of other occasions to discuss prices and/or sales volumes. [*] participating in EEA-wide multilateral pricing arrangements with its competitors covering ESBO/esters between the early 1990s and 1996.[207] The Commission refers also to the evidence of the multi-lateral meeting of 14 October 1997 marked "[*]" (see recital (268)).

(135) [*] also acknowledge having had bilateral anti-competitive contacts.[208] They aimed at the conclusion of *ad-hoc* agreements on specific customers. Those contacts related to tin stabilisers and ESBO/esters.[209]

4.6 Chronology of contacts

(136) Annex I contains details on the exact dates, locations, participants, categories of the product and other specific information pertaining to the Fides/AC Treuhand meetings held between 1987 and 2000. Annex II contains details on CEFIC meetings held between 1986 and 2000, more precisely details on dates, CEFIC sub-group and participants. These Annexes constitute an integral part of this Decision.[210] The Annexes also mention several meetings that are not mentioned expressly in the chronology set out in recitals (138) - (324).

(137) For a considerable number of the meetings referred to in the Annexes, there is contemporaneous direct evidence that the participants in the respective cartels had regular anti-competitive discussions. Those various meetings will be treated in the chronology set out in recitals (138) - (324). For a number of other meetings in the Annexes, there is no direct evidence of anti-competitive discussions. In this regard, however, there is no reason to consider that, in a particular phase of a series of meetings, meetings and discussions occurred which were completely different from what had transpired at earlier or subsequent meetings when the meetings were attended by the same people, took place under similar external conditions and indisputably had the same primary purpose, namely to discuss the arrangements within the industrial sector concerned.[211] In the absence of alternative plausible explanations, the Commission is entitled to rely on coincidences and indicia to

207 [*]. This is also confirmed by a contemporaneous document in the possession of the Commission showing that a meeting took place on 14 October 1997 between Faci, Akcros, Ciba and another competitor. The discussions at this meeting concerned ESBO/esters and in particular the sales volumes and the pricing policy applied on the EEA ESBO market. The meeting was classified as "[*]" and the notes instructed the attendees to "[*]" (see recital (268)). [*].

208 [*] claims that the bilateral contacts were outside the scope of Fides/AC Treuhand scheme. [*]. [*] states that the content of the bilateral communication was specific implementation of the particular arrangements. See [*]. [*].

209 [*]. See [*].

210 Where official minutes of the meetings are available, the reference can be found in the footnotes of the Annexes.

211 See the joint Opinion of Mr. Vesterdorf, acting as Advocate General, in the Polypropylene judgments (Case T-1/89 [1991] ECR II-867, T-2/89 [1991] ECR II-1087, T-3/89 [1991] ECR II-1177, T-4/89 [1991] ECR II-1523, T-6/89 [1991] ECR II-1623, T-7/89 [1991] ECR II-1711, T-8/89 [1991] ECR II-1833, and T-9/89 to T-15/89 [1992] ECR II-499, II-629, II-757, II-907, II-1021, II-1155 and II-1275), section I.A.3 at II-954.

establish the existence of secret cartels[212] and the evidence should be viewed globally.[213]

4.6.1 1987

4.6.1.1 Tin stabilisers cartel

(138) [*],[214] in November 1986, an informal meeting between Akzo, Baerlocher and Ciba took place. During that meeting, it was proposed to implement a quota system for tin stabilisers. However, the cartel for that product did not in fact start to function until 1987. Likewise, [*] dates the efforts to launch a close cooperation on the tin stabiliser market back to an informal meeting of 11 November 1986. However, [*], that was a bilateral meeting attended by the representatives of Akzo and Ciba at the occasion of a fair in Düsseldorf.[215]

(139) On 24 February and 11 November 1987, the PVC Tin Stabilisers Group held two meetings in Zürich. Fides organised the meetings.[216] The participant suppliers were Ciba, Akzo, Baerlocher and Tinstab.[217] [*], another Fides meeting was also held on 26 August 1987 in Zürich.

(140) [*], during the meeting of 24 February 1987, the participants proceeded to implement the quota system for tin stabilisers, as proposed during the informal meeting in November 1986.[218] [*] contemporaneous handwritten notes drafted on the occasion of that meeting[219] and explains the methodology of the quota system. Those notes also show that the participants agreed on allocation of customers and on new prices to

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212 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 P, *Aalborg Portland and others v Commission* [2004] ECR I-123, paragraphs 55-57. The fact that there are minutes of these other meetings which, on their face, do not suggest any anti-competitive activity, is not sufficient to ground an alternative explanation for the meetings. First, these minutes exist even for meetings where ostensibly there were anti-competitive discussions. Second, the Court of First Instance has recognised that such minutes prepared in the context of covert cartels are not reliable evidence; Case T-314/01, *Avebe v. Commission* [2006], ECR II-3089, paragraph 113. Third, there is evidence on the file showing that the parties deliberately used these minutes to cover up the existence of the cartel.

213 See Joined Cases T-67/00 e.a., *JFE Engineering Corp v. Commission* [2004], ECR II-2501, paragraph 180; and Case T-54/03, *Lafarge v Commission* (not yet reported), paragraphs 56 and 271.

214 [*].

215 [*].

216 As of 1 December 1993, the reference to Fides is changed to AC Treuhand as the case may be in accordance with the evidence.

217 Tinstab participated only in the meeting of 11 November 1987. [*]. [*], Tinstab also started to participate between February and November 1987. It was represented by [employee]. [*].

218 [*].

219 Where evidence is provided by [*] and there is reference to contemporaneous handwritten notes drafted on the occasion of a certain meeting, these notes are drafted by [employee] (see for instance recitals (141), (142), (144)-(145).). [*]. [employee] worked for [*], PVC Stabilisers, see recitals (52) and (58). [*].

specific customers. Furthermore, the notes show agreement in principle to increase prices in Spain.[220]

(141) [*] a table with the heading "*23/24.2.87*" and [*] the table was established on the basis of the information exchanged during the first Fides meeting on tin stabilisers. Handwritten additions by [employee] show the initial quotas for the participants as well as corrections, following audits later in the year.[221]

(142) [*] evidence showing that there was a multilateral meeting, other than the AC Treuhand meeting, concerning tin stabilisers on 17 March 1987.[222]

(143) Contemporaneous documentation shows th*e deviatio*ns in the individual sales data of Ciba, Akzo and Baerlocher[223] for May 1988 as compared to May 1987. The geographical scope of the figures encompasses Belgium, Luxembourg, Denmark, Germany, Finland, France, Greece, the Netherlands, Italy, Norway, Austria, Portugal, Sweden, Switzerland and Spain among others.[224] The data was supplied by Fides and in particular, by [employee].

(144) On 26 August 1987, there was a meeting on tin stabilisers, in Zürich. It was attended by Akzo, Baerlocher and Ciba. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants agreed on new prices for specific, major customers.[225] The notes also show the amount in tonnage which the participants would sell to various customers in 1988.

(145) On 11 November 1987, there was a Fides meeting of the PVC Tin Stabilisers Group, attended by the participant suppliers Akzo, Baerlocher, Ciba and Tinstab. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants agreed new prices for **s**pecific major customers. The notes also show the agreed quotas and deviations from those quotas.[226]

4.6.1.2 ESBO/esters cartel

(146) [*].[227]

(147) [*].[228]

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220 There was also reference to "[*]"; [*].
221 [*].
222 [*].
223 At the time Chemische Werke München (CMW), now Baerlocher GmbH.
224 [*].
225 [*].
226 [*].
227 [*]. Only the meeting place of the December meeting is indicated: Zürich. [*] also confirms that anti-competitive arrangements started in the heat stabiliser industry in 1987. The participants were Air Liquide, Akzo and Ciba; [*]. For a more detailed presentation of the participants in each meeting of the PVC Tin Stabilisers Group and the ESBO and Ester Group for the period between 1987 and 2000, please see Annex I.
228 [*].

(148) [*].[229]

(149) [*].[230]

4.6.2 1988

4.6.2.1 Tin stabilisers cartel

(150) In 1988, the PVC Tin Stabilisers Group held five Fides meetings in Zürich, (19 January, 30 June, 1 July, 27 and 28 September). The participant suppliers were Akzo, Baerlocher, Ciba, Harcros[231] and Tinstab.[232] The geographical scope of the existing anti-competitive arrangements covered the EEA.[233] [*], a Fides meeting was also held on 10 November 1988 in Heidelberg.

(151) On 19 January 1988, there was a Fides meeting of the PVC Tin Stabilisers Group, attended by the suppliers Akzo, Baerlocher, Ciba and Tinstab. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participant suppliers exchanged information on the agreed quotas and deviations from those quotas. The notes also show that they agreed new prices for specific, major customers.[234]

(152) On 28 September 1988, [employee] from Harcros (formerly Lankro) took part in the Fides meeting of the PVC Tin Stabilisers Group. The first point on the agenda of that meeting deals with Harcros' entry into the PVC Tin Stabilisers Group. The minutes show that the participants discussed "[*]" with Harcros. Harcros' representative was informed about the modalities of the exchange of statistical data (such as country definition, products covered, commercial data to be reported in regular time periods by means of complete forms). After intensive discussion, all participants[235] agreed by vote to Harcros' participation in the PVC Tin Stabilisers Group.[236] According to the minutes, Harcros had to receive the relevant forms so that it could provide the relevant sales information to the PVC Tin Stabilisers Group.

(153) According to contemporaneous handwritten notes, drafted on the occasion of that meeting, the participants furthermore agreed on price increases, as per 1 January 1989, for specific customers, as well on allocation of customers.[237]

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229 [*].
230 [*].
231 Harcros from 28 September 1988.
232 For a more detailed presentation of the participants in each meeting of the PVC Tin Stabilisers Group for the period between 1987 and 2000, please see Annex I.
233 For the period between 1987 and 2000, the geographical scope covered was the territory covered by the EEA Agreement.
234 [*].
235 For the list of participants, please see Annex I.
236 [*].
237 [*]. In its description of the notes of [employee], [*] states that the data regarding Akzo probably encompass Harcros (formerly Lankro).

(154) On 10 November 1988, there was a meeting on tin stabilisers, in Heidelberg, Germany. It was attended by Akzo, Baerlocher and Ciba. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the meeting was attended by [employee] (for Ciba), [employee] (for Akzo, Tinstab and Lankro) and [employee] (for Baerlocher). The notes show that the participants agreed on a set of price increases: a general price increase, to be implemented in two stages, a specific price increase for Spain and individual price increases for specific customers. More meetings, this time regarding individual EEA countries, were planned for the same month.[238]

4.6.2.2 ESBO/esters cartel

(155) [*][239] [*][240]

(156) [*].[241]

(157) [*].[242]

(158) [*].[243]

4.6.3 1989

4.6.3.1 Tin stabilisers cartel

(159) In 1989, the PVC Tin Stabilisers Group held seven Fides meetings in Zürich (9 and 10 January 1989, 28 April 1989, 24 and 25 July 1989, 27 and 28 November 1989). The participant suppliers were Akzo, Baerlocher, Ciba, Harcros and Tinstab.[244] [*], a Fides meeting was also held on 12 May 1989 in Zürich.

(160) [*] submitted a table to the Commission concerning tin stabilisers showing detailed individua*l sales volumes* of "CIBA", "HAR/AKZO" and "BAER/C*OM"* for 1989 and 1990. The table's heading is "*West European market*".[245] Besides the individual sales, total sales volumes were summed up into the so-called "*Swiss total*". [*] explains the meaning of "*Swiss total*" as a reference to the participants to the agreements for which Fides acted as an intermediary at the time, namely, Ciba, Harcros/Akzo and Baerlocher/Comtin.[246] A note at the bottom of the document stipulates that the "*Swiss*" market shares were: Ciba 58,8%, A/H 20% and B/C 21,2%. The figures in the

238 [*] description, the heading reads as follows: "[*]"; [*].
239 [*].
240 For the period between 1987 and 2000, the geographical scope covered was the territory covered by the EEA Agreement.
241 [*].
242 [*].
243 [*].
244 On 10 January 1989.
245 [*]. [*] clarifies that [employee] drafted the table for Comtin's Board probably early 1991. [*] reply dated 30 June 2008 to the Commission's Article 18 request for information dated 30 May 2008, [*].
246 [*].

note reflected the quotas which the then participants to the PVC Tin Stabilisers Group agreed upon for 1990. The quotas covered the entire "*West European Market*".[247] The document also mentions and lists the so-called "*Outsiders*" and their respective individual sales in 1989 and 1990[248] which are summed up in the "*Subtotal Outsiders*".[249]

(161) On 10 January 1989, there was a Fides meeting of the PVC Tin Stabilisers Group, attended by the suppliers Akzo, Baerlocher and Ciba. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants agreed new prices for specific major customers.[250]

(162) On 12 May 1989, there was a meeting in Zürich on tin stabilisers. It was attended by Akzo, Baerlocher, Ciba, Harcros. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants exchanged information on agreed prices for specific customers in a number of EEA countries. The notes also show that the participants discussed possible corrections of the deviations of the quotas and agreed on new overall target prices.[251]

4.6.3.2 ESBO/esters cartel

(163) [*],[252] [*].

(164) [*].[253]

(165) [*].[254]

(166) [*][255]

4.6.4 1990

4.6.4.1 Tin stabilisers cartel

(167) In 1990, the PVC Tin Stabilisers Group held five Fides meetings in Zürich (21 and 22 March, 29 and 30 May and 27 September). The participant suppliers were Akzo, Baerlocher, Ciba, Harcros and Comtin[256]. [*], a Fides meeting was also held on 30 October 1990 in Zürich.

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247 " [*]." [*] reply dated 30 June 2008 to the Commission's Article 18 request for information dated 30 May 2008, [*].

248 The yearly sales of CECA cover the period 1986 – 1990.

249 Under the category "*outsiders*", there are listed the following companies: Reagens, CECA and another competitor.

250 [*].

251 [*].

252 [*].

253 [*].

254 [*].

255 [*].

256 From 22 March 1990 onwards.

(168) On 30 May 1990, there was a Fides-meeting of the PVC Tin Stabilisers Group in Zürich. The suppliers attending the meeting were Akzo, Baerlocher, Ciba and Comtin. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants discussed the preparation of a document on PVC, so as to "*beef up*" the official minutes of the meeting.[257]

(169) On 27 September 1990, there was a Fides meeting of the Tin Stabilisers Group in Zürich. The meeting was attended by the suppliers Akzo, Baerlocher, Ciba and Harcros. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants exchanged information on their respective sales volumes in 1989 and deviations from the agreed quota in August 1990. The notes further show that the participants discussed a common approach vis-à-vis [*], a competitor.[258]

(170) On 30 October 1990, there was a meeting in Zürich on tin stabilisers. It was attended by Akzo, Baerlocher, Ciba and Harcros. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants agreed new prices for one specific customer,[259] as well as a time table for meetings concerning price increases to be applied in a number of EEA countries.[260]

4.6.4.2 ESBO/esters cartel

(171) [*].[261] [*].

(172) [*].[262]

(173) [*].[263]

(174) [*].[264]

(175) [*]. [265]

4.6.5 1991

4.6.5.1 Tin stabilisers cartel

(176) In 1991, the PVC Tin Stabilisers Group held nine Fides meetings in Zürich and Lausanne (14 and 15 January, 4 March, 16 and 17 May, 16 and 17 September, 25 and 26 November). The participant suppliers were Akzo, Baerlocher, Ciba and Harcros.

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257 [*].
258 The exact wording is: "[*].
259 The notes state in part: "[*]".
260 [*].
261 [*].
262 [*].
263 [*].
264 [*].
265 [*] [*].

(177) On 26 November 1991, there was a Fides meeting of the PVC Tin Stabilisers Group in Zürich. The meeting was attended by the participant suppliers Akzo, Baerlocher, Ciba and Harcros. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants agreed on new prices for specified customers in a number of EEA countries. Furthermore, the notes show that the participants agreed on a general price increase of 0,25-0,30 DM/kg and on new prices in Spain, planned to be applied during the first week of February 1992. They also agreed that prices in Spain should not be lowered.[266]

4.6.5.2 ESBO/esters cartel

(178) [*].

(179) [*][267]

(180) [*].[268]

(181) [*].[269]

(182) On 11 and 12 September 1991, there were two Fides meeting of the ESBO and Ester Group in Lausanne. The minutes of the meeting on 12 September 1991 show that the participant suppliers were Ciba, Harcros, Akzo, CECA and Chemson. They discussed the sales statistics spanning from 1989 to several months of 1991.[270] According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants exchanged information on agreed prices for specific customers in a number of EEA countries. Furthermore, the notes show discussion on the quota for Spain and mention the date of 8 October 1991 for a planned meeting concerning supplies to customers in that Member State.[271]

(183) On 8 October 1991, there was a meeting in Palma de Mallorca on ESBO/esters. It was attended by Akzo, CECA, Ciba, Chemson and Harcros. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants agreed on new prices for specific customers in Spain. Those prices are listed in a table which also identifies the designated supplier.[272]

(184) On 15 October 1991, there was a meeting in the United Kingdom on ESBO/esters. It was attended by Akzo, CECA, Ciba, Chemson and Harcros. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants agreed on new prices and price increases relating to the [*] group of

266 [*].
267 [*].
268 [*].
269 [*].
270 [*] reply to the Article 18 request for information sent 8 October 2007, [*]: the agenda for and the meeting minutes of 11-12 September 1991 refer to and confirm the meeting minutes of 5-6 June 1991.
271 [*].
272 [*].

companies.[273] The notes also show the "*protective price*", to be offered to the [*] group of companies by participants other than the designated supplier. [*] submits that it was agreed that each undertaking was to introduce the new prices at different, specified dates, so as to hide the fact that there was an agreement amongst the suppliers.[274]

(185) On 5 December 1991, there was a Fides meeting of the ESBO and Ester Group in Zürich. The meeting was attended by the participant suppliers Ciba, Harcros, Akzo, CECA and Chemson. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants exchanged information on sales volumes and prices to specific customers. The notes also show that the participants agreed on new quotas from 1 January 1992, following Harcros' take over of Greiz.[275]

4.6.6 1992

4.6.6.1 Tin stabilisers cartel

(186) In 1992, the PVC Tin Stabilisers Group held eight Fides meetings in Zürich (9 and 10 January, 11 and 12 May, 9 and 10 September, 19 and 20 November). The participant suppliers were Akzo, Baerlocher, Ciba, Harcros and, as of 20 November 1992, Reagens. [*], a Fides meeting was also held on 15 January 1992.

(187) During the inspection at the premises of [*], the Commission found handwritten notes of [employee], dated January 1992, which read as follows:

"[*]" [276]

(188) [*] clarifies that "[*]" was a synonym for the meetings of the PVC Tin Stabilisers Group organised by Fides, whereas the wording "[*]" refers to the country meetings in the United Kingdom. The country meetings were organized to implement the quotas agreed at AC Treuhand meetings at pan-EEA level. The notes concern the pricing policy towards a customer, [*]. Because that particular customer was operating at EEA-wide level, the pricing policy was to be agreed upon among the members of the PVC Tin Stabilisers Group at EEA level. [277]

(189) The Commission also found documents containing tables at the premises of [*] which show detailed individual sales of Baerlocher, Akzo, Harcros, Ciba and other companies for a number of individual customers on the United Kingdom tin stabiliser market in 1992. The tables also contain the market shares of the companies mentioned.[278]

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273 [*]. [*] is a customer.

274 [*]

275 [*]. The Fides minutes also refer to the Harcros-Greiz Dolau takeover: [*].

276 Inspection document found at [*], dated January 1992, [*]. ([*]. Transcript, [*], 30 June 2008, [*].

277 [*], 30 June 2008, [*]. The clarification of the wording "[*]" is confirmed also on [*].

278 Inspection documents found at [*],[*]and [*].

(190) On 10 January 1992, there was a Fides meeting of the PVC Tin Stabilisers Group, attended by the participant suppliers Akzo, Baerlocher, Ciba and Harcros. According to contemporaneous handwritten notes drafted on the occasion of that meeting (and headed with the abbreviation "[*]" -for "tin stabilisers"- and "[*]"), the participants agreed on new quotas as from 1 January 1992, following Harcros' take over of Greiz.[279]

(191) On 15 January 1992, there was a meeting concerning tin stabilisers in Grosvenor, the United Kingdom. It was attended by Akzo, Baerlocher, Ciba and Harcros. According to contemporaneous handwritten notes, drafted on the occasion of that meeting, the participants agreed on new prices for specific customers in the United Kingdom.[280]

(192) On 12 May 1992, there was a Fides meeting of the PVC Tin Stabilisers Group, attended by the participant suppliers Akzo, Baerlocher, Ciba and Harcros. According to contemporaneous handwritten notes drafted on the occasion of that meeting (and headed with the abbreviation "Sn" for tin), the participants agreed on new prices for specified customers in Germany.[281]

(193) On 10 September 1992, there was a Fides meeting of the PVC Tin Stabilisers Group, attended by the participant suppliers Akzo, Baerlocher, Ciba and Harcros. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants agreed on new prices for specified customers in Germany.[282]

(194) On 20 November 1992, there was a PVC Tin Stabilisers Group meeting attended by the participant suppliers Ciba, Baerlocher, Akzo, Harcros and, for the first time, Reagens. It was agreed that Reagens would share its commercial data on tin stabilisers from January 1991 onwards. The minutes of the meeting, distributed by Fides to the participant companies on 7 December 1992, read as follows: "[*]"[283]

(195) [*] confirms Reagens' participation.[284] [*][*] was invited to, and did in fact, join the PVC Tin Stabilisers Group in 1992. [*] [285] ".[286]

4.6.6.2 ESBO/esters cartel

(196) In 1992, there were seven Fides meetings of the ESBO and Ester Group (17 and 18 March, 27 April, 23 and 24 September, 15 and 16 December). The participant

279 [*].
280 [*].
281 [*].
282 [*].
283 Inspection document, found at [*], minutes of 20 November 1992, [*], cf. also inspection document, found at [*], dated 04.12.1992, [*]. Corroborated also by [*].
284 [*] explains that the participants to the anti-competitive arrangements decided already in 1991 to approach Reagens. The contact was made by [employee] (Baerlocher). Cf. [*].
285 [*]. [*].
286 Reply of 31 October 2007 to the Article 18 request for information of 8 October 2007, [*]. [*] claims that despite engaging with AC Treuhand, it continued to behave competitively on the market.

suppliers were Akzo, CECA, Chemson, Ciba and Harcros. [*], a Fides meeting was also held on 23 June.

(197) On 17 March 1992, there was a Fides meeting of the ESBO and Ester Group, attended by the suppliers Akzo, CECA, Chemson, Ciba and Harcros. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants agreed on general price increases in the form of surcharges and, [*], discussed "*beefing up*" the official minutes of the meeting ("*white paper*") with some information on the so called "*Töpfer*"-law.[287]

(198) On 23 June 1992, there was a meeting in Zürich on ESBO/esters. It was attended by Akzo, CECA, Chemson, Ciba and Harcros. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants agreed on prices for specific customers in a number of EEA countries and agreed on the basic principles of a general price list which would also include the so called "*protective prices*" (see recital (121)).[288]

(199) On 23 September 1992, there was a Fides meeting of the ESBO and Ester Group, attended by the participant suppliers Akzo, CECA, Chemson, Ciba and Harcros. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants discussed prices for specified customers in a number of EEA countries and agreed on a general price increase of 10% for Italy.[289]

(200) On 15 December 1992, there was a Fides meeting of the ESBO and Ester Group, attended by the participant suppliers Akzo, CECA, Chemson, Ciba and Harcros. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants exchanged information on agreed prices as well as on sales volumes for specific customers in a number of EEA countries.[290]

4.6.7 1993

(201) As referred to in recitals (10), (19) and (20), Akcros was created in 1993 as a 50/50 joint venture between the Akzo Group and the Harcros/Elementis Group**.** Through the joint venture, the two groups fused their operations relating to PVC processing additives (including tin stabilisers and ESBO/esters). On 19 March 1993, the Umbrella Joint Venture Agreement was signed and on 29 April 1993 the Commission approved the merger. On 28 June 1993, the U.K. Partnership Agreement was signed. It is concluded that the joint venture became operational as of 28 June 1993.[291] As a consequence, the references to Akzo and/or Harcros in the evidence referred to in recitals (202) - (213) must be considered as a reference to Akcros as of 28 June 1993.

287 [*]. [*].
288 [*].
289 [*].
290 [*].
291 According to [*].

4.6.7.1 Tin stabilisers cartel

(202) In 1993, the PVC Tin Stabilisers Group held four Fides meetings in Zürich (3 and 4 February, 13 and 14 September). The participant suppliers were Baerlocher, Ciba, Harcros and Reagens. [*], Fides meetings were also held on 15, 25 and 28 January 1993.

(203) On 15, 25 and 28 January 1993, meetings concerning tin stabilisers took place between Akzo, Harcros, Baerlocher and Ciba. According to contemporaneous handwritten notes drafted on the occasion of those meetings, the participants discussed prices and sales volumes in the United Kingdom, Italy, France and Germany. The notes also show that the participants agreed price increases and/or minimum prices for specific customers in those EEA countries (see recital (120)).[292]

(204) On 3 February 1993, a Fides meeting of the PVC Tin Stabilisers Group took place in Zürich. The participant suppliers attending the meeting were Akzo, Harcros, Baerlocher, Ciba and Reagens. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants agreed on new quotas following Reagens' entry.[293]

(205) In December 1993, AC Treuhand took over from Fides.[294] The PVC Tin Stabilisers Group held two meetings (1 and 2 December 1993) organised by AC Treuhand. The participant suppliers were Baerlocher, Ciba, Akcros and Reagens.

(206) On 2 December 1993, an AC Treuhand meeting of the PVC Tin Stabilisers Group took place in Zürich. The participant suppliers attending the meeting were Akcros, Baerlocher, Ciba and Reagens. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants discussed sales volumes and agreed on prices for specific customers in a number of EEA countries. The notes also show agreements on new prices for specific EEA countries and monitoring of implementation of earlier agreed prices.[295]

(207) A document (containing a table) found during the inspections at [*] depicts the situation on the United Kingdom market in 1993 ("*PVC Stabiliser Market*" (including tin stabilisers)). The table shows the individual sales volumes (in tonnes) and market shares of Baerlocher, Akcros and Ciba among others.[296]

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[292] [*].

[293] [*] also submits handwritten notes of [employee] dated 19 January 1993, showing the new quota scheme. [*] explains that [employee] (AC Treuhand) informed [employee] that Reagens had accepted these quotas, [*].

[294] [*]. [*], 10 June 2008 to the Commission's Article 18 request for information of 23 May 2008, [*].

[295] [*].

[296] Inspection document found in [*],[*].

4.6.7.2 ESBO/esters cartel

(208) In 1993, the ESBO and Ester Group held one Fides meeting (15 September). [*], such Fides meetings were also held on 23 and 24 March and 7 September 1993. The participant suppliers were Akzo, CECA, Ciba, Chemson, Harcros and, as of 7 September, Akcros.

(209) On 23 March 1993, a meeting concerning ESBO/esters took place in Lausanne. It was attended by Akzo, CECA, Ciba, Chemson and Harcros. That meeting was followed by an ESBO/esters meeting on the next day, 24 March 1993, in Zürich. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants agreed on new prices for specific customers in a number of EEA countries.[297]

(210) On 7 September 1993, a meeting concerning ESBO/esters took place in Heppenheim, Germany. It was attended by Akzo, Harcros, Ciba, CECA and Chemson. According to contemporaneous notes drafted on the occasion of that meeting, the participants discussed customer allocation and agreed on prices (to be) offered to specific customers.[298]

(211) On 15 September 1993, a Fides meeting of the ESBO and Ester Group took place in Zürich. The participant suppliers attending the meeting were Akzo, Harcros CECA, Chemson and Ciba. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants discussed agreed prices for specific customers in a number of EEA countries and agreed on a general price increase.[299]

(212) In December 1993, AC Treuhand took over from Fides.[300] The ESBO and Ester Group held one AC Treuhand meeting (15 December). The participant suppliers were Akcros, CECA, Chemson, Ciba and Harcros.

(213) On 15 December 1993, an AC Treuhand meeting of the ESBO and Ester Group took place in Zürich. The participant suppliers attending the meeting were Akcros, CECA, Chemson and Ciba. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants discussed sales volumes for specific customers in a number of EEA countries and deviations from agreed quotas. The notes also show that the participants agreed on new target prices for "Western Europe", to be applied immediately.[301]

297 [*].
298 [*].
299 [*].
300 [*], 10 June 2008 to the Commission's Article 18 request for information of 23 May 2008, [*].
301 [*].

4.6.8 *1994*

4.6.8.1 Tin stabilisers cartel

(214) In 1994, the PVC Tin Stabilisers Group held six AC Treuhand meetings in Zürich (15 and 16 March, 22 and 23 June, 8 and 9 November). The participant suppliers were Akcros, Baerlocher, CECA, Ciba and Reagens. [*], an AC Treuhand meeting also took place on 30 March 1994.

(215) On 16 March 1994, CECA joined the AC Treuhand meetings of the PVC Tin Stabilisers Group. The minutes of the meeting show that CECA's participation was unanimously agreed upon by all other participant companies at that date. The delegates of the companies participating in the meeting were from Akcros, CECA, Baerlocher, Ciba and Reagens.[302]

(216) On 30 March 1994, a meeting concerning tin stabilisers took place near Munich, Germany. It was attended by Akcros, Baerlocher, CECA, Ciba and Reagens. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants discussed prices and sales volumes for each supplier to specified customers in Germany and France and agreed on new prices for those customers.[303]

(217) On 22 June 1994, an AC Treuhand meeting of the PVC Tin Stabilisers Group took place in Zürich. It was attended by the participant suppliers Akcros, Baerlocher, CECA, Ciba and Reagens. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants discussed prices and sales volumes for each supplier to specified customers in different EEA countries and agreed on new prices for those customers. The notes also show that the participants agreed on general price increases for France and Greece.[304]

(218) A table entitled "[*]"[305] and dated 22 September 1994 concerning tin stabilisers shows the development of the individual sales realised by the participants (Ciba, Akcros, Baerlocher, Reagens and CECA) during the first seven months of 1994. The geographical scope of the table is "Western Europe". The table was prepared on the basis of the information provided by AC Treuhand.[306] It shows the deviations from the agreed 1994 quotas, in order to take into account the creation of Akcros and its impact on the market.[307] The document shows the corresponding deviations for Ciba, Akcros, Baerlocher and Reagens for 1993 in the respective geographical areas.[308]

302 [*].

303 [*].

304 [*].

305 [*]. The wording describes the tin stabilisers in the Community ("*Europe*"), [*] reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*].

306 [*].

307 In 1993, Akcros, the JV of Akzo and Harcros, was established (see sub-section 2.2.3 and recital (201)), changing thus the market share between individual participants to the anti-competitive activities.

308 The table shows that Ciba exceeded its allocated quota. [*]

(219) On 8 and 9 November 1994, AC Treuhand meetings of the PVC Tin Stabilisers Group took place in Zürich. The meetings were attended by the participant suppliers Akcros, Baerlocher, CECA, Ciba and Reagens. According to contemporaneous handwritten notes drafted on the occasion of those meetings, the participants exchanged information on prices for each supplier to specified customers in different EEA countries as well as for two customers with operations in different EEA countries. The notes also show that the participants agreed on new prices for those customers and on general price increases for specific EEA countries.[309]

4.6.8.2 ESBO/esters cartel

(220) In 1994, there were two AC Treuhand meetings of the ESBO and Ester Group (22 March and 15 September). [*], the participant suppliers were Akcros, CECA, Chemson and Ciba.

(221) On 22 March 1994, an AC Treuhand meeting of the ESBO and Ester Group took place in Zürich. It was attended by the participant suppliers Akcros, CECA, Chemson and Ciba. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants had discussions on prices and sales volumes for each supplier to specific customers in different EEA countries and agreed on new prices for those customers. The notes also show discussions and agreements on new quotas following the Akzo-Harcros joint venture.[310]

(222) On 15 September 1994, an AC Treuhand meeting of the ESBO and Ester Group took place in Zürich. It was attended by the participant suppliers Akcros, CECA, Chemson and Ciba. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants discussed agreed prices for each supplier to specified customers in different EEA countries as well as for two customers with operations in different EEA countries. The notes also show that the participants exchanged information on their sales volumes in different EEA countries and discussed deviations from the agreed quotas.[311]

4.6.9 1995

4.6.9.1 Tin stabilisers cartel

(223) In 1995, the PVC Tin Stabilisers Group held four AC Treuhand meetings in Zürich (28 and 29 March, 4 and 5 September). The participant suppliers were Akcros, Baerlocher, CECA, Ciba and Reagens. [*], AC Treuhand meetings were also held on 23 February, 13 April, 22 June and 6 September 1995.

309 [*].
310 [*].
311 [*].

(224) The Commission is in possession of several contemporaneous documents detailing the situation in the Spanish heat stabiliser sector. Handwritten notes[312] found during the Commission inspection at [*] and dated 11 January 1995 refer to a meeting of "[*]"[313] and present a summary of the 1994 sales of tin stabilisers in the Spanish market. The notes are drafted for the attention of [employee][314]) who took part in the AC Treuhand meetings of the PVC Tin Stabilisers Group (see Annex I).[315] The notes present the individual sales volumes (in tonnes) and market shares of Akcros, Baerlocher and Ciba (identified therein as the "[*]" members), as well as, those of CECA, and Reagens who traded also in the Spanish market.[316] The notes also show [*]'s sales to seven customers and compare the sales set down and agreed by the "[*]" with Baerlocher's respective actual sales achieved in 1994 and 1993. In this regard, [*][317] confirms that the notes constitute a detailed list of the specific volumes to be supplied in line with the quotas generally agreed upon at the AC Treuhand meetings and those actually supplied to Spanish customers in 1993 and 1994. Furthermore, [*] specifies that the notes compare sales to the customers set and agreed upon by the "[*]" during the country meeting on the one hand, and [*]´s actual sales on the other hand. As already indicated and evidenced by the notes, the list was drafted for [employee] in a country meeting concerning Spain and afterwards sent to [employee] (Baerlocher UK Limited). Representatives of Akcros, Baerlocher and Ciba participated in the country meeting at issue.

(225) The detailed list of volumes by customer described in recital (224) is also contained in another handwritten document found at [*].[318] The document contains Baerlocher's supply volumes and it lists the sales figures of Akcros, Baerlocher and Ciba among others.[319] The document is marked in the upper left-hand side corner with the letter "[*]". The summary of the sales calculation shows exactly the same sales figures for Akcros, Baerlocher and Ciba, referring to them again as the "[*]", on one hand, and CECA, Reagens and another supplier on the other hand as described in recital (224). It concerns octyl and butyl tin stabilisers. [*][320] states that the document reports on a country meeting between the participants of the PVC Tin Stabilisers Group

312 Drafted by [employee]. [*] reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*].

313 This is the Tin [*] because of the abbreviation Sn.

314 [*] reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*].

315 Inspection documents, found at [*], dated 11 January 1995, [*].

316 The document includes also the tonnage of a Spanish competitor ([*]) producing methyl tin stabilisers and therefore referred to as Metil. The same tonnage of this competitor is mentioned also in the handwritten notes of November 1995 (see recital (235)). [*] reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*].

317 [*], [*] reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*].

318 Inspection document, found at [*], non-dated, [*]. The handwritten notes mentioned in recitals (224) and (225) appear to be drafted by the same person. [*] confirms that this document was also drafted by [employee] in January 1995. [*] reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*].

319 The notes mention 48 customers. For each customer, there is the respective volume and price. The column attributed to Reagens is empty.

320 [*] reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*]. Cf. also [*]reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*].

concerning Spain. It clarifies the notion "[*]" as a reference to the "[*]" "[*]". [*] explains that Reagens and CECA were not included in the total figure of the "[*]" because they did not attend the meeting.[321] It also specifies that the discussions concerned sales volumes and prices (in Spanish pesetas) for each customer as well as the implementation of general price increases.[322]

(226) On 23 February 1995, there was a meeting on tin stabilisers, attended by Akcros, Baerlocher, CECA, Ciba and Reagens. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants discussed and exchanged information on prices and sales volumes for each supplier to specified customers in Germany, Belgium, France, Norway and Sweden. They also agreed on new prices for those customers.[323]

(227) On 28 March 1995, there was an AC Treuhand meeting of the PVC Tin Stabilisers Group. It was attended by the participant suppliers Akcros, Baerlocher, CECA, Ciba and Reagens. According to contemporaneous handwritten notes, drafted on the occasion of that meeting, the participants discussed and exchanged information on agreed prices as well as on sales volumes for each supplier to specified customers in Sweden and the United Kingdom.[324]

(228) On 13 April 1995, a meeting on tin stabilisers took place. It was attended by Akcros, Baerlocher, CECA, Ciba and Reagens. According to contemporaneous handwritten notes, drafted on the occasion of that meeting, the participants discussed and agreed on prices and sales volumes to specific customers in Italy. They also agreed on new prices to those customers.[325]

(229) On 22 June 1995, a meeting on tin stabilisers took place. It was attended by Akcros, Baerlocher, CECA, Ciba and Reagens. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants discussed prices and sales volumes for each supplier to specified customers in Germany, Italy, France, Sweden and the United Kingdom. They also agreed on new prices for those customers.[326]

(230) On 5 September 1995, an AC Treuhand meeting of the PVC Tin Stabilisers Group took place. It was attended by the participant suppliers Akcros, Baerlocher, CECA, Ciba and Reagens. According to contemporaneous handwritten notes, drafted on the occasion of that meeting, the participants discussed prices and sales volumes for each supplier to specified customers in Denmark, the Netherlands, Norway and Sweden as

[321] For Reagens the statement is reconfirmed also on p.30. [*] reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*].
[322] " [*]". [*] reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*].
[323] [*].
[324] [*].
[325] [*].
[326] [*].

well as to two customers with operations in different EEA countries. The notes also show agreements on new prices for those customers.[327]

(231) On 6 September 1995, a meeting on tin stabilisers took place. It was attended by Akcros, Baerlocher, CECA, Ciba and Reagens. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants discussed prices and sales volumes for each supplier to specified customers in France, Portugal and Spain. The notes also show agreements on new prices for those customers.[328]

(232) On 12 September 1995, an AC Treuhand meeting of the PVC Tin Stabilisers Group took place. It was attended by the participant suppliers Akcros, Baerlocher, CECA, Ciba and Reagens. According to contemporaneous handwritten notes, drafted on the occasion of that meeting, the participants discussed prices and sales volumes for each supplier (including the designated supplier) to specified customers in a number of EEA countries. The notes also show agreements on new prices for those customers.[329]

(233) An inspection document[330] dated 21 September 1995, shows deviations by Ciba, Akcros, Baerlocher, Reagens and CECA. The figures concern tin stabilisers for "[*]" and "[*]". The figures show the deviations for the month of August as well as the cumulative figures until that point in time. [*][331] specifies that it requested this document from AC Treuhand and that it was sent by [employee]. It confirms that the document contains data on the deviations from agreed quotas for the month of August and cumulated data for the first eight months of 1995.

(234) Similar monthly and cumulated data tables (as in recital (233)), provided by [employee] (AC Treuhand) and requested by [*], were found during the inspections at [*]. Those documents are dated 30 October 1995, 28 November 1995 and 22 December 1995 and concern deviations for September, October and November 1995 and the respective cumulative figures.[332]

(235) Contemporaneous handwritten notes dated 20 November 1995, found at [*], show sales and corresponding market shares attributed to, as well as actually realised volumes (in tonnes) by, Akcros, Baerlocher, Ciba and Reagens.[333] The document describes the situation of the tin stabiliser market in Spain. The notes read as follows:

"[*]"

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327 [*].

328 [*].

329 [*].

330 Inspection document, found at [*], dated 21 September 1995, [*]. See also [*].

331 [*].

332 Inspection document, found at [*], dated 21 September 1995, [*]. The reference to the month of September 1995 for the document sent on 28 November 1995 ([*]) is probably incorrect; it most likely concerns the month of October.

333 Inspection document, found at [*], dated 20.11.1995, [*]. Transcript, [*] reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*]. Based on the connection between these notes and the ones mentioned in recitals (224) and (225), as well as on [*] reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*]. The Commission's reading of some words in the handwritten notes is different from [*], as presented in the transcript.

(236) It should be noted that the document described in recital (235), under the heading "[*]", contains exactly the same sales figures for the "[*]" members and others as the documents described in recitals (224) and (225). [*][334] the document was prepared when [employee] ([*], Spain) met with [employee] ([*]) when they were both in Spain for an ELSA meeting. [employee]asked [*] Spanish colleague for the information on the Spanish market so that he could get prepared for an AC Treuhand meeting of the PVC Tin Stabilisers Group.

(237) Concerning the slightly differing quotas mentioned for the Spanish tin stabiliser market in January 1995 (see recital (224)) in relation to those in November 1995, [*][335] specified that the sales volumes and quotas of Akzo, Ciba and Baerlocher, indicated in the January 1995 document, apply to 1994 whilst the sales volumes and quotas of the same companies, as presented on 20 November 1995, refer to 1995.

(238) [*][336] [*].[337][*].[338]

4.6.9.2 ESBO/esters cartel

(239) In 1995, the ESBO and Ester Group held two AC Treuhand meetings (21 March and 12 September). The participant suppliers were Akcros, CECA, Chemson and Ciba. [*], an AC Treuhand meeting was also held on 7 April 1994.

(240) On 21 March 1995, there was an AC Treuhand meeting of the ESBO and Ester Group. The participant suppliers were Akcros, CECA, Chemson, Ciba, [*]and [*]. The participants agreed that Chemson would contact Faci to offer membership in the ESBO and Ester Group. In the same meeting, [*] representative announced that it would no longer participate in the ESBO and Ester Group and withdrew. [*] submits contemporaneous handwritten notes, drafted on the occasion of that meeting. The notes show that the representatives discussed new quotas following [*] exit and sales volumes of the possibly new participant Faci. Furthermore, the notes show that the representatives agreed on new target prices for France, Italy, Portugal and the United Kingdom.[339]

(241) On 7 April 1995, a meeting concerning ESBO/esters took place. It was attended by Akcros, CECA, Ciba, Chemson, [*] and, for the first time, by Faci. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants discussed Faci's sales and the new quotas following the exit of [*], and the possible entry of Faci, in the AC Treuhand ESBO and Ester Group (see recital

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334 [*] reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*].
335 [*]reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*].
336 [*].
337 [*].
338 "[*]" [*]reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*].
339 [*].

(255)). Furthermore, the notes show agreed prices for customers in specific EEA countries.[340]

4.6.10 1996

4.6.10.1 Tin stabilisers cartel

(242) In 1996, the PVC Tin Stabilisers Group held six AC Treuhand meetings in Zürich (8 and 9 January, 15 and 16 July, 6 and 7 November). The participant suppliers were Akcros, Baerlocher, CECA, Ciba and Reagens. The geographical scope was the same as in the previous years, that is the territory covered by the EEA Agreement.

(243) A document on tin stabilisers drafted by [employee], found at the premises of [*]and dated 8 January 1996 states the following:

"[*][341]
[*][342] [*][343]
[*][344,345]

(244) Handwritten notes also dated 8 January 1996 and entitled "[*]" were copied at the premises of [*].[346] The notes present an overview of volumes and prices of tin stabilisers sales to specific customers mostly divided by country (Spain, United Kingdom, France, Finland, Germany and Sweden). The document reads as follows:

"[*][347]
[*][348].
[*][349]
[*][350]

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340 [*].

341 The next meeting was on 15-16 July 1996 (see Annex I). Corroborated by [*], see [*] reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*].

342 The reference to "[*]" refers to the PVC Tin Stabilisers Group as organised by AC Treuhand. [*] reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*].

343 This sentence refers to fixing the quota in order to reflect the current market power. [*]reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*].

344 The last two lines refer to the agreement of [employee] regarding the actions mentioned. [*]reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*].

345 Inspection document, found at [*], dated 8 January 1996, [*]. For transcript see [*] reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*].

346 It is concluded that "[*]" means [*].

347 This remark corresponds to the information contained in another document found also at the premises of [*] and dealing with the Spanish tin stabiliser market (see recital (235)). According to [*] the remark means that Ciba should not supply the customer any more in 1996. [*] reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*].

348 The remark means that [*] should be the one company to supply the customer until the end of 1996. [*] reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*].

349 [*] claims that agreements were to be discussed at the local level. [*] reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*].

350 [*] states that [employee] wanted to discuss the issues at the meeting on 9 January 1996. [*] reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*].

[*][351]
[*][352],[353]

(245) On 9 January 1996, an AC Treuhand meeting of the PVC Tin Stabilisers Group took place. It was attended by the participant suppliers Akcros, Baerlocher, CECA, Ciba and Reagens. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants exchanged information on prices and sales volumes for each supplier to specified customers in Germany, Norway, Portugal and the United Kingdom as well as two customers with operations in different states in the EEA. The notes also show agreements on new prices for those customers.[354]

(246) On 29 January 1996, Ciba ([employee]) notified AC Treuhand ([employee]), in writing, that its participation in both the PVC Tin Stabiliser and ESBO and Ester Groups was terminated with immediate effect.[355] The letter referring explicitly to tin stabilisers and ESBO/esters was submitted to the Commission by [*].

(247) [*], CECA terminated its participation in the PVC Tin Stabilisers Group on 1 April 1996, with immediate effect.[356] That withdrawal lasted only until September 1997.

(248) In its response to the Statement of Objections, [*] states that CECA re-joined the meetings of the PVC Tin Stabilisers Group only as of 11 February 1998.[357]

(249) [*][358]

(250) AC Treuhand meetings took place on 16 July 1996 and on 7 November 1996. Akcros, Baerlocher, Ciba and Reagens all attended those meetings. CECA was absent. The minutes of the meeting of 7 November 1996 state under the heading "[*]", that there was no new information other than "[*]".[359]

(251) A letter dated 27 November 1996 and found at the premises of [*], provides the compiled statistics for tin stabilisers for "[*]" covering the month of October 1996. The document was drafted and sent by AC Treuhand.[360]

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351 [*] describes that [employee] wanted to discuss Ciba´s divergence from the agreed quota to the detriment of Akcros at the meeting on 9 January 996. [*] reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*].

352 The division of EEA countries between [employee]and [employee], mentioned in the last two lines of the document, refers to their way of presentation of the market situation at the meeting of the PVC Tin Stabilisers Group on 9 January 1996. [*] reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*].

353 Inspection document, found at [*], dated 8 January 1996, [*].

354 [*].

355 [*] reply of 15 November 2007 to the Commission's Article 18 request for information of 8 October 2007, [*].

356 [*].

357 [*] response to the Statement of Objections, [*].

358 [*].

359 [*].

360 Inspection document found at [*], dated 27 November 1996, [*].

4.6.10.2 ESBO/esters cartel

(252) In 1996, there were four AC Treuhand meetings of the ESBO and Ester Group (13 and 14 February, 16 July, 6 November). The participant suppliers were Akcros, CECA, Chemson, Ciba and Faci (6 November 1996). The geographical scope was the same as in the previous years, that is the territory covered by the EEA Agreement.

(253) On 29 January 1996, Ciba ([employee]) notified AC Treuhand ([employee]), in writing, that its participation to both the PVC Tin Stabiliser and ESBO and Ester Groups was terminated with immediate effect.[361] The letter referring explicitly to tin stabilisers and ESBO/esters was submitted to the Commission by [*].

(254) Despite the letter described in recital (246) concerning Ciba's withdrawal from the PVC Tin Stabilisers and ESBO and Ester Groups, [*] provides evidence showing that on 14 February 1996, an AC Treuhand meeting of the ESBO and Ester Group took place. It was attended by Akcros, CECA, Chemson, Ciba and [*]. According to contemporaneous handwritten notes provided by [*] drafted on the occasion of that meeting, the participants even discussed a possible quota for Faci in view of its up-coming participation and agreed that audits would no longer be carried out by AC Treuhand: "[*]".[362] The official minutes of that meeting, distributed to all participants, confirm the proposed change in the participation to the AC Treuhand meetings by noting that [*] and Faci should be invited to join the ESBO and Ester Group.[363]

(255) On 16 July 1996, an AC Treuhand meeting of the ESBO and Ester Group took place. It was attended by the participant suppliers Akcros, CECA, Chemson, Ciba and Faci. [*] contemporaneous handwritten notes, drafted on the occasion of that meeting, show the actual target prices to be applied in general as well as in France and in Italy. Furthermore, the notes summarize the new methodology of the cooperation, such as no more "*audits*".[364] The notes also state: "[*]") followed by this list of names: *Ceca (*[employees]*), Faci (*[employee]*), Akcros (*[employee]*); Chemson (*[employees]*);* [*] *(*[employee]*); CAL [Ciba Additive Lampertheim represented by* [employee]*]).* For [*] it is added that its participation is conditional upon [*] joining within one year.

(256) On 6 November 1996, an AC Treuhand meeting of the ESBO and Ester Group took place. It was attended by the participant suppliers Akcros, CECA, Chemson, Ciba and Faci. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants agreed on new target prices for France.[365]

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361 [*] reply of 15 November 2007 to the Commission's Article 18 request for information of 8 October 2007, [*].

362 [*].

363 [*] reply to the Article 18 request for information sent 8 October 2007, [*].

364 [*]. In accordance with the new methodology, on 18 July 1996, AC Treuhand sent "[*]" to the participants in which the participants were asked to provide monthly sales volumes per country; see [*].

365 [*].

4.6.11 1997

4.6.11.1 Tin stabilisers cartel

(257) In 1997, the PVC Tin Stabilisers Group held four AC Treuhand meetings in Zürich and Lugano (11 and 12 March, 16 and 17 September). The participant suppliers were Akcros, Baerlocher, CECA, Ciba and Reagens.

(258) The Commission found an internal note at [*] of 11 March 1997 entitled [*]".[366] Under the heading "[*]"[367] the note, firstly, presents the following general overview: "[*]"[368] At the end of that item, the note shows each company's deviation from the earlier agreed quotas: "[*]".[369] The note furthermore presents individual sales (volume) figures for tin stabilisers in "[*]" by "[*]" (Atochem-CECA is listed as one of the outsiders). The note also states that the following meeting would take place in Lugano on 17-18 September 1997.

(259) The note seems to be related to an AC Treuhand meeting of the PVC Tin Stabilisers Group on 12 March 1997. The representatives of the participant suppliers were [employee] and [employee] (Baerlocher), [employee] (Akcros), [employee] (Ciba) and [employee] (Reagens). The minutes of that meeting contain individual estimates of the 1996 sales of "[*]" in "[*]" in the exact same way as the note found at [*] (see recital (258)).[370]

(260) The Commission found handwritten notes of 12 March 1997 at [*]. The notes show deviations from the earlier agreed quotas (see also recital (258)).[371] Furthermore, those notes show the same sales figures by non-members, as presented in the official minutes of the meeting (see recitals (258) and (259)). In addition and as regards in particular one specific customer, namely [*] (hereinafter referred to as "[*]"), the notes list each participant's sales volumes. The notes read as follows:[372]

"[*]"[373]

(261) [*][374] [*][375] [*][*]. [*][*][376]

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366 Inspection document, found at [*], dated 11 March 1997, [*]. [*]"

367 [*],[*]

368 [*].

369 [*].

370 See handwritten minutes of the meeting, inspection document, found at [*], dated 12 March 1997, [*]. See for official minutes [*]. The meeting on 12 March 1997 was preceded by a dinner the night before, that is on 11 March 1993, see Annex I.

371 Inspection document, found at [*], dated 12 March 1997, [*]. [*].

372 The typed transcript of these handwritten notes provided by [*] and used in the Statement of Objections is neither precise nor complete.

373 Inspection document, found at [*], dated 12 March 1997, [*]. For transcript see [*] reply of 30 June 2008 to the Commission's Article 18 request for information of 30 May 2008, [*].

374 [*].

375 Cf. "pink papers" in recital (125) et seq.

376 [*].

(262) As regards the duration of the infringement, [*] following Ciba's and CECA's termination of participation in AC Treuhand meetings on 29 January 1996 and 1 April 1996 respectively.[377] This claim cannot be accepted as explained in section 5.4.3.2.2.

(263) On 9 September 1997, a bilateral meeting took place between CECA's employee, [employee], and [employee] from Ciba at Frankfurt airport. Contemporaneous handwritten notes taken by [*] [employee] show that they discussed prices and sales volumes concerning a customer, [*], as well as upcoming increases in minimum prices.

"[*]"[378]

(264) On 17 September 1997, an AC Treuhand meeting of the PVC Tin Stabilisers Group was held in Lugano.[379] The participant suppliers in that meeting were Akcros, Baerlocher, Ciba and Reagens. [*] submits contemporaneous handwritten notes drafted on the occasion of that meeting. The notes show that the representatives jointly decided to not offer lower prices than the ones earlier agreed upon: "[*]".[380]

(265) On 1 October 1997, a telephone conversation took place between [employee] (CECA) and [employee] (Baerlocher). Contemporaneous handwritten notes of [employee]regarding that conversation show that the discussion concerned the price fall in the United Kingdom as well as prices for tin stabilisers.

"[*]"[381]

(266) On 19 and 20 November 1997, the CEFIC sub-groups ESPA, ETINSA and ECOSA (EMMSSA) met in Budapest. [employee] handwritten notes on the ETINSA meeting read as follows:

"[*]".[382]

4.6.11.2 ESBO/esters cartel

(267) In 1997, there were three AC Treuhand meetings of the ESBO and Ester Group (13 March, 10 July and 10 September). The participant suppliers were Akcros, CECA, Chemson, Ciba and Faci.

(268) On 14 October 1997, a multilateral meeting took place in Milan. That meeting was neither attended nor organised by AC Treuhand. Participants were [employee] (Reagens), [employee] (Faci), [employee] (Faci), [employee] (Akcros), [employee]

377 [*].
378 [*].
379 [*].
380 [*].
381 [*].
382 Inspection document, found at [*], dated 20 November 1997, [*]. See [*]reply of 20 July 2008 to the Commission's Article 18 request for information of 3 June 2008 for a typed transcript; case [*]. "[*]" probably refers to CECA's [employee]. "[*]" is likely a reference to "[*]" which was involved in ETINSA but clearly [employee] wished to point out that it was not part of the AC Treuhand PVC Tin Stabilisers Group.

(Ciba) and another supplier's representative. The meeting concerned ESBO/esters. The notes drafted and distributed internally in Reagens by [employee]read as follows:

"[*][383]"[384]

(269) Those notes show that the participants in the AC Treuhand meetings also had meetings and contacts outside the AC Treuhand meetings. They met on a number of occasions to discuss the latest developments on the ESBO/esters market (the memo refers to a previous meeting in Milan and a planned meeting in Charles de Gaulle airport in Paris) and agreed to "[*]". They exchanged sensitive information on the production capacities and fixed "[*]" and "[*]". The geographical scope of such arrangements corresponds to that covered by the AC Treuhand meetings. Furthermore, those meetings were attended by a party who did not produce ESBO/esters (Reagens).[385]

4.6.12 1998

4.6.12.1 Tin stabilisers cartel

(270) In 1998, the PVC Tin Stabilisers Group held eight AC Treuhand meetings in Zürich and Lugano (10 and 11 February, 29 and 30 June, 14 and 15 September, 12 and 13 November). The participant suppliers were Akcros, Baerlocher, CECA, Reagens and Ciba/Chemtura.[386]

(271) [*][387][*][388] [*][389][*].

(272) On 11 February 1998, an AC Treuhand meeting of the PVC Tin Stabilisers Group took place in Zürich. It was attended by the participant suppliers Akcros, Baerlocher, CECA[390], Ciba, and Reagens. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants agreed on new minimum prices for major customers in the EEA. For example, in relation to Italy, it is stated: "[*]" The notes also show that the representatives reconfirmed the customer allocation agreement: "[*]".[391]

(273) As described in recitals (50) and (55), Ciba sold its vinyl additives business to Chemtura –at that time named Witco– in the context of a swap arrangement in May 1998. [*] explains that [employee], who represented Ciba in meetings organised by

383 This phrase indicates that other meetings with the same participants preceded the meeting of 14 October 1997.

384 Inspection document, found at [*], dated 14 October 1997, [*].

385 The meeting note referred to in recital (268) clearly refers to other meetings of a similar scope (see the phrase "[*]".

386 In May 1998, Ciba sold its Vinyl Additives business to Chemtura, see recitals (50), (55) and (273).

387 [*].

388 [*].

389 [*]. See recitals (261) - (262).

390 This was the first time CECA participated again in an AC Treuhand meeting of the PVC Tin Stabilisers Group since it terminated its participation in April 1996. See recital (247).

391 [*].

AC Treuhand before the swap, continued participating in those meetings as a representative of Chemtura. [*][392] [*].

(274) By agreement of 15 July 1998, as referred to in recital (22), Akzo Nobel N.V. acquired Elementis' share of the Akcros joint venture. The business of the U.K. Partnership was transferred into Akzo Nobel N.V.'s subsidiary Pure Chemicals Ltd (renamed Akcros Chemicals Ltd) by virtue of an agreement dated 2 October 1998.[393]

(275) [*].[394] [*]. [*]. [Employee] [*].

(276) Handwritten notes dated 5 November 1998 and found at the office of [employee]during the inspections show bilateral contact between [employee] (Reagens) and [employee] (CECA) on tin intermediates among other things. The notes indicate discussions with a number of competitors (Akcros, Reagens, Baerlocher, Chemtura and CECA). In the relevant part, the notes state the following:

[*]"[395]

(277) [*], an AC Treuhand meeting of the PVC Tin Stabilisers Group took place in Zürich on 13 November 1998. It was attended by the participant suppliers Akcros, Baerlocher, CECA, Chemtura and Reagens. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants agreed on new target prices and on prices to be offered to specific customers (see recital (301)). The contemporaneous notes also include a reference to maximum prices in "[*]" for the period January to December 1999. [396]

4.6.12.2 ESBO/esters cartel

(278) In 1998, there were eight AC Treuhand meetings of the ESBO and Ester Group (11 and 12 March, 20 and 25 May, 20 July, 13 August, 19 and 20 October). The participant suppliers were Akcros, CECA, Chemson, Faci and Ciba/Chemtura. [*], an AC Treuhand meeting was also held on 14 August 1998.

(279) On 12 March 1998, an AC Treuhand meeting of the ESBO and Ester Group took place at the Ascott Hotel in Zürich. It was attended by the suppliers Akcros, CECA, Chemson, Faci and Ciba.[397] [*], that was the first time [employee] attended such a meeting as the representative of [*].[398] According to the contemporaneous notes

392 [*].

393 [*] ([*]).

395 Inspection document, found at [*], dated 5 November 1998, [*]. [*] provided a typed transcript with [*] reply of 20 June 2008 to the Commission's Article 18 request for information of 3 June 2008. See [*]. As to the "*pink paper system*", [*] states in [*] reply that "[*]". See [*].

396 [*].

397 See [*].

398 See for the minutes of the meeting, [*] reply of 21 November 2008 to the Commission's Article 18 request for information of 8 October 2007, [*]. See also [*] reply of 21 November 2008 to the Article 18 request for

drafted by [employee] and entitled “[*]” the participants exchanged their respective market shares in "[*]" in 1996-1997. The notes also show price increases for ESBO/esters, covering the period between 1 April 1998 and 30 June 1998 in specific EEA regions/countries, such as Scandinavia, Portugal and Greece. The participants also agreed on a minimum and a target price to be achieved by the end of 1998. In the notes, it is stated: "[*]"

“ [*] [*] [*] [*]
[*] [*] [*] [*]

”

” [399]

(280) [*] has also provided notes of that meeting which contain similar information to that in [employee] notes.[400]

(281) [*] submitted a separate set of notes, drafted by [employee], relating to an AC Treuhand meeting of the ESBO and Ester Group of 20 May 1998 held in Zürich at the Ascott Hotel. The meeting was attended by the participant suppliers Akcros, CECA, Chemson, Faci and Ciba. [*] the first part of the notes, under “[*]”, presents the information reported to [employee]by [employee] (CECA). [401] The notes show in great detail the allocated “[*]” (initial and actual), the deviations from those “[*]” in the time period January – April 1998 as well as the total deviations until May 1998. The geographical scope covers "[*]":

“

[*]	[*]							
[*]	[*]	[402]						
		[*][403]						

information of 8 October 2007, [*] and [*]reply of 14 November 2007 to the Article 18 request for information of 8 October 2007, [*].

399 [*].
400 [*].
401 [*].
402 [*].
403 [*].

[*]	[*]	[*]	[*]	[*]	[*]	[*]	[*]	[*]
[*]	[*]	[*]	[*]	[*]	[*]	[*]	[*]	[*]
[*]	[*]	[*]	[*]	[*]	[*]	[*]	[*]	[*]

„[404]

(282) On 25 May 1998, an AC Treuhand meeting of the ESBO and Ester Group took place at the Ascott Hotel in Zürich. It was attended by the participant suppliers Akcros, CECA, Chemson, Faci and Ciba. Contemporaneous handwritten notes drafted by [employee] of Arkema France on the occasion of that meeting, provide evidence on specific price levels on a competitor basis and regarding certain EEA countries such as France and Spain.[405] The document also shows detailed figures on quotas and sales volumes (for Akcros, CECA, Chemson, Ciba and Faci). [*]submits contemporaneous handwritten notes drafted on the occasion of an AC Treuhand meeting of the ESBO and Ester Group on the same occasion. The notes show that the representatives agreed on new target prices ("[*]") to be applied as of June and July 1998.[406] Those [*] notes are very similar to [*] notes on the same meeting.

(283) As described in recitals (50) and (55), Ciba sold its vinyl additives business to Chemtura –at that time named Witco– in the context of a swap arrangement in May 1998. [*] explains that [employee], who represented Ciba in meetings organised by AC Treuhand before the swap, continued participating in those meetings as a representative of Chemtura. [*][407] [*].

(284) [*]submits handwritten minutes drafted by [employee]on the occasion of the AC Treuhand meeting of the ESBO and Ester Group held on 20 July 1998 in Lugano (Grand Hotel Eden).[408] The meeting was attended by the participant suppliers Akcros, CECA, Chemson, Faci and Chemtura (formerly Witco). The issues dealt with were country-based sales volumes (in tonnes) by competitor, market shares of the participant companies (in %) and their respective deviations by competitor as well as prices for certain competitors and certain EEA countries. Furthermore, the notes show the agreed new quotas as from 1 July 1998 and new target and minimum prices.[409] The last line of the notes reads as follows: "[*]" [*] also submits handwritten notes, drafted by [employee] (representing [*]) on the occasion of that meeting.[410] At the end of those notes, the following is stated: "[*]".

404 The document also shows [*] sales per EEA country/group of EEA countries in 1994 and in very detailed figures. The discussion on [*] is presented in a table just next to the table on the quoten, see. [*]. For further explanation of the contents of the table, cfr. [*] reply of 20 June 2008 to the Commission's Article 18 request for information of 3 June 2008. [*].

405 The notes also mention [employee] of Witco (Vinyl Additives GmbH Germany).

406 [*].

407 [*].

408 For attendees, see minutes of the meeting, [*].

409 [*].

410 [*] confirms participating in the AC- Treuhand meeting of the ESBO and Ester Group on 20 July 1998.

(285) [*], an AC Treuhand meeting of the ESBO and Ester Group was also held on 14 August 1998. It was attended by the participant suppliers Akcros, CECA, Chemson, Chemtura (formerly Witco) and Faci. According to the contemporaneous handwritten notes drafted by [employee] ([*])[411] on the occasion of that meeting, the participants exchanged information on prices to customers in specific EEA countries and agreed on new target prices for specific EEA countries.[412]

(286) As indicated in recital (274), the Akzo Group acquired the business of the U.K. Partnership by virtue of an agreement dated 2 October 1998.

(287) On 20 October 1998, an AC Treuhand meeting of the ESBO and Ester Group took place in Zürich. It was attended by the participant suppliers Akcros, CECA, Chemson, Chemtura and Faci. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants exchanged information on prices to customers in specific EEA countries. Furthermore, the notes contain a table showing the actual customer allocation with prices to be applied by the different suppliers for the relevant customers. The notes also list each supplier market share.[413]

(288) Furthermore, the minutes of that AC Treuhand meeting of the ESBO and Ester Group on 20 October 1998, drafted by [employee], state the following:

"[*]."[414]

(289) [*][415] [*].

(290) [*] submitted another handwritten document drafted by [employee] on 24 November 1998.[416] The notes refer to ESBO/esters and present deviations from previous sales volumes for the month of October 1998 and the cumulative deviations until that month for Akcros, CECA, Chemson, Faci, Chemtura and another supplier. The notes also present individual tonnages for the entire year and for the first nine months for

411 Following Ciba's and Chemtura's swap agreement in May 1998, [employee] continued to participate in the AC Treuhand meetings as representative of Witco (Chemtura). Here again where evidence is provided by [*] and there is reference to contemporaneous handwritten notes drafted on the occasion of a certain meeting, these notes are drafted by [employee] (see for instance recitals (287) and (301)).

412 [*]. [*] also submits internal instructions to apply the price increases agreed at this meeting, see [*].

413 [*].

414 [*].

415 [*].

416 According to [*], the notes were drafted on the occasion of an AC Treuhand meeting that took place at the Hilton Hotel in Antwerp from 24 November 1998 until 26 November 1998. [*]. The Commission does not possess evidence corroborating [*] contention that the participants met in the context or under the auspices of AC Treuhand and there is no evidence of an AC Treuhand meeting from the other participants on 24-26 November 1998. Other documents in the Commission's file show that CEFIC meetings were held on 25-26 November 1998 at the Hilton Hotel in Antwerp. See for minutes of these meetings, [*]. The list of participants of the ESPA General Assemble meeting in the morning of 26 November 1998 ([*], show the presence of all participating undertakings, [*] mentions, except Faci.

Akcros, CECA, Chemson, Faci and Chemtura.[417] The document mentioned in this recital reads as follows:

"

[*]	[*]	[*]	[*]	[*]
[*]	[*]		[*]	
	[*]	[*]	[*]	[*]
	[*]	[*]	[*]	[*]
	[*]	[*]	[*]	[*]
	[*]	[*]	[*]	[*]
	[*]	[*]	[*]	[*]
	[*]	[*]	[*]	[*]
	[*]		[*]	
	[*]	[*]	[*]	[*]
	[*]	[*]	[*]	[*]
	[*]	[*]	[*]	[*]
	[*]	[*]	[*]	[*]
	[*]	[*]	[*]	[*]
	[*]	[*]	[*]	[*]

The volumes in the lower part of the table correspond to the actual market shares ("[*]") as shown in the notes described in recital (281).

(291) [*] submitted a document which it identifies as also dated 24 November 1998 concerning ESBO/esters. [*], the document was drafted by [employee] (CECA) on the occasion of the AC Treuhand meeting in Antwerp (Hilton Hotel, Groenplaats), from 24 to 26 November 1998. The participant suppliers were Akcros, CECA, Chemson, Faci and Chemtura. The document refers to the market shares for the year 1994 and states the following: [418]

[*]	**[*]**	**[*]**
[*]	**[*]**	**[*]**
[*]	**[*]**	**[*]**
[*]	**[*]**	**[*]**
[*]	**[*]**	**[*]**
[*]	**[*]**	**[*]**

"

417 This table is drafted in a similar way as with the tables presenting the deviations from agreed tin stabiliser quotas from 1995 (see recitals (233)-(234)).

418 [*].

(292) Other contemporaneous notes drafted by [employee] ([*]) state exactly the same percentage share as in the document described in recital (291), divided among the same companies, namely, Ciba/Chemtura, Akcros, CECA and Chemson. In addition, the document states tonnages for "[*]" vis-à-vis the rest of the world. Those tonnages are the same as the figures contained in [employee] notes (see recital (290)).[419] [*] identifies [employee] document as dated 24 November 1998, concerning ESBO/esters and drafted on the occasion of the same meeting. In that document, however, and distinct from [employee] notes, the table is headed "[*]t" and the first figure is presented in percentage terms.[420]

(293) [*]submits another document dated 25 November 1998 containing the handwritten notes of [employee] ([*]). [*]explains that those notes were also drafted on the occasion of the meeting that took place from 24 to 26 November 1998 in Antwerp at the Hilton Hotel (see recital (291)). The contemporaneous notes[421] show the monthly sales of the participating companies and the corresponding deviations from the agreed quota for certain months of 1998 as follows:

"[*]

						„[422]

(294) Akcros' request for a "[*]" may refer to [*] price increase announced on 15 October 1998 (see recital (287)).

(295) [*] also submitted undated handwritten notes, drafted by [employee] at the occasion of an AC Treuhand meeting of the ESBO and Ester Group.[423] The participant suppliers were Akcros, CECA, Chemson, Faci and Chemtura. [*], those notes "[*]" and relate to one single "[*]" meeting.[424] Furthermore, [*] states that " [*]".[425][employee]began

[419] [*].

[420] [*].

[421] [*]. The grids are added by the Commission in order to ease the reading.

[422] The Commission's investigation does not confirm that there was an AC Treuhand meeting in the period 24 – 26 November 1998. However, the minutes of the (CEFIC) ESPA General Assembly meeting show that on 26 November 1998, a meeting did indeed take place in Antwerp and that [employee]was one of the attendees. See Annex II. The day before, on 25 November 1998, the CEFIC groups ELSA (in the morning) and ECOSA (EMMSSA) (in the afternoon) also met in Antwerp. See Annex II.

[423] [*].

[424] [*], reply of 20 June 2008 to the Commission's Article 18 request for information of 3 June 2008, [*].

[425] [*], reply of 20 June 2008 to the Commission's Article 18 request for information of 3 June 2008, [*].

working for the relevant division of Arkema France on 1 October 1998 and attended her first AC Treuhand meeting on 20 October 1998.[426]

(296) The notes referred to in recital (295) contain tables showing sales volumes and prices for each of the five manufacturers mentioned in recital (295), per EEA country and per customer. The EEA countries covered are Sweden, Norway, Denmark, Finland, the Netherlands, Portugal, Belgium[427], United Kingdom, Germany (1) and (2), France (1) and (2). The following is an example of such tables:

“

[*]		[*]	[*]	[*]	[*]	[*]
[*]	[*]	[*]	[*]	[*]	[*]	
[*]	[*]	[*]	[*]	[*]	[*]	
[*]	[*]	[*]	[*]	[*]	[*]	
[*]		[*]	[*]	[*]	[*]	[*]
[*]	[*]	[*]	[*]	[*]	[*]	
[*]	[*]	[*]	[*]	[*]	[*]	
[*]	[*]	[*]	[*]	[*]	[*]	
[*]	[*]	[*]	[*]	[*]	[*]	”[428]

(297) Furthermore, those notes contain tables showing sales volumes and prices for each of the same five manufacturers. Certain major customers with operations in different states in the EEA were supplied in each national market according to that table. The customers covered are [*], [*], [*], [*], [*] and [*].[429]

4.6.13 1999

(298) [*], [employee].[430] [*]

4.6.13.1 Tin stabilisers cartel

(299) In 1999, the PVC Tin Stabilisers Group held nine AC Treuhand meetings in Zürich and Lugano (22 and 23 February, 26 and 27 April, 19 and 20 July, 23 September, 29 and 30 November). The participant suppliers were Akcros, Baerlocher, CECA, Reagens and Chemtura.

(300) In an e-mail of 19 February 1999, [employee] of Akcros UK wrote the following to Akcros Germany:

“[*]” [emphasis added][431]

426 [*].
427 [*].
428 [*]
429 See in particular [*].
430 [*]..
431 Inspection document found at [*],[*].

That statement shows an agreement between the tin stabiliser suppliers to increase prices.

(301) On 23 February 1999, an AC Treuhand meeting of the PVC Tin Stabilisers Group took place in Zürich. The participant suppliers attending the meeting were Akcros, Baerlocher, CECA, Reagens and Chemtura. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants monitored adherence to earlier agreed price increases for specific customers (see recital (290)).[432] Following the specific discussion of prices for different customers, the notes state "[*]"). The official minutes of the meeting confirm [employee] notes as to the occurrence and the date of the meeting.

(302) On 27 April 1999, an AC Treuhand meeting of the PVC Tin Stabilisers Group took place in Zürich. The participant suppliers attending the meeting were Akcros, Baerlocher, CECA, Reagens and Chemtura. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants agreed to increase all prices in the United Kingdom by GBP 200, in order to compensate for the change in the GPB/DM exchange rate.[433] The handwritten notes show that the discussion at the meeting concerned prices and individual customers and went beyond the issues which were listed in the official AC Treuhand minutes.[434]

(303) [*].[435] [*][436] [*].

(304) [*][437] [*][438]

4.6.13.2 ESBO/esters cartel

(305) In 1999, there were eight AC Treuhand meetings of the ESBO and Ester Group (25 and 26 January, 26 and 27 May, 28 and 29 September, 14 and 15 December). The participant suppliers were Akcros, CECA, Chemson, Faci and Chemtura.

(306) On 26 January 1999, an AC Treuhand meeting of the ESBO and Ester Group took place. The participant suppliers attending the meeting were Akcros, CECA, Chemson, Chemtura and Faci. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants exchanged information on sales volumes, both by individual participants to the meeting and by outsiders, to specific customers in specific EEA countries for the year 1998.[439] In particular, the notes in question

432 [*].

433 [*].

434 Inspection document found at [*],[*].

435 [*].

436 [*].

437 [*].

438 [*].

439 [*]. In [*] description, [*] states that the year should be 1999, as clearly follows from the contents of the notes.

analyse the total sales of ESBO/esters in 1998 and contain a breakdown of the totals sold by the participants. Also, for individual customers, the notes establish: (a) the total amount purchased ("Pot"); (b) the amounts purchased from the participants; and (c) the amount left over for others.

(307) On 27 May 1999, an AC Treuhand meeting of the ESBO and Ester Group took place in Zürich. The participant suppliers attending the meeting were Akcros, CECA, Chemson, Faci and Chemtura. According to contemporaneous handwritten notes drafted on the occasion of that meeting, the participants exchanged information on prices to customers in specific EEA countries.[440]

(308) [*].[441]

(309) On 29 September 1999, an AC Treuhand meeting of the ESBO and Ester Group took place. The participant suppliers attending the meeting were Akcros, CECA, Chemson, Faci and Chemtura. That meeting was preceded by a dinner on the evening of the previous day, 28 September 1999, attended by representatives of Akcros, CECA, Chemson, Faci and Chemtura. [*] submitted contemporaneous handwritten notes, drafted by [employee] on the occasion of an AC Treuhand meeting of the ESBO and Ester Group held on 28 to 29 September 1999.[442]

The last line of the notes refers to the following prices:

[*][443]

(310) [*].[444] On that occasion, [employee] had discussions with his competitors about pricing for ESBO/esters. [*]: "[*]". [*] specifies that several others attended those meetings including [employee] and [employee], both of CECA, a representative of Faci, [employee] and [employee]of Chemson and [employee] of Baerlocher.[445]

(311) [*] submission mentioned in recital (310) corresponds to [*] documentary submission concerning the minimum price level of ESBO/esters (recital (309))

(312) [*]".[446] [*].[447]

(313) [*].[448]

---

440 [*].
441 [*].
442 The handwriting and transcript of the original notes indicate "*29/8/99*", rather than 29/9/99. However, [*] dates this meeting on 29 September 1999. See [*].
443 See also recitals (310)-(314), which confirm the same topic of the arrangements.
444 As to the date of the meeting, [*] refers to two ELISA meetings, on 16 June 1999 and on 10 November 1999. See [*]. See for the draft minutes of the 16 June 1999 meeting, [*]. See for the minutes of the 10 November 1999 meeting, including list of attendees, [*].
445 [*].
446 [*].
447 [*].
448 [*].

(314) [*] . [449]

(315) On 15 December 1999, an AC Treuhand meeting of the ESBO and Ester Group was held in Zürich. It was attended by the suppliers Akcros, CECA, Chemson, Faci, Chemtura and [*].[450] The first point of the minutes, taken by [employee] (AC Treuhand), reads as follows:

"[*]." [emphasis added]([*])

4.6.14 2000

4.6.14.1 Tin stabilisers cartel and ESBO/esters cartel

(316) In 2000, the PVC Tin Stabilisers Group held two AC Treuhand meetings in Zürich (20 and 21 March). The participant suppliers were Akcros, Baerlocher, CECA, Reagens and Chemtura. The ESBO and Ester Group held five AC Treuhand meetings (21 and 22 March, 20 June, 25 and 26 September). The participant suppliers were Akcros, CECA, Chemson, Faci and Chemtura.

(317) In a memorandum dated 16 February 2000, [employee]of Akcros reports to his superior, [employee] (Akcros' [*]), "[*]."[451]

The relevant parts of that memorandum read as follows: "[*][452]" *[*emphasis added*]*. [453]

(318) [*] admits that the document mentioned in recital (317) was preceded by [employee] handwritten notes which served as the basis for the drafting of the memorandum of 16 February 2000 and depict the same picture as that of the memorandum (see recital (317)). The notes also outline the discussions that took place at the AC Treuhand meetings. The relevant parts of the handwritten notes read as follows:

"[*]".[454]

(319) [*][455] [*][456] [*].[457]

---

449 [*].

450 See minutes of the meeting, [*].

451 Inspection document, found at [*],[*].

452 Indeed, [*] describes the purpose of the cartel as freezing ("[*]") the market shares. See [*].

453 Inspection document, found at [*],[*]. Here, it is important to note that [employee] memo describes in the year 2000, various arrangements which are clearly distinguished in terms of time and correspond to the past, present and future tenses.

454 Inspection document, found at [*],[*]. Here, it is important to note that [employee] notes describe in the year 2000, various arrangements which are clearly distinguished in terms of time and correspond to the past and present tenses.

455 [*]

456 [*].

457 [*].

(320) Akcros also decided to end its participation as regards the ESBO and Ester Group. On 22 March 2000, during an AC Treuhand meeting in Zürich, [employee] (Akcros) announced that decision to the participant suppliers of the ESBO and Ester Group: CECA ([employee]), Chemson ([employees]), Chemtura ([employee]), and Faci ([employees]).[458]

(321) In addition, in an internal e-mail sent from [employee] to [employee] on 17 May 2000, [employee] proposes the following text of a letter to AC Treuhand, confirming Akcros' position in writing: "[*]" *[emphasis added].*[459] A slightly modified version was sent to AC Treuhand on 5 June 2000.[460]

(322) [*] monthly marketing report for March 2000 dated 6 April 2000[461] contains a brief reference to AC Treuhand: "[*]". The Commission notes that the participants had previously sought to obtain price increases in respect of Drapex, a type of ESBO/esters (see recital (312)).

(323) The last meeting of the ESBO and Ester Group organised by AC Treuhand took place on 26 September 2000, in Rapallo (Italy). The minutes of that meeting state:

"[*]"[462] Emphasis added.

4.6.15 2001

(324) In an e-mail dated 18 April 2001, [employee] replied to [employee] request for data on market shares per country in "[*]", for tin stabilisers and ESBO/esters. In [employee] e-mail, [employee] writes the following:

"[*]"[463]

---

458 Inspection document, found at [*], dated 22 March 2000, [*]. According to [*][*], [*]participated in the meeting of the ESBO and Ester Group organised by AC Treuhand on 20 June 2000. However, in the list of attendants of that meeting, there is no indication of Akzo's/Akcros' participation in that meeting. See Annex I. [*].

459 Inspection document, found at [*],[*].

460 [*].

461 [*].

462 [*] reply of 22 November 2007 to the Commission's Article 18 request for information of 8 October 2007, [*]. According to the minutes: "[*]" It is noted, that such a meeting, or any following AC Treuhand meeting of the ESBO and Ester Group did not take place. (Idem.).

463 Inspection document, found at [*],[*].

5 APPLICATION OF ARTICLE 81 OF THE TREATY AND ARTICLE 53 OF THE EEA AGREEMENT

5.1 Relationship between the Treaty and the EEA Agreement

(325) The arrangements described in recitals (100) - (324) applied to all the territory of the EEA. They were therefore liable to affect competition in the whole of the common market and the territory covered by the EEA Agreement.

(326) The EEA Agreement, which contains provisions on competition analogous to the Treaty, came into force on 1 January 1994.

(327) Insofar as the arrangements affected competition in the common market and trade between Member States, Article 81 of the Treaty is applicable. Article 53 of the EEA Agreement is applicable insofar as the arrangements affected competition in the territory covered by that Agreement and trade between the Contracting Parties to that Agreement.

5.2 Jurisdiction

(328) In the present case the Commission is the competent authority to apply both Article 81 of the Treaty and Article 53 of the EEA Agreement on the basis of Article 56 of the EEA Agreement, since the cartels had an appreciable effect on trade between Member States (see sub-section 5.4.6).

5.3 Application of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement

(329) Article 81(1) of the Treaty prohibits as incompatible with the common market all agreements between undertakings or 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.

(330) Article 53(1) of the EEA Agreement (which is modelled on Article 81(1) of the Treaty) contains a similar prohibition. However the reference in Article 81(1) to trade *"between Member States"* is replaced by a reference to trade *"between contracting parties"* and the reference to competition *"within the common market"* is replaced by a reference to competition *"within the territory covered by the ... [EEA] Agreement"*.

5.3.1 Agreements and concerted practices

5.3.1.1 Principles

(331) Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement prohibit agreements between undertakings and concerted practices. An agreement 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 agreement may be express or implicit in the behaviour 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.[464]

(332) In its judgement in the PVC II case[465], 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 [81(1) EC] of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way". [466]

(333) Although Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement draw a distinction between the concept of "concerted practices" and "agreements between undertakings", the object is to bring within the prohibition of these articles a form of co-ordination between undertakings by which, without having reached the stage where an agreement properly so-called has been concluded, they knowingly substitute practical co-operation between them for the risks of competition.[467]

(334) The criteria of co-ordination and co-operation laid down by the case law of the Court of Justice, 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 whereof is either to influence the conduct on the market of an actual or potential

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[464] Case T-9/99 *HFB and others v. Commission* [1999] ECR II-1487 paragraphs 196 and 207.

[465] Joined Cases T-305/94 *Limburgse Vinyl Maatschappij N.V. and others v Commission* (PVC II), [1999] ECR II-931, paragraph 715.

[466] The case law of the Court of Justice and the Court of First Instance in relation to the interpretation of Article 81 of the Treaty applies equally to Article 53 of the EEA Agreement. See paragraphs No 4 and 15 as well as Article 6 of the EEA Agreement, Article 3(2) of the EEA Surveillance and Court Agreement, as well as Case E-1/94 of 16 December 1994, paragraphs 32-35. References in this text to Article 81 of the Treaty therefore apply also to Article 53 of the EEA Agreement.

[467] Case C-48/69 *Imperial Chemical Industries v Commission* [1972] ECR 619, paragraph 64.

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.[468]

(335) 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 behaviour.[469] 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.

(336) 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.[470]

(337) Moreover, it is established case law that the exchange, between undertakings, in pursuance of a cartel falling under Article 81(1) of the Treaty, of information concerning their respective deliveries, which not only covers deliveries already made but is intended to facilitate constant monitoring of current deliveries in order to ensure that the cartel is sufficiently effective, constitutes a concerted practice within the meaning of that article.[471]

(338) However, in the case of a complex infringement of long duration, it is not necessary for the Commission to characterise the conduct as exclusively one or other of these forms of illegal behaviour. The concepts of agreement and concerted practice are fluid and may overlap. The anti-competitive behaviour may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when 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 common enterprise having one and the same overall objective into several different forms of infringement. A cartel may therefore

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468 Joined Cases 40-48/73 *Suiker Unie and others v Commission* [1975] ECR 1663, paragraphs 173-174.

469 See also Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, paragraph 255-261.

470 See also Case C-199/92 *P Hüls v Commission*, [1999] ECR I-4287, paragraphs 158-167.

471 See, in this sense, Case T-147/89 *Société Métallurgique de Normandie v Commission* [1995] ECR II-1057; Case T-148/89 *Trefilunion v Commission* [1995] ECR II- 1063 and Case T-151/89 *Société des treillis et panneaux soudés v Commission,* [1995] ECR II-1191.

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.[472]

(339) In its PVC II judgement[473], the Court of First Instance stated that "[i]n 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 [81] of the Treaty".

(340) 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 at 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 the 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 has pointed out, it follows from the express terms of Article 81(1) of the Treaty that agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.[474]

(341) The organisation of meetings or providing services relating to anti-competitive arrangements[475] may also be prohibited under certain conditions according to the jurisprudence of the Court of First Instance. In its judgement of 8 July 2008, the Court of First Instance states that "it is sufficient for the Commission to show that the undertaking concerned attended meetings at which anticompetitive agreements were concluded" and that "the Commission must prove that the undertaking intended, through its own conduct, to contribute to the common objectives pursued by the participants as a whole and that it was aware of the substantive conduct planned or implemented by other undertakings in pursuance of those objectives, or that it could reasonably have foreseen that conduct and that it was ready to accept the attendant risk").[476]

5.3.1.2 Application in the present case

5.3.1.2.1 Tin stabilisers cartel

(342) The objective of the undertakings' collusive arrangements for tin stabilisers was to increase and maintain prices in the EEA above normal competitive levels and to sustain that objective through customer and sales volume allocation in those products. They regularly attended meetings and had contacts at which they engaged in: price-fixing, market sharing through sales quotas, customer sharing and allocation and the

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[472] See again Case T-7/89 *Hercules v Commission*, paragraph 264, referred to in footnote 469.

[473] Joined Cases T-305/94 *Limburgse Vinyl Maatschappij N.V. and others v Commission* (PVC II), [1999] ECR II-931, paragraph 696.

[474] See Case C-49/92 P *Commission v Anic Partecipazioni S.p.A.* [1999] ECR I-4125, paragraph 81.

[475] Such as checking deviations and monitoring compliance facilitating the implementation of the agreements.

[476] Case T-99/04 *AC Treuhand v Commission*, [2008] ECR II-1501, paragraphs 122 and 127.

exchange of commercially sensitive information, in particular on customers, pricing and sales volumes.

(343) As to price fixing, the participants made arrangements jointly to fix prices of tin stabilisers across the EEA. They agreed upon prices and/or price increases and pricing policies, see recitals (187)-(189), (225), (238), (244), (249) (300), (317) and (318) among others, and on price increases in the form of minimum prices, see recital (263) among others).

(344) There were also market sharing arrangements between the participants by agreements on quotas (see recitals, (140), (141), (160), (187)-(189), (216), (224) - (225), (228)-(238), (244), (258), (260), (261) and recital (317) among others). Compliance with the allocated market shares was monitored, as is demonstrated in Chapter 4, see recitals (228) and (234) among others).

(345) As part of the collusive scheme the participants also shared and allocated customers. The participants discussed their sales and prices to specific customers (see recitals (187)-(189), (224)-(225), (235), (238), (260), (263) and (317) among others).

(346) The participants exchanged commercially sensitive information, on sales to individual customers (see recitals (189), (224), (225), (244) and (260) among others), on prices (see recitals (225), (238), (244) and (317)) and on sales volumes (see recitals (141), (160), (187) - (189), (224)-(225), (235), (238) and (258)).

(347) Some factual elements of the illicit arrangements could also aptly be characterised as a concerted practice. While there clearly existed an agreement behind the action taken to ensure implementation through the agreements on quotas, price increases and sharing of customers, the operation of these arrangements could also be regarded as adherence to a concerted practice to facilitate the coordination of the parties' commercial behaviour. Through that, the producers in question were able to monitor the applicable quotas and prices in order to ensure adequate effectiveness of the agreement as well as the joint control of the market. Given the existence of that system of information exchange and coordination, it is concluded that the parties used the knowledge and contents of the information exchanged in their continued operations on the market.

(348) The various agreements and concerted practices formed part of a scheme of price fixing and quota allocation throughout the entire period of the cartel. That scheme was devised to monitor compliance with the arrangements through meetings, audits as well as through other contacts (exchanges of faxes, telephone communications). That scheme was part of a series of efforts made by the undertakings in question, in pursuit of a single aim, namely to avoid competition by maintaining prices above normal competitive levels and sustaining that objective through customer and volume allocation. On that basis, it is apparent that the collusive arrangements in this case present all the characteristics of an agreement and/or a concerted practice in the sense of Article 81 of the Treaty.

5.3.1.2.2 ESBO/esters cartel

(349) The objective of the undertakings' collusive arrangements on ESBO/esters was to increase and maintain prices in the EEA above normal competitive levels and to sustain that objective through customer and sales volume allocation in those products. They regularly attended meetings and had contacts at which they engaged in: price-fixing, market sharing through sales quotas, customer sharing and allocation and the exchange of commercially sensitive information, in particular on customers, pricing and sales volumes.

(350) As to price fixing, the participants made arrangements jointly to fix prices of ESBO/esters across the EEA. They agreed upon prices and/or price increases and pricing policies, see recitals (282), (317) and (318) among others, on minimum prices (including so called floor prices), see recitals (268), (279), and target prices, see recitals (213), (240), (279).

(351) There were also market sharing arrangements between the participants by agreements on quotas (see recitals (221), (281), (282), (284), (290), (291), (293) and (317) among others). Compliance with the allocated market shares was monitored, as is demonstrated in Chapter 4, see recital (281) among others).

(352) As part of the collusive scheme the participants also shared and allocated customers. The participants discussed their sales and prices to specific customers (see recitals (287), (296), (297) and (317) among others).

(353) The participants exchanged commercially sensitive information on sales to individual customers (see recitals (296), (297) and (317)), on prices (see recitals (317), (318)) on production capacities (see recitals (291) and (292)) and on sales volumes (see recitals (221), (281)).

(354) Some factual elements of the illicit arrangements could also aptly be characterised as a concerted practice. While there clearly existed an agreement behind the action taken to ensure implementation through the agreements on quotas, price increases and sharing of customers, the operation of these arrangements could also be regarded as adherence to a concerted practice to facilitate the coordination of the parties' commercial behaviour. Through that, the producers in question were able to monitor the applicable quotas and prices in order to ensure adequate effectiveness of the agreement as well as the joint control of the market. Given the existence of that system of information exchange and coordination, it is concluded that the parties used the knowledge and contents of the information exchanged in their continued operations on the market.

(355) The various agreements and concerted practices formed part of a scheme of price fixing and quota allocation throughout the entire period of the cartel. That scheme was devised to monitor compliance with the arrangements through meetings, audits as well as through other contacts (exchanges of faxes, telephone communications). That scheme was part of a series of efforts made by the undertakings in question, in pursuit

of a single aim, namely to avoid competition by maintaining prices above normal competitive levels and sustaining that objective through customer and volume allocation. On that basis, it is apparent that the collusive arrangements in this case present all the characteristics of an agreement and/or a concerted practice in the sense of Article 81 of the Treaty.

5.3.1.2.3 AC Treuhand's role in the infringements

5.3.1.2.3.1 Tin Stabilisers

(356) AC Treuhand's active involvement and central role in the tin stabiliser cartel is manifested as follows:

(a) Fides/AC Treuhand was present and organised the cartel meetings and the preceding dinners from 1987 until 2000 (recitals (112), (113), (139), (205), (214), (223), (242), (257), (270), (299), (316) as well as Annex I).[477] Against that background, it appears that AC Treuhand had to organise and participate in the discussions during the dinners so as to incorporate the information from these discussions in the material (such as "red", "pink" papers and slides) distributed to the participants during the next morning session.

(b) AC Treuhand's employee, [employee], chaired numerous AC Treuhand meetings of the PVC Tin Stabilisers Group. In that capacity, [employee] needed to be present, active and playing a leading role during the entire meeting.[478] The position of a chairman can in no circumstances be compared to that of an administrative secretary, as claimed by AC Treuhand.[479] In addition, by providing extensive services to the cartel, AC Treuhand was financially motivated to promote a successful course for the cartel. Here, it should be mentioned that since 5 September 1995, [employee] chaired all the AC Treuhand meetings of the PVC Tin Stabilisers Group. At that particular meeting, it was agreed that the item of "[*]" was no longer to be put on the agendas for the future meetings.[480] It should also be mentioned that [*] statements and clarifications on AC Treuhand's leading role concerning the meetings and dinners confirm the statements of [*] and [*].

(c) AC Treuhand drafted and disseminated the official minutes of the official AC Treuhand meetings (the "white papers"). [employee] prepared them.[481]

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477 [*] submits that AC Treuhand organised and participated in the meetings and the preceding dinners. [*] There are several instances where the minutes taken by [employee] mention the occurrence and discussions of the dinner preceding and the morning meeting as well. Thus, the minutes of 20 October 1998 read as [*] and the minutes of 15 December 1999 read "[*]."; Inspection document, found at [*],[*].

478 [*].

479 [*].

480 [*].

481 See minutes of the all the meetings as listed in Annex I.

(d) AC Treuhand produced, distributed and collected the so-called "pink" and "red" papers with the agreed market shares and prices.[482] The "red" and "pink" papers were used to conceal traces of illegal arrangements[483] whereas the "white" papers served as official, "lawful" minutes and a means to disguise the anti-competitive arrangements and to divert attention from the "red" and "pink" papers (recitals (128) and (197)).

(e) AC Treuhand calculated the "plusses and minuses", that is the deviations from the agreed market shares in a monitoring exercise (recital (117)).

(f) By monitoring and calculating the deviations, AC Treuhand had the authority over the members of the agreement to require them to adapt their business behaviour, for example by 'shifting' customers in order to restore the agreed quotas (recital (119)).

(g) AC Treuhand informed the participants of the deviations during the meetings by using the "pink" papers or communicated those deviations via fax and post (recitals (129), (233) and (234)).

(h) AC Treuhand's meetings served as basis for the "country meetings" in order to implement the agreements.

(i) Until 1996, AC Treuhand carried out an audit on a yearly basis at the premises of the participants in order to check the accuracy of the reported figures and provide the basis for redressing deviations from the concluded agreements (recital (116)).

(j) AC Treuhand was willing to act and/or acted as a moderator in case of tensions between the members of the agreement and encouraged the parties to find compromises (recitals (109) and (261)). AC Treuhand accepted and conducted that role as its fees related to the range and extent of the services it provided to the cartel. That is confirmed by [*] and [*].[484] More precisely, AC Treuhand acted also as "[*]" of the discussions and the negotiations amongst the participants. The final clean version of [employee] notes was inserted into the "pink"/"red" papers. In this regard, [*] explains that [*]"[485]

(k) AC Treuhand charged fees for its services (see recital (69)).

(357) The anti-competitive nature of Fides/AC Treuhand meetings for the PVC Tin Stabilisers Group throughout the entire period between 1987 and 2000 is evidenced by

[482] For the operation of the "red" and "pink" papers arrangements, please see recital (412).

[483] As explained in recitals (125)-(127), because of their colour, the "red" and "pink" papers were easily distinguishable from other meeting documents. These documents were not allowed to be taken outside AC Treuhand's premises.

[484] [*] [*] reply to the Statement of Objections, [*]. On this basis, it should be concluded that AC Treuhand's fees were also related to the duration of its services.

[485] [*].

numerous contemporaneous documents such as notes, letters and minutes and is supplemented and confirmed by [*] as well as by [*] for the period until 1996 - 1997. In particular, as regards the period from 1996 - 1997 until 2000, the continuation of the anti-competitive arrangements is proven by the following:

(a) [*] statements and contemporaneous evidence covering the period before and after 1996 - 1997. In particular, for the period after 1996 - 1997, [*]'s evidence related to the AC Treuhand meetings of the PVC Tin Stabilisers Group on 11 February 1998 (recital (272)), 13 November 1998 (recital (277)), 23 February 1999 (recital (301)) and 27 April 1999 (recital (302)).

(b) [*].

(c) Akzo's announcement of 21 March 2000 informing AC Treuhand, [employee], of its decision to withdraw from the meetings while it wishes to continue in the statistical exchange of sales data (see recital (319)).[486]

(d) [*] statements and clarifications match the statements provided earlier by [*] and [*] on AC Treuhand's involvement and role within the infringements.

5.3.1.2.3.2 ESBO/esters

(358) AC Treuhand's active involvement and central role in the ESBO/esters cartel is manifested as follows:

(a) Fides/AC Treuhand was present and organised the cartel meetings and the preceding dinners from 1991 until 2000 (recitals (178), (196), (208), (220), (239), (252), (267), (278) (305) and (316) as well as Annex I).[487] Against that background, it appears that AC Treuhand had to organise and participate in the discussions during the dinners so as to incorporate the information from those discussions in the material (such as "red", "pink" papers and slides) distributed to the participants during the next morning session.

(b) AC Treuhand's employee, [employee], acted as the *de facto* chairman of numerous AC Treuhand meetings of the ESBO and Ester Group.[488] In that group, [employee] was "[*]" at least from 1995 onwards.[489] In that capacity, [employee] opened and moderated the discussions of the meetings. In this

486 As demonstrated in recital (356) (b), at that point in time, [employee] acted as the chairman of the AC Treuhand meetings of the PVC Tin Stabilisers Group. Thus, [employee] was well informed of the participants at, and contents of, the AC Treuhand meetings.

487 [*] There are several instances where the minutes taken by [employee] mention the occurrence and discussions of the dinner preceding and the morning meeting as well. For example, the minutes of the 15 December 1999 meeting drafted by [employee] read as follows: "[*]"*[emphasis added]*; Inspection document, found at [*],[*].

488 In similar vein as with the PVC Tin Stabilisers Group, please see footnote 478.

489 For example, the minutes of 12 September 1995 begin by: "[*]." There are numerous other examples referring to [employee] as secretary. [*] reply to the Article 18 request for information sent 8 October 2007, [*].

regard, [*] specifies that "[*]"[490] [employee]"[*]" of the meetings.[491] Such a position cannot be compared to that of an administrative secretary.

(c) AC Treuhand drafted and disseminated the official minutes of the official AC Treuhand meetings (the "white papers"). It was [employee] who prepared them.[492]

(d) AC Treuhand produced, distributed and collected the so-called "pink" and "red" papers with the agreed market shares and prices.[493] The "red" and "pink" papers were used to conceal traces of illegal arrangements[494] whereas the "white" papers served as official, "lawful" minutes and the means to disguise the anti-competitive arrangements and to divert the attention from the "red" and "pink" papers (see recitals (128) and (197)).

(e) AC Treuhand calculated the "plusses and minuses", that is the deviations from the agreed market shares in a monitoring exercise (see recital (117)).

(f) By monitoring and calculating the deviations AC Treuhand had authority over the members of the agreement to require them to adapt their business behaviour, for example by ‘shifting’ customers in order to restore the agreed quotas (recital (119)).

(g) AC Treuhand informed the participants of the deviations during the meetings by using the "pink" papers or communicated those deviations via fax and post (recital (129)).

(h) AC Treuhand's meetings served as basis for the "country meetings" in order to implement the agreements.

(i) Until 1996, AC Treuhand carried out an audit on a yearly basis at the premises of the participants in order to check the accuracy of the reported figures and provide the basis for redressing deviations from the concluded agreements (recital (116)).

(j) AC Treuhand acted also as "moderator" of the discussions and negotiations amongst the participants. The final clean version of [employee] notes was inserted into the "pink"/"red" papers. In this regard, [*] explains that "[*]"[495]

(k) AC Treuhand charged fees for its services (see recital (69)).

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491 [*].

492 See minutes of the all the meetings as listed in Annex I.

493 For the operation of the "red" and "pink" papers arrangements, please see recital (412).

494 As explained in recitals (125)-(127), because of their colour, the "red" and "pink" papers were easily distinguishable from other meeting documents. These documents were not allowed to be taken outside the AC Treuhand premises.

495 [*].

(359) The anti-competitive nature of AC Treuhand meetings of the ESBO and Ester Group throughout the entire period between 1991 and 2000 is evidenced by numerous contemporaneous documents such as notes, letters and minutes and is supplemented and confirmed by the submissions of immunity/leniency applicants as well as by Faci and Chemson. In particular, as regards the period from 1996-1997 until 2000, the continuation of the anti-competitive arrangements is proven by the following:

(a) [*] contemporaneous evidence on several meetings such as the meetings dated 12 March 1998 (recital (279)), 20 May 1998 (recital (281)) 20 July 1998 (recital (284)) and 29 September 1999 (recital (309));

(b) [*]contemporaneous evidence on the AC Treuhand meetings of 12 March 1998, 25 May 1998, 20 October 1998, 26 January 1999 and 27 May 1999 (see recitals (280), (282), (287), (306) and (307));

(c) [*];

(d) Akzo's announcement of 22 March 2000 informing AC Treuhand, [employee], of its decision to withdraw from the meetings while it wishes to continue in the statistical exchange of sales data (see recital (320)).[496]

5.4 The parties' comments in response to the Statement of Objections

5.4.1 The parties' arguments that the evidence does not suffice to prove the cartels

(360) Several parties argue that the Commission has not produced sufficiently clear, precise and consistent evidence to prove the infringements.[497] In particular, they argue that for the years 1997-2000, the Commission does not meet the requisite standard of proof and that the evidence submitted by [*] and [*] is not reliable. As regards the evidence submitted by [*], it is argued that it has low probative value for the period post 29 May 1998 ([*]) as it is not clear how that evidence came into [*] possession. In [*] reply to the Statement of Objections, [*] also contested the authorship of the contemporaneous handwritten notes submitted by [*] in the context of its Leniency application.[498] [*] questions in general the relevance of the meetings referred to in the Annexes for which there is no specific evidence of anti-competitive activity for these particular meetings. It is also argued, as explained in further detail in recitals (372), (373) and (374) that [*] manipulated a certain document which was part of its evidence.

(361) This reasoning cannot be accepted. The principle that prevails in Community law is the unfettered evaluation of evidence and it is only the reliability of the evidence that

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[496] At that point in time, [employee] acted as the "[*]" of the AC Treuhand meetings of the ESBO and Ester Group. Thus, he was well informed of the participants and contents of the AC Treuhand meetings.

[497] For instance [*],[*]. and [*]; [*],[*]; [*],[*], [*],[*], [*],[*] and [*],[*].

[498] [*] reply to the Statement of Objections, [*].

is decisive when it comes to its evaluation.[499] The evidence submitted by [*] and [*] consists of statements and contemporaneous documents and is precise.[500] As it was submitted by direct participants to the cartel meetings, its evidentiary value is very high.[501] The credibility is enhanced by its level of detail.[502] The handwritten notes are detailed, structured (often with tables, bullets or numbered items) with a high level of precision. On its own, the probative value of the notes already attests to the existence of the infringement.

(362) Admittedly, [*] made their submissions after the material events and for the purposes of obtaining a reduction of the fine. This however does not mean that their submissions are devoid of probative value. Statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence.[503] Moreover, the fact of seeking to benefit from the application of the Leniency Notice in order to obtain immunity from or a reduction of the fine does not, as such, create an incentive to submit distorted evidence. Indeed, any attempt to mislead the Commission could call into question the sincerity and completeness of cooperation of the person seeking to benefit, thereby jeopardising its chances of benefiting from the Leniency Notice.[504]

(363) As to the authorship of the notes submitted by [*], it should be mentioned that in the Statement of Objections, the Commission explained that *"[w]here evidence is provided by* [*] *and there is reference to contemporaneous handwritten notes drafted on the occasion of a certain meeting, these notes are drafted by* [employee]*"*.[505] In addition, during the Oral Hearing, [*] confirmed that the notes submitted by it were drafted by a direct participant in the cartel meetings, [employee] (see footnotes 219 and 411). Thus, the author of the notes submitted by [*] is known to the parties and the issue of how [*] got possession of the notes does not affect the reliability of the evidence.[506] Nonetheless, as already indicated, [employee] was a long time employee of [*] which explains how [*] got possession of [employee] contemporaneous notes (see recital (58)).

499 Case T-44/00 *Mannesmannröhren-Werke v Commission* [2004] ECR II-2223, paragraphs 84-85. See also T-50/00 *Dalmine S.p.A. v Commission* [2004] ECR 2395, paragraphs 72, 73.

500 See for instance the quotation in recitals (290)-(296) and the evidence referred to in recitals (279) and (280).

501 See Joined Cases T-67/00 e.a. *JFE Engineering Corp v. Commission* [2004] ECR II-2501, paragraph 207. The author of the notes submitted by [*] is indicated in footnotes 219 and 411.

502 Opinion by AG Vesterdorf in Joined Cases T-1/89 *Rhône-Poulenc SA a. o. v Commission* [1991] ECR II-867, section I.E.4.

503 See Joined Cases T-67/00 e.a. *JFE Engineering Corp v. Commission* [2004] ECR II-2501, paragraph 211.

504 See T-120/04 *Peróxidos Orgánicos v Commission* [2006] p. II-4441, paragraph 70.

505 This statement was contained in footnote 184 (and footnote 358) of the Statement of Objections.

506 Case T-44/00 *Mannesmannröhren-Werke v Commission* [2004] ECR II-2223, paragraphs 84-85. See also T-50/00 *Dalmine S.p.A. v Commission* [2004], ECR 2395, paragraphs 72, 73. It should also be recalled that [employee]was [*] former employee for a long period of time before [employee] joined [*] and later on retired.

(364) In any case, on the basis of various objective factors, it is concluded that [employee] notes are reliable and credible.[507] [Employee] is known to be the author of the notes and no argument has been raised to suggest that he is an unreliable author or that he would have any reason to fabricate the notes. The account of the origin of these very copious notes is perfectly credible (that is preparation during a number of years of cartel meetings, in particular those organised by Fides/AC Treuhand). Moreover, [employee] notes are corroborated by other contemporaneous evidence from the cartel meetings. [employee] notes match notes taken by other participants (see, for example, the notes taken by [*] representative at the meetings on 12 March, 25 May and 20 July 1998 referred to in recitals (279), (282) and (284)) and indeed AC Treuhand minutes (see, for example, the evidence of the 23 February 1999 tin stabilisers meeting; recital (301)). Separately, [employee] notes are invariably dated and frequently state the place where the relevant meeting took place. For instance, they often bear the reference "[*]"[508] (Zürich) on the top of, at least, the first page of [employee] reports, a reference which confirms their reliability as to the place where the anti-competitive arrangements occurred and were recorded.[509] The reliability of those notes is also shown by their clarity and the fact that they often contain detailed information, including tables with very precise figures.[510] It is concluded that the precise, detailed nature of the information makes it wholly unlikely that it "*simply reflected market gossip* [and] *was completely wrong or invented*".[511]

(365) None of the parties is able, apart from simply contesting the reliability of the handwritten notes and pointing to allegedly unclear details, to prove the statements and documents factually wrong. The content of the contemporaneous documents in the Commission's possession clearly demonstrate that the participants in the cartels discussed and agreed prices, quotas, customers and volumes and exchanged sensitive commercial information. In addition, precise figures were discussed within the cartel arrangements and were written down so that the author would remember the agreements and discussions. The statements by [*] that the infringements stopped in "[*]" and the affidavits submitted by [*] in response to the Statement of Objections cannot be considered as more reliable than the contemporaneous handwritten notes.[512] The affidavits submitted by [*] were produced in *tempore suspecto*. On the contrary, the contemporaneous notes must be considered to have greater probative power as they came into being at the time of the infringement, when the parties to the infringement were not under investigation (*in tempore non suspecto*). The fact that the

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507 See Joined Cases T-25/95 e.a. *Cimenteries CBR and others v Commission* [2000] ECR II-491, paragraph 1053.

508 "[*]" stands for Zürich (See description in [*]).

509 [*].

510 This fact alone is an indication that the information was obtained from competitors; Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others v Commission* ("PVC II") [1999] ECR II-931, paragraphs 613, 633 and 634.

511 See case T-11/89 *Shell v Commission* [1992] ECR II-757, paragraph 86.

512 See case T-54/03 *Lafarge v Commission* [2008] ECR II-120, paragraph 379; and case T-59/02 *Archer Daniels Midland v* Commission [2006] ECR II-3627 paras 277 and 290) where the relative unreliability of ex post statements prepared by an undertaking's employee(s) is confirmed.

documents were drawn up at the time of the meetings and often without any thought for the fact that they might fall into the hands of third parties and/or authorities must be regarded as having great significance.[513]

(366) It is with that in mind that several contemporaneous notes from 1996 until 2000 presented in recitals (242) - (322) should be seen and assessed (see also section 5.4.3.2.2). In addition to the contemporaneous evidence submitted by [*] and [*], those notes which were drafted in 1997, 1998, 1999 and 2000 and found during the inspections, including inspections at [*] premises,[514] show the continuation of the infringement after "[*]".

(367) It also has to be noted in this respect that the competitors arranged their meetings with a view to being "[*]" from the Commission's investigation[515] and were receiving information on the anti-competitive agreements and other arrangements through the *"red"* and *"pink"* papers. This enabled the parties to not leave traces and to make it extremely difficult to uncover the evidence of the cartel. With that in mind, the value of contemporaneous notes depicting the anti-competitive arrangements of meetings which are supposed to remain secret is even greater.

(368) In addition, it should be mentioned that *"In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.*[516]*"It is sufficient if the body of evidence relied on by the institution, viewed as a whole, (…) supports the firm conviction that the alleged infringement took place"* and an individual undertaking participated therein[517] This is also confirmed in the *Sumitomo* judgment.[518] Further, in the *Technische Unie*[519] judgment of the Court, it is explicitly

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513 Opinion by AG Vesterdorf in Joined Cases T-1/89 *Rhône-Poulenc SA and others. Commission* [1991] ECR II-867, section I.E.4.

514 Reference is made to the notes described in recitals (300) and (318).

515 See for example, recital (317).

516 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 P *Aalborg Portland and others v Commission* [2004] ECR I-123, paragraphs 53-57 and Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP *Dresdner Bank AG and Others v Commission*, judgement of 27 September 2006 (not yet published) paragraphs 59-67.

517 Joined Cases C–238/99 P, C–244/99 P, C–245/99 P, C–247/99 P, C250/99 P to C–252/99 P and C–254/99 P *Limburgse Vinyl Maatschaapij and others v Commission* [2002] ECR I–8375, paragraphs 513 to 523; see also Joined Cases T–67/00, T–68/00, T–71/00 and T–78/00 *JFE Engineering Corp. a.o.*, cited above, paragraphs 179 and 180.

518 In the *Sumitomo* judgment (C-403/04 P *Sumitomo Metal Industries v Commission* [2007] ECR I-729, paragraph 51) it was held that "*it is normal for the activities which anti-competitive practices and agreements entail to take place in a clandestine fashion, for meetings to be held in secret, and for the associated documentation to be reduced to a minimum. It follows that, even if the Commission discovers evidence explicitly showing unlawful contact between traders, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. Accordingly, in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (Aalborg Portland and Others v Commission, paragraphs 55 to 57).* "

stated *"indicia and coincidences may provide information not just about the mere existence […] but also about the duration of continuous anti-competitive practices or the period of application of anti-competitive agreements"*.

(369) As to [*] point regarding the meetings presented in the Annexes, as mentioned in recital (137), for a considerable number of the meetings referred to in the Annexes, there is contemporaneous direct evidence that the participants in the respective cartels had regular anti-competitive discussions. For a number of other meetings in the Annexes, there is no direct evidence of anti-competitive discussions. In this regard, however, as already indicated in recital (137), there is no reason to consider that, in a particular phase of a series of meetings, meetings and discussions occurred which were completely different from what had transpired at earlier or subsequent meetings when the meetings were attended by the same people, took place under similar external conditions and indisputably had the same primary purpose, namely to discuss the arrangements within the industrial sector concerned.[520] The Commission recalls in this regard that in the absence of alternative plausible explanations, it is entitled to rely on coincidences and indicia to establish the existence of secret cartels[521] and that the evidence should be viewed globally.[522] This is also confirmed by the Court of Justice in the *Technische Unie* case. [523]

(370) Furthermore, the evidence used in this Decision is consistent. Very importantly, [*] evidence corroborates [*] evidence and both corroborate overall the submissions of [*]. [*] evidence also corroborates [*] evidence for a certain period in time.[524] All three submissions in turn correspond with the evidence in the Commission's possession deriving from the inspections and in particular with the documents

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519 C-113/04 P *Technische Unie v. Commission* [2006], ECR I-8831, paragraphs 165-166.

520 See the joint Opinion of Mr. Vesterdorf, acting as Advocate General, in the Polypropylene judgments (Case T-1/89 [1991] ECR II-867, T-2/89 [1991] ECR II-1087, T-3/89 [1991] ECR II-1177, T-4/89 [1991] ECR II-1523, T-6/89 [1991] ECR II-1623, T-7/89 [1991] ECR II-1711, T-8/89 [1991] ECR II-1833, and T-9/89 to T-15/89 [1992] ECR II-499, II-629, II-757, II-907, II-1021, II-1155 and II-1275), section I.A.3 at II-954.

521 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 P *Aalborg Portland and others v Commission* [2004] ECR I-123, paragraphs 55-57. The fact that there are minutes of those other meetings which, at first glance, do not suggest any anti-competitive activity, is not sufficient to ground an alternative explanation for the meetings. First, these minutes exist even for meetings where ostensibly there were anti-competitive discussions. Second, the Court of First Instance has recognised that such minutes prepared in the context of covert cartels are not reliable evidence (Case T-314/01 *Commission v. Avebe* [2006] ECR II-3089, paragraph 113). Third, there is evidence on file showing that the parties deliberately used these minutes to cover up the existence of the cartel.

522 See Joined Cases T-67/00 e.a. *JFE Engineering Corp v. Commission* [2004] ECR II-2501, paragraph 180; Judgment of 8 July 2008 in Case T-54/03 *Lafarge v Commission*, paragraphs 56 and 271.

523 "*[T]he fact that such evidence was not adduced for certain specific periods does not preclude the infringement from being regarded as having been established during a more extensive overall period than those periods, provided that such a finding is based on objective and consistent indicia. In the context of such an infringement, extending over a number of years, the fact that the infringement is demonstrated at different periods, which may be separated by more or less long periods, has no impact on the existence of that agreement, provided that the various actions which form part of the infringement pursue a single aim and come within the framework of a single and continuous infringement*"; Case 113/04 P *Technische Unie* v *Commission*, [2006] ECR I-8831, paragraph 169.

524 [*].

showing continuous participation throughout the years 1996 – 1999 and placing the end of both infringements in the year 2000, that is March and September 2000 for tin stabilisers and ESBO/esters respectively.

(371) In light of the reasoning in recitals (360) to (370), it is apparent that the evidence in question is highly persuasive.

(372) The parties argue that one of the handwritten notes of [employee] concerning the meeting of 29 September 1999 has been manipulated. Specifically, they point to the fact that there are two versions of these notes in the file, one of which contains the date 29 August 1999 and the other dated 29 September 1999.[525] The argument is made that the original notes were dated 29 August 1999 and that one of the copies on file was tampered to read 29 September 1999 and thus coincide with the AC Treuhand meeting of that date.

(373) The suggestion that there was some sort of illicit manipulation is entirely groundless. [employee] attended the AC Treuhand meeting of 29 September 1999 on behalf of CECA (see Annex I ESBO/esters). This is evidenced clearly by the AC Treuhand minutes of that meeting.[526] [employee] took notes of that meeting but erroneously dated them 29 August 1999. This was already recognised at footnote 383 of the Statement of Objections which made it clear that the notes were incorrectly dated 29 August 1999. However, these notes correspond to the 29 September 1999 AC Treuhand meeting as shown by the fact that they overlap with the official minutes. All the parties had access to the two versions of the contemporaneous handwritten notes in the context of the access to the file exercise.

(374) Moreover, the Commission has always been aware of the second version of this document where the date was corrected. [*] corrected the date in question at the time of [*] when it provided the same original document with the original date ("[*]") corrected to read "[*]". The same correction was also made in the respective transcript.[527]

(375) Consequently, in view of the detail of the notes and in particular of the dates involved, the document in question is reliable and credible.

5.4.2 *AC Treuhand: its role in the infringements, its arguments in response to the Statement of Objections and the Commission's assessment*

(376) AC Treuhand, as a party to the infringements, was central to the organisation of the anti-competitive arrangements at issue in this Decision. AC Treuhand was the organiser of meetings and provided services relating to the anti-competitive arrangements. In fact, the reason that AC Treuhand was so central to the cartels was its location which was outside the Community (recitals (112) and (318)).

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525 [*].
526 [*].
527 [*].

(377) For the period until "[*]", AC Treuhand denies all the objections raised by the Commission in the Statement of Objections. [*].[528]

(378) [*].[529] [*].

(379) Furthermore, AC Treuhand contests the reliability of statements made by some other parties and more specifically by immunity/leniency applicants as regards its role during the entire period of the infringement.

5.4.2.1 The Commission's appraisal and conclusion

(380) The arguments put forward by AC Treuhand cannot be accepted. AC Treuhand actively participated in both cartels throughout the entire period. [*].

(381) Based on the facts mentioned in recitals (356) - (359), AC Treuhand played a significant role in the organisation and conduct of the meetings. AC Treuhand had precise knowledge of the anti-competitive arrangements and in fact, drafted and disseminated in a very professional way all the information on prices, quotas and customers. It was entrusted with the power to conduct audits with the cartel participants. Only the data ultimately approved by AC Treuhand became the basis of negotiations and arrangements. AC Treuhand made available its location to conceal the cartels. In both cartels, its role was that of preventing the detection of both infringements. As moderator, its role was that of encouraging compromises with a view to concluding the anti-competitive agreements. AC Treuhand provided its services, its professional expertise and infrastructure to both cartels in order to benefit from them. Such conduct can only be characterized as active participation and involvement conducive to, and facilitating, the anti-competitive arrangements and their implementation. In no circumstances, can such conduct be interpreted as AC Treuhand acting as a simple administrative and statistical secretariat.

(382) On the basis of the reasoning in recitals (356) - (359) and (376) - (387), it is concluded that AC Treuhand intended, through its own conduct, to contribute to the common objectives pursued by the participants, it was aware of the substantive conduct planned or implemented by other undertakings in pursuance of those objectives, or that it could reasonably have foreseen that conduct and that it was ready to accept the attendant risk. Therefore, AC Treuhand must be considered a perpetrator for the purposes of Article 81 of the Treaty.

(383) In doing so, AC Treuhand contributed significantly to the common objectives pursued by the participants. On that basis, AC Treuhand could not but be aware of the anti-competitive nature of the conduct at issue and was able to make a significant contribution to the committing of the infringements.

(384) Based also on the facts mentioned in recitals (380) to (383), AC Treuhand's arguments cannot be accepted.

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528 [*].

529 [*].

(385) As to AC Treuhand's point on the reliability of statements made by immunity/leniency applicants, as already stated, the fact that submissions made by immunity/leniency applicants after the material events and for the purposes of obtaining a reduction of the fine, does not mean that such submissions are devoid of their probative value. Statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence.

(386) [*].[530] On the contrary, the contemporaneous notes must be considered to have greater probative power as they came into being at the time of the infringement, when the parties to the infringement were not under investigation (*in tempore non suspecto*). The fact that the documents were drawn up immediately after the meetings and often without any thought for the fact that they might fall into the hands of third parties and/or authorities must be regarded as having great significance.[531]

(387) As to the issue of "white", "red" and "pink" papers, it should be recalled that "*given the secret nature of the cartel, the fact that no written reference is made to the existence of the cartel in the minutes of the meetings (...) is not a relevant argument for establishing that [the undertaking] was not or could not have been informed of that cartel or even less that [its] organs had not expressly or tacitly approved the anti-competitive conduct.*"[532]

5.4.3 Single, complex and continuous infringement

5.4.3.1 Principles

(388) A complex cartel may properly be viewed as a *single and continuous infringement* for the time frame in which it existed. The Court of First Instance pointed out in the *Cement* cartel case that the concept of 'single agreement' or 'single infringement' presupposes a complex of practices adopted by various parties in pursuit of a single anti-competitive economic aim.[533] 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 of the Treaty.

(389) 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

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530 See judgments: T-54/03 *Lafarge v Commission* (not yet reported) paragraph 379; and T-59/02 *Archer Daniels Midland v* Commission [2006], ECR II-3627 paras 277 and 290) where the relative unreliability of ex post statements prepared by an undertaking's employee(s) is confirmed.

531 Opinion by AG Vesterdorf in Joined Cases T-1/89 *Rhône-Poulenc SA and others. Commission* [1991] ECR II-867, section I.E.4.

532 Case T-314/01 *Avebe v Commission* [2006] ECR II-3089, paragraph 113.

533 Joined Cases T-25/95 and others, *Cement* ECR [2000] II-491, paragraph 3699.

involved was a single infringement which progressively would manifest itself in both agreements and concerted practices.[534]

(390) Although a cartel is a joint enterprise, each participant in the arrangement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries, or even cheating may occur, but will not however prevent the arrangement from constituting an agreement/concerted practice for the purposes of Article 81 of the Treaty where there is a single, common and continuing objective.

(391) 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 behaviour of the other participants or could have reasonably foreseen or been aware of them and was prepared to take the risk.[535]

(392) Although Article 81 of the Treaty does not refer explicitly to the concept of single and continuous infringement, it is settled case-law of the Courts that "an undertaking may be held responsible for an overall cartel even though it is shown that it participated directly only in one or some of the constituent elements of that cartel, if it is shown that it knew, or must have known, that the collusion in which it participated was part of an overall plan and that the overall plan included all the constituent elements of the cartel".[536]

(393) The fact that an undertaking concerned did not participate directly in all the constituent elements of the overall cartel cannot relieve it of responsibility for the infringement of Article 81 of the Treaty. Such a circumstance may nevertheless be taken into account when assessing the seriousness of the infringement which it is found to have committed. Such a conclusion is not at odds with the principle that responsibility for such infringements is personal in nature, nor does it neglect individual analysis of the evidence adduced, in disregard of the applicable rules of evidence, or infringe the rights of defence of the undertakings involved.

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534 Case T–1/89 *Rhône-Poulenc S.A. v Commission* [1991] ECR II–867, paragraphs 125–126.

535 See Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 83 (referred to in footnote 474).

536 See Cases T-147/89, T-295/94, T-304/94, T-310/94, T-311/94, T-334/94, T-348/94 *Buchmann v Commission, Europa Carton v Commission*, *Gruber + Weber v Commission*, *Kartonfabriek de Eendracht v Commission*, *Sarrió v Commission* and *Enso Española v Commission,* paragraphs 121, 76, 140, 237, 169 and 223, respectively. See also Case T-9/99 *HFB Holding and Isoplus Fernwärmetechnik v Commission*, paragraph 231.

(394) In fact, as the Court of Justice stated in its judgement in Commission v Anic Partecipazioni[537], 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 of Justice 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 a 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 Article 81 of the Treaty. 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 infringement considered as a whole.[538]

5.4.3.2 Application in the present case

5.4.3.2.1 One single infringement for tin stabilisers, one single infringement for ESBO/esters

(395) In the Statement of Objections, although it reserved the right to find separate infringements, the Commission found there were grounds to treat the anti-competitive arrangements for tin stabilisers and ESBO/esters as a single and continuous infringement. In response to the Statement of Objections, several parties[539] challenged this finding and argued that the arrangements should be seen as two separate infringements. Although there are close points of similarities between the arrangements, the Commission finds the parties' arguments well founded. In addition, the Commission conducted a further analysis and, for the reasons developed in recitals (396) to (404), it concludes that there were two parallel – but similar – infringements.[540]

(396) It should also be noted that, in the Choline chloride case, the Court of First Instance held that an infringement of Article 81 (1) of the Treaty can *"result from a series of acts or from continuous conduct which forms part of an 'overall plan' because they*

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537 Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraphs 78–81, 83–85 and 203.

538 See judgment of the Court of Justice, Joined Cases C-204, 205, 211, 213, 217 and 219/00 *Aalborg Portland A/S and Others v. Commission*, [2004] ECR I-123, paragraph 258. See also Case C-49/92 P *Commission v Anic Partecipazioni*, paragraphs 78-81, 83-85 and 203 and the judgment of 12 December 2007 in Joined Cases T-101/05 and T-111/05 *BASF and UCB v Commission*, ECR [2007] p. II-4949, paragraphs 159-161.

539 [*],[*], [*],[*], [*],[*], [*],[*], [*],[*], [*],[*]. See also and [*][*] and [*],[*].

540 In paragraph 335 of the Statement of Objections, the Commission reserved the right to find separate infringements. It also indicated that when considering the conduct in relation to each product separately, they would both constitute an infringement of Article 81 of the Treaty and Article 53 of the EEA agreement in their own right. Hence, the parties have been able to put down their point of view on whether the acts alleged in the Statement of Objections to have been committed constituted a single infringement or several infringements, see Case T-15/02 *BASF v Commission* [2006] ECR II-497, paragraphs 73 – 102.

had the same object of distorting competition within the common market."[541] The tin stabilisers and ESBO/esters infringements do not form part of an overall plan to distort competition in the common market. In this respect, the Commission relies on the criteria established by the Court of First Instance such as *"the period of application, the content (including the methods used) and, correlatively, the objective of the various agreements and concerted practices in question"*.[542] The application of the aforementioned criteria demonstrates that the tin stabiliser infringement is distinct from the ESBO/esters infringement as they are not *"complementary in nature"* and cannot be seen *"within a framework of a global plan having a single objective"*.[543]

(397) Tin stabilisers and ESBO/esters do have potential complementary uses in PVC products (see recitals (4) and (5)), but this does not, under the circumstances of this case, suffice to show a single infringement covering both products. Tin stabilisers and ESBO/esters belong to different product markets (see recitals (4) and (5)).[544] The properties, characteristics, prices and usages of the products are different and they are sold to different customers.[545] There is no evidence of economic interdependence between the two cartels. Indeed, the cartel meetings for tin stabilisers and ESBO/esters were held separately, never at the same time, and there was no pattern to link the meetings to each other. The customers discussed in the cartel meetings were also different most of the time.

(398) Furthermore, the starting and ending points of the arrangements were different (see recital (100)) which suggest a lack of interdependence. Indeed, with respect to the termination dates, the reactions of the cartels to Akcros' withdrawal were independent of each other. The tin stabiliser cartel participants planned only one meeting per year but their cartel in fact was discontinued whereas the ESBO/esters cartel decided to continue meetings as before and that cartel lasted until September 2000.

(399) [*], recitals (275) and (289)).

(400) In the circumstances of this case, there is also insufficient evidence of overlapping participation of the suppliers in both arrangements. Baerlocher and Reagens participated for tin stabilisers only, Chemson and Faci for ESBO/esters only. Akzo/Harcros/Akcros, CECA and Ciba/Chemtura participated for both products (see recital (76)). CECA also entered the two arrangements at different times (ESBO/esters in 1991 and tin stabilisers in 1994) and withdrew only from the tin stabiliser cartel in 1996/1997. Undertakings involved in the production of one product only, for instance Baerlocher and Reagens (see recitals (30), (63) and (76)), are customers for the other

541 Judgment of the Court of First Instance in Joined Cases T-101/05 and T-111/05 *BASF and UCB v. Commission* [2007] ECR II-4949, paragraph 161.

542 Judgment of the Court of First Instance in Joined Cases T-101/05 and T-111/05 *BASF and UCB v. Commission* [2007] ECR II-4949, paragraph 181.

543 Joined Cases T-101/05 and T-111/05 *BASF and UCB v. Commission* [2007] ECR II-4949, paragraphs 179, 181.

544 See also Commission Decision of 29 April 1993 in Case IV/M310 – *Harrisons & Crosfield/AKZO*, OJ C 128, 8.5.1993, paragraph 22

545 See for instance [*],[*] and [*],[*].

product which was subject to the cartel. Evidence suggesting overlapping participation in the arrangements is scarce. Reagens' participation in an ESBO/esters meeting in 1997 (see recital (268)), seems to be an isolated event occurring because Reagens at that time considered starting supplying ESBO/esters. Even though there is other evidence treating both products together or suggesting that the parties of the arrangements for one product were aware of the arrangements on the other product, that does not suffice to show that the arrangements were interdependent.[546]

(401) It is therefore concluded that there was one single and continuous infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement for tin stabilisers and a separate single and continuous infringement for ESBO/esters.

(402) Indeed, the parties to each arrangement expressed their joint intention to behave on the market in a certain way and adhered to a common plan to limit their individual commercial conduct as regards price setting, sales and customers for the respective product. At least, they knowingly adopted or adhered to collusive devices which facilitated the coordination of their commercial behaviour. The collusion for each product was in pursuit of a single anti-competitive aim of increasing and maintaining prices in the EEA for tin stabilisers and ESBO/esters above normal competitive levels and to sustaining that objective through customer and sales volume allocation in these products (see recital (100)). They had meetings and contacts on a regular basis and arranged a monitoring system to ensure compliance with the common rules were all parts of that overall plan.

(403) In this regard, it should be noted that it is natural that arrangements over a period of time involve organisational changes, a variation in the participant undertakings, their respective importance in the cartel or changes in the intensity and regularity of the meetings. The fact that undertakings leave the cartel for a period a time does not have an impact on the single and continuous character of the infringement.

(404) Given these elements, the continuous conduct for tin stabilisers and the continuous conduct for ESBO/esters, should be considered as separate single infringements which manifested themselves in both agreements and concerted practices.

5.4.3.2.2 *Continuity of both infringements; the period 1996-1997*

(405) Various parties challenge the continuity of the infringements after 1996-1997. That cannot be accepted. The duration of both infringements up until 2000 is established by the evidence. Given the overlaps in the facts relating to the two infringements, and the methodology applied, this section seeks to avoid repetition by treating both the ESBO/esters infringement and the tin stabiliser infringement, while specifying the evidence for each independently. First, the arguments of the parties will be examined. Then the Commission's conclusions will be articulated.

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[546] Certain evidence refers to both tin stabilisers and ESBO/esters (see recitals (317) and (324) among others). However, this only shows awareness on developments concerning the other product.

(406) [*], [*] and [*] claim that the anti-competitive discussions within AC Treuhand ended in 1996-1997.

(407) [*][547] states, that the arrangements concerning the "red papers" and other improper competitor contacts organised by AC Treuhand stopped around 1996-1997.

(408) [*][548] argues that the participants decided, under Chemtura's leadership, to terminate any discussions on prices and market share for tin stabilisers under the auspices of AC Treuhand in 1996 - 1997. This decision was allegedly re-confirmed at the meeting on 17-18 September 1997. That said, [*] appears to accept that it had some involvement in anti-competitive activities until 22 January 1998.[549]

(409) [*][550] [*], by letter dated 29 January 1996, Ciba informed the other participants of the PVC Tin Stabilisers Group that its participation was terminated with immediate effect. Ciba and Akcros announced that they only wanted to cooperate further within AC Treuhand provided that the quotas ended. [*] also submits that CECA terminated its cooperation with the PVC Tin Stabilisers Group with immediate effect as of 1 April 1996.

(410) [*] [*] [551] [*], [*].[552] [*].[553] Therefore, [*] accepts that the cartel continued after 1996 and has not provided the end date of its participation.

(411) In addition to [*], [*] and [*], and in response to the Statement of Objections and during the Oral Hearing, several other parties challenged the Commission's findings as regards the evidence for the post 1996 - 1997 period.[554]

(412) Those arguments cannot be accepted. It does appear that the methodology and perhaps even the exact content of the collusions within AC Treuhand changed in 1996 - 1997 for both products. Indeed, in 1996, the participant undertakings decided to discontinue the "audit" function of AC Treuhand (recitals (116), (254) and (255); see also recital (419) on the "audits"). It also appears that the "red" papers were not used in the last two years of the cartels. This is evidenced in [employee] statement (recital (317)) concerning both tin stabilisers and ESBO/esters. Moreover, evidence in the Commission's file suggests that the participants did not use the "pink" papers in 1998 as they were considering their re-introduction in that year and the conditions for such re-introduction (see recital (276)). There are also instances where it can be observed that the degree of cooperation between the parties may not have been as intense in

547 [*].
548 [*] reply of 31 October 2007 to the Commission's Article 18 request for information of 8 October 2007, [*].
549 In fact, in [*] reply of 31 October 2007 to the Article 18 request for information of 8 October 2007, [*], [*] originally denied that any AC Treuhand meetings took place after 1997, pp. 6 and 9. Given the weight of the documentary evidence establishing meetings up until 2000, [*] has backed down from that outright denial ([*] response to the Statement of Objections, [*]).
550 [*].
551 [*].
552 [*].
553 [*].
554 [*],[*]; [*],[*]; [*],[*]; [*][*].; [*],[*]and [*],[*].

certain stages of the infringements. Such a situation arose with the introduction of Chemtura as newcomer in 1998 (recitals (273) and (283)) and its price increase announced by press release (see recitals (275) and (289)). Also, there are certain indications of competitive conduct on the markets in the later stages of the cartels although that cannot counteract the evidence on the file showing that there were ongoing anti-competitive arrangements (albeit not always implemented fully). In a long lasting cartel, it is typical that the intensity and the degree of cooperation amongst the participants varies.

(413) However, the overall plan and purpose of the cartels that materialised through the various types of anti-competitive activities (see recital (100)) continued from 1996 and until at least March 2000 (for tin stabilisers) and September 2000 (for ESBO/esters).

(414) [*].

(415) As to the overall plan and purpose of the cartels and as a legal context to the evidence, it should be pointed out that in *Technische Unie v Commission*, the Court of Justice held that *"[T]he fact that such evidence was not adduced for certain specific periods does not preclude the infringement from being regarded as having been established during a more extensive overall period than those periods, provided that such a finding is based on objective and consistent indicia. In the context of such an infringement, extending over a number of years, the fact that the infringement is demonstrated at different periods, which may be separated by more or less long periods, has no impact on the existence of that agreement, provided that the various actions which form part of the infringement pursue a single aim and come within the framework of a single and continuous infringement".*[555]

(416) More specifically, a number of elements demonstrate that the infringements continued until 2000.

(417) First, and most importantly, contemporaneous evidence found during the inspections and submitted by the participant undertakings shows that anti-competitive activities on tin stabilisers and ESBO/esters were still ongoing right up until 2000 (see recital (419) in more detail).

(418) There were numerous anti-competitive contacts and meetings during that time period involving precisely the same parties who claimed that the anti-competitive meetings had ceased (see recitals (257) - (323), Annex I). In addition to the meetings organised by AC Treuhand, there were other intense bilateral and multilateral meetings or contacts between the parties to the respective cartels during the relevant period (see for example recitals (263) and (265) for tin stabilisers and (268) for ESBO/esters).

[555] Case 113/04 P *Technische Unie* v *Commission*, [2006] ECR I-8831, paragraph 169.

(419) The continuation of the anti-competitive behaviour throughout the relevant period is proven by the following evidence laid out in the factual chronology:

(a) With regard to Tin stabilisers, six AC Treuhand meetings took place in 1996. The participant undertakings were Akcros, Baerlocher, CECA, Ciba, Reagens and AC Treuhand (recital (242)). The evidence includes handwritten notes dated 9 January 1996 and 11 June 1996 which show discussions between competitors on prices (recitals (245) and (249)).

(b) With regard to ESBO/esters, four meetings organised by AC Treuhand took place in 1996. The participant undertakings were Akcros, CECA, Chemson, Ciba, Faci and AC Treuhand (recital (252)). The evidence includes hand written notes dated 16 July 1996 which show discussions between competitors on prices and on a change in the cooperation in the sense that "audits" would no longer take place (recital (255)). On 6 November 1996, the cartel was also expanded when Faci attended its first AC Treuhand meeting (recital (256)).

(c) With regard to Tin stabilisers, eight meetings and contacts took place in 1997, including four AC Treuhand meetings. The participants were Akcros, Baerlocher, CECA, Ciba and Reagens (recital (257)). The evidence includes contemporaneous handwritten notes dated 11 and 12 March 1997 which show quota allocations and deviations for tin stabilisers (recitals (258), (260)). Contemporaneous notes of a tin cartel meeting of 17 September 1997 state "[*]" (recital (264)). [*] statement that the anti-competitive arrangements came to an end in 1996, contradicts [*] own later statement that during a meeting dated 12 March 1997, [employee] disclosed to the participants the individual sales figures of each participant as well as the diverging amounts from the former agreed quotas (see recitals (260) to (261)).[556]

(d) With regard to ESBO/esters, four meetings took place in 1997, including 3 AC Treuhand meetings. The participant undertakings were Akcros, CECA, Ciba, Chemson, Faci and AC Treuhand (see recital (267)). The evidence includes contemporaneous notes dated 14 October 1997 and marked "[*]". The notes show discussions on quota allocation and prices as well as other anti-competitive arrangements (recital (268)).

(e) With regard to Tin stabilisers, nine meetings and contacts took place in 1998, including eight AC Treuhand meetings. The participant undertakings were Akcros, Baerlocher, CECA, Ciba/Chemtura, Reagens and AC Treuhand (recital (270)). The evidence includes contemporaneous handwritten notes dated 11 February 1998 which show discussions between competitors on prices and customer allocation (recital (272)). In 1998, [*] (recital (275)). [*]

556 [*] itself took detailed notes detailing the information provided (recital (260)).

(recital (275)). Handwritten notes dated November 1998 make reference to the “[*]” with the wording “[*]” [emphasis added] (see recital (276))

(f) With regard to ESBO/esters, at least eight AC Treuhand meetings took place in 1998. Additional meetings took place, such as meetings from 24 to 26 November 1998 in Antwerp (recitals (278), (290) to (293)) The participant undertakings were Akcros, CECA, Ciba/Chemtura, Chemson, Faci and AC Treuhand (see recital (278) and footnote 416). The evidence includes handwritten notes dated 12 March 1998, 20 May 1998, 25 May 1998, 20 July 1998, 14 August 1998, 20 October 1998 and November/December 1998. The notes show discussions between competitors on market shares, quotas, prices and customer allocation (recitals (279) to (282), (284), (285), (287), (288) and (295) to (297)). The evidence also includes contemporaneous handwritten notes of meetings in Antwerp from 24 to 26 November 1998. Those notes show discussions between competitors on sales volumes, quotas, market shares (recitals (290) to (293)). Moreover, in 1998, [*] (recital (289)). [*]." (recital (289)).

(g) With regard to Tin stabilisers, nine AC Treuhand meetings took place in 1999. The participant undertakings were Akcros, Baerlocher, CECA, Chemtura, Reagens and AC Treuhand (see recital (299)). The evidence includes contemporaneous handwritten notes dated 23 February 1999 and 27 April 1999 which show discussions between competitors on prices (recitals (301) and (302)). On 19 February 1999, in an e-mail, Akcros' UK [*] writes that "[*]" (recital (300)). [*] [*] (recital (298)).

(h) With regard to ESBO/esters, nine meetings took place in 1999, including eight AC Treuhand meetings. The participant undertakings were Akcros, CECA, Chemson, Faci, Chemtura and AC Treuhand (see recital (305)). The evidence includes contemporaneous handwritten notes dated 26 January 1999, 27 May 1999 and 28 and 29 September 1999 which show discussions between competitors on sales volumes and prices (recitals (306), (307) and (309)). Also, contemporaneous evidence from September to November 1999 shows a successful price increase of 10% as well as ESBO/esters’ price fixing to the price of DM 2 per kilo (recitals (308), (310) to (314)). [*] [*] (recital (298)).

(i) With regard to Tin stabilisers, two AC Treuhand meetings took place in 2000. The participant undertakings were Akcros, Baerlocher, CECA, Chemtura Reagens and AC Treuhand (recital (316)). With regard to ESBO/esters, five AC Treuhand meetings took place in 2000. The participant undertakings were Akcros, CECA, Chemson, Faci and Chemtura (recital (316)). The evidence of anti-competitive discussions during those meetings includes the [*] memo of 16 February 2000 found during the inspections (see recital (317) which confirms that anti-competitive discussions were taking place during those meetings. That memo states among other things "[*]" (recital (317)). The handwritten notes which served

as a basis for the memorandum states among other things: "[*]" (see recital (318)). Akcros distanced itself from the AC Treuhand meetings on tin stabilisers on 21 March 2000 and on ESBO/esters on 22 March 2000 (recitals (319) and (320)). An e-mail dated 17 May 2000 states "[*]" and "[*]" (see recital (321)). As regards ESBO/esters, the minutes of the meeting on 26 September 2000 specify that as of that date "[*]" (see recital (323)).

(420) Moreover, evidence provided in [*], shows that both cartels continued well after 1996 - 1997. That evidence for the infringements is as follows:

a) With regard to Tin stabilisers, [*] explained that the cartel continued until 2000.[557] [*] provides evidence that it continued until at least 27 April 1999 and does not exclude that the cartel continued later ([*]) (see recital (302)).

b) With regard to ESBO/esters, [*] explained that the cartel continued until 2001.[558] [*] provides evidence that it continued until at least 27 May 1999 (see recital (307)) and [*] provides evidence that it continued until 29 September 1999 (see recital (309)). Moreover, [*].[559] Also [*]".[560] It should be noted that Faci joined the ESBO/esters cartel in late 1996, that is, during or after the change of methodology of the cartel.

(421) In this context, the Commission rejects the argument made by [*] that the end date of the ESBO/esters cartel must be set by reference to the last proven meeting (29 September 1999 in [*]'s view). The jurisprudence shows that the end date of an infringement can come a certain time after the last proven cartel contact.[561] The duration of a cartel must be established by reference to the conduct of the participants and, in the absence of public distancing, it must be assumed that participants take account of information exchanged with their competitors for the purposes of determining their conduct on that market.[562] As discussed further below, there is certainly no evidence of the anti-competitive arrangements being terminated in any of the meetings established for 1999. Also, the Commission considers that in late 1999 and early 2000 there is evidence of the parties in both infringements acting on the basis of information exchanged in an anti-competitive manner in an attempt to obtain price increases (see recitals (303), (308), (309), (312), (314)).

(422) Furthermore, there is no evidence of any undertaking distancing itself publicly, openly and unequivocally from all the elements or participants of the cartels in 1996 - 1997.

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557 [*] states: "[*]", see [*].

558 [*] states:"[*]". [*], see [*].

559 [*].

560 [*]. The Community courts have held that the mere fact of exchanging competitors' information which an independent operator keeps strictly secret as confidential business information is sufficient to demonstrate that it had an anti-competitive intention (See Case T-12/89 *Solvay v Commission* [1992] ECR II-907, paragraph 100; T-202/98 *Tate & Lyle v Commission* [2001] II-2035, paragraph 66).

561 Case T-59/99 *Ventouris v Commission* [2003] ECR II-5257, paragraphs 191-193; see also Joined Cases T-101/05 and T-111/05 *BASF AG and others v Commission* [2007] ECR II-4949, paragraph 187.

562 See for example Case C-199/92 P *Hüls AG v Commission* [1999] ECR 1-4287, paragraph 162.

In stark contrast, the file shows that where undertakings did want to withdraw from the cartels, the evidence trail is invariably clear in that regard.

(423) Notably, evidence exists showing that Akzo distanced itself from the cartels, first during the AC Treuhand meeting on tin stabilisers on 21 March 2000 and, second, during the AC Treuhand meeting on ESBO/esters on 22 March 2000. Moreover, in its subsequent letter in writing on 5 June 2000, which covered both tin stabilisers and ESBO/esters, Akzo confirmed its withdrawal. Both [*] memo of 16 February 2000 (recital (317)) and the internal e-mail of 17 May 2000 (recital (321)) are drafted in order to ensure withdrawal from AC Treuhand in 2000 from both groups of products (with regard to the evidence from [*] in 2000, see also recitals (427) to (434)).

(424) There is also evidence showing that CECA interrupted its participation in the tin stabilisers cartel. CECA distanced itself from the tin stabilisers anti-competitive arrangements as of 1 April 1996 until 9 September 1997 (see recitals (247), (263) and (272)).[563] No other undertaking distanced itself at that stage.

(425) The other undertakings and in particular [*][564] acknowledged CECA's termination of its participation in the tin stabilisers arrangements. That shows that apart from CECA, the other parties continued their participation uninterrupted. CECA re-joined the tin stabilisers cartel in September 1997 (see recital (263)) and re-joined the AC Treuhand meetings in February 1998 (see recital (272)). [565]

(426) Furthermore, concerning Ciba, there is evidence which at first seems to suggest that it stopped its participation in the AC Treuhand meetings on 29 January 1996 in both groups of products (see recitals (246) and (253)). However, [*] does not claim that it stopped participating at that point. Moreover, there is copious evidence showing that Ciba participated in AC Treuhand meetings following 29 January 1996. In fact, in [*][*] contemporaneous documents showing that it continued participating in anti-competitive arrangements (in relation to tin stabilisers see recitals (99) and (264), in relation to ESBO/esters see recitals (254) to (256)). Moreover, handwritten notes dated January 1996 show discussions between competitors on volumes and prices for tin stabilisers (see recital (244)). A [*] note dated June 1996 reports on a conversation on tin stabilisers between competitors as follows: “[*]” (see recital (249)). The note shows that, at that time, [*] considered [*] part of the arrangement. There is evidence of Ciba's uninterrupted participation from February 1996 until May 1998 when it exited the relevant markets (see recitals (242) to (245), (250), (257) to (261), (263), (264), (270) and (272) in relation to tin stabilisers and recitals (252), (254) to (256), (267), (268), (278) to (282) in relation to ESBO/esters).

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563 [*] acknowledges that its participation in the infringement restarted on 9 September 1997 with a bilateral meeting between CECA and Ciba (see recital (263)).

564 See recital (247).

565 CECA restarted participating in the multilateral meetings as of 11 February 1998. CECA had previously had a bilateral meeting with Ciba on 9 September 1997 (see footnote 563); [*], reply of 14 November 2007 to the Commission’s Article 18 request for information of 8 October 2007, [*]. The Commission also possesses evidence showing that CECA regularly attended AC Treuhand meetings from February 1998 until March 2000 for tin stabilisers and September 2000 for ESBO/esters.

(427) Finally, it is important to consider the evidence surrounding Akcros' withdrawal in 2000 in more detail. Overall, Akcros' withdrawal from both cartels can only be explained by the fact that from its own perspective, there remained ongoing anti-competitive behaviour at the respective meetings. That is indeed admitted in the memorandum of 16 February 2000 drafted by [employee].[566] It is for that reason that [employee] recommended that Akcros no longer attend the meetings and proposed awareness training in the context of compliance.

(428) Moreover, Akcros saw fit to follow-up with a formal letter to AC Treuhand on 5 June 2000, confirming its withdrawal from the cartels. The fact that it considered it necessary to do so, almost two months after the public distancing at the meetings of 21 and 22 March 2000, shows the high level of concern within the Akzo Group regarding its participation and the need to have a clear withdrawal (see recital (321)). The letter specifically notes that "[*]".[567]

(429) The withdrawal statement of Akcros should be seen and understood in the context of anti-competitive meetings that took place, since 1987 for tin stabilisers and 1991 for ESBO/esters, in a "[*]" place outside Community jurisdiction and with the involvement of AC Treuhand. The statement also shows that the purpose of the meetings extended beyond sales statistics which could have been communicated and obtained without those meetings (indeed, Akzo specifically noted that, while it was withdrawing from the meetings, it would continue to provide monthly and quarterly sales data). It should also be noted that Akzo's statement that it would continue to supply its monthly and quarterly sales figures and its concern that the meetings could be "[*]" (see recital (321)) is in stark contradiction to the argument by [*], [*], [*] and [*] for tin stabilisers and [*], [*] and [*]for ESBO/esters that the purpose of the meetings after 1996 - 1997 was purely an exchange of information where no anti-competitive activity was conducted. Akzo did not want its representatives to meet with competitors and decided to distance itself from such gatherings (see recitals (317) to (321)). That decision can only be explained by the fact that, in Akzo's view, improper discussions did take place amongst competitors whilst together.

(430) Certain parties have argued that the Commission has interpreted [employee]memorandum[568] in a manner favourable to its own case. That is incorrect. The Commission's conclusions in that regard are based on a reading of that document as a whole, and in conjunction with the other contemporaneous evidence on file, including the considerable evidence demonstrating the existence of the infringements from 1996 to 2000, the handwritten notes prepared before that memorandum was drafted and the evidence of what Akzo actually did at the time.

(431) As explained in recital (418), [employee] memorandum contains a number of directly incriminating statements.[569] Those statements must be seen as credible because the

566 The document ([*]) – which is dated 16 February 2000 - reads*: "*[*]*".*
567 [*].
568 See in particular [employee]'s response to the Statement of Objections, [*];
569 [*] (recital (317)).

author would not incriminate itself otherwise.[570] Moreover, those statements are consistent with the other contemporaneous evidence on file.

(432) [employee] memorandum may seem self-contradictory in parts and also contains certain statements softening the admission ("[*]", "[*]" and "[*]"[571]). However, those statements do not show that there were no cartels. They may suggest that the cartel operated in a different fashion in the past but do not prove that the cartels were terminated by the time the memorandum was drafted in February 2000. In other words, even if there was a change in the dynamic of the cartel, that does not mean that the cartel had ceased. Indeed, in his memorandum, [employee] writes that "[*]".[572] A "[*]" relationship after a certain point in time does not mean a competitive one.

(433) In any case, the Commission has considerable doubts with regard to the reliability of any statements in the memorandum suggesting that the cartels no longer operated in the context of the AC Treuhand meetings. It needs to be recalled that the memorandum in question was prepared in the context of an ongoing internal investigation at Akzo and that certain individuals within that undertaking may have been attempting to limit the degree of their involvement in cartel activities. Indeed, the suggestion in the memorandum that cartel activities within the context of AC Treuhand meetings had ended years beforehand is contradicted by considerable direct contemporaneous evidence of ongoing infringements during the period 1996-2000 (see recitals (412) - (429)). Furthermore, the memorandum quoted in recital (317) is less direct with respect to the anti-competitive arrangements than the underlying handwritten notes which refer directly to the need to raise prices and the fact that the meetings took place outside the Community to avoid detection (see recital (318)). Moreover, the fact that there was an attempt, in the memorandum, to limit the damage (whether expressly by [employee] or because [employee] was mis-informed as to the real situation) is supported by the draft letter to AC Treuhand of 17 May 2000 (see recital (321)). That letter, which was also drafted by [employee], shows the tendency to hide any suspicion of anti-competitive behaviour and contains the sentence: "[*]" That statement supports the conclusion that [employee] was drafting documents with one eye on the future at the relevant time.

(434) Akzo's actions speak for themselves and support the Commission's conclusion that anti-competitive behaviour was ongoing. Thus Akzo considered it necessary to withdraw from the AC Treuhand meetings. It did so by publicly distancing itself at respective meetings on the tin stabilisers cartel and the ESBO/esters cartel in March 2000. Moreover, Akzo was so concerned about the issue that, two months later, it considered it necessary to follow-up by sending a formal letter to AC Treuhand which was carefully drafted by Akzo employees. Akzo also emphasised the importance of compliance training so that employees would "[*]" (see the [employee] memorandum, recital (317)).

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570 Joined Cases T-67/00 e.a. *JFE Engineering Corp v. Commission* [2004] ECR II-2501, paragraph 212.

571 [*].

572 [*].

(435) Incidentally, the participants that allege that the cartels ceased in 1999, or earlier, claim that they still used AC Treuhand as a statistics-collecting body and continued to travel outside the Community to discuss market issues. It is undisputed that the tin stabiliser participants attended AC Treuhand meetings until 21 March 2000 and that the ESBO/Esters participants attended until 26 September 2000. Notably, they were often represented by the same individuals from their respective companies despite the alleged downgrading of the cartel. However, none of the participants has explained why they would continue to use such a body based outside the Community, rather than a body within the existing CEFIC industry body. It appears commercially irrational for those companies to expend the cost and effort of working through AC Treuhand when there were other industry bodies which were well adapted to that function and more inclusive in terms of membership. If there were legal information exchanges, those could have taken place within CEFIC and discussions could have taken place during existing meetings, without the need to duplicate resources by having a parallel system. Indeed, once the cartels ended, the parties did indeed adopt the rational conduct by exchanging information within CEFIC. Thus, the minutes of the final meeting of the AC Treuhand ESBO and Ester Group state that a new subgroup called ESBA would be set up for the statistical exchange.

(436) It is therefore concluded that the anti-competitive activities on both groups of products organised by AC Treuhand continued after 1996 - 1997. The last meeting of the PVC Tin Stabilisers Group organised by AC Treuhand took place on 21 March 2000. The last meeting of the ESBO and Ester Group organised by AC Treuhand took place on 26 September 2000.

(437) In response to the Statement of Objections, which found that Arkema France (CECA) had uninterruptedly participated in a single and continuous infringement involving tin stabilisers and ESBO/esters between 11 September 1991 and 26 September 2000, [*][573] pointed out that there were two separate infringements. It argued that it did not participate in the infringement for tin stabilisers during the period 1 April 1996 to 9 September 1997 and consequently, that the first part of the tin stabilisers infringement would be time barred. The Commission concludes that Arkema France (CECA): (a) participated in the tin stabilisers cartel from 16 March 1994 until 31 March 1996 (the "[*]"); (b) withdrew from that cartel in the period from 1 April 1996 to September 1997, see recitals (247), (263) and (272); and (c) participated again in the cartel from 9 September 1997 until 21 March 2000 (the "[*]"). It is appropriate to make a finding that Arkema France (CECA) participated in the cartel on tin stabilisers during the first period of infringement because Arkema France (CECA) later rejoined the same cartel. Moreover, this finding is appropriate with a view to discouraging repeat infringements by Arkema France (CECA) and the interest of enabling any injured parties to bring matters before national civil courts. However, in the exercise of its discretion, an in view of the particular circumstances of the present case, the Commission will not seek to impose a fine on Arkema France (CECA) for the first period of infringement.

573 [*].

5.4.4 Restriction of competition

5.4.4.1 Principles

(438) The anti-competitive behaviour in the present case had the object and effect of restricting competition in the Community and the EEA.

(439) Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement expressly include as restrictive competition agreements and concerted practices which directly or indirectly fix selling prices or any other trading conditions or allocate markets or sources of supply.

5.4.4.2 Application in the present case

(440) Each of the cartels has to be considered as a whole and in light of the overall circumstances.

(441) With respect to the tin stabilisers cartel, the principal aspects of the complex of agreements and concerted practices which can be characterised as restrictions of competition are: fixing of prices (including price increases, target prices and minimum prices, see recital (343)); allocating markets through sales quotas, see recital (344); allocating and sharing of customers, see recital (345); and exchanging commercially sensitive information, in particular on customers, production and sales, see recital (346).

(442) With respect to the ESBO/esters cartel, the principal aspects of the complex of agreements and concerted practices which can be characterised as restrictions of competition are: fixing of prices (including price increases, target prices and minimum prices, see recital (350)); allocating markets through sales quotas, see recital (351); allocating and sharing of customers, see recital (352); and exchanging commercially sensitive information, in particular on customers, production and sales, see recital (353).

(443) Those agreements and concerted practices had as their object the restriction of competition within the meaning of Article 81 of the Treaty and Article 53 of the EEA Agreement. They are described in detail in section 4 of this Decision. The characteristics of the horizontal arrangements under consideration in this case essentially constitute market sharing by allocation of sales volumes and price fixing, of which agreeing upon price increases or a certain price level are typical examples. By planning common action on price initiatives, the objective of the undertakings was to eliminate the risks involved in any unilateral attempt to increase prices, notably the risk of losing market share, since the members of the cartels were able to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors was going to be[574]. Prices being the main instrument of competition, the various collusive arrangements and mechanisms adopted by the participants were all

[574] Case 8/72 *Vereeniging van Cementhandelaren* v *Commission* [1972] ECR 977, paragraph 21.

ultimately aimed at inflating prices for the benefit of the suppliers and above the level which would be determined by conditions of free competition. Ceasing to determine their policy in the market independently, the cartel members thus undermined the concept inherent in the provisions of the Treaty relating to competition[575].

(444) The anti-competitive object of the parties is also shown by the fact that they took deliberate action to conceal their meetings and to avoid detection of their agreements and documents (*"white"* papers for example, see also recital (128)), in particular through the organisation and location of the AC Treuhand meetings outside the Community.[576] In addition, to that effect, they used "code-names" (*"white"*, "*red*" and "*pink*" papers), and made efforts to avoid being in possession of documents pertaining to anti-competitive behaviour". The anti-competitive object applied to both infringements.

(445) Regarding the anti-competitive object of the exchange of information, the arrangements for both groups of products have to be seen in their context and in light of all the circumstances. They served to attain the objective of increasing and maintaining prices above normal competitive levels and sustaining that objective through customer and sales volume allocation; an objective that was not based on competition and enabled the undertakings to adapt their strategy to the information received from competitors.

(446) It is settled case-law that, for the purpose of application of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement, there is no need to take into account the actual effects of an agreement when it has as 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 proven.[577]

(447) There is also evidence of implementation and indeed monitoring of the anti-competitive arrangements:

(a) The implementation of decisions relating to the cartel was ensured usually through meetings and other contacts between the representatives of the participant undertakings (see section 4);

(b) The agreements adopted between the higher-level representatives of the undertakings, at the dinners, were put into operation by the employees of the undertakings who discussed the more detailed and specific issues of the agreements (see recital (114) on tin stabilisers (and ESBO/esters), recitals (288) and (315) on ESBO/esters);

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575 Case T–311/94 *BPB de Eendracht* v *Commission* [1998] ECR II–1129, paragraph 192.

576 Inspection document at [*] (typed memorandum): "[*]" (emphasis added, see recital (317)).

577 Case T-62/98 *Volkswagen AG vs Commission* [2000] ECR II-2707, paragraph 178.

(c) The agreements discussed at the Fides/AC Treuhand meetings (mainly in Zürich) were implemented through the meetings and other contacts at local "EEA country" level (see recital (132), on tin stabilisers and ESBO/esters);

(d) The fact that the participants met regularly over a period ranging from 4 years (for certain participants) to 13 years (for certain other participants) to discuss prices, quotas and customers is an indication that their arrangements must have been successful;[578]

(e) There was regular checking of the deviations from the agreements as well as "audits" up until 1996 (see recital (116) (both products) and recitals (254) and (255) on ESBO/esters);

(f) Implementation also took the form of compensation to participant undertakings where a member increased its market share beyond the agreed market shares (see recitals (118) (tin stabilisers), (119) and (317) (both products). In addition, where decisions on market shares and customer allocation were not correctly followed because one member took a customer account from another member, that account would be given back to the aggrieved party which would be, thus, compensated for the initial “[*]”;

(g) There is also some evidence of communications referring to status of price cooperation in the market (see recital (300) on tin stabilisers and recitals (310) to (314), on ESBO/esters);

(h) As to the stabilisation of market shares, the regular review of the market at meetings, as well as the AC Treuhand monitoring and audit mechanisms allowed for the monitoring of eventual deviations, in particular regarding customer allocation, in order to re-establish the agreed positions of the participants (see recitals (281) and (296), on ESBO/esters and recitals (238) and (244), on tin stabilisers).

(448) [*] argues that it acted competitively on the market on tin stabilisers, that it did not offer the prices suggested by Fides and that in fact, it increased its market shares and sales volumes during the Fides/AC Treuhand years.[579]

(449) However, if an undertaking is present at meetings or participated in contacts with competitors that have a manifestly anti-competitive purpose, it may be held liable for an infringement even where its own conduct on the market does not comply with the conduct agreed. Unless that undertaking openly, unequivocally and publicly distances itself from what is agreed and from all the participants of the cartel, it will be considered to be a party even if it does not in fact abide with the outcome of the

578 Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others v Commission* [1999] ECR II-931, paragraph 748.

579 [*] reply dated 31 October 2007 to the Commission’s Article 18 request for information dated 8 October 2007, [*].

meetings.[580] That must be done in such a way that the other participants are aware that it does not subscribe to the conclusions of meetings and will not act in conformity with them or is participating in the meetings in a spirit which is different from theirs.[581] More particularly, 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).[582]

(450) There is considerable evidence showing that Reagens participated in the cartel meetings and complied with the overall objective of the tin stabilisers cartel.[583]

5.4.5 Claims regarding the Commission's investigation and alleged violation of rights of defence

(451) In response to the Statement of Objections, several parties made claims regarding the Commission's investigation and argued that their rights of defence were violated.[584] In summary, they challenge the Commission for not having acted within a reasonable time and state that the excessive length of the investigation adversely affected their rights of defence.

(452) The parties' assertion that there was irregularity (such as unreasonable delay in the investigation) can only lead to a claim of violation of rights of defence if the Commission was in fact responsible for that irregularity.[585] Moreover, in order for there to be a violation of the rights of defence, it needs to be shown that the company in question experienced difficulties in defending itself effectively as a result of the procedural irregularity.[586] On that basis, the following section addresses the parties'

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580 Case T-334/94 *Sarrió* v *Commission* [1998] ECR II-1439, paragraph 118. It is, indeed, 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*"; See also Case T-141/89 *Tréfileurope Sales v Commission* [1995] ECR II-791, paragraph 85; Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 232; and Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-103/95 and T-104/95 *Cimenteries CBR SA and others v Commission* [2000] ECR II-491, paragraph 1389.

581 Case T-7/89 *SA Hercules Chemicals NV v Commission* [1991] ECR II-1711, paragraph 232, Case T-12/89, *Solvay et Compagnie SA v Commission* [1992] ECR II-907, paragraph 98, Case T-141/89, *Tréfileurope Sales SARL v Commission* [1995] ECR II-791, paragraphs 85 and 86, Case T-15/89, *Chemie Linz AG v Commission* [1992] ECR II-1275, paragraph 135, Case T-61/99, *Adriatica di Navigazione S.p.A. v Commission* [2003] ECR II-5349, paragraph 135, Joined Cases T-25/95 *Cimenteries CBR SA and others v Commission* [2000] ECR II-491, paragraph 3199. See also Case C-199/92, P *Hüls AG v Commission* [1999] ECR I-4287, paragraph 155 and Case C-49/92 P, *Commission v Anic Partecipazioni S.p.A.* [1999] ECR I-4125, paragraph 96, C-204/00 P *Aalborg Portland A/S and others v Commission* [2004] ECR I-123, paragraphs 81-86 and Joined Cases T-259/02 *Raiffeissen Zentralbank Österreich and others v Commission* (Lombard Club), [1966] ECR II-5169, paragraph 486.

582 This was the case for Akzo/Akcros which publicly announced at the AC Treuhand meetings that they did not wish to participate in the meetings (recitals (317), (319) - (321)) and sent letters to that effect.

583 See recitals (194), (216), (217), (235), (258), (260), (276), (301), (302) and (316).

584 [*],[*]; [*],[*]; [*],[*]; [*],[*]; [*],[*], [*],[*]; [*],[*]; [*], letter of 03.07.2009, [*]; [*],[*]and [*], [*].

585 Case C-113/04 P *Technische Unie BV and others v Commission* [2006] ECR I-8831, paragraphs 45-48.

586 Case C-113/04 P *Technische Unie BV and others v Commission* [2006] ECR I-8831, paragraph 61 (see also paragraph 69).

claims on procedural irregularities first (section 5.4.5.1) and then the parties' claims regarding the violation of their rights of defence (section 5.4.5.2).

5.4.5.1 Alleged procedural irregularities

(453) The parties challenge the Commission for not having acted within a reasonable time period (see recital (451)). In particular, they claim that the Commission could - and should - have advanced its investigation during the judicial proceedings referred to in recitals (84) and (86)-(90). As indicated in recital (97), [*], [*], [*], [*], [*], [*] and [*] submitted, after the Oral Hearing and in response to a statement made by the Commission during the Oral Hearing, additional comments on the length of the investigation.

(454) According to established case-law, the reasonableness of the period of the Commission's investigation is to be examined in the specific circumstances of the case, in particular, its importance, its complexity and the conduct of the parties.[587] That list is not exhaustive and one of those factors may justify a duration which is prima facie too long.[588] Given the circumstances of the case at hand, notably the appeal before the Court of First Instance, the importance of the case and its complexity, the Commission cannot be considered to bear responsibility for any unreasonable delay. In fact, as described in recitals (455) to (457), the Commission has acted reasonably throughout the investigation, in particular by awaiting the judgment of the Court of First Instance.[589] It cannot be accused of inaction as a "*result of lack of diligence*".[590]

(455) In this regard, it should be noted that in its Decision of 8 May 2003 addressed to Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd concerning a claim of legal privilege in the context of an investigation pursuant to Article 14(3) of Council Regulation No 17 in Case No COMP/E-1/38.589, C(2003) 1533 final,[591] the Commission undertook to not open the envelope containing Set A documents and to not add Set A documents to its file before the parties had the opportunity to lodge an appeal against that Decision. Moreover, during the hearing on interim measures, the Commission also informed the Court of First Instance that the investigation had been suspended.[592] Further to the parties' appeal and request for interim measures, in their respective

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587 Joined Cases T-305/94 *Limburgse Vinyl Maatschappij (LVM) and others v Commission* [1999] ECR II-931, paragraph 187.

588 Judgment of 3 September 2009 in Joined Cases C-322/07 P *Bolloré and Others v Commission*, not yet reported, paragraph 145.

589 Judgment of 17 September 2007, in Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemcials Ltd and Akcros Chemicals Ltd v Commission* [2007], ECR II-3523.

590 Joined Cases C-238/99 P *Limburgse Vinyl Maatschappij (LVM) a. o. v Commission* [2002], ECR I-8616, paragraph 144.

591 See recital (85)

592 Order of the President of the Court of First Instance of 30 October 2003 in Joined Cases T-125/03 R and T-253/03 R *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission* [2003], ECR II-4771, paragraph 185: "*At the hearing, however, the Commission stated that the uncertainty in which it was placed, as regards the content of the documents in question, caused major problems in allocating its resources and defining its priorities and consequently, obliged it to suspend its investigation.*"

orders, the President of the Court of First Instance and the President of the Court of Justice took note of the Commission's undertaking not to allow third parties to have access to the Set A and Set B documents. The orders also relay the Commission's statement that if the documents were held to be legally privileged by the Court of First Instance – thus rendering the Commission's decision unlawful –, "[*]".[593] In addition, the Commission twice submitted applications to the Court of First Instance for priority treatment to be given to the procedure before that court in Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission*,[594] explaining that it was unable to use the documents in question pending the ruling in the case and that that was causing delays in the administrative procedure.

(456) These elements meant that first, the Commission could not have finalised its investigation at least with regard to these documents before the Court of First Instance determined whether they were legally privileged. Within that context, it should be highlighted that the Set A documents and the handwritten notes of Set B are documents that place the end of the infringements in the year 2000 in connection to the products dealt with by the present proceeding, namely, tin stabilisers and ESBO/esters. Thus, those documents are very important for the Commission's investigation as they refer to two pivotal elements of an investigation, namely, duration of the infringements and products concerned. As the Commission could not have shown the documents to third parties and could not have used them as evidence before the Court of First Instance pronounced its judgment[595] (see recitals (87) and (88)), it could not have carried out its investigation at least with regard to the actual duration of the infringements in connection to the products concerned.

(457) While the Commission could, in theory, have issued a Statement of Objections without using Set A and Set B documents, it would have considerably damaged the Commission's own case. Indeed, as described in recital (456), the documents (established *in tempore non suspecto*) contained elements that were pivotal to the Commission's investigation. Moreover, in response to the Statement of Objections, certain parties now argue that the Set A and Set B documents are exculpatory in part. Although that argument is not accepted (see recitals (430)-(436)) it is another reason why the Commission acted reasonably by not issuing a Statement of Objections in advance of the judgment on 17 September 2007 in Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission*. Indeed, the possible exculpatory value of those documents, even if it can be argued that they have such value, means that it would have been a potential violation of the rights of

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[593] See Commission Decision of 8 May 2003 addressed to Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd, C(2003) 1533 final, referred to in recital (85), order of the President of the Court of First Instance of 30 October 2003 in Joined Cases T-125/(03 R and T-253/03 R, Akzo Nobel and Akcros Chemicals v Commission, referred to in footnote 121, paragraphs 3, 39, 51 and point 2 of the recitals of the order, and order of the President of the Court of Justice of 27 September 2004 in Case C-7/04 P(R), *Commission v Akzo and Akcros*, referred to in footnote 125, paragraphs 165, 166 and point 5 of the recitals of the order.

[594] See Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission* [2007], ECR II-3523, paragraph 21.

[595] The Court of First Instance rendered its judgment in Joined Cases T-125/03 and T-253/03 on 17 September 2007.

the defence to proceed with the case without enabling the parties to have access to the documents in question.

(458) [*]

(459) [*], [*], [*], [*] and [*] advanced arguments that the Commission could - and should - have informed them earlier that they were subject to the Commission's investigation.

(460) Under current jurisprudence, where the Commission sends an Article 18 request for information to an undertaking, it is required to inform the undertaking of the putative infringements concerned by the investigation and of the fact that, in that context, the Commission might have to impute to it unlawful conduct.[596] In this regard, [*], [*], [*], [*] and [*] contend that the requirement to inform them of the putative infringements concerned by the investigation was not fulfilled, and/or was fulfilled too late. They point out that it was only when they received the Statement of Objections that they became aware of the Commission's allegations. The Commission notes that, in the Article 18 requests for information sent to [*], [*], [*] and [*],[597] those undertakings were informed of the putative infringements concerned by the investigation and that the Commission might impute unlawful conduct to heat stabiliser producers involved in the unlawful infringement. [*]'s arguments in this respect are addressed in recitals (462) to (466).

(461) As explained in recitals (454)-(458), the Commission acted reasonably by suspending its investigation in this case while proceedings were pending before the Court of First Instance concerning the claim for legal professional privilege with respect to the Set A and Set B documents. It was considered that it was not expedient to send out Article 18 requests for information during that time period. The determination of whether and when an undertaking is to be addressed an Article 18 request for information is at the Commission's discretion for a number of policy and practical reasons. Accordingly, the fact that a company was not subject to on-site inspections and/or did not receive any Article 18 requests for information or received Article 18 requests for information later than other companies does not amount to an irregularity committed by the Commission.

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596 Case T-99/04 *AC Treuhand v Commission*, [2008] ECR II-1501, paragraph 57.

597 Article 18 requests for information to [*] of 15 May 2008, [*]; of 27 June 2008, [*]; of 18 July 2008, [*] and of 11 September 2008, [*]. In these Article 18 requests for information [*] was informed of the fact that *"[t]he Commission is currently investigating alleged anti-competitive behaviour relating to certain agreements and concerted practices on the market for heat stabilisers in ... the EU/EEA"*. It was also indicated that the Commission had information that Community producers of heat stabilisers may have agreed, since 1986, to fix and/or co-ordinate prices. It was also informed that *"[i]f the existence of such behaviour were to be confirmed, it might constitute an infringement of Article 81 of the EC Treaty and/or Article 53 of the EEA Agreement.* [*] was also asked for a language waiver should the Commission issue a Statement of Objections to it. Similar Article 18 requests for information (including requests for language waivers) were sent to [*] (such as Article 18 request for information of 8 October 2007, [*]; of 22 January 2008, [*]; of 23 May 2008, [*] and 15 July 2008, [*]), [*] (such as Article 18 request for information of 8 October 2007, [*]; of 12 February 2008, [*]; of 23 May 2008, [*]; of 27 June 2008, [*] and of 16 July 2008, [*]) and to [*] (Article 18 request for information of 1 July 2008, [*]).

(462) [*] raises various arguments with respect to the Commission's alleged failure to properly notify it that the Commission might impute unlawful conduct to [*]. As the other parties, [*] received several Article 18 requests for information that brought the putative infringements concerned by the investigation to [*]'s attention and indicated that the Commission might impute unlawful conduct to undertakings involved in the unlawful infringement(s). The only difference between the Article 18 requests for information sent to [*] and those sent to other undertakings was that the request to [*] referred to undertakings/parties involved in the heat stabilisers sector as opposed to undertakings producing and trading heat stabilisers. The reason for that difference was to request information from [*] which was involved in the anti-competitive arrangements as neither a producer nor a trader.[598] As to the information of the putative infringements, [*] was informed in the exact same manner as all the other undertakings which received Article 18 requests for information. There is no reason why [*] should have been treated differently than the other undertakings (see footnotes 597 and 598).

(463) [*] also challenged the Commission for having refused to clearly inform it of its status as witness or potentially accused party. [*] specified that the undertaking should be informed of its status "[*]"

(464) In its first Article 18 request for information of 8 October 2007, the Commission informed [*] of the subject matter and purpose of the investigation underway, the potential putative infringements and of its status.[599]

(465) In the Article 18 request for information of 8 October 2007 (fifth point), the Commission requested a language waiver in which it put forward the possibility of issuing a Statement of Objections and a Decision to be addressed to [*]: "*If the Commission were to decide to issue a Statement of Objections and a Decision in this case, every addressee will receive such Statement of Objections or Decision as well as other future correspondence in the official EU language of its place of registration. The Statement of Objections and the Decision may be addressed to more than one legal entity that belongs to the same corporate group. The Commission can however issue a possible Statement of Objections, other correspondence and a possible Decision in another EU language, in case the addressee has authorised the Commission to do so. We would be obliged if you would authorise the Commission to address a possible Statement of Objections, other further correspondence and a possible Decision in this case in English* ***to you***." [Emphasis added] [600]

[598] In these requests, [*] was informed of the fact that "*[t]he Commission is currently investigating alleged anti-competitive behaviour relating to certain agreements and concerted practices on the market for heat stabilisers in ... the EU/EEA*". [*]. It was also indicated that the Commission had information that undertakings involved in the heat stabilisers sector may have agreed, since 1986, to fix and/or co-ordinate prices. It was also informed that "*[i]f the existence of such behaviour were to be confirmed, it might constitute an infringement of Article 81 of the EC Treaty and/or Article 53 of the EEA Agreement.* [*]; See for the relevant Article 18 request for information [*] of 8 October 2007, [*] of 28 February 2008 ([*]),[*] of 5 June 2008 ([*]),[*] of 4 July 2008 ([*]).

[599] See [*].

[600] [*].

(466) As from March 2003 ([*][601]), [*] was at least aware that it could be held liable for infringements of Article 81 of the Treaty. On that basis, and when the request for a language waiver was made in case it became the addressee of a Statement of Objections or a Decision (see recital (465)), [*] could only have concluded that it was a possible target of the investigation.

(467) [*] claims that the one week extension to the deadline to respond to the Statement of Objections granted by the Hearing Officer was disproportionate as compared to the length of the Commission's investigation. Whilst this is an issue within the Hearing Officer's field of competence, it is observed that the overall deadline set for [*] (including the extension of the Hearing Officer) amounted to more than eight weeks,[602] which is twice the time period prescribed in Article 17 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.[603] An extension of six months, as requested by [*], would have been disproportionate, in particular in view of the fact that the extension was requested on the basis of the need to investigate issues relating to parental liability only. [*] was not the only undertaking that faced issues of parental liability and there is no reason why it should have been treated differently than other undertakings.

(468) [*][604] [*].[605]

(469) [*] and [*] challenge the Commission for not having investigated the company ChemTrade Roth GmbH. [*] also points to lack of motivation in the Statement of Objections regarding the starting date in the infringement of the old Chemson Austria. Those claims cannot be accepted. First, it is established case law that it is for the Commission to assess whether a particular item of information is necessary to enable it to bring light to an infringement of competition rules.[606] ChemTrade Roth GmbH took over the relevant business from the Chemson group two years after the infringement had ended (see recital (42)). The Commission focussed its investigation on companies that participated in the infringement and, in its replies to Article 18 requests for information, [*] responded to the Commission's questions and provided information on Fides/AC Treuhand meetings dating back to 1991 (see the references in the footnotes of Annex I). [*] and [*] and all other addressees have been given the opportunity to comment on the Statement of Objections and have been given access to all the evidence (including documents submitted by Chemson) used by the

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601 [*]

602 The Statement of Objections was sent on 18 March 2009 and [*]received the CD-Rom containing the accessible documents in the Commission's case file on 23 March 2009 (which was the starting date for the deadline). It consulted the documents and statements that were accessible at Commission premises only on 30 March 2009. [*] and [*]. The deadline to respond was on the 14 May 2009, to which the Hearing Officer granted an extension until 21 May 2009.

603 OJ L 123, 27.4.2004, p.18.

604 [*],[*], [*][*].

605 Case T-141/94 *Thyssen Stahl v Commission* [1999] ECR II-347, paragraph 110 and Case T-9/99, *HFB a.o. v Commission* [2002] ECR II-1487, paragraph 384.

606 Case C-94/00 *Roquette Frères v Commission* [2002] ECR I-9011, paragraph 78.

Commission as basis for its allegations. There can be no irregularity committed by the Commission in focussing its investigation on the legal entities participating in the infringement. The arguments regarding the starting date in the infringement of the old Chemson Austria cannot be accepted. In Annex I to the Statement of Objections, to which paragraph 443 of the Statement of Objections explicitly referred, 13 March 1997 is listed as the first date when [employee] is named as a participant in AC Treuhand meetings.

(470) [*] considers that the Commission's reasoning on liability renders its defence meaningless. The assessment on liability for Chemson and ACW, which is dealt with in sub-section 6.2.7, cannot be considered as an irregularity.

(471) [*] notes that the Commission did not provide the sales figures for the calculation of a possible fine. That cannot be accepted. The value of sales, including the value of sales of Chemson for ESBO/esters, was indicated in paragraph 71 of the Statement of Objections. The precise sales figures used to calculate the fines are submitted by the parties in response to Article 18 requests for information sent out after the Statement of Objections.

(472) To sum up, the Commission cannot be held responsible for any procedural errors or irregularities. Nonetheless, the parties' claims on violation of rights of defence will be examined.

5.4.5.2 Alleged violation of rights of defence

(473) A number of parties (recital (451)) argued that their rights of defence were violated. In particular, they state that the unreasonable delay in the investigation made it difficult for them to find exculpatory evidence. They argue that it was difficult – if not impossible –to locate documents and individuals and the recollection of key individuals is no longer reliable. It should be pointed out that the burden of proof of a violation of rights of defence is on the addressees.[607] They must "*indicate the specific objections found by the Commission [...] which might have been refuted*" had there been no procedural error.[608] It is on that basis that the claims on violation of rights of defence will be examined. As demonstrated in recitals (474)-(487), none of the parties have provided sufficient evidence showing that their rights of defence were violated.

(474) First, and as a general remark, it should be emphasized that for an investigation which concerns a long-lasting cartel, it is not uncommon that individuals who participated in the anti-competitive arrangements are no longer available and, if they are available, their recollection is not always reliable. The same issue applies to the location and discovery of documents.[609] These are the usual characteristics of a long lasting cartel

[607] Case C-113/04 P *Technische Unie BV and others v Commission* [2006] ECR I-8831, paragraph 61; Case T-405/06 *ArcelorMittal a.o. v Commission*, not yet reported, paragraph 167.

[608] Case C-113/04 P *Technische Unie BV and others v Commission* [2006] ECR I-8831, paragraph 64.

[609] The Court of First Instance has alluded to a "*general duty of care*" under which undertakings should ensure "*the proper maintenance of records in their books or files of information enabling details of their activities to be retrieved, in order, in particular, to make the necessary evidence available in the event of legal or*

with high turnover of individuals and identification of evidence that spans over a number of years.

(475) [*] claims that the excessive length of the investigation impaired its rights of defence. It points, in particular, to the fact that it was only in the Article 18 request for information of 8 October 2007 that more specific indications were given as to the direction and details of the investigation.[610] That argument cannot be accepted. [*]. It was in a perfect position to preserve its evidence, including any exculpatory evidence. Any failure to do so can only be [*]'s responsibility. Indeed, [*] has better knowledge than anyone that the case was suspended due to the ongoing litigation and did not need reminders from the Commission. [*] does not explain which "specific objections" by the Commission it could have rebutted in the absence of the suspension of the investigation. Moreover, [*] does not identify the documentary evidence which it was allegedly prevented from obtaining due to the delay. [*] simply makes a vague argument that it would have been "[*]" to ensure that all the relevant data was available. This is not enough to show a violation of rights of defence. [*] states that the Commission's inaction has created problems for access to, and the co-operation of, a number of individuals.[611] As to [employee] and [employee], [*] could have tried to talk to them as early as 2003 but failed to do so. There was also a number of other witnesses available to [*] and it received their statements ([*]). However, those statements, made in *tempore suspecto*, could not rebut the Commission's findings (see recital (365)). Lastly, as regards [*]'s reference to [employee], he was employed by Chemtura and there is no reason to think that he would cooperate with [*]. Therefore, there is no causative link to the duration of the investigation. Moreover, [*] has not shown that it made consistent and serious attempts to contact the persons in question. Hence, it has not shown that it was "*no longer possible to obtain evidence from them.*"[612]

(476) [*] claims that the delay in the investigation undermined its ability to defend itself.[613] That cannot be accepted. First, and most importantly, as to documentary evidence, [*] has not provided any clear information as to what documents it may have been able to obtain to refute the Commission's objections had it been informed of the investigation earlier. In response to the Statement of Objections, [*] does not claim that it could not find documents or that specific relevant documents (or sets of documents) were destroyed. Rather, [*] says that the delay "[*]".[614] The fact that documents may have been harder to find is certainly not sufficient to establish a violation of the rights of defence. As noted in recital (474), documents are often hard to find in cartel

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administrative proceedings" (see Joined Cases T-5/00 and T-6/00 *Nederlandse Federative Vereniging voor de Groothandel op Elektrotechnisch Gebied e.a. v Commission* [2003] ECR II-5761, paragraph 87 and Case T-161/05 *Hoechst GmbH v Commission*, judgment of 30 September 2009, not yet reported, paragraph 71).

610 [*].

611 [*].

612 Case C-113/04 P *Technische Unie BV and others v Commission* [2006] ECR I-8831, paragraph 64

613 [*].

614 [*].

investigations. Moreover, [*] had a general duty of care to preserve documents in the event of legal or administrative proceedings.[615]

(477) As to witness evidence, [*] refers to a number of individuals that allegedly would have been able to assist it in its defence. It is noted, first of all, that [*] does not explain which "*specific objections*" of the Commission those witnesses could have rebutted. Moreover, even if it had been informed of the investigation at an earlier point in time, it is doubtful whether [*] could have obtained the cooperation of those witnesses. In fact, [*] withdrew from the Heat Stabilisers business in 1998 and its employees in that sector remained within the Akzo Group. Therefore, [*]' access to those people was likely to be limited *regardless* of the Commission's investigation. It follows that there is no clear causative link to the duration of the Commission's investigation. In other words, any alleged inability to access the witnesses cannot be seen as "*the consequence of*" any delay by the Commission.[616]

(478) It should also be noted that, according to [*] reply to the Statement of Objections, [*] started making concerted inquiries with respect to a number of individuals only in May 2009 after having received the Statement of Objections. Thus, at least for the period May 2008-May 2009, any loss of evidence can only be attributed to [*]. [*] states that it has contacted the former employees who were transferred to Akzo, but most of them have not responded. However, [*] has not shown that it made consistent and serious attempts to contact the persons in question. Hence, it has not shown that it was "*no longer possible to obtain evidence from them*".[617]

(479) In any case, it is unlikely that the witnesses would have provided convincing exculpatory evidence which could have rebutted the evidence with respect to the cartel. The evidence is particularly strong relating to the period up to [*] departure from the cartel. [*] claims that the witnesses are "[*]" the handwritten notes.[618] It is noted, first, that the overall weight of the handwritten notes shows the existence of a cartel and there is no need for interpretation. Second, [*] provides no examples of what needs to be interpreted.

(480) [*] claim that interviews with the witnesses "[*]"[619] is too general to show that its rights of defence have been violated. With regard the specific witnesses, it is noted that:

(a) [employees] were employees of the Akzo Group since 1998. There is no reason to think that they would cooperate with [*] or that Akzo would permit them to do so. In fact, [*] asked Akzo if it could gain access to [employee], but

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615 See Joined Cases T-5/00 and T-6/00 *Nederlandse Federative Vereniging voor de Groothandel op Elektrotechnisch Gebied e.a. v Commission* [2003] ECR II-5761, paragraph 87 and Case T-161/05 *Hoechst GmbH v Commission*, judgment of 30 September 2009, not yet reported, paragraph 71.

616 Case C-113/04 P *Technische Unie BV and others v Commission* [2006] ECR I-8831, paragraphs 61 and 64.

617 Case C-113/04 P *Technische Unie BV and others v Commission* [2006] ECR I-8831, paragraph 64

618 [*].

619 [*].

Akzo never replied[620]. In addition, the fact that Akzo's witnesses (such as [employee]) provided no information that helped Akzo rebut the Commission's findings (see recital (365)), confirms that they would not have been able to provide useful information to [*]. Moreover, [employee], who was interviewed by [*], almost goes as far as admitting [employee]'s participation in anti-competitive conduct[621].

(b) As to [employee], the evidence proving his participation in cartel meetings is compelling (see section 4). For instance, there is strong evidence that [employee], as a representative of Harcros, joined the cartel on tin stabilisers in September 1988, which [*] existed at that time (see recitals (152)-(153)). That evidence could not be called into question by statements made in *tempore suspecto* by [employee]. It is also noted that the evidence in the Commission's possession regarding the Akcros Chemicals joint venture is comprehensive, including documents from [*], and shows that the joint venture was not autonomous (see section 6.2.3). Moreover, [*] refers to "[*]" who explain that [employee]was in charge. [*] could get evidence from those employees and it is noted that [*] has not explained what extra evidence [employee] would have been able to provide.

(c) As to [employee] and [employee], [*] provides no explanation of what information they could provide (and no indication of [employee]'s role).

(d) Regarding the other individuals referred to by [*][622], there is no evidence that they participated in the cartels and there is no reason to think that they could provide any information that would rebut the Commission's objections.

(481) [*] argued that as it was not legally notified before 2009 that it would be subject of the investigation, its rights of defence were violated since it had difficulties locating exculpatory evidence. [*]. Those arguments cannot be accepted. In addition to the arguments made in recital (474), it is noted that [*] has not indicated the specific objections which might have been refuted had the Commission notified it earlier. [*].

(482) [*] argues that its rights of defence were violated as it was only contacted by the Commission on 8 October 2007.[623] It states that, had it been contacted earlier, "[*]." As indicated in recital (473), a statement of that general character is not sufficient to show that its rights of defence were violated.

(483) [*] argues that its rights of defence were violated as a result of the excessive duration of the investigation. In this respect, [*] underlines that it was informed on the allegations raised against it only nine years after the termination of the illicit conduct and six years after the instigation of the investigation. [*] underlines that its position

620 [*].
621 [*].
622 [*].
623 [*].

would have been significantly better in 2004, before the sale of Dynamit Nobel AG, as it would have had access both to the individuals involved and the documentation concerned. [*] refers to the established case-law in case *PVC II*[624] and *Technische Unie*[625] where the Court sets a three-year limit as the reasonable duration for the issuance of the Statement of Objections. [*] argues that the fact that other undertakings launched court proceedings against the inspection decision and investigative steps taken by the Commission does not justify any suspension of the investigation for several years for [*]. In this respect, [*] claims that the protection of rights of defence overrules the suspension principle. Those arguments cannot be accepted. As demonstrated in recitals (454)-(457), first the Commission, as a sound administrator, had to await the judgement of the Court of First Instance in Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission* relating to the disputed documents. That delay indeed had an impact on the entire investigative proceedings, and therefore on all the parties subject to this investigation. As explained in recital (474), during a long-lasting cartel individuals necessarily change and underlying documents from previous years become less easily accessible. The argument that [*] position would have been better if it had been informed in 2004 cannot be accepted either, as [*] does not clearly demonstrate to which documents and individuals it would have had access or which documents or statements would have clearly helped it in rebutting the Commission's allegations.

(484) Furthermore, [*] argues, that the Commission failed to investigate the business of ChemTrade Roth GmbH. By excluding ChemTrade Roth GmbH from the current proceedings, [*] argues that the Commission diminished [*] rights of defence and breached the principles of equality of arms and sound administration. [*] advances the argument that [*], as an addressee of a Statement of Objections and a Decision, depends on the completeness of the facts established by the Commission. As a result, [*] is deprived of any possibility to defend itself both against the allegation that it was involved in the ESBO/esters cartel and against the allegation that it exercised decisive influence over its subsidiaries. The argument that ChemTrade Roth GmbH would have exculpatory evidence is purely hypothetical and [*] has not indicated the specific objections found by the Commission which might have been refuted by that evidence.

(485) [*] claims that the unreasonable duration of the investigation, the fact that it was contacted only on 8 October 2007, and the fact that ChemTrade Roth GmbH was not investigated prevented [*] from retrieving the information necessary for its defence and [*].[626] First, as to documentary evidence, [*] has not provided any clear information as to what documents it may have been able to obtain to refute the Commission's objections, nor which specific objections would be concerned. Rather it claims that it was materially impossible to retrieve "[*]" which would have allowed it to exercise its rights of defence and to apply for leniency.[627] There is no indication of

[624] Joined Cases T-305/94 *Limburgse Vinyl Maatschappij N.V. and others v Commission* (PVC II), [1999] ECR II-931.
[625] Case C-113/04 P *Technische Unie BV and others v Commission* [2006] ECR I-8831.
[626] [*].
[627] [*].

what these exculpatory documents would be. As to witnesses, [*] only refers to the fact that [employee] and [employee] had left the company (in 2002 and 2006 respectively) and that "[*]" was no longer accessible. In particular, [*] argues that had the investigation not lasted so long, it would have been able to secure the cooperation of an ex-employee [*].

(486) In addition, [*] argues that the Commission's reasoning on liability renders [*] defence meaningless. It argues that most of the liability falls on [*] although the documents are provided not by [*] but by [*]. At the outset, it should be noted that the Commission's source of corporate information concerning the parties is the undertakings themselves. In their replies to the Statement of Objections, [*] and [*] presented information different than that in their replies to the Article 18 requests for information (see recital (635)). As a result, the argument that most of the documents concerning liability are under another company's control cannot be accepted. In addition, it is not explained why the companies in question do not possess information concerning their own undertaking in the past or why the companies which belonged in the same group in the past are not able to communicate amongst themselves and acquire information in order to respond accurately and correctly to the Article 18 requests for information.

(487) Based on the reasoning in recitals (473) to (486), it is apparent that the parties have not sufficiently proven that any irregularity allegedly committed by the Commission would have resulted in a violation of their rights of defence.

5.4.6 *Effect upon trade between Member States and between EEA Contracting Parties*

5.4.6.1 Principles

(488) Article 81(1) of the Treaty is aimed at agreements which might harm the attainment of a common market between Member States, whether by partitioning national markets or by affecting the structure of competition within the Community. Similarly, Article 53(1) of the EEA Agreement is directed at agreements that undermine the achievement of a homogeneous European Economic Area.

(489) The Court of Justice and Court of First Instance 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 fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States*".[628] In any event, whilst Article 81 of the Treaty does not require that agreements referred to in that

[628] See Case 56/65 *Société Technique Minière* [1966] ECR 282, paragraph 7; Case 42/84 *Remia* and Others [1985] ECR 2545, paragraph 22 and Joined Cases T-25/95 and others, *Cimenteries CBR* [2002] ECR II-491, paragraph 3930.

provision actually affect trade between Member States, it does require that it be established that the agreements are capable of having that effect.[629]

5.4.6.2 Application in the present case

(490) The arrangements which are the object of this Decision had an appreciable effect upon trade between Member States and between contracting parties of the EEA Agreement.

(491) As demonstrated in section 2.4 entitled "Trade between Member States and Contracting Parties to the EEA Agreement", the sectors concerned are characterised by a substantial volume of trade between Member States. There is also a considerable volume of trade between Member States and between contracting parties of the EEA Agreement.

(492) The application of Article 81 of the Treaty and Article 53 of the EEA Agreement to a cartel is not, however, limited to that part of the members' sales that actually involve the transfer of goods from one Member State to another. Nor is it necessary, in order for these provisions to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States.[630]

(493) In the present case, the cartel arrangements covered tin stabilisers and ESBO/esters and concerned the entire EEA. The existence of a price fixing mechanism, a quota and customer allocation system, as well as exchange of commercial sensitive information resulted, or were likely to result, in the automatic diversion of trade patterns from the course they would otherwise have followed.[631]

(494) Insofar as the activities of the cartels related to sales in countries that are not members of the Community or the EEA, they lie outside the scope of this Decision.

5.4.7 Provisions of competition rules applicable to Austria, Finland, Iceland, Liechtenstein, Norway and Sweden

(495) The EEA agreement entered into force on 1 January 1994. For the period prior to that date during which the cartels operated, the only applicable provision for the present proceedings is Article 81 of the Treaty; insofar as the cartel arrangements covered Austria, Finland, Iceland, Norway and Sweden (then EFTA Member States), they were not caught by Article 81 of the Treaty.

(496) In the period 1 January to 31 December 1994, the provisions of the EEA agreement applied to the EFTA Member States which had joined the EEA; the cartels thus constituted a violation of Article 53 of the EEA Agreement as well as of Article 81 of the Treaty, and the Commission is competent to apply both provisions. The restriction

[629] Case C-306/96 *Javico*, [1998] ECR I-1983, paragraphs 16 and 17; see also Case T-374/94, *European Night Services,* [1998] ECR II-3141, paragraph 136.

[630] See Case T-13/89 *Imperial Chemical Industries v Commission* [1992] ECR II-1021, paragraph 304.

[631] See Joined Cases 209 to 215 and 218/78 *Van Landewyck and others v Commission* [1980] ECR 3125, paragraph 170.

of competition in these five EFTA states during that one year period falls under Article 53 of the EEA Agreement.

(497) After the accession of Austria, Finland and Sweden to the Community on 1 January 1995, Article 81 of the Treaty became applicable to the cartels addressed in this Decision insofar as they affected those markets. The operation of the cartels in Norway remained in violation of Article 53 of the EEA Agreement.

(498) In practice, insofar as the cartels applied to Austria, Finland, Norway and Sweden, they constituted a violation of the EEA and/or Community competition rules as from 1 January 1994.

5.5 Non-Application of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement

(499) On the basis of the facts before the Commission, there are no indications suggesting that the conditions of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement could be fulfilled in this case. In response to the Statement of Objections, none of the parties objected to that conclusion.

6 ADDRESSEES OF THE PRESENT PROCEEDINGS

6.1 Principles

(500) The subjects of Community competition rules are undertakings, a concept which is not identical with that of corporate legal personality for the purposes of commercial or fiscal national law. The undertaking that participated in the infringement is therefore not necessarily identical with the precise legal entity within the group of companies whose representatives actually took part in the cartel meetings. The term "undertaking" is not defined in the Treaty. It may refer to any entity engaged in commercial activities. The case law has confirmed that Article 81 of the Treaty is aimed at economic units which consist of a unitary organisation of personal, tangible and intangible elements which pursue 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.[632]

(501) 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

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

be held liable for its infringement.[633] Measures enforcing Community competition rules must thus be addressed to a legal entity.

(502) It is accordingly necessary to define the undertaking that will be held accountable for the infringement of Article 81 of the Treaty by identifying one or more legal persons to represent the undertaking. According to 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"*.[634] If a subsidiary does not determine its own conduct on the market independently, the company which directed its commercial policy forms a single economic entity with the subsidiary and may thus be held liable for an infringement on the ground that it forms part of the same undertaking.

(503) 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 (or almost 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.[635]

(504) The Court of First Instance has also ruled that in a case where a subsidiary is wholly owned by two parent companies, each holding 50% and having joint management power, the situation is analogous to the situation of a wholly-owned subsidiary.[636]

(505) Legal entities within an undertaking having participated on their own right in an infringement and which have been acquired in the meanwhile by another undertaking continue to answer themselves for their unlawful behaviour prior to their acquisition, when they have not been purely and simply absorbed by the acquirer, but continued their activities as subsidiaries.[637] In such a case, the acquirer might only be liable for

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633 Although an 'undertaking' within the meaning of Article 81 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 personality to be the addressee of the measure. Case T-305/94 *PVC* [1999] ECR II-931, paragraph 978.

634 See the judgment of the Court of First Instance in Case T-203/01 *Michelin v Commission* [2003] ECR II-4371, at paragraph 290.

635 Judgment of 10 September 2009 in Case C-97/08 P *Akzo a.o. v Commission*, not yet reported, paragraphs 60-64. Judgment of the Court of First Instance of 12 December 2007 in Case T-112/05 *Akzo v Commission*, [2007] ECR II-5049, paragraphs 60-65 and judgment of the Court of First Instance of 18 December 2008 in Case T-85/06 *General Quimica a.o. v Commission,* not yet reported, paragraphs 58-64. Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others v Commission* [2005] ECR II-10, 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-286/98 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. See also the judgment of the Court of First Instance in Case T-203/01 *Michelin v Commission* [2003] ECR II-4371, at paragraph 290.

636 Case T-314/01 *Avebe v Commission*, [2006] ECR p. II-3085, paragraph 138.

637 Case C-279/98 P *Cascades v Commission* [2000] ECR I-9693, paragraphs 78 to 80: *"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*

the conduct of its new subsidiary from the moment of its acquisition if the latter persists on the infringement and liability can be established.[638]

(506) 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.[639] 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 the 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 whole period of the infringement and thus liable for the activity of the entity that was absorbed.[640] 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.[641] Liability for a fine may thus pass to a successor where the corporate entity which committed the violation has ceased to exist in law.

(507) Different conclusions may, however, be reached when a business is transferred from one company to another, in cases where transferor and transferee are linked by economic ties, that is to say, when they belong to the same undertaking. In such cases, liability for past behaviour of the transferor may transfer to the transferee, notwithstanding the fact that the transferor remains in existence.[642]

(508) In response to the Statement of Objections and referring to case law, several parties argued that 100% ownership, or near 100% ownership, does not on its own create any presumption, but that additional elements are required.[643] That argument cannot be accepted. As already stated in recital (503), the attribution of liability to the parent company can indeed be sufficiently based on a presumption following from a 100%

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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."

638 Case T-354/94 *Stora Kopparbergs Bergslags AB v Commission* [1998] ECR II-2111, at paragraph 80.

639 Case T-6/89 *Enichem Anic* v *Commission (Polypropylene)* [1991] ECR II-1623, paragraph 237; Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraphs 47-49.

640 See Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraphs 78 and 79.

641 See in Case T-305/94 *PVC II* [1999] ECR II-931, paragraph 953. This point was confirmed by the Court of Justice in *Limburgse Vinyl Maatschappij NV* and others, referred to in footnote 465 (PVC II).

642 See judgment in Joined Cases C-204/00 P (and other), *Aalborg Portland A/S a.o. v Commission* [2004] ECR I, 267, paragraphs 354-360, and Case T-43/02 *Jungbunzlauer AG v Commission*, [2006] ECR II, p. 3435, paragraphs 132-133.

643 Akzo, [*]; Elementis, [*]; Elf Aquitaine, [*], Chemson, [*]. Baerlocher, [*]. The parties refer mainly to Case C-286/98 P *Stora Kopparbergs Bergslags v Commission* [2000] ECR I-9925, paragraphs 27, 28 and 29 and to Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/&02, T-132/02 and T-136/02, *Bolloré a.o. v Commission*, [2007] ECR II 947, paragraph 132.

(or near 100%) ownership.[644] This is recently confirmed by the Court of Justice in Case C – 97/08 P[645]. Additional elements are only used to reinforce the presumption. The same principles hold true, mutatis mutandis, for the purposes of the application of Article 53 of the EEA Agreement.

(509) In this regard, it is important to emphasize that the companies can rebut the presumption by submitting 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 and such that they fall outside the definition of an undertaking*." It is for the company "*to put before the Court any evidence relating to the economic and legal organisational links between its subsidiary and itself which in its view are apt to demonstrate that they do not constitute a single economic entity*".[646] The Court of Justice has recently ruled that "*the conduct of the subsidiary on the market cannot be the only factor which enables the liability of the parent company to be established, but is only one of the signs of the existence of an economic unit.*" Indeed, in order to ascertain whether a subsidiary determines its conduct on the market independently, account must be taken "*of all the relevant factors relating to economic, organisational and legal links which tie the subsidiary to the parent company, which may vary from case to case and cannot therefore be set out in an exhaustive list.*"[647] On that basis, it is because the presumption can be rebutted that additional elements are not condition precedent to its application. As indicated in recital (508), additional elements are only used to reinforce the presumption.

6.2 Application to this case

(510) In application of the principles referred to in recitals (500) to (509), this Decision is addressed to legal entities that represent and are part of the undertakings involved in the cartels as presented in Chapter 4. Those addressees are companies that participated directly in the cartels or parent companies that participated by exercising decisive influence over the general commercial policies of their subsidiaries. Together, these companies form part of the undertaking that committed the infringement of Article 81 of the Treaty.

6.2.1 Akzo

(511) The legal entity Akzo Nobel N.V., as the ultimate parent company of the Akzo undertaking, participated in the infringements in the period 24 February 1987 to 22

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[644] In addition to the case law indicated in footnote 635, the (near) 100% presumption is recently confirmed in the judgment of the Court of First Instance of 31 March 2009 in Case T-405/06 *ArcelorMittal a.o. v Commission*, not yet reported, paragraph 89. See also judgment of the Court of First Instance on 8 October 2008 in Case T-69/04 *Schunk a.o. v Commission*, not yet reported, paragraph 56.

[645] Judgment of 10 September 2009 in Case C-97/08 P *Akzo a.o. v Commission*, not yet reported, paragraphs 60-64.

[646] See Case T-112/05 *Akzo v Commission*, [2007] ECR II-5049, paragraph 64 and Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and others* v *Commission* [2005] ECR II-10, paragraph 61.

[647] Judgment of 10 September 2009 in Case C-97/08 P *Akzo a.o. v Commission*, not yet reported, paragraphs 73-74

March 2000. Throughout that period, different legal entities belonging to the Akzo Group carried out the tin stabilisers and ESBO/esters businesses and participated directly in the infringements. In the period 1987 – 1993, wholly owned subsidiaries of Akzo Nobel N.V. participated directly in the cartels[648] (see recitals (512) - (519)). In the period 1993 – 1998, when the tin stabilisers and ESBO/esters businesses of the Akzo Group and Harcros/Elementis Group were centralised in the joint venture structure Akcros Chemicals (see recital (10)) legal entities of the joint venture participated in the infringement (see recitals (536) - (564)). In 1998, Akzo Nobel N.V. acquired Elementis' share of the joint venture and continued the tin stabilisers and ESBO/esters businesses and the direct participation in the cartels through a wholly owned subsidiary (see recitals (582) - (587)).

(512) In the period 24 February 1987 to 28 June 1993, the following companies of the Akzo Group participated directly in the infringements: a) With regard to tin stabilisers, Akzo Nobel Chemicals GmbH participated directly in the infringements during the period 24 February 1987 until 28 June 1993. This was through the regular participation of its employees, [employee], [employee] and [employee], in the cartel meetings during that period (see recitals (12), (139), (201) and Annex I). b) With regard to ESBO/esters, Akzo Nobel Chemicals B.V. participated directly in the infringements for the period 11 September 1991 until 28 June 1993. The contemporaneous evidence indicates that representatives of this company attended cartel meetings with respect to ESBO/esters (see recitals (9), (182), (201) and Annex I).

(513) Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals B.V.should therefore be held liable for their direct participation in the cartels.

(514) In addition, there is another company that together with Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals B.V. form part of the undertaking that committed the infringements. Throughout their infringement periods, Akzo Nobel N.V. was the 100 % (indirect) parent company of those undertakings (see recital (9)). In line with the case-law referred to in recital (503), there is therefore a presumption that Akzo Nobel N.V. exercised decisive influence over Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV. Consequently, Akzo Nobel N.V., together with those subsidiaries, form part of the undertaking that committed the infringements.[649]

[648] As referred to in footnotes 23 and 24, it should be noted that in its replies to the Commission's Article 18 requests for information, Akzo did not provide full information about the legal entities employing the individuals that participated in cartel meetings and cartel contacts. It should also be noted that these individuals participated in Fides/AC Treuhand meetings as representatives of "Akzo", see Annex I.

[649] In its judgment of 12 December 2007 in Case T-112/05, the Court of First Instance concluded that Akzo Nobel N.V, together with the subsidiaries Akzo Nobel Chemicals International BV and Akzo Nobel Chemicals B.V. among others, constitutes an undertaking for the purposes of Article 81 EC. See Case T-112/05 *Akzo v Commission*, referred to in footnote 635, paragraph 85. This has been approved by the Court of Justice on appeal in Case C-97/08 P *Akzo a.o. v Commission*, not yet reported.

(515) In addition to Akzo Nobel N.V.'s 100% ownership of Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV, there are further elements that reinforce the presumption.

(516) Reporting within the Akzo Group led ultimately to Akzo Nobel N.V. The Supervisory Council regularly received reports on the different businesses of the Akzo Group and consulted periodically with Akzo Nobel N.V.'s Board of Management about issues such as planning, investments, acquisitions, divestments and personnel.[650] Thus, Akzo Nobel N.V. had put a mechanism in place which allowed it to supervise the activities of the Akzo Group, including Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV, with a view of ensuring that they were in accordance with the commercial objectives and strategies set by the parent company.

(517) Furthermore, the reporting lines applicable to the individuals participating in cartel meetings led to [employee] ([*]the Akzo Group, 1 February 1988 – 1 March 1991, [*] Akzo Nobel N.V. ([*]) 1991-1995)) and ultimately to [employee], [*]Akzo Nobel N.V.[651]

(518) Moreover, minutes of the meetings of the Board of Management of Akzo Nobel N.V. show that the Board was briefed about the activities of the different divisions, that it approved divestments, approved the "*Strategic Plan 1992-1997*" and discussed changes in the Authority Schedules.[652] Again, that shows a mechanism which allowed Akzo Nobel N.V. to supervise the activities of the Akzo Group, including Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV, with a view to ensuring that they were in accordance with the commercial objectives and strategies set by the parent company.

(519) It is concluded that Akzo Nobel N.V. constituted one undertaking with the subsidiaries Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV. On the basis of recital (503), Akzo Nobel N.V. should be liable for Akzo Nobel Chemicals' GmbH and Akzo Nobel Chemicals' BV direct participation in the infringements and for their respective periods until the creation of Akcros Chemicals which was the successor of the tin stabiliser and ESBO/esters businesses of the Akzo Group.

(520) The liability of the legal entities carrying out the business of Akcros Chemicals and forming part of the undertaking that committed the infringements, established in this Decision, will be dealt with in sub-section 6.2.3.

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652 Minutes (draft) of meetings of November 1992 and March 1993. [*]. The minutes of the meeting on 23 November 1992 mention that the areas changed in relation to the former version of the Authority Schedules (dated May 1982) were: investments and divestments, finance, personnel affaires, technology and environment and annual reporting. In its Article 18 request for information of 23 May 2008, the Commission requested copies of documents regarding the authority and relationship between the parent company and subsidiary in the Akzo Group in the period 1986 to present, in particular the Akzo Nobel Authority Schedules. In [*], [*] only copies of the Authority Schedules for 1993-2007, see [*]. See also [*].

6.2.1.1 Arguments by Akzo in response to the Statement of Objections

(521) Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals B.V. contest their liability.[653] They claim that the Commission fails to substantiate why these particular Akzo subsidiaries are held liable and that it fails to distinguish liability in relation to tin stabilisers and ESBO/esters respectively. Those shortcomings alone suffice to render the Commission's allegations ineffective. As to tin stabilisers, they emphasise that the Akzo companies cannot be held liable as they did not produce tin stabilisers in that period. Such production was carried out by Tinstab (see recitals (11) and (16)), over which the Akzo companies did not exercise decisive influence. In any event, given that any liability during the period 24 February 1987 to 28 June 1993 ended more than five years before the Commission's commencement of the investigation, the Commission is time-barred from acting against them.

(522) Akzo Nobel N.V. contests its liability as the parent company. Akzo Nobel N.V. claims it could only be held liable as parent company in so far as the subsidiaries can be held liable and concurs with the subsidiaries as to why they cannot be held liable. Akzo Nobel N.V. argues that 100% ownership does not create a presumption of decisive influence. As to tin stabilisers, and that Akzo only had a 49% share in Tinstab, so a 100% presumption in any event cannot apply. As to ESBO/esters, Akzo Nobel N.V. argues that the additional elements put forward by the Commission do not offer any indication whatsoever that the ultimate parent company gave the subsidiaries instructions as regards the market conduct or otherwise sought to influence that conduct.

6.2.1.2 The Commission's appraisal and conclusion

(523) The arguments put forward by the Akzo companies cannot be accepted.

(524) First, as regards the substantiation of the involvement of Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV, involvement of a legal entity is established when personnel of the legal entity have taken part in illegal meetings and contacts. Evidence and information obtained from Akzo itself shows that employees of these Akzo subsidiaries were directly involved in the cartels. The Commission's case against the subsidiaries is sufficiently reasoned. As to tin stabilisers, Annex I to the Statement of Objections named the individuals who participated in the meetings. The legal entities employing those individuals were clearly indicated in paragraph 9 of the Statement of Objections (actual recital (12)). Paragraph 9 of the Statement of Objections was based on information submitted by Akzo itself.[654] In response to the Statement of Objections, Akzo did not contest the identification of the legal entities in paragraph 9 of the Statement of Objections. As to ESBO/esters, it was specifically indicated in Annex I to the Statement of Objections that Akzo Chemie BV (now

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654 As referred to in footnotes 23 and 24, it should be noted that in its replies to the Commission's Article 18 requests for information, Akzo did not provide full information about the legal entities employing the individuals that participated in cartel meetings and cartel contacts. It should also be noted that these individuals participated in Fides/AC Treuhand meetings as representatives of "Akzo", see Annex I.

named Akzo Nobel Chemicals BV, see recital (9)) was a direct participant in the ESBO/esters arrangements.

(525) Akzo Nobel Chemicals GmbH participated directly in tin stabilisers cartel and therefore errs in stating that liability was based on the participation of Tinstab. The argument that Akzo did not produce tin stabilisers during that period, even if assuming that it is true, does not cast doubt on its participation. Indeed, it is clear from the official minutes of the Fides meetings[655] that during that period the individuals concerned represented Akzo and not Tinstab (Tinstab participated in the meetings for a certain time and had its own representative at those meetings). Tinstab supplied tin stabilisers to its shareholder Akzo (see recital (11) and the documents referred to in footnote 21). The other participants to the meeting perceived Akzo as a distinct entity with its own representatives. In any event, it is sufficient for the Commission to prove that the company participated in the arrangements. Whatever commercial interest the participants may have had in participating is irrelevant as far as the existence of the infringement is concerned.[656] Certainly, the Akzo subsidiaries in question have not shown that they indicated to their competitors that they were participating in a spirit that was different from theirs.

(526) The arguments on parental liability of Akzo Nobel N.V. cannot be accepted. The legal entities directly participating in the anti-competitive arrangements were ultimately 100% owned by Akzo Nobel N.V. (see recital (9)). As to the claim that 100% ownership is not enough to trigger a presumption, the Commission refers back to recitals (508) and (509). The Commission can indeed rely on the presumption that Akzo Nobel N.V. exercised decisive influence over its subsidiaries. It is for Akzo Nobel N.V. to rebut that presumption by producing sufficient evidence demonstrating that the companies concerned "*do not constitute a single economic entity*" (see recital (509)). Akzo Nobel N.V. states itself that it does not even attempt to submit any evidence to make such a rebuttal.[657] Moreover, the Commission has adduced additional evidence of decisive influence. Therefore, the presumption applies and Akzo Nobel N.V. should be held jointly and severally liable with its subsidiaries in that period.

(527) As to the argument on prescription, entities of the Akzo Group participated in cartel arrangements throughout the period 1987-2000 for tin stabilisers and the period 1991-2000 for ESBO/esters (see recital (511)). It cannot be accepted that prescription would apply simply due to reorganisation within the Akzo Group. Indeed, the infringements referred to in Article 81(1) of the Treaty are committed by "*undertakings*". Also the prescription rules in Article 25 of Regulation (EC) No 1/2003 apply to "*undertakings*". The "effet utile" of these two provisions can only be ensured if the period of limitation begins to run only on the day on which the infringements committed by the "*undertaking*" cease. Otherwise, companies could easily evade

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[655] See Annex I.

[656] Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries a.o. v Commission*, [2007] ECR I-729, paragraphs 46-47.

[657] In its response to the Statement of Objections Akzo Nobel N.V. states: [*],[*].

enforcement by corporate restructuring (including joint ventures with another undertaking) and would have an incentive to do so in order to avoid fines. Moreover, undertakings which have chosen not to undergo restructuring would be worse off. Even more, such a restructuring (including through the creation of joint ventures) would favour large undertakings with the means to shift operations and liability from one legal entity to the other, whereas small undertakings without multiple forms of corporate structure would not have the same means of restructuring operations and hence, liability. Furthermore, in the case at hand, the two infringements are continuing infringements within the meaning of Article 25(2) of Regulation (EC) No 1/2003 (see recital (401)). Reorganisation of Akzo's tin stabiliser and ESBO/esters business does not interrupt the infringements. According to Article 25(2) of Regulation (EC) No 1/2003, time begins to run on the day on which the infringements ceased. Therefore, if legal persons who form part of the Akzo undertaking participate in an infringement, the period of limitation begins to run only on the day on which the infringements committed by the Akzo undertaking cease. The objection of limitation can therefore not be accepted.

6.2.2 Harrisons & Crosfield (Harcros) (now Elementis)

(528) The legal entities Harrisons & Crosfield plc (now Elementis Holdings Limited) and Elementis plc, as parent companies of the Harcros/Elementis Group participated in the infringements during the period 28 September 1988 to 2 October 1998. Throughout that period, there were different legal entities belonging to the Harcros/Elementis Group which carried out the tin stabilisers and ESBO/esters businesses and which participated directly in the infringements. In the period 1988 -1993, a wholly owned subsidiary of Harrisons & Crosfield plc (now Elementis Holdings Limited)[658] participated directly in the cartels (see recitals (529) - (534)). In the period 1993 – 1998, when the tin stabilisers and ESBO/esters businesses of the Harcros/Elementis Group was carried out through the joint venture structure Akcros Chemicals (see recital (19)), legal entities of the joint venture participated in the infringements (see recitals (536)- (564)).

(529) Harcros Chemicals UK Ltd participated directly in the cartel for tin stabilisers in the period 28 September 1988 to 28 June 1993 and in the cartel for ESBO/esters in the period 11 September 1991 to 28 June 1993 (see recitals (17), (152), (182), (201) and Annex I). Harcros Chemicals UK Ltd (now Elementis UK Limited) should therefore be held liable for its direct participation in the cartels. In addition, there is another company that together with Harcros Chemicals UK Ltd (now Elementis UK Limited) form part of the undertaking that committed the infringements established in this Decision.

(530) In the period 28 September 1988 to 28 June 1993 Harcros Chemicals UK Ltd (now Elementis UK Limited) was (almost) wholly owned by Harrisons & Crosfield plc

[658] As referred to in footnotes 30 to 32, it should be noted that that the individuals concerned participated in Fides/AC Treuhand meetings as representatives of "Harcros", see Annex I.

(now Elementis Holdings Limited), see recitals (14) and (15).[659] In line with the case-law referred to in recital (503) there is therefore a presumption that Harrisons & Crosfield plc (now Elementis Holdings Limited) exercised decisive influence over Harcros Chemicals UK Ltd (now Elementis UK Limited). Consequently, Harrisons & Crosfield plc (now Elementis Holdings Limited) and Harcros Chemicals UK Ltd (now Elementis UK Limited) together form part of the undertaking that committed the infringements established in this Decision. The current ultimate parent company of the Harcros/Elementis Group, Elementis plc, became the ultimate parent in February 1998. The liability of Elementis plc is further dealt with in recitals (546) to (564).

(531) In addition to Harrisons & Crosfield's plc (now Elementis Holdings Limited) (almost) 100% ownership of Harcros Chemicals UK Ltd, there are elements that reinforce the presumption. Statements in the annual report[660] show that from Harrisons & Crosfield plc's own perspective it was directly involved in the management of the businesses of the Harcros/Elementis Group: "[*]."

(532) Each division of the Harcros/Elementis Group's business, including the Chemicals and Industrial Division, reported on their activities at the meetings of the Board of Directors of Harrisons & Crosfield plc. Minutes of the Board meetings[661] show that the Board authorised actions such as disposal of a business within the Chemicals and Industrial Division and the negotiations for the creation of the joint venture with Akzo. Thus, Harrisons & Crosfield plc had put in place a mechanism which allowed it to supervise and direct its subsidiary's activities with a view to ensuring that they were in accordance with the commercial objectives and strategies set by the parent. The Board meetings were held by the parent company on a regular basis and were an important part of the organisational framework within which Harrisons & Crosfield plc exercised its control.

(533) It is concluded that Harcros Chemicals UK Ltd (now Elementis UK Limited) and Harrisons & Crosfield plc (now Elementis Holdings Limited) constituted one undertaking throughout the period 28 September 1988 to 28 June 1993. On the basis of recital (503), Harrisons & Crosfield plc (now Elementis Holdings Limited) should be held liable for Harcros Chemical UK Ltd's (now Elementis UK Limited) direct participation in the infringements from 28 September 1988 until the creation of Akcros Chemicals which was the successor of the tin stabilisers and ESBO/esters business of the Harcros/Elementis Group (including Harcros Chemicals UK Ltd).

(534) The liability of the legal entities carrying out the business of Akcros Chemicals and forming part of the undertaking that committed the infringements established in this Decision, is dealt with in sub-section 6.2.3.

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[659] In the period 1988 – 1992, the ultimate parent company Harrisons & Crosfield plc (now Elementis Holdings Limited) owned 970-980 out of 1000 shares of the intermediate parent company Harrisons & Crosfield Holdings Limited, which in turn owned 1 499 998 out of 1 500 000 shares of Harcros Chemicals UK Limited (now Elementis UK Limited), [*]. In 1993, Harcros Chemicals UK Ltd was wholly owned (indirectly) by Harrisons & Crosfield plc (now Elementis Holdings Limited), [*].

[660] See [*].

[661] See [*] Minutes of the Meetings of Directors in 1992 -1993 [*].

(535) In response to the Statement of Objections, Elementis[662] pointed to the fact that it exited the tin stabilisers and ESBO/esters businesses at issue when Akcros Chemicals was created in 1993. That claim cannot be accepted. Elementis continued the tin stabiliser and ESBO/esters business (and the anti-competitive arrangements) through the vehicle of a joint venture, to which Harcros Chemicals UK Ltd was a 50% partner.[663] Its involvement in the infringements ended on 2 October 1998, when Elementis sold its share in the joint venture to Akzo (see recitals (274) and (286)). The issue of prescription for the infringements that ended on 2 October 1998 is dealt with in recitals (672) to (682).

6.2.3 Akcros Chemicals

(536) The negotiations between the Akzo and the Harcros/Elementis Groups to establish the joint venture Akcros Chemicals started in 1992.[664] As referred to in recital (20), the Umbrella Joint Venture Agreement was signed on 19 March 1993, the joint venture was cleared by the Commission on 29 April 1993 and on 28 June 1993, the U.K. Partnership Agreement was signed.

(537) In the period 28 June 1993 to 2 October 1998, representatives of Akcros Chemicals directly participated in the infringements for tin stabilisers and ESBO/esters (see recitals (23), (201), (274), (286) and Annex I). As the Akcros Chemicals joint venture did not have a legal personality,[665] legal entities must be identified to be held liable as the participants in the infringements. As described in recitals (538) to (564), the partners to the U.K. Partnership and the responsible parent companies should be held liable as being part of the undertaking that committed the infringements committed by Akcros Chemicals.

(a) The partners to the U.K. Partnership

(538) For the reasons in recitals (539) to (540), it is apparent that the representatives of the U.K. Partnership, which formed part of the joint venture conglomerate Akcros Chemicals, participated directly in the infringements. The U.K. Partnership did not have any separate legal personality under English law. In such circumstances, and for the reasons indicated in recitals (539) and (540), the partners themselves (namely, Pure Chemicals Ltd, Harcros Chemicals UK Ltd and subsequently Akcros Services Ltd) should be held liable as direct participants in the infringements.

(539) The partners made arrangements amongst themselves to second employees to the service of the U.K. Partnership and they were the individuals who participated in the cartel meetings and contacts (see recital (23) and footnote 41). Although those employees were formally employed by one of the partners (first Harcros Chemicals

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662 [*].

663 Harcros Chemicals UK Ltd was a party to the Umbrella Joint Venture Agreement and to the U.K. Partnership Agreement. On 2 July 1993 Akcros Services Ltd, another subsidiary of the Harcros/Elementis Group, succeeded Harcros Chemicals UK Ltd as the 50% partner in the U.K. Partnership, see recital (20).

664 Minutes of meetings of the Directors of Harrisons & Crosfield plc, see [*].

665 Confirmed by Akzo and Elementis in their responses to the Statement of Objections, [*].

UK Ltd, subsequently Akcros Services Ltd), the partners agreed, by contract, that those employees would be seconded to the U.K. Partnership. The Secondment Agreement[666] stipulates that Akcros Services Ltd "[*]". In other words, the partners took a common decision regarding the services of these employees and should not be able to escape liability by seconding those individuals to a partnership which had no legal personality. Therefore, the partners must be held jointly responsible for their actions. Notably, these employees participated in Fides/AC Treuhand meetings under the name of "Akcros" or "Akcros Chemicals".

(540) Furthermore, it is clear from the agreements referred to in footnote 41 that Harcros Chemicals UK Ltd (subsequently replaced by Akcros Service Ltd) carried on its business "*together*"[667] with Pure Chemicals Ltd in the form of the U.K. Partnership. In essence, the U.K. Partnership was a vehicle through which the partners themselves acted. All property of the partnership belonged to the partners. As to debts, the U.K. Partnership Agreement (point 13) stipulates that "[*]." Moreover, profits or losses of the U.K. Partnership belonged to or were borne by the partners. Indeed, the U.K. Partnership Agreement stipulates that "[*]".[668] Consequently, any profits resulting from the cartel would have ended up with Pure Chemicals Ltd and Harcros Chemicals UK Ltd and subsequently Akcros Services Ltd as partners. The legal entities that would have profited from the illicit arrangements should also be held liable for them.

(541) The partners to the U.K. Partnership Agreement, that is, Pure Chemicals Ltd (now Akcros Chemicals Ltd), Harcros Chemicals UK Ltd (now Elementis UK Limited) and, from 2 July 1993, Akcros Services Ltd (now Elementis Services Limited) must be considered as the legal entities that participated directly in the infringements in the period 28 June 1993 to 2 October 1998. In addition, there are other companies that together with these legal entities form part of the undertaking that committed the infringements established in this Decision.

(b) The parent companies

-- Parental liability for the partners

(542) During the participation of Akcros Chemicals in the cartels (28 June 1993 – 2 October 1998), Akzo Nobel N.V. owned 100% of the direct participant Pure Chemicals Limited. Harrisons & Crosfield plc (now named Elementis Holdings Limited) owned 100% of the direct participants Harcros Chemicals UK Ltd and Akcros Service Ltd until 23 February 1998. From that date, until 2 October 1998, Elementis plc was the ultimate owner of those subsidiaries (through the intermediate company Elementis Holdings Limited, the successor of Harrisons & Crosfield plc) (recitals (14), (15), (20) and (21)).

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666 Secondment agreement concluded between Akcros Services Limited on the one hand and Pure Chemicals Limited and Akcros Services Limited (trading together in partnership) on the other, see [*].

667 See for instance the U.K. Partnership, [*] and the Secondment agreement, [*].

668 See [*]. The capital of the individual partnerships was individually held on a 50:50 basis by the Harcros/Elementis and Akzo Groups (see Commission Decision of 29 April 1993 in Case No IV/M.310 – *Harrisons & Crosfield/Akzo* OJ C, 8.5.1993, see also UK Partnership Agreement, [*]).

(543) Given the 100% ownership of their subsidiaries, there is a presumption that Akzo Nobel N.V. and Harrisons & Crosfield plc (now Elementis Holdings Limited) and -- from February 1998 -- Elementis plc, exercised decisive influence over their subsidiaries.[669] In addition, there are elements that reinforce the presumption. Those elements are presented in subsection (a) for Akzo and in subsection (b) for Elementis (Harcros).

(a) Akzo Nobel N.V.

(544) The Authority Schedules of Akzo Nobel N.V. in that period[670] cover particularly, [*]. Thus, the management of Akzo Nobel N.V. plays a significant role in several essential aspects of the strategy of the subsidiaries (including Pure Chemicals Ltd) and reserve the power of final decision with respect to a range of matters that define their course of conduct on the market. Neither Akzo Nobel N.V. nor Pure Chemicals Ltd have attempted to show that these authority schedules were inapplicable to the latter.

(b) Harrisons & Crosfield plc (now Elementis Holdings Limited) and Elementis plc

(545) Each division of the Harcros/Elementis Group's business, including the Chemicals and Industrial Division, reported on their activities at the meetings of the Board of Directors of Harrisons & Crosfield plc (now Elementis Holdings Limited) and subsequently of Elementis plc. Minutes of the Board meetings[671] show that the Board received reports on the chemicals business and, in particular, the preparations and functioning of the joint venture Akcros. Harrisons & Crosfield plc acted as guarantor for the time credit banking facilities of Akcros. [employee], who himself participated in cartel meetings, made a presentation on the Akcros business at the Harrisons & Crosfield plc's Directors meeting on 13 September 1994. At its meetings on 19 March 1996 and 6 August 1996, the Board of Directors of Harrisons & Crosfield plc approved capital expenditures of Akcros. At the Directors' Meeting of Elementis plc on 26 March 1998, the Board agreed that Akzo Nobel's offer to purchase Elementis' interest in Akcros could be accepted under certain conditions. Thus, Harrisons & Crosfield plc (now Elementis Holdings Limited) and subsequently Elementis plc had put in place a mechanism which allowed them to supervise the joint venture's activities with a view to ensuring that they were in accordance with the commercial objectives and strategies set by the parent companies.

-- Parental liability for the joint venture

(546) During the participation of Akcros Chemicals in the anti-competitive arrangements, Akzo Nobel N.V. (via its wholly owned subsidiaries), owned 50% of the joint venture, see recital (19). Harrisons & Crosfield plc (now named Elementis Holdings Limited),

[669] As to Akzo Nobel N.V. see also recital (9).

[670] [*] Akzo Authority Schedules of 1993 and 1995 [*]. See also Case T-112/05, referred to in footnote 635 , paragraphs 68 – 82. In this judgment the Court of First Instance concluded that Akzo Nobel N.V., together with Akzo Nobel Chemicals International BV among others, constituted an undertaking for the purposes of Article 81 of the Treaty.

[671] See [*] Minutes of the Meetings of Directors in 1993-1999;[*].

owned the other 50% of the joint venture via its wholly owned subsidiaries until 23 February 1998. From that date, Elementis plc was the ultimate owner of Harcros'/Elementis' 50% share of Akcros Chemicals (through the intermediate company Elementis Holdings Limited, the successor of Harrisons & Crosfield plc) (see recitals (15), (20) and (21)). As parent companies and equal shareholders in the joint venture they should be held jointly and severally liable for the behaviour of the U.K. Partnership.

(547) This conclusion is based on legal, economic and organisational links demonstrating that the joint venture (including the U.K. Partnership) did not enjoy an autonomous position but, rather, that the Akzo and Harcros/Elementis Groups exercised decisive influence on the commercial conduct and policies of the joint venture on an equal footing.[672] It is apparent that, on the one hand, the parent companies exercised this decisive influence directly on the joint venture. On the other hand, the parent companies exercised decisive influence through the intermediary of their wholly-owned subsidiaries who were parties to the Umbrella Joint Venture Agreement which established the workings of Akcros Chemicals. Those parties were Akzo Nobel Chemicals International BV (for the Akzo Group) and Harcros Chemicals UK Ltd (for the Harcros/Elementis Group) (the "*parties*"). It is presumed that those wholly-owned subsidiaries acted under the decisive influence of their respective parents. Those subsidiaries were also clearly empowered to ensure that the joint venture partners, within their respective groups, would respect policy decisions taken in relation to the joint venture (see point 4.1 of the Umbrella Joint Venture Agreement; discussed further in recitals (555) -(559)).[673]

(548) The legal, economic and organisational links in question are based, first, on the fact that the parent companies set up the joint venture as a means to combine their respective heat stabiliser businesses, with a view to maintaining their commercial interest; second, on the actual management structure of the joint venture; and third on the evidence relating to the dissolution of that joint venture.

(549) First, it should be recalled that Akcros Chemicals did not have a legal personality in its own right but consisted of jointly owned partnerships (such as the U.K. Partnership) and jointly owned legal entities. That joint venture was, as a whole, designed to house and combine the respective heat stabiliser businesses of the Akzo Group and the Harcros/Elementis Group, but without being set free from the control of the parent companies.

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672 This is in line with the judgment in Case T-314/01 *Avebe v Commission*, [2006] ECR II-3085, paragraphs 89-97, 123-127 and 138-141.

673 According to Akzo, prior to the establishment of Akcros, Akzo Nobel Chemicals International BV was the entity within the Akzo Group that dealt with heat stabilisers. [*]. See also [*]. In its judgment of 12 December 2007 in Case T-112/05, the Court of First Instance concluded that Akzo Nobel N.V, together with the subsidiary Akzo Nobel Chemicals International BV among others, constitutes an undertaking for the purposes of Article 81 EC. See Case T-112/05 *Akzo v Commission*, referred to in footnote 635, paragraph 85. As indicated in recitals (529) to (533), Harrisons & Crosfield plc, together with the subsidiary Harcros Chemicals UK Ltd, constitutes one undertaking for the purposes of Article 81 EC.

(550) The two parent companies, Akzo Nobel N.V. and Harrisons & Crosfield plc, were both actively involved in the negotiations and the establishment of the joint venture (see recital (536)). In particular, they authorised, set mandates for and monitored the negotiations. They intervened in case of difficulties, made decisions on the management set-up of the joint venture, on the organizational structure thereof as well as on a specific safety clause (exit rule). They also supervised and approved the contracts. [*]:

- At the meeting of 30 June 1992, the Board of Directors of Harrisons & Crosfield plc authorised the individuals GWP and PJS to continue the negotiations for the joint venture with Akzo "[*]". It was also noted that "[*]."[674]

- At the meeting of 6 October 1992, the Board of Directors of Harrisons & Crosfield plc ratified the decision made at the Strategic Planning Conference to authorise PJS to enter into negotiations for a possible joint venture with Akzo "[*]".[675]

- At the meeting of 2 November 1992, the Board of Directors of Akzo Nobel N.V. discussed the "[*]" in the negotiations and decided that "[*]." The Board of Directors also noted that "[*]"[676] The meeting on 10 November is also referred to in the minutes of meeting of the Board of Harrisons & Crosfield plc on 3 November 1992, where it was reported that the next stage was to prepare Heads of Agreement which would be "[*]".[677]

- At the meeting of 30 November 1992, the Board of Directors of Akzo Nobel N.V. noted that it [*]." The Board also approved, "[*]."[678]

- At the meeting of 2 February 1993, the Board of Directors of Harrisons & Crosfield plc was informed that the proposed joint venture arrangements with Akzo "[*]".[679]

- At the meeting of 1 March 1993, the Board of Directors of Akzo Nobel N.V. noted that "[*]". The Board also agreed "[*]″ regarding redundancies in the future should be added to the agreements and that the joint venture should have its own management development plan, in close cooperation with both parties. The Board also noted: ″[*]."[680]

- At the meeting of 2 March 1993, the Board of Directors of Harrisons & Crosfield plc noted that "[*]" but that "[*]." The Board anticipated, notwithstanding the delay caused by the Akzo Board, that the agreements would be ready for signature prior to the next Board meeting and it was resolved therefore that a committee comprising any

674 [*].
675 [*].
676 [*]
677 [*].
678 [*], [*].
679 [*].
680 [*].

two directors be appointed to act for and on behalf of the Board and to exercise its powers in all aspects of the proposed joint venture arrangements with Akzo.[681]

- At the meeting of 15 March 1993, the Board of Akzo Nobel N.V. noted the following:
"[*]."[682]

- At the meeting of 30 March 1993, the Board of Directors of Harrisons & Crosfield plc, viewed tabled illustrations of the logo to be used by the joint venture.[683]

(551) Minutes of Board meetings of Harrisons & Crosfield plc also show that the parent companies supervised the results of Akcros, that they were in contact regarding the workings of the joint venture throughout the period 1993 – 1998, and that they provided guarantees for Akcros' loans and approved its expenses[684]. The minutes show the following:

- "[*][685]"[686]

- "[*]."[687]
(Emphasis added). It must be concluded that the other "share" of the guarantee and capital expenditure was borne by Akzo Nobel N.V..

(552) As a result of the joint venture, the two groups merged their operations relating to the development, manufacture, and sales of primarily PVC processing additives (including tin stabilisers and ESBO/esters) in Europe and in the United States. Recital B of the Umbrella Joint Venture Agreement declared that the two "Groups" would combine their operations. Thus both groups transferred assets and personnel to the joint venture. They both transferred tangible and non-tangible assets, which meant the relocation of their respective plants, equipment and personnel as well as contribution

681 [*].
682 [*].
683 [*].
684 See [*] Minutes of the Meetings of Directors in 1993-1999[*]. The minutes of the meeting of the Directors of Harrison & Crosfield plc dated 2 March 1993 refer to the Board of Akzo intervention liable to potentially cause a delay in signing the arrangements for the JV which in fact did not occur. See minutes of meeting of directors of Harrison & Crosfield plc, [*]. In [*], [*] clarifies, that all references to "*Akzo*" in general in the minutes of meetings of Directors of Harrisons & Crosfield plc –both regarding the period of preparation and the period of functioning of Akcros JV– refer to the ultimate parent company of the company which signed the Umbrella Joint Venture agreement (see footnote 34). That signing company was Akzo Chemical International BV, and its ultimate parent company was Akzo Nobel N.V. See also Minutes of the Meetings of the Board of Management in 1992-1993, [*], and recital (550). Commission Decision of 29 April 1993 in case No IV/M310 – *Harrisons & Crosfield/Akzo*, OJ C 128, 8.5.1993. See also Elementis' reply of 3 July 2008, [*].
685 [*] Meeting of 24 June 1994.
686 [*].
687 [*].

of intellectual property. Also the jointly-owned joint venture Tinstab (see recital (11)) was transferred to Akcros.[688]

(553) Second, in addition to the involvement of the parent companies referred to in recitals (550) and (551), the management structure shows that the parent companies actually exercised decisive influence over the joint venture either directly or through their wholly-owned subsidiaries (the parties) who signed the Umbrella Joint Venture Agreement.

(554) Crucially, the parties appointed the members of the Governing Board which was the body controlling the joint venture. The Governing Board was composed of seven members for the first three years and subsequently five members. Akzo and Harcros/Elementis each appointed three members during the first three years and two members thereafter. The Managing Director also was a member of the Governing Board but was not entitled to vote. Decisions were adopted on the basis of simple majority. Thus, Akzo and Harcros/Elementis had equal power in the Governing Board and relied on each other in the exercise of their powers. As explained in recitals (555) to (562), the responsibilities of the Governing Board and its composition with high level executives from the Akzo and Harcros/Elementis Groups as representatives show that the power to influence the general market behaviour of Akcros lay in the hands of both Akzo and Harcros/Elementis.

(555) The Governing Board approved matters pertaining to the strategic direction of Akcros. Indeed, the Governing Board laid down "[*]."

(556) The Governing Board set the overall policy of the joint venture, but that was done in conjunction with the parties. Thus, according to section 4.2 of the Umbrella Joint Venture Agreement, " [*]". Those plans were reviewed and approved by the Governing Board which was, as noted, comprised of Akzo and Harcros appointees.

(557) [*].

(558) The policy matters to be determined by the Governing Board itself, listed in Schedule 4, covered capital expenditure, people, contracts and "other matters". More specifically, [*].[689] Furthermore, they also covered the appointment of senior managers, wage and salary increases, the opening of branches and the creation of subsidiaries, the acquisition, disposal and licensing of technical know-how and intellectual property, any contract arrangement between any joint venture entity and any member of either Party's group, borrowings, banking arrangements and dividend policy and investment policy.

(559) The Governing Board also played the key role in the selection of the managers of the Joint Venture. In particular, the Umbrella Joint Venture Agreement provides that [*]. Moreover, the Governing Board was responsible for choosing the Managing Director

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688 See the Umbrella Joint Venture Agreement ([*]) and Commission Decision of 29 April 1993 in Case IV/M310 – *Harrisons & Crosfield/Akzo*, OJ C 128, 8.5.1993. See also [*].

689 [*].

(the first Managing Director was named in the Umbrella Joint Venture Agreement itself). It was also involved in the selection of country managers and senior executives (schedule 4) and could also remove those managers.

(560) The persons chosen for the Governing Board of Akcros came from a high management level within the Akzo Group and the Harcros/Elementis Group[690]:

- [Employee] was [*] in 1993 and [*] of Harrison & Crosfield plc between 1988 and 1994 as well as [*] of Harcros Chemicals UK Ltd in 1988.
- [Employee] was [*] in 1993 and 1995 and [*] of Harrisons and Crosfields plc between 1989 and 1998 as well as [*]of Elementis plc in 1998.[691]
- [Employee] was [*] in 1993 and [*] of Harcros Chemicals UK Ltd between 1989 and 1994.
- [Employee] was the [*] of Akcros in 1993 to 1995 and [*] of Harcros Chemicals UK Ltd in 1989.
- [Employee] was [*] in 1995 and [*] of Harrisons & Crosfield plc between 1994 and1997 and of Harcros Chemicals UK Ltd between 1995 and 1997.
- [Employee], [*] within the Akzo Group, was one of the [*].[692]
- [Employee], employed by Akzo Nobel Nederland BV, was [*] of Akcros from 1995 onwards.[693]

(561) Moreover, individuals that previously represented Akzo and Harcros in the anti-competitive contacts were appointed to senior positions in the joint venture and/or continued participating in cartel meetings as representatives of the joint venture.[694]

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690 In its replies to the Commission's Article 18 requests for information, Akzo did not provide a list of the members of the Akcros' Governing Board with indications of the individuals' positions in other entities in the Akzo Group. It is noted that [employee], Akzo's [*], participated [*] in AC Treuhand meetings, that he signed the Umbrella joint venture Agreement and that he attended the meeting of the Board of Management of Akzo Nobel N.V. on 15 March 1993, see [*].

691 In response to the Statement of Objections, Elementis indicated that [employee] was the [*] of "Harcros" in the period May 1993 – October 1998, [*].

692 [Employee] participated in AC Treuhand meetings on 28 November 1989, 17 May 1991, 10 September 1992, 20 November 1992, and [employee], who also participated in AC Treuhand meetings, reported to him. Akzo has, in various responses to Article 18 requests for information, proven to be highly uncooperative in providing information regarding the legal entities participating in the cartel and, in particular, regarding who employed the individuals who participated.

693 See Table 3 in recital (23).

694 [employee]who participated in Fides/AC Treuhand meetings for Akzo was appointed member of the joint venture's Governing Board, see [*]. [Employee] also signed the Umbrella Joint Venture Agreement of 19 March 1993. [Employees], who all participated in meetings for Harcros, continued participating in meetings as representatives of the joint venture. [Employee] was also appointed the [*]of Akcros, see Umbrella [*] Joint Venture Agreement . See also [*].

(562) Entrusting individuals with simultaneous or consecutive positions in the parent companies and in the joint venture constitutes a classic mechanism to keep information flow and coherence within the members of the group (in this case between the joint venture and the parents) and guarantees predictability of management and on policy aspects.

(563) Third, it was the ultimate parent companies of the two groups, Akzo Nobel N.V. and Elementis plc that signed the Umbrella Acquisition Agreement according to which on 15 July 1998, Elementis plc agreed to sell to Akzo Nobel N.V. its 50 per cent interest in the various Akcros Partnerships and the Akcros Shares.[695]

(564) To conclude, the following legal entities should be held jointly and severally liable for the infringements of Akcros in the period 28 June 1993 to 2 October 1998: Akzo Nobel N.V.; Akcros Chemicals Ltd; Elementis Holdings Limited; Elementis UK Limited (until 2 July 1993) and Akcros Services Ltd (from 2 July 1993). In addition, Elementis plc will be held jointly and severally liable with them for the period 23 February 1998 to 2 October 1998.

6.2.3.1 Arguments by Akzo and Elementis in response to the Statement of Objections

(565) In response to the Statement of Objections, Akzo[696] claimed that the Commission erred in finding Pure Chemicals Ltd liable for Akcros' infringements on the basis of employment ties with the individuals involved. Akzo also states that the Commission wrongly concludes that Akcros Chemicals had no legal personality. There were several legal entities within the joint venture structure which could be held liable.

(566) In addition, Akzo Nobel N.V. and Elementis both contested being held liable as parent companies of Akcros Chemicals.[697]

(567) Akzo Nobel N.V. submits that only the joint venture can be held liable for any infringement and there is no basis for the Commission to consider any Akzo company to constitute a single undertaking with the joint venture. It argues that the Avebe judgement (see recital (504)) does not apply because that judgment did not address the question as to whether the parent companies of the partners to a partnership can be held liable and it concerned only a "*cooperative*" joint venture. That case law cannot be transposed to assess the liability of a company that co-owns a "*concentrative*" joint venture. Indeed, Akcros Chemicals was a full function concentrative joint venture independent from its shareholders which withdrew from the business. A joint venture cannot be concentrative in nature if it does not act autonomously.[698] In any event, the

695 See Umbrella Acquisition Agreement, [*].

696 Response of Akzo Nobel Chemicals GmbH, Akzo Nobel Chemicals BV, Akzo Nobel Chemicals International BV and Akcros Chemicals Ltd, [*].

697 Response of Akzo Nobel N.V., [*], of Elementis, [*]. In its response, Elementis uses the denomination "*Elementis*", without specifying what legal entities it refers to as being the parent companies of the joint venture.

698 Akzo Nobel N.V. refers to Commission Decision of 29 April 1993 in Case No IV/M310 - *Harrisons & Crosfield/Akzo*, OJ C 128, 8.5.1993, paragraph 9.

additional elements referred to by the Commission do not prove that control was actually exercised. The Commission also errs in stating that the joint venture was the U.K. Partnership and that all individuals were employed by partners to the U.K. Partnership. Referring to paragraph 94 of the Consolidated Jurisdictional Notice[699], Akzo Nobel N.V. states that the fact that individuals are formally employed by partners to the U.K. Partnership does not mean that they act on behalf of the partners. They were acting for the joint venture.

(568) Elementis argues along the same lines as Akzo Nobel N.V.. It asserts that there is no presumption that a parent company exercises decisive influence over a joint venture. Even in a case of 100% ownership, additional elements are needed. The Avebe judgment was case specific and does not alter the obligation of the Commission to demonstrate that the parent company actually exercised decisive influence. As the Commission has not discharged its burden of proof, it cannot hold the parent companies liable for the infringement of a joint venture.

(569) Elementis also refers to the Commission decision in the Rubber Chemicals,[700] where the Commission did not hold the parent companies liable. Elementis also states that the decisions in the GIS[701] and Chloroprene Rubber[702] cases cannot be used as precedents as they are under appeal.

(570) Elementis acknowledges that Harcros/Elementis had *de jure* joint control of Akcros with Akzo. It argues however that in practice, Harcros/Elementis were unable to exercise decisive influence over Akcros. The Commission has not provided any evidence either of instructions issued by Harcros/Elementis to Akcros concerning its day-to-day management and/or strategic commercial conduct or of the fact that Akcros actually followed these instructions. Nor has the Commission provided any evidence that any anti-competitive behaviour by Akcros Chemicals was on the instruction of the parent. [Employee] was firmly in charge of the joint venture and was managed by neither Akzo nor Harcros. There were difficulties experienced in the management of the joint venture which Harcros could not manage and as a result Harcros considered buying Akzo's share in order to overcome the management issues. There is no evidence that Harcros was involved in discussions concerning the marketing strategy of Akcros, market trends, pricing and/or market share policy. The board minutes of the ultimate parent company show only high level review of financial performance and capital expenditure plans. De facto, Akcros acted independently of any parental instruction. The parent company was not aware of any infringements.

[699] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.04.2008, p. 1.

[700] Commission Decision of 21 December 2005 in Case No COMP/F/C.38.443 — *Rubber chemicals*, OJ L 353, 13.12.2006.

[701] Commission Decision of 24 January 2007 in Case No COMP/38.899 — *Gas Insulated Switchgear*, OJ C 5, 10.1.2008, p. 7

[702] Commission Decision of 5 December 2007 in Case No COMP/38.629 — *Chloroprene Rubber*, OJ C 251, 3.10.2008, p. 11.

6.2.3.2 The Commission's appraisal and conclusion

(571) The arguments presented by Akzo and Elementis cannot be accepted.

(572) First, as regards the liability of Pure Chemicals Ltd (now Akcros Chemicals Ltd), it should be emphasized that in paragraph 17 of the Statement of Objections (see recital (20) in this Decision), it was established that the Akcros Chemicals joint venture had no legal personality in its own right "*but consisted of a number of partnerships and jointly-owned legal entities*". When anti-competitive arrangements are carried out by such a joint venture, the Commission must determine which legal entity(ies) is(are) the appropriate addressee(s) of a Statement of Objections and a Decision. Direct involvement of legal entities in an infringement is established when personnel of the legal entities have taken part in illegal meetings and contacts. As indicated in recital (23), the individuals participating in the infringement worked under and for the U.K. Partnership of the joint venture as a whole and were formally employed by Harcros Chemicals UK Ltd and, subsequently, by Akcros Services Ltd (see also footnote 41). The present U.K. Partnership did not have a legal personality of its own and, as such, it could not have been an addressee of a Statement of Objections or a Decision. In the circumstances, and for the reasons explained in recitals (538) to (541), the partners to the U.K. Partnership should be held liable. It cannot be accepted that only one of the partners to the U.K. Partnership should be held liable. As indicated in recital (540) the partners carried on their business together and any profit resulting from the cartels would have ended up with them. Therefore, as a partner to the U.K. Partnership, Pure Chemicals Ltd should be held liable as a direct participant in the anti-competitive activities together with Harcros Chemicals UK Ltd and, subsequently Akcros Service Ltd. This reasoning is also supported by the reasoning of Akzo Nobel N.V. (see recital (567)) that the employees acted for the joint venture, not for the partner by which it was formally employed.

(573) The argument that parent companies cannot be held liable for the joint venture cannot be accepted. It is settled case-law that the anti-competitive conduct of an undertaking can be attributed to another undertaking where it has not decided independently upon its own conduct on the market but carried out, in all material respects, the instructions given to it by that other undertaking, having regard in particular to the economic and legal links between them.[703]

(574) In the case at hand, Akzo Nobel N.V. (through the vehicle of its wholly owned subsidiary Akzo Nobel Chemicals International BV) and Harrison & Crosfield plc (now Elementis Holdings Limited, through the vehicle of its wholly owned subsidiary Harcros Chemicals UK Ltd, now Elementis UK Limited) and – as of February 1998 – Elementis plc (through the vehicle of its wholly owned subsidiary Harcros Chemicals UK Ltd, now Elementis UK Limited) exercised decisive influence on the commercial conduct and policies of the joint venture on an equal footing (see recitals (546) - (564)).

[703] Case T-314/01 *Avebe v Commission*, [2006] ECR II-3085, paragraph 135.

(575) Based on the factual circumstances of the joint venture, it appears that Akcros Chemicals and its 50/50 parents form together a single economic unit for the purposes of the application of Article 81 of the Treaty. This is so as Akcros Chemicals did not decide independently upon its own conduct on the market. First, contrary to what Akzo and Elementis argue, Akcros Chemicals was not established in order for the Akzo and Harcros/Elementis Groups to withdraw from the relevant markets. The establishment of the joint venture and the transfer of assets were made in order to provide "[*]".[704] With that purpose, the Akzo and Harcros/Elementis Groups transferred assets to the joint venture (see recital (552)) and established a management structure which shows that the parent companies actually exercised decisive influence over the joint venture either directly or through their wholly-owned subsidiaries (the parties) who signed the Umbrella Joint Venture Agreement (see recital (553)). Individuals that previously represented the groups of Akzo and Harcros in anti-competitive contacts were appointed to senior positions in the joint venture and/or continued participating in cartel meetings as representatives of the joint venture (recital (561). There was also overlapping personnel in the joint venture and in the two partner-groups (see recital (560)).

(576) It is also established, in recitals (550), (551) and (563), that the ultimate parent companies were involved in the negotiations on and establishment and workings of the joint venture and were the companies that terminated the joint venture on 2 October 1998.

(577) Furthermore, the full-function nature of a joint venture simply makes the joint venture similar to a normal subsidiary having separate legal personality. Otherwise, parent companies could evade their liability by choosing to establish a full-function joint venture irrespective of the existence of joint management power and joint share control. This is even more so in this case, where the joint venture consists of a number of partnerships without legal personality half owned by each group (Akzo, Harcros/Elementis) and a number of legal entities also half owned by companies of each group.

(578) Elementis' references to other Commission Decisions do not alter the reasoning in this case. It should be pointed out that the Commission enjoys a margin of discretion in deciding which legal entities of an undertaking it holds liable for an infringement. Its assessment is, and should be, made in accordance with the specific circumstances of each case. The fact that, in a previous Decision, the Commission chose not to hold parent companies of a joint venture liable does not mean that the Commission is prevented from holding the parent companies liable in this case. Moreover, the Commission's approach in the present case is aligned with other recent decisions.[705]

[704] [*].

[705] Commission Decision of 24 January 2007 in Case No COMP/38.899 — Gas Insulated Switchgear, OJ C 5, 10.1.2008, p. 7; Commission Decision of 5 December 2007 in Case No COMP/38.629 — Chloroprene Rubber, OJ C 251, 3.10.2008; p. 11; and Commission Decision of 15 October 2008 in Case No COMP/39.188 — Bananas, OJ C 189, 12.8.2009, p. 12.

(579) Elementis' claim that its *de jure* joint control over Akcros was never exercised in practice and that there were problems with the management of the joint venture rather highlight the fact that the Akzo and Harcros companies indeed decided jointly over the joint venture. It was because Akzo was an equal partner to the joint venture that Elementis on its own could not solve the difficulties. In this regard it is noted that the Governing Board (consisting of equal number of members from Akzo and Harcros) had the power to remove the Managing Director (Schedule 4 of the Umbrella Joint Venture Agreement). Akzo and Harcros nominated an equal number of members of the Governing Board, where decisions were taken by simple majority (see recital (554)). It was only by buying Akzo's share that Harcros on its own would have been in a position to solve difficulties. That is indeed illustrated in minutes of the meeting of 9 October 1997 of the Board of Directors of Harrisons & Crosfield plc: "[*]."[Emphasis added][706] Moreover, in order to find that two entities belong to the same undertaking that committed the infringement, it is not necessary to show that one entity gave instructions to the other as regards the day-to-day management and certainly not as regards the infringing behaviour. Nor it is necessary that the parent company is aware of the infringing behaviour.[707]

(580) Moreover, as to Elementis influence as parent company, it is worth noting as an additional point that Elementis itself accepts, in its response to the Statement of Objections, that it has a written policy to comply with all applicable legislation.[708] That must be understood as being applicable to all relevant subsidiaries. In other words, instructions are issued which the entire Harcros/Elementis Group must respect.

(581) It is apparent that the assertions of Akzo and Elementis do not alter the conclusions reached in recitals (536) to (564).

6.2.4 Akcros Chemicals Ltd

(582) Akcros Chemicals Ltd was the direct participant in the infringements for tin stabilisers in the period 2 October 1998 – 21 March 2000 (recitals (23), (274), (319) and Annex I) and for ESBO/esters in the period 2 October 1998 – 22 March 2000 (recitals (23), (286), (320) and Annex I).

(583) On 15 July 1998, Elementis plc agreed to sell to Akzo Nobel N.V. its 50% share of the joint venture. On 2 October 1998, the Akzo Group acquired Elementis' share of the U.K. Partnership (see recitals (22), (274) and (286)). The business of the U.K. Partnership was transferred into the acquiring Akzo company (Pure Chemicals Ltd, whose name changed subsequently to Akcros Chemicals Ltd), which was a 100% subsidiary of Akzo Nobel N.V. In line with the case-law referred to in recital (503) there is therefore a presumption that Akzo Nobel N.V. exercised decisive influence over Akcros Chemicals Ltd. Consequently, for the time period between 2 October

706 [*].
707 Case T-112/05 *Akzo v Commission*, [2007] ECR II-5049, paragraphs 58 and 83.
708 [*].

1998 and 22 March 2000 Akcros Chemicals Ltd and Akzo Nobel N.V. together form part of the undertaking that committed the infringement.

(584) In addition to Akzo Nobel N.V.'s 100% ownership of Akcros Chemicals Ltd there are elements that reinforce the presumption.

(585) The Authority Schedules of Akzo Nobel N.V. in that period[709] cover particularly, [*]. Thus, the management of Akzo Nobel N.V. plays a significant role in several essential aspects of the strategy of the subsidiaries and reserve the power of final decision with respect to a range of matters that define their course of conduct on the market.

(586) Moreover, the type-written memorandum drafted by [employee] of Akcros Chemicals Ltd in 2000 recommended to "[*]" (see recital (317)). The same is true for [employee]'s handwritten notes which were established in preparation of the type-written memorandum (recital (318)). Arnhem was the location of Akzo Nobel N.V. headquarters at the time. Inspection documents also show that Akzo Nobel N.V. issued instructions to its subsidiaries on conduct in the event of an investigation by the Commission and on compliance programs.[710] Accordingly, the parent company, Akzo Nobel N.V. gave instructions and was consulted regarding compliance with competition law of the subsidiaries which certainly shows exercise of influence over its subsidiaries' commercial conduct.

(587) It is concluded that Akzo Nobel N.V. and Akcros Chemicals Ltd constituted one undertaking throughout the period 2 October 1998 to 22 March 2000. They should therefore be held jointly and severally liable for the infringements in that period.

6.2.4.1 *Arguments by Akzo Nobel N.V. in response to the Statement of Objections*

(588) In response to the Statement of Objections, Akzo Nobel N.V. contests being held liable for the behaviour of Akcros Chemicals Ltd. In particular, as stated in recital (508), it argues that 100% ownership or near 100% ownership is not enough to trigger a presumption and that additional elements are needed. It argues that the additional elements presented by the Commission in the Statement of Objections are erroneous and/or irrelevant.

6.2.4.2 *The Commission's appraisal and conclusion*

(589) The arguments presented by Akzo Nobel N.V. cannot be accepted. As to the claim that 100% ownership is not enough to trigger a presumption on the exercise of decisive influence, the Commission refers to the arguments put forward in recitals (508) and (509). Therefore, it was for Akzo Nobel N.V. to rebut that presumption by producing sufficient evidence demonstrating that the companies concerned "*do not constitute a single economic entity*" (see recital (509)). Akzo Nobel N.V. acknowledges that it does not even attempt to submit any evidence to support such a

[709] Akzo Authority Schedules of 1995-2000, see [*].See also Case T-112/05 referred to in footnote 635.

[710] Inspection document found at [*],[*]. See also [*] response to the Statement of Objections, [*].

rebuttal.[711] Moreover, the Commission has adduced additional evidence of decisive influence. Therefore, Akzo Nobel N.V. should be held jointly and severally liable with its subsidiary in the period concerned.

6.2.5 Elf Aquitaine/Arkema France/CECA

(590) The Elf Aquitaine undertaking participated in the infringement for tin stabilisers during the periods 16 March 1994 to 31 March 1996 and from 9 September 1997 to 21 March 2000 (see recitals (28), (215), (247), (263) and (319) and Annex I). The first part of the infringement for tin stabilisers is not subject to fines (see recital (437)). During the first part of the infringement (16 March 1994 to 31 March 1996) and the second part of the infringement (9 September 1997 to 21 March 2000), CECA SA participated directly in the cartel (see recitals (28), (215), (247), (263) and (319) and Annex I). CECA SA should therefore be held liable for direct participation in the tin stabiliser infringement from 16 March 1994 to 31 March 1996 and from 9 September 1997 to 21 March 2000.

(591) The Elf Aquitaine undertaking participated in the infringement for ESBO/esters during the period 11 September 1991 to 26 September 2000 (see recitals (182) and (322) and Annex I). CECA SA was the legal entity which directly participated in that infringement (see recitals (28), (182) and (323) and Annex I).

(592) With respect to both infringements, Arkema France should be held liable as the immediate 99,9% parent company of CECA SA (for tin stabilisers from 16 March 1994 to 31 March 1996 and from 9 September 1997 until 21 March 2000 and for ESBO/esters from 11 September 1991 until 26 September 2000). Indeed, in accordance with the case law referred to in recital (503) it is presumed that Arkema France exercised decisive influence and effective control over CECA SA. In response to the Statement of Objections, Arkema France entirely accepts that it exercises decisive influence over its "*business unit*" CECA SA.[712]

(593) As referred to in recital (27), Elf Aquitaine S.A. was the 97,6% owner of Arkema France from 1 January 1986 to 13 December 2000. In accordance with the case law referred to in recital (503), it is presumed that Elf Aquitaine S.A. exercised decisive influence and effective control over Arkema France and CECA SA.

(594) In addition to Elf Aquitaine's almost 100% ownership of Arkema France and CECA SA there are elements that reinforce the presumption.

(595) A number of individuals held positions in the Management Committee and/or in the Board of Directors of both Elf Aquitaine S.A. and Arkema France (and sometimes also held positions in CECA SA). The individuals listed below are examples of such overlapping personnel:

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711 In its response to the Statement of Objections Akzo Nobel N.V. states: "[*]", [*].

712 [*]. It is also noted that, in its judgment of 30 September 2009 in Case T-174/05 *Elf Aquitaine v Commission*, not yet reported, the Court of First Instance accepted that Elf Aquitaine and Arkema France were part of one undertaking for nearly the entirety of the period at issue in the present case.

(a) [employee] was [*] of Elf Aquitaine S.A. (in 1991-1999) and of [*] of Arkema France (in 1991-1999). [Employee] was also [*] of Arkema France (in 1990-2000) and [*] of CECA SA (in 1990). Moreover, [employee] was also [*] of the Elf Aquitaine Group and as such attended the meetings of the Board of Directors of Elf Aquitaine, see recital (596).
(b) [Employee] was [*] of Elf Aquitaine S.A. (in 1992-1997), of [*] of Elf Aquitaine S.A. (in 1998-1999) and [*] of Arkema France (in 1990-2000). He was also (in 1994 - 1997) [*] of the Elf Aquitaine Group and as such attended the meetings of the Board of Directors of Elf Aquitaine, see recital (596).
(c) [Employees] were [*] of both Elf Aquitaine ([employee] in 1990-1997, [employee] in 1994-2000) and Arkema France ([employee] in 1990-1997, [employee] in 1990-2000).
(d) [Employees] were all [*] of Elf Aquitaine S.A. ([employee] in 1991-1993, [employee] in 1991-1992, [employee] in 2000 and [employee] in 1992-2000) and [*] of Arkema France ([employee] in 1990-2000, [employee] in 1990-1993 and [employees] in 1994-2000). [Employees] were also, for different periods, [*] and as such attended the meetings of the Board of Directors of Elf Aquitaine, see recital (596).[713]

(596) Furthermore, minutes of the meetings of the Board of Directors of Elf Aquitaine S.A. show that the directors of the different sectors (including [employee], see recital (595), [*]) attended the meetings. At the meetings, the directors debriefed the Board of Directors of Elf Aquitaine S.A. on the activities of the divisions. In particular, [*], in [*] debriefings, presented activities and events concerning Arkema France (or its predecessor such as Elf Atochem).[714] Thus, Elf Aquitaine S.A. had put in place a mechanism which allowed it to supervise the activities of the Elf Aquitaine Group, including Arkema France and CECA SA, with a view to ensuring that they were in accordance with the commercial objectives and strategies set by the parent company.

(597) It is concluded that the Elf Aquitaine undertaking, constituted by the legal entities Elf Aquitaine S.A., Arkema France and CECA SA participated in the infringements. More specifically, the companies of the Elf Aquitaine Group should be held liable for the following periods:
(a) CECA SA, for its direct participation for tin stabilisers in the periods 16 March 1994 – 31 March 1996 and 7 September 1997 – 21 March 2000 and for ESBO/esters in the period 11 September 1991 – 26 September 2000;
(b) Arkema France, jointly and severally with CECA SA for its respective periods of direct involvement;
(c) Elf Aquitaine S.A., jointly and severally liable with CECA SA and Arkema France as their (almost) 100% parent company for the respective periods of involvement.

[713] [*], and [*].
[714] Minutes of the meetings of the Conseil d'Administration of Elf Aquitaine, [*].

6.2.5.1 Arguments by Elf Aquitaine in response to the Statement of Objections

(598) Elf Aquitaine S.A. contests liability for the behaviour of Arkema France/CECA SA. It emphasises that a presumption based only on 100% ownership or near 100% ownership would violate general principles of Community and corporate law. Accordingly, as stated in recital (508), it argues that (near) 100% ownership is not enough to trigger a presumption, but that additional elements are needed. It argues that the additional elements presented by the Commission in the Statement of Objections are erroneous and/or irrelevant. In any event, a presumption of criminal responsibility must be interpreted restrictively and must be effectively rebutted by evidence showing commercial autonomy on the market concerned by the infringement.

(599) As to the additional elements presented by the Commission, Elf Aquitaine S.A. argues that the list of overlapping personnel is erroneous and irrelevant for proving decisive influence. Indeed, [employee]'s role(s) in both Arkema France and Elf Aquitaine S.A. do not suffice to show that Elf Aquitaine S.A. exercised decisive influence over Arkema France. Any anti-competitive activities were never discussed within – and definitely not known by - Elf Aquitaine's Management Committee. In addition, the commercial policy for heat stabilisers was never discussed by the Management Committee. [Employee] had responsibilities relating to hydrocarbons, not heat stabilisers, and [employees] had no operational positions, especially not within the heat stabilisers sector. [Employee] was [*] in both Elf Aquitaine S.A. and Arkema France.

(600) In any event, Elf Aquitaine S.A. rebuts the presumption by showing that the subsidiaries acted autonomously on the market concerned by the infringement. Elf Aquitaine S.A. refers to the fact that: a) Arkema France was free to enter contracts without authorisation of the parent company; b) Arkema France was free to determine what products/services to produce; c) Arkema France decided its own sales objectives and sales margins; d) Arkema France acts under its own name, not under the name of Elf Aquitaine S.A. nor as an agent thereof; e) Elf Aquitaine S.A. was never active on the tin stabiliser and ESBO/esters market; f) any involvement of Elf Aquitaine S.A. in the commercial policy of the subsidiary would be contrary to the division of tasks between the companies of the Elf Aquitaine Group and g) the turnover for tin stabilisers and ESBO/esters is a very small part of the turnover of Arkema France and an even smaller part of the turnover of Elf Aquitaine S.A.

6.2.5.2 The Commission's appraisal and conclusion

(601) Elf Aquitaine S.A.'s arguments cannot be accepted. As to the claim that 100% ownership or near 100% ownership is not enough to trigger a presumption on the exercise of decisive influence, the Commission refers to the arguments put forward in recitals (508) and (509). Therefore, it was for Elf Aquitaine S.A. to rebut that presumption by producing sufficient evidence demonstrating that the companies concerned "*do not constitute a single economic entity*" (see recital (509)). The general

statements of Elf Aquitaine S.A., unsupported by evidence (see recital (600)), do not constitute evidence to rebut the presumption that it actually exercised decisive influence over Arkema France and CECA SA. Moreover, the Commission has adduced additional evidence showing actual evidence of decisive influence. Therefore, Elf Aquitaine S.A. should be held jointly and severally liable with its subsidiaries in the periods concerned.

(602) Nonetheless, the Commission presents its reply to the arguments put forward by Elf Aquitaine S.A. in recitals (598) - (599).

(603) First, it cannot be accepted that an application of the (near) 100% presumption would violate general principles of Community law and of corporate law. In fact, in holding certain legal entities responsible as representatives of the undertaking that committed the infringement, the principle of the personal nature of criminal responsibility and the presumption of innocence are indeed respected.[715] Article 81 of the Treaty is addressed to "undertakings" which may comprise several legal entities. The principle of personal responsibility and the presumption of innocence are not breached as long as the legal entities are held liable on the basis of circumstance which pertain to their own role and conduct within the undertaking. In the case of a parent company, liability is established on the basis of exercise of decisive influence over the commercial policy of the subsidiary. That liability was indicated in the Statement of Objections, on which Elf Aquitaine S.A. was given the opportunity to comment and exercise its rights of defence. Moreover, references to certain areas of national corporate law where the principle of autonomy of a subsidiary is construed differently, is not appropriate in the context of an infringement of Article 81 of the Treaty. The same applies to references to criminal responsibility which is not relevant in the context Community competition law applicable to undertakings and is governed by an entire different system of rules.

(604) Second, the examples of overlapping personnel are invoked by the Commission as they corroborate the presumption of a single economic unit. Entrusting individuals with consecutive positions in the parent company and the subsidiary constitutes a classic mechanism to keep information flow and coherence within the members of the group and guarantees predictability of management and on policy aspects. It is obvious that the information and knowledge one individual obtains from one position may be used and considered also in other positions, for the benefit of the undertaking as a whole. Moreover, the minutes of board meetings referred in recital (596) also indicate the existence and functioning of a single undertaking. Indeed, during the regular board meetings there were reports on the market situation and the financial situation of the Chemicals division and subsidiaries (including Arkema France and CECA SA) are directly referred to. The minutes also show discussions on

[715] See, in a different context, the reasoning in Case C-49/92 P *Commission v Anic Partecipazioni S.p.A.*, referred to in footnote 474, paragraphs 83-84 and in Case T-9/99 *HFB a.o. v Commission*, [2002] ECR *II-1487*, paragraph 97. See also Judgment of the Court of First Instance on 8 October 2008 in Case T-69/04 *Schunk a.o. v Commission*, not yet reported, paragraphs 73 and 74.

investments, strategy and ethics of the Elf Aquitaine Group and that the financial result of the group was consolidated at the level of Elf Aquitaine S.A..[716]

(605) For the reasons stated in recitals (590) to (604), Elf Aquitaine S.A. should be held jointly and severally liable with Arkema France and CECA SA as they form part of the undertaking that committed the infringements.

6.2.6 Baerlocher

(606) The Baerlocher undertaking participated in the infringement for tin stabilisers in the period 24 February 1987 to 21 March 2000. Throughout that period, there were different legal entities belonging to the Baerlocher Group which participated in the infringement. The following companies participated directly in the infringement:

(a) MRF Michael Rosenthal GmbH during the period 12 October 1990 to 16 July 1996. This was through the regular participation of its principal owner [*] (see recitals (31), (242) and Annex I);
(b) Baerlocher GmbH during the period 24 February 1987 to 16 July 1996. This was through the regular participation of its employees, [*] (also its ultimate owner), [employees], (see recitals (36), (140), (242) and Annex I);
(c) Baerlocher UK Limited, during the period 28 March 1995 to 17 September 1997. This was through the regular participation of its employee [*], (see recitals (36), (227) and (264) and Annex I); and
(d) Baerlocher Italia S.p.A. during the period 22 June 1994 to 21 March 2000. This was through the regular participation of its employees [*], see recitals (36), (217) and (319) and Annex I).

(607) Moreover, MRF Michael Rosenthal GmbH and Baerlocher GmbH should also be held liable as parent companies. During the period 24 February 1987 to 12 October 1990, Baerlocher GmbH was the ultimate parent company of the Baerlocher Group (see recital (31)). During the period between 12 October 1990 and 21 March 2000, the entity MRF Michael Rosenthal GmbH was the 100% parent company of Baerlocher GmbH and hence the ultimate parent company of the Baerlocher Group (see recital (31)). Baerlocher GmbH was the immediate parent company of Baerlocher Italia S.p.A. and Baerlocher UK Limited (100% or near 100% owned), see recital (33).

(608) As to MRF Michael Rosenthal GmbH as ultimate parent company, it is presumed, in accordance with recital (503), that in the period 12 October 1990 to 21 March 2000, it exercised decisive influence and effective control over its subsidiaries. In addition to the 100% or almost 100% ownership, there are elements that reinforce the presumption.

(609) [Employee], who personally participated in cartel meetings and contacts in the period 11 November 1987 to 16 July 1996, holds the majority of the shares of MRF Michael

[716] See for instance [*]. As to the consolidation of the accounts, see judgment of the Court of First Instance of 18 December 2008 in Case T-85/06 *General Quimica a.o. v Commission,* not yet reported, paragraph 75.

Rosenthal GmbH (see recital (31)). [Employee] was also [*] of MRF Michael Rosenthal GmbH (1990-2004 and 2006-2008) and of the wholly (or almost wholly) owned subsidiaries Baerlocher GmbH (1986-2004), Baerlocher Italia S.p.A. (1988-2004) and Baerlocher UK (1994).[717] [Employee] was also [*]of Baerlocher GmbH and [*]of other companies of the Baerlocher Group (see recital (36)).

(610) Indeed, it is established case law that an economic unit exists in cases of strong personal links between the companies. For instance, in Dansk Rørindustri the Court of Justice ruled: "*… the Court of First Instance reached the conclusion that that economic unit existed on the basis of a series of elements which established that Mr Henss controlled the companies concerned, including, in addition to the fact that he or his wife held, directly or indirectly, all or virtually all the shares, the fact that Mr Henss held key functions within the management boards of those companies and also the fact that he represented the various undertakings at meetings of the directors' club, as indicated at paragraph 20 of this judgment, and that the undertakings were allocated a single quota by the cartel.*"[718] The same applies to this case.

(611) In addition, MRF Michael Rosenthal GmbH (and also Baerlocher GmbH) is established as limited liability companies (in German: Gesellschaft mit beschränkter Haftung, GmbH). Under German corporate law, the shareholders of a limited liability company (GmbH) exert a strong control over the management of the GmbH. Among other things, they appoint and dismiss the managing directors of the GmbH. They also take the necessary measures to examine and supervise the way the GmbH is managed. Moreover, the managing directors of the GmbH have the obligation, at the request of any shareholder, to immediately provide information about the affairs of the company and to allow access to its books and documents.[719]

(612) As to Baerlocher GmbH, as intermediate parent company, it is also presumed in accordance with recital (503) that it exercised decisive influence and effective control over its subsidiaries. In addition to the 100% or almost 100% ownership, the elements referred to in recital (609) - (611) reinforce the presumption. Moreover, Baerlocher explains itself that Baerlocher GmbH manages the Baerlocher Group activities (see recitals (32) and (614)).

(613) It is concluded that the Baerlocher undertaking, constituted by the legal entities MRF Michael Rosenthal GmbH, Baerlocher GmbH, Baerlocher UK Limited and Baerlocher Italia S.p.A. participated in the infringement during the period 24 February 1987 to 21 March 2000. More specifically, the following Baerlocher companies should be held liable for the corresponding periods:

(a) Baerlocher UK Limited, for its direct participation in the period 28 March 1995 to 17 September 1997;

717 [*].

718 Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri a.o. v Commission*, [2005] ECR I-5425, paragraph 120.

719 Judgment of the Court of First Instance on 8 October 2008 in Case T-69/04 *Schunk a.o. v Commission*, not yet reported, paragraph 67.

(b)Baerlocher Italia S.p.A., for its direct participation in the period 22 June 1994 to 21 March 2000;
(c) Baerlocher GmbH, for its direct participation in the period 24 February 1987 to 16 July 1996 and jointly and severally liable with Baerlocher UK Limited as its 100% parent company in the period 28 March 1995 to 17 September 1997 and with Baerlocher Italia S.p.A. as its (almost) 100% parent company for the period 22 June 1994 to 21 March 2000;
(d) MRF Michael Rosenthal GmbH, for its direct participation in the period 12 October 1990 to 16 July 1996 and jointly and severally liable with Baerlocher GmbH as its 100% parent company for the period 12 October 1990 to 16 July 1996 and jointly and severally liable with Baerlocher GmbH and Baerlocher UK Limited for the period 28 March 1995 to 17 September 1997 and with Baerlocher GmbH and Baerlocher Italia S.p.A. for the period 22 June 1994 to 21 March 2000.

6.2.6.1 Baerlocher's arguments in response to the Statement of Objections

(614) Baerlocher contests that MRF Michael Rosenthal GmbH and Baerlocher UK Limited are liable.[720] It considers that Baerlocher GmbH should be held liable for the period 1987-1990 and that Baerlocher Italia S.p.A. should be held liable as of 1990. It argues that MRF Michael Rosenthal GmbH never participated in the arrangements and that it cannot be held liable as parent company of its subsidiaries. Baerlocher argues that it is purely a holding company, whose only purpose is to hold the shares in Baerlocher GmbH. Baerlocher contends that the operative business is carried out by Baerlocher GmbH and its subsidiaries and [employee] participated in AC Treuhand meetings only as [*] of Baerlocher GmbH. According to Baerlocher, MRF Michael Rosenthal GmbH never exercised decisive influence over its subsidiaries; Baerlocher GmbH decided on the business strategy, sales policy, investments, capacities, financial matters and legal issues. As stated in recital (508), Baerlocher also argues that 100% ownership or near 100% ownership is not enough to trigger a presumption on the exercise of decisive influence, but that additional elements are needed. As to the subsidiaries, according to Baerlocher, the infringement should be attributed to Baerlocher Italia S.p.A., at least as from 1990, if not starting from the beginning of the tin stabiliser cartel and Baerlocher UK Limited should not be held liable because it was merely a sales company.

6.2.6.2 The Commission's assessment and conclusion

(615) Baerlocher’s arguments cannot be accepted. As to the direct participation of MRF Michael Rosenthal GmbH, it is established that [employee], who holds the majority of the shares of MRF Michael Rosenthal GmbH (see recital (31)) and is hence ultimately the owner of all the Baerlocher companies involved in the arrangements, personally participated in cartel meetings and contacts. [Employee] was therefore well aware of the illicit behaviour, but did not intervene to stop it.[721] Regarding parental liability for MRF Michael Rosenthal GmbH and Baerlocher GmbH, the Commission refers to the

[720] [*].
[721] Case T-309/94, *Koninklije KNP BT v Commission*, [1998] ECR-1007, paragraph 48.

reasoning on the 100% or almost 100% presumption in recitals (508) and (509). The argument that MRF Michael Rosenthal GmbH is a holding company is not sufficient, in itself, to reverse that presumption.[722] Moreover, the personal links and the corporate form of the companies referred to in recitals (609) to (611) reinforce the presumption.

(616) As to the subsidiaries, they are held liable as they participated directly in the infringement through their employees (see recital (36)). The argument that Baerlocher UK Limited did not participate in the cartel because it was merely a sales company cannot be accepted. Indeed, as a sales company it sold tin stabilisers. The object of the anti-competitive arrangement was to increase and maintain prices in the EEA above normal competitive levels. In any event, it is sufficient for the Commission to prove that the companies participated in the arrangements. Whatever commercial interest the participants may have had in participating is irrelevant as far as the existence of the infringement is concerned.[723]

6.2.7 Chemson

(617) The Chemson companies participated in the ESBO/esters infringement during the period 11 September 1991 – 26 September 2000 (recitals (182) and (323), and Annex I). More specifically, employees of the legal entity named Chemson Gesellschaft für Polymer Additive mbH participated in cartel meetings in the period 11 and 12 September 1991 to 26 September 2000 (recitals (45), (182), (323) and Annex I). As presented in recital (41), the legal entity Chemson Gesellschaft für Polymer Additive mbH (the old Chemson Germany) transferred the majority of its assets on 17 May 2000 to the new Chemson Germany (which assumed the same name).[724] Thus, these two legal entities, both called Chemson Gesellschaft für Polymer Additive mbH, participated directly in the cartel meetings, one of them before the buy-out, the other one after the buy-out. Moreover, also Polymer Additive Produktions- und Vertriebs Gesellschaft mbH, Arnoldstein (the old Chemson Austria) must be considered as a direct participant in the cartel meetings in the period 13 March 1997 to 17 May 2000 through its [*] [employee] (see recitals (41), (45), (46), (267) and Annex I). As referred to in recital (39), the old Chemson Austria was the immediate parent company of the old Chemson Germany in the period 30 September 1995 – 30 September 1999. In the period 30 September 1999 – 17 May 2000, the Chemson companies switched places in the Chemson Group and the old Chemson Germany became the immediate parent company of the old Chemson Austria. In response to the Statement of Objections the parties provided new information on the corporate structure, see recital (635). Chemson, ACW and GEA also provided new information during the Oral Hearing.[725]

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[722] Judgment of the Court of First Instance on 8 October 2008 in Case T-69/04 *Schunk a.o. v Commission*, not yet reported, paragraph 70.

[723] Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries a.o. v Commission*, [2007] ECR, I-729, paragraphs 46-47.

[724] That is, Chemson Gesellschaft für Polymer Additive mbH. [employee] [*] and employee [*] were also transferred from the old Chemson Germany to the new Chemson Germany.

[725] [*].

(618) As to the legal entities forming part of the undertaking that committed the infringement, a distinction should be made between the liability of the old Chemson Germany and of the new Chemson Germany. A distinction should also be made between the liability of the old Chemson Austria and of the new Chemson Austria. Furthermore, the liability of the ultimate parent company Metallgesellschaft/GEA should be assessed.

(a) The old Chemson Germany

(619) In line with the case law referred to in recital (506), the old Chemson Germany is the entity that participated directly in the cartel prior to the buy-out (that is, the entity today named Aachener Chemische Werke Gesellschaft für glastechnische Produkte und Verfahren mbH, see recital (41)) and it should be held liable for its direct participation until the date it divested its assets, that is, from 11 September 1991 until 17 May 2000.

(620) Moreover, as referred to in recitals (39) and (617), in the period 30 September 1999 to 17 May 2000, the old Chemson Germany was the 100% immediate parent company of the old Chemson Austria (which in turn participated directly in the infringement, see recitals (617) and (622)). In line with the case-law referred to in recital (503), there is therefore a presumption that in that period the old Chemson Germany exercised decisive influence over the old Chemson Austria. Moreover, [employee] was [*]of both companies. The old Chemson Germany should therefore be held jointly and severally liable with the old Chemson Austria for the latter company's direct participation in the cartel.[726] As the old Chemson Austria has ceased to exist in law, the liability for the direct participation of that company passes to its successor, the new Chemson Austria (see recitals (622), (624) and (626)).

(b) The new Chemson Germany

(621) In line with the case law referred to in recital (506), the new Chemson Germany is the entity which participated directly in the cartel with the acquired assets after the buy-out, (that is, the entity now named Chemson GmbH, see recital (41)) and it should be held liable for its direct participation in the period 17 May 2000 until 26 September 2000.

(c) The old Chemson Austria

(622) In the period 13 March 1997 to 17 May 2000, Chemson Polymer-Additive Produktions- und Vertriebs GmbH Austria (the old Chemson Austria) participated directly in the infringement through its [*], [employee] (see recitals (46), (267) and Annex I).[727]

726 The old Chemson Germany was the parent company of the old Chemson Austria for a period of a few months, probably as part of a re-arrangement of the Chemson companies for the buy-out in 2000.

727 [*].

(623) During the period 30 September 1995 to 30 September 1999, the old Chemson Austria was the immediate 100% parent company of the old Chemson Germany (see recital (39)). On 30 September 1999, preceding the buy-out in 2000, the old Chemson Austria and the old Chemson Germany switched places in the Chemson Group; more specifically, the old Chemson Austria became the immediate subsidiary of the old Chemson Germany (see recitals (617) and (620)). In line with the case-law referred to in recital (503), there is therefore a presumption that during the period 30 September 1995 to 30 September 1999 the old Chemson Austria exercised decisive influence over the old Chemson Germany. Moreover, [employee] was [*] of both companies.

(624) As referred to in recital (41), the old Chemson Austria was transferred to the new Chemson Austria. Had it not been transferred, it would have been held liable for its direct participation in the infringement in the period 13 March 1997 to 17 May 2000. It would also have been held jointly and severally liable with the old Chemson Germany as its immediate 100% parent company from 30 September 1995 until 30 September 1999. In such circumstances, the liability of the transferred company, the old Chemson Austria, must pass to its legal successor, Chemson Polymer-Additive AG (the new Chemson Austria, see further recitals (626) -(627)).

(d) The new Chemson Austria

(625) After the buy-out on 17 May 2000, the old Chemson Austria was transferred to Chemson Polymer-Additive AG (the new Chemson Austria, see recital (41)). The new Chemson Austria was the 100% immediate parent company of the new Chemson Germany (which participated directly in the cartel). In line with the case-law referred to in recital (503), there is therefore a presumption that the new Chemson Austria exercised decisive influence over the new Chemson Germany. Moreover, [employee], although formally employed by the new Chemson Germany, was [*] of the new Chemson Austria and reported to the supervisory Board of that company. The new Chemson Austria explains that it has "[*]".[728]

(626) In line with the reasoning in recital (506), the liability of the old Chemson Austria, which is transferred to the new Chemson Austria (see recital (41) and (622)), should pass to its legal successor, the new Chemson Austria.[729] Accordingly, the new Chemson Austria should be held liable for the direct participation of the old Chemson Austria for the period 13 March 1997 to 17 May 2000. It should also be held jointly and severally liable with the old Chemson Germany for the period 30 September 1995 until 30 September 1999 as it assumes the liability of the old Chemson Austria as parent company of the old Chemson Germany during that period. Additionally, the new Chemson Austria should be held jointly and severally liable with the new Chemson Germany in the period 17 May 2000 to 26 September 2000.

[728] [*].

[729] In case the legal succession for the new Chemson Austria does not apply, Metallgesellschaft AG (now GEA Group AG) should assume the liability of the old Chemson Austria.

(627) Consequently, Chemson Polymer-Additive AG (the new Chemson Austria) should be held liable for the direct participation of Chemson Polymer-Additive Produktions- und Vertriebs GmbH Austria (the old Chemson Austria) in the period 13 March 1997 – 17 May 2000. Chemson Polymer-Additive AG (the new Chemson Austria) should also be held jointly and severally liable with Aachener Chemische Werke Gesellschaft für glastechnische Produkte und Verfahren mbH (the old Chemson Germany) for the period 30 September 1995 until 30 September 1999, and with Chemson GmbH (the new Chemson Germany) for the period 17 May 2000 until 26 September 2000.[730]

(e) Metallgesellschaft/GEA

(628) Prior to 17 May 2000, the two Chemson companies, the old Chemson Germany and the old Chemson Austria, were wholly owned (indirect) subsidiaries of Metallgesellschaft AG (now GEA Group AG) (see recital (39)). In line with the case-law referred to in recital (503), there is therefore a presumption that Metallgesellschaft AG (now GEA Group AG) exercised decisive influence over its intermediate subsidiaries and ultimately over the old Chemson Germany and the old Chemson Austria. Together with them it therefore forms part of the undertaking that committed the infringement in the period 11 September 1991 to 17 May 2000.

(629) In addition to Metallgesellschaft AG's 100% ownership of the old Chemson Germany and the old Chemson Austria in the period prior to 17 May 2000, there are further elements that reinforce the presumption.

(630) Chemetall, which was the intermediate parent company of the old Chemson companies (see recital (39)), and the old Chemson companies (Germany and Austria) were subject to various control agreements (such as "Beherrschungs" and/or "Gewinnabführungsvertrag") which ultimately lead to the parent company Metallgesellschaft AG. According the agreements, Chemetall and the old Chemson companies (Germany and Austria) bore no business risk, as their profit and losses were ultimately transferred to and borne by the parent company Metallgesellschaft AG. Those agreements, together with other documents (such as internal rules) show that Metallgesellschaft AG had a mechanism at its disposal to exercise influence on its subsidiaries, so that they were not able to autonomously determine their behaviour on the market. In particular, after the near bankruptcy of Metallgesellschaft AG in 1993, Metallgesellschaft's control over the subsidiaries intensified.[731] According to a letter provided by Chemson: "[*]." [732]

(631) Consequently, for the period 11 September 1991 to 17 May 2000, GEA Group AG (former Metallgesellschaft AG) should be held jointly and severally liable with Aachener Chemische Werke Gesellschaft für glastechnische Produkte und Verfahren mbH (the old Chemson Germany). It should also be held jointly and severally liable with Chemson Polymer-Additive AG (the new Chemson Austria which is the legal

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730 It should be noted that [employee] was also the new Chemson's Austria [*] as from 17 May 2000.

731 [*].

732 [*]: "[*]."

successor of the old Chemson Austria, see recital (41)) for the period 30 September 1995 to 17 May 2000.

(f) Conclusion

(632) The following companies should be held liable for the following periods:

Aachener Chemische Werke Gesellschaft für glastechnische Produkte und Verfahren mbH (the old Chemson Germany) should be held liable for direct participation in the period 11 September 1991 – 17 May 2000. It should also be held jointly and severally liable with Chemson Polymer Additive-AG (the new Chemson Austria, the legal successor of the old Chemson Austria).

Chemson Polymer Additive-AG (the new Chemson Austria, the legal successor of the old Chemson Austria) should be held liable for direct participation in the period 13 March 1997 – 17 May 2000. It should also be held jointly and severally liable with Aachener Chemische Werke Gesellschaft für glastechnische Produkte und Verfahren mbH (the old Chemson Germany).

GEA Group AG (former Metallgesellschaft AG) should be held jointly and severally liable with Aachener Chemische Werke Gesellschaft für glastechnische Produkte und Verfahren mbH (the old Chemson Germany) and Chemson Polymer-Additive AG (the new Chemson Austria, the legal successor of the old Chemson Austria) for their respective periods.

Chemson GmbH (the new Chemson Germany) should be held liable for direct participation in the period 17 May 2000 – 26 September 2000. Chemson Polymer -Additive AG (the new Chemson Austria) should be held jointly and severally liable with Chemson GmbH for that period.

6.2.7.1 Arguments by Chemson, ACW and GEA in response to the Statement of Objections and the Commission's assessment

(633) Chemson, ACW and GEA all contest liability. Each suggest that liability should be attributed to one or both of the other two entities, or possibly to other legal entities that were not addressees to the Statement of Objections.

(634) In response to the Statement of Objections, during the Oral Hearing and in letters commenting on several points raised during that Hearing, Chemson, ACW and GEA submitted information on corporate structure which differed from the information that they themselves previously provided the Commission in replying to several Article 18 requests for information. For the sake of completeness, accuracy and good administration, the Commission has based itself on the new information provided by the undertakings.

(635) GEA revealed that the old Chemson Germany was a 100% direct subsidiary of Metallgesellschaft only until September 1994. Thereafter, the old Chemson Germany became a subsidiary of the intermediate parent company Dynamit Nobel AG, which was not 100% owned by Metallgesellschaft. In 1994, the other shareholders of Dynamit Nobel AG (Dresdner Bank AG and Deutsche Bank AG) each held 14,3% of Dynamit Nobel AG, leaving a 71,4% stake of Dynamit Nobel to Metallgesellschaft. As from 1995, the banks each held 0,25% of Dynamit Nobel and Metallgesellschaft (indirectly) held the remaining 99,5%. The banks retained their respective 0,25 % holding of the shares until 1999. For a limited period of time there were intermediate parent companies (100% owned by Metallgesellschaft AG) in the ownership line between Metallgesellschaft AG and Dynamit Nobel AG (see recitals (647) to (650)). Moreover, according to information provided by Chemson and ACW after the Statement of Objections was received,[733] the old Chemson Austria was the immediate parent company of the old Chemson Germany in the period 30 September 1995 until 30 September 1998, thereafter the two companies were sister companies until 30 September 1999. Until the buy-out in 2000, the old Chemson Germany was the immediate parent company of the old Chemson Austria.

6.2.7.1.1 Chemson

(636) Chemson argues that the old Chemson Austria cannot be held liable as direct participant. Chemson argues that [employee] only represented Chemson Germany (there is no evidence suggesting that he represented Chemson Austria) and that only the old Chemson Germany was a member of the AC Treuhand ESBO and Ester Group.

(637) Chemson's arguments cannot be accepted. Direct involvement of a legal entity is typically established when personnel of the legal entity have taken part in illegal meetings and contacts. Direct involvement can also be demonstrated where personnel from a different legal entity (which is part of the same undertaking) were aware of the illicit behaviour, but did not intervene to stop it.[734] [Employee] was the [*] of both the old Chemson Germany and the old Chemson Austria at the same time (see recitals (45) and (46)). Under such circumstances, the old Chemson Austria is indeed a direct participant in the infringement.

(638) Chemson also argues that the old Chemson Austria cannot be held liable as an intermediate parent company since 100% ownership is not enough to trigger a presumption (see recitals (508) and (509)), but additional elements are needed to trigger such a presumption. Chemson argues that the old Chemson Austria was not able to exercise decisive influence over the old Chemson Germany as such influence was exercised by Chemetall and/or Metallgesellschaft (see recital (630)). Chemson further argues that, in any event, the presumption is rebutted as the Commission acknowledges that the Chemson companies bore no risks relating to the business but were ultimately controlled by Metallgesellschaft. Chemson argues that both Chemson

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733 [*]

734 Case T-309/94 *Koninklije KNP BT v Commission*, [1998] ECR-1007, paragraph 48.

companies were always *de facto* controlled by Chemetall and subsequently by Metallgesellschaft and were *de facto* not able to act autonomously on the market. Chemson also states that the standard of proof for rebutting the presumption should be lower considering the passage of time.

(639) Chemson's arguments cannot be accepted. As to the claim that (near) 100% ownership is not enough to trigger a presumption, the Commission refers to the arguments put forward in recitals (508) and (509). The Commission can indeed rely on the presumption that the old Chemson Austria exercised decisive influence over its subsidiary. It is for the new Chemson Austria to rebut that presumption by producing sufficient evidence (not necessarily relating to the market concerned by the infringement) demonstrating that the companies concerned "*do not constitute a single economic entity*" (see recital (509)). It has not adduced such evidence.

(640) The arguments brought forward by Chemson are under no circumstances sufficient to rebut this presumption. On the contrary, Chemson referred to documents that show that Chemetall exercised decisive influence over the old Chemson Austria[735]. However, that in no way alters the Commission's finding that liability for the behaviour of the subsidiary the old Chemson Germany has to be attributed to its 100% parent company, the old Chemson Austria. The fact that Chemetall or Metallgesellschaft AG have the means to exercise influence on their intermediate subsidiary strengthens the view that the Chemson companies form part of a single undertaking together with their parent companies. In this regard, it is noted that even if a lower standard of proof for rebutting the presumption were to exist *quod non,* Chemson did not provide evidence to rebut the presumption. Therefore, the old Chemson Austria should be held liable for the infringing behaviour of its 100% subsidiary the old Chemson Germany. It should also be noted that the Commission has the discretion to determine (as long as the conditions for liability are fulfilled) what particular legal entities from an undertaking it holds liable for the infringement.

(641) Chemson also argues that the new Chemson Austria is not the legal successor of the old Chemson Austria. Metallgesellschaft still exists (in the form of GEA) and should assume that liability. The succession theory applies only for companies directly involved in the infringement.

(642) Chemson's arguments cannot be accepted. The new Chemson Austria is indeed the legal successor of the old Chemson Austria (see recital (41)). On 30 June 2000, the company Chemson Polymer-Additive AG was transferred to Chemson Polymer-Additive GmbH according to the Austrian law governing changes to the legal personality of companies (Umwandlung von Handelgesellschaften).[736] According to Austrian law, such transfer includes the transfer of all rights and duties[737] and therefore qualifies as legal succession. If the legal person initially responsible for the

[735] See for example [*].

[736] See [*]: Transformation according to paragraphs 2 et seq. of the Federal law on the transformation of mercantile associations (Umwandlung von Handelgesellschaften, "UmwG"): "Umwandlung gemäß §§ 2 ff UmwG durch übertragung des Unternehmens".

[737] § 1 UmwG specifies the transfer as "Gesamtrechtsnachfolge".

infringement ceases to exist and loses its legal personality, having been purely and simply absorbed by another legal entity, that latter entity must be held responsible for the whole period of the infringement and thus liable for the activity of the entity that was absorbed. There is no indication in Community case law that succession would apply only to companies that are directly involved in the infringement. Otherwise, companies could easily evade liability by transferring assets to other legal entities not directly involved in the infringement. In addition, the old Chemson Austria was indeed a direct participant in the infringement (see recital (637)).

(643) It is established that the new Chemson Germany should be held liable for direct participation in the period 17 May 2000 to 26 September 2000. The new Chemson Austria should be held liable as its immediate parent company (see recitals (503), (625) and (627)).

6.2.7.1.2 ACW

(644) Referring to case law,[738] ACW argues that there is a clear unity of conduct with the old and the new Chemson companies. In particular, Chemson Austria was the directing mind before and after the buy-out in 2000 and the new Chemson Austria should be held liable on the basis of economic succession. After the buy-out, the old Chemson Germany became economically inactive. It remained dormant until November 2006 when it merged with ACW and became economically active in the sector of specialty glass. The Commission's approach to hold ACW liable is wrong as a matter of law and as a matter of policy. According to ACW, there is no sense in treating the two Chemson companies differently and the Commission applies a different approach to successor liability for Ciba than it does for ACW. Moreover, ACW claims that Chemson Germany ceased to act autonomously from 1 October 1998 onwards and began to act as an agent.

(645) ACW's arguments cannot be accepted. In the case of a transfer of assets/activities which were involved in a competition law infringement (human and capital resources without a legal identity), the main rule is that the legal entity responsible for those assets at the time of the infringement continues to be liable where it remains in existence.[739] Indeed, until 17 May 2000 the assets were with the old Chemson Germany, and therefore ACW as the legal entity which is identical to the old Chemson Germany is responsible. Further, it is clear that any profits resulting from the operation of the cartel until 17 May 2000 would have ended up with the old Chemson Germany (now ACW) and ultimately with Metallgesellschaft (now GEA Group AG). It is also clear that the value of the business that was divested on 17 May 2000 ended up with Chemetall and ultimately with Metallgesellschaft (now GEA

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738 Case T-43/02 *Jungbunzlauer AG v Commission*, [2006] ECR II, p. 3435, paragraphs 132, Case C-204/00 P *Aalborg Portland A/S and others v Commission* [2004] ECR I-123, paragraph 357, 358 and Case C-280/06, *ETI and others*, [2007] ECR, I-1893.

739 See Case C-297/98 P *SCA Holding Ltd v Commission* [2000] ECR I-10101, paragraph 27, where the Court established that "*it falls to the legal or natural person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, at the date of the decision finding the infringement, the operation of the undertaking was no longer its responsibility.*"

Group AG). The entities bearing the fruits of the anti-competitive behaviour should also bear responsibility for it. That applies *a fortiori* also to dormant companies. Otherwise companies could easily avoid liability by transferring their assets to other legal entities and causing the company involved in the infringement to remain dormant for a period of time. Community case law on economic succession to which ACW refers, does not support its claims as it concerns other factual situations. Indeed, those cases concern situations where there are structural links between the transferor and the transferee, such as intra group transfers or transfers between companies being controlled by the same public authority, which is not the situation in the case at hand. Further, insofar as ACW claims that Chemson Germany was only an agent, it is noted that the document ACW uses to support its view only mentions that [*][740]. [*].

(646) The arguments of ACW do not alter the conclusion reached in recital (619) regarding the liability of that company.

6.2.7.1.3 GEA

(647) GEA contests liability as a parent company. It argues that from September 1994 onwards, the old Chemson Germany became a 100% subsidiary of the intermediate parent company Dynamit Nobel AG (Dynamit Nobel), which was not 100% owned by Metallgesellschaft. In 1994, the other shareholders of Dynamit Nobel AG (Dresdner Bank AG and Deutsche Bank AG) each held 14,3% of Dynamit Nobel AG, leaving a 71,4% stake of Dynamit Nobel to Metallgesellschaft. From 1995, the banks each held 0,25% of Dynamit Nobel and Metallgesellschaft (indirectly) held the remaining 99,5%. According to a consortium agreement ("*Konsortialvertrag*") between companies of Metallgesellschaft[741] and the banks and a consortium credit agreement ("*Konsortialkreditvertrag*")[742] between Dynamit Nobel, Metallgesellschaft Industrie GmbH and a consortium of banks[743], the banks had far reaching powers which reduced the influence of Metallgesellschaft on Dynamit Nobel. In addition, the corporate form of the intermediate parent company, Dynamit Nobel, as a share company ("*Aktiengesellschaft"*) prevented the shareholders from exercising decisive influence. According to German law, the Board of Directors ("*Vorstand"*) of a share company manages the company under its own responsibility. In addition, GEA argues that Metallgesellschaft had no de facto control over Dynamit Nobel, Chemetall and the Chemson companies and refers to statements of a former member of the Board of Metallgesellschaft and of two managers of Dynamit Nobel.

(648) The arguments presented by GEA cannot be accepted. First, until September 1994, Metallgesellschaft was indeed the 100% parent company of the old Chemson Germany. As indicated in recitals (508) and (509), the Commission can therefore

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741 Metallgesellschaft AG and its 100% subsidiaries MG Industriebeteiligungen AG (which was transformed ("Umwandlung") into Metallgesellschaft Industrie GmbH in June 1994), MG-Management-Service GmbH.

742 GEA only provided an unsigned draft of this agreement.

743 Westdeutsche Landesbank Girozentrale ("Konsortialführerin"), Commerzbank AG, Deutsche Bank AG, Dresdner Bank AG.

presume that it exercised decisive influence over its subsidiary. This conclusion is not rebutted by GEA's argument that there was no de facto control. The statements of former managers on the group structure focus on the independence of Dynamit Nobel vis-à-vis Metallgesellschaft, which is not relevant for the period prior to 1994 when the old Chemson Germany was the direct 100% subsidiary of Metallgesellschaft. Furthermore, the statement during the Oral Hearing that Chemetall, a sister company of the old Chemson Germany, was designated to play a coordinating role over the operations of the Chemson companies only strengthens the conclusion that there was a single undertaking. Indeed, that decision could only have been taken by the board of directors of Metallgesellschaft and only shows that the parent company exercised influence to divide tasks and organise the operations of the Metallgesellschaft Group. At the Oral Hearing, GEA also explained that the financial result of the Metallgesellschaft Group was consolidated at Metallgesellschaft AG. Any profit derived from the anti-competitive arrangements would therefore ultimately end up with Metallgesellschaft AG.

(649) As to the period post 1994, it cannot be accepted that the consortium agreement and the consortium credit agreement (see recital (647)) would have given the banks far reaching powers on the management of the business as suggested by GEA. The banks are merely financial investors and the contracts are aimed at protecting their financial interests.[744] The investor banks had no wish to interfere with the business but instead agreed to let MG Industriebeteiligungen AG[745] run the business. Accordingly, the consortium agreement states that the banks agree that MG Industriebeteiligungen AG assumes the business leadership in Dynamit Nobel[746]. Moreover, the consortium credit agreement[747] expressly mentions that a control and profit transfer agreement was to be signed between Dynamit Nobel AG and Metallgesellschaft Industrie GmbH[748], which would not need to be approved by the banks. That the banks agreed to the conclusion of that agreement shows that they were not interested in influencing Dynamit Nobel's business behaviour, but wanted Metallgesellschaft to take the lead in this regard. The control agreement was entered between MG-Management-Service GmbH[749] and Dynamit Nobel (see recital (650)). It is concluded that the consortium agreement and the consortium credit agreement do only protect the financial interests of the banks[750] and do not in any way reduce Metallgesellschaft's influence on the operational business. As to the argument of the corporate form of Dynamit Nobel as "Aktiengesellschaft", a form that shows that the companies constitute separate economic entities, it cannot be accepted. It should be noted that under German law, in

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744 See in the respect §§ I.5, II.1, II.4 and V of the consortium agreement, [*].

745 Transformed ("Umwandlung") into Metallgesellschaft Industrie GmbH in June 1994.

746 "[*]." (Number I. 5. of the agreement), [*].

747 Assuming that it was signed.

748 § 11(1) c) of the agreement, [*]. Metallgesellschaft Industrie GmbH is 100% owned by Metallgesellschaft AG, in addition a control and profit transfer agreement between Metallgesellchaft Industrie GmbH and Metallgesellschaft was concluded on 28 September 1994 and registered on 17 February 1995.

749 MG-Management-Service GmbH is 100% owned by Metallgesellschaft, in addition, control and profit transfer agreement between MG-Management-Service GmbH and Metallgesellschaft was concluded on 29 September 1994 and registered on 29 May 1995.

750 See § 11.1 a and b of credit consortium agreement, [*].

an "Aktiengesellschaft", the majority shareholders exercise their influence on the companies' conduct through the means of the annual general meeting. This is the main means that enables the majority shareholders to exercise indeed decisive influence on the company's conduct. Consequently, Dynamit Nobel does not constitute a separate, autonomous economic entity.

(650) Moreover, on 29 September 1995, a profit transfer agreement (Gewinnabführungsvertrag) was concluded between Metallgesellschaft Industrie GmbH and Dynamit Nobel. The agreement was registered on 8 December 1995 and had retroactive effect from 1 October 1994. According to that agreement, Dynamit Nobel was to transfer its profits to Metallgesellschaft Industrie GmbH and Metallgesellschaft Industrie GmbH was to equalise any loss of Dynamit Nobel. Hence, it is Metallgesellschaft, via Metallgesellschaft Industrie GmbH, that bears the risk of Dynamit Nobel's business conduct. Moreover, on 9 September 1996, a control agreement (Beherrschungsvertrag) was entered into between MG-Management-Service GmbH and Dynamit Nobel. According to that agreement, MG-Management-Service GmbH exercises direct control over Dynamit Nobel and is entitled to give instructions to the latter company. Accordingly, Dynamit Nobel bore no risk relating to the business and did not dispose of its profit, and was completely controlled by Metallgesellschaft.[751] The strength of those agreements is not in anyway undermined by the consortium agreement and the consortium credit agreement. On the contrary, as stated in recital (649), the consortium agreement clearly states that MG Industriebeteiligungen AG assumes the business leadership of Dynamit Nobel.

(651) The statements of former managers of the Metallgesellschaft Group do not alter that conclusion. The statements are of general character and ignore the existence of the profit transfer and control agreement.

(652) The arguments presented by GEA do not alter the conclusion reached in recital (631) regarding Metallgesellschaft's AG liability (now GEA Group AG).

6.2.7.1.4 Conclusion

(653) The following companies are held liable for the periods indicated:

Aachener Chemische Werke Gesellschaft für glastechnische Produkte und Verfahren mbH (the old Chemson Germany) is held liable for direct participation in the period 11 September 1991 – 17 May 2000. It is also held jointly and severally liable with Chemson Polymer-Additive AG (the new Chemson Austria, the legal successor of the old Chemson Austria).

[751] MG-Management-Service GmbH entered into all rights and duties of Metallgesellschaft Industrie GmbH because Metallgesellschaft Industrie GmbH was merged into MG-Management-Service GmbH in July 1996 (Verschmelzung). Therefore the profit transfer agreement and also the consortium credit agreement (if signed) have from this date MG-Management-Service GmbH as party. Metallgesellschaft enters into rights and duties of MG-Management-Service GmbH which was merged into Metallgesellschaft in May 1998 (Verschmelzung). Metallgesellschaft is from this date MG-Management-Service GmbH party of control agreement which remains in force.

Chemson Polymer-Additive AG (the new Chemson Austria, the legal successor of the old Chemson Austria) is held liable for direct participation in the period 13 March 1997 – 17 May 2000. It is also held jointly and severally liable with Aachener Chemische Werke Gesellschaft für glastechnische Produkte und Verfahren mbH (the old Chemson Germany).

GEA Group AG (former Metallgesellschaft AG) is held jointly and severally liable with Aachener Chemische Werke Gesellschaft für glastechnische Produkte und Verfahren mbH (the old Chemson Germany) and Chemson Polymer-Additive AG (the new Chemson Austria, the legal successor of the old Chemson Austria) for their respective periods of direct and indirect participation.

Chemson GmbH (the new Chemson Germany) is held liable for direct participation in the period 17 May 2000 – 26 September 2000. Chemson Polymer-Additive AG (the new Chemson Austria) is held jointly and severally liable with Chemson GmbH for that period.

6.2.8 Chemtura

(654) Employees of Vinyl Additive GmbH (now named Chemtura Vinyl Additives GmbH (see recital (48)) participated directly in the cartel for tin stabilisers from 12 December 1997 to 21 March 2000 (recitals (52), (55), (58) and (319)) and in the cartel for ESBO/esters from 12 December 1997 until 26 September 2000 (recitals (52), (55), (58) and (323)). The entity now named Chemtura Vinyl Additives GmbH should therefore be held liable for the period of the infringements in which it participated. That means that Chemtura Vinyl Additives GmbH should be held liable for its direct participation in the period 12 December 1997 – 29 May 1998 (when it belonged to the Ciba Group (see also recital (659)) and for its continued direct participation in the period thereafter (when it belonged to the Chemtura Group). In addition, there are other companies which together with the legal entity that directly participated in the cartel form part of the undertaking that committed the infringements. In this regard, a distinction should be made between the period during which that entity belonged to the Ciba Group (12 December 1997-29 May 1998, see sub-section 6.2.9) and the period during which it belonged to the Chemtura Group (29 May 1998 until 26 September 2000, see recitals (655) to (658)).

(655) On 29 May 1998, Chemtura acquired Vinyl Additives GmbH from Ciba (see recitals (50), (55), (273) and (283)). In the period 29 May 1998 to 26 September 2000, Chemtura Vinyl Additives GmbH was 100% owned by Chemtura Corporation, see recital (48). In accordance with the case law referred to in recital (503), it is presumed that Chemtura Corporation exercised decisive influence and effective control over Chemtura Vinyl Additives GmbH. Chemtura Corporation will therefore be held jointly and severally liable with Chemtura Vinyl Additives GmbH for the period 29 May 1998 to 26 September 2000.

(656) In addition to Chemtura Corporation's 100% ownership of Chemtura Vinyl Additives GmbH, there are further elements that reinforce the presumption. In particular, the reporting lines of individuals participating in the cartel lead to Chemtura Corporation. [employee] (Chemtura Vinyl Additives GmbH) reported, in 1994-1998, to [employee] ([*], Witco GmbH (now Chemtura Organometallics GmbH)) and, in 1999-2000, to [employee] ([*]of Chemtura Vinyl Additives GmbH). Both [employees] reported in their turn to [employee] ([*]) of Chemtura Corporation. [Employee] in [*] turn reported to [*], Polymer Chemicals of Chemtura Corporation.[752]

(657) Chemtura Corporation was also informed about the cartel activities in which its subsidiary was involved. [*] (see recitals (275), (289)) and made the decision that [employees], would attend the future AC Treuhand meetings (see recital (298)).

(658) It is concluded that Chemtura Corporation and Chemtura Vinyl Additives GmbH constituted one undertaking throughout the period 29 May 1998 to 26 September 2000. Therefore, Chemtura Corporation and Chemtura Vinyl Additives GmbH are held jointly and severally liable for the infringements during that period.

6.2.9 Ciba

(659) Companies of the Ciba Group participated in the infringement for tin stabilisers during the period 24 February 1987 to 29 May 1998 (see recitals (50), (55), (58), (139) and (273) and Annex I) and in the infringement for ESBO/esters during the period 11 September 1991 to 29 May 1998 (see recitals (50), (55), (58), (182) and (283) and Annex I). The companies that participated directly in the infringements were the following: Ciba Lampertheim GmbH (for tin stabilisers during the period 24 February 1987 to 12 December 1997 see recitals (50), (55), (58) and (139) and Annex I) and for ESBO/esters during the period 11 September 1991 to 12 December 1997 (see recitals (50), (55), (58) and (182) and Annex I), and Vinyl Additive GmbH (for tin stabilisers from 12 December 1997 until 21 March 2000, see recitals (55) (58) and (319) and Annex I and for ESBO/esters from 12 December 1997 until 26 September 2000, see recitals (55), (58) and (323) and Annex I). As mentioned in recital (56), Ciba-Geigy AG was from 1986 to 20 December 1996 (directly or indirectly) owner of 100% of the shares of Ciba Lampertheim GmbH and Vinyl Additive GmbH and their ultimate parent company. On the basis of the case law referred to in recital (503) it can be presumed that it exercised decisive influence on its subsidiaries and formed one single economic unit with them during the aforementioned period. Vinyl Additive GmbH was established on 12 December 1997 and was acquired by Chemtura on 29 May 1998 (see recitals (50), (55) and (273) and (283)). Vinyl Additive GmbH (now named Chemtura Vinyl Additives GmbH) should be held liable for the period of its direct participation during the period 12 December 1997 to 29 May 1998 (when it was part of the Ciba Group).[753] Ciba Lampertheim GmbH should be held liable for its direct participation in the cartels in the period from 24 February 1987 to 12 December

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753 As presented in recital (654), Vinyl Additive GmbH (now named Chemtura Vinyl Additives) will also be held liable for its direct participation in the period when it belonged to the Chemtura Group.

1997 and jointly and severally liable with Vinyl Additive GmbH (now named Chemtura Vinyl Additives GmbH) as its 100% parent company during the period 12 December 1997 to 29 May 1998. In addition, there are other companies that together with Ciba Lampertheim GmbH and Vinyl Additive GmbH form part of the undertaking that committed the infringements established in this Decision.

(660) As referred to in recital (56) and footnote 78, Ciba Holding AG has been the ultimate 100% parent company of the Ciba Group since 1 January 1997. As far as the speciality chemicals business is concerned, Ciba Holding AG is the continuation of the previous parent company, Ciba-Geigy AG.[754] In fact, in connection with the merger with Sandoz into Novartis on 20 December 1996, the speciality chemicals business of Ciba–Geigy AG was spun-off from Novartis. The effective date of the spin-off was 1 January 1997 and the transfer was done in several stages. Thus, Novartis spun-off the chemicals business to Ciba Spezialitätenchemie Holding AG/Ciba SC Holding AG (now Ciba Holding AG), which was formed with retroactive effect as of 1 January 1996. Furthermore, Ciba-Geigy AG transferred its assets and liabilities to Ciba Spezialitätenchemie Holding AG/Ciba SC Holding AG (now Ciba Holding AG) according to an agreement of 13 December 1996 (so called "Sacheinlagevertrag"). Thus, Novartis is not – and was never intended to be – the economic successor of Ciba-Geigy AG as far as the speciality chemicals business is concerned. In any event, and in case Novartis would be considered as the legal successor of that business (although for a very short period of time), the entire merger and spin-off transaction intertwined the companies Ciba-Geigy AG, Novartis and Ciba SC Holding AG (now Ciba Holding AG) so that there were economic links between them.[755] Also, in such a situation, in accordance with the case law cited in recital (507), it is concluded that Ciba Holding AG should be held liable for the past role of Ciba-Geigy AG.

(661) Under the Articles of Association of Ciba Spezialitätenchemie Holding AG (now named Ciba Holding AG), it was empowered to dispose of all legal entities which were active in the area of specialty chemicals which includes PVC Additives such as Heat Stabilisers. Accordingly, its Board of Directors was to implement the "[*]"[756], while it was entrusted to decide upon the organization and the administration of accounting, financial control and financial planning of Ciba Holding AG. Furthermore, it is to be noted that, in line with those Articles of Association, Ciba Holding AG took over all the assets and liabilities relating to the area of specialty chemicals arising from the separation of Ciba-Geigy AG into a Specialty Chemicals Group and a Life Sciences Group. Moreover, on the basis on other documents in the

754 It should be noted that Ciba SC Holding AG was created in 1996 and was part of the group created following the merger of Ciba-Geigy AG and Novartis AG ([*]).

755 Subsequently, Ciba Spezialitätenchemie Holding AG/Ciba SC Holding AG (now Ciba Holding AG) became a publicly listed company. See Background for the Novartis merger, [*], Information for shareholders, [*], The rights offering, [*], vertrag, [*] and Master Spin-off agreement, [*].

756 [*], [*].

Commission's file, it is concluded that Ciba Holding AG has the power to exercise decisive influence over its subsidiary.[757]

6.2.9.1 *Ciba's arguments in the response to the Statement of Objections and the Commission's assessment*

(662) Ciba claims that Novartis, as the legal successor of Ciba-Geigy AG which still exists, should be held liable and not Ciba SC Holding AG (now Ciba Holding AG). According to Ciba, the Sacheinlagevertrag referred to in recital (660) does not change that situation. Ciba Lampertheim was a 100% subsidiary of Novartis at the time of the infringement so Novartis must assume liability. In Ciba's view, Novartis, Ciba-Geigy AG and Ciba Holding AG did not constitute one continuing single economic entity at the time of the Decision so the Commission cannot hold Ciba liable.

(663) Ciba's argument cannot be accepted. It should be noted that after the merger and the legal and economic succession of Ciba-Geigy AG into Novartis on 20 December 1996, the specialty chemicals business was again separated from Novartis and integrated into Ciba-SC Holding AG by way of the spin-off agreement of 13 March 1997 (with retroactive effect as of 1 January 1997). As the underlying documents for the merger of Ciba-Geigy AG to Novartis demonstrate, that merger was only aimed at incorporating the other activities of Ciba-Geigy AG into Novartis AG without the activities subject to the present proceeding[758]. In those specific circumstances, it would therefore be artificial to consider that liability for the infringement of Ciba-Geigy AG has moved to and remained with Novartis. Indeed, the presumption based on 100% ownership cannot be applied in cases where the parent company holds 100% of the shares in the subsidiary temporarily[759]. Accordingly, even with the 100% ownership, it cannot be presumed that Novartis exercised decisive influence; moreover, no lasting links could have developed between the subsidiary and the parent for a period of only 11 days. That is confirmed by the fact that on 13 December 1996 – and hence, before the merger of Ciba-Geigy AG and Novartis – Ciba-Geigy AG and Ciba SC Holding AG concluded an agreement by which all assets and liabilities of Ciba-Geigy AG in the business of specialty chemicals were transferred to Ciba SC Holding AG (the "Sacheinlagevertrag" referred to in recital (660)[760]). The Court of First Instance confirmed in the Jungbunzlauer judgment that *"the fact that a company continues to exist as a legal entity does not exclude the possibility that, with*

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757 [*]. [*].

758 Cf. [*].

759 Cf. footnote 62 of the opinion of Advocate-General Kokott of 23 April 2009 in Case C-97/08P *Akzo Nobel N.V. and Others v Commission* (not yet reported), referring to the Opinion of Advocate General Warner in Joined Cases 6/73 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223, 266. As regards rebuttal of the 100% presumption Advocate-General Kokott states: "*The Commission correctly mentions the following examples in this regards: a) the parent company is an investment company and behaves like a pure financial investor, b) the parent company holds 100% of the shares in the subsidiary only temporarily and for a short period, c) the parent company is prevented for legal reasons from fully exercising its 100% control over the subsidiary.*

760 [*]. This contract additionally states [*].

reference to Community competition law, there may be a transfer of part of the activities of that company to another which becomes responsible for the acts of the former".[761]

(664) The entire merger and spin-off transaction intertwined the companies concerned (Novartis AG, Ciba-Geigy AG and Ciba SC Holding AG) so that economic links existed between them. In addition, all the means of production were (or were intended to be) transferred from Ciba-Geigy AG to Ciba SC Holding AG and the latter continued the industrial activity. Thus, the economic entity that participated in the infringements remains the same. Ciba Holding AG should therefore be held liable for the infringements committed by Ciba-Geigy AG through its fully owned subsidiary Ciba-Geigy Marienberg GmbH (later renamed Ciba Lampertheim GmbH).

(665) In accordance with the case law referred to in recital (503), the facts establish that Ciba Holding AG exercised decisive influence and effective control over its subsidiaries not only through the 100% ownership but also through the elements that reinforce this presumption, that is, the powers of the ultimate parent company and its respective statutory bodies (such as the Board of Directors) (recital (661)). Ciba Holding AG is therefore held jointly and severally liable with Ciba Lampertheim GmbH and Vinyl Additives GmbH (now named Chemtura Vinyl Additives GmbH) for the period 24 February 1987 – 29 May 1998.

6.2.10 *Faci*

(666) Employees of Faci S.p.A. participated in the infringement for ESBO/esters during the period from 6 November 1996 to 26 September 2000 (see recitals (61), (256) and (323) and Annex I). It is therefore held liable for its direct participation in that cartel.

6.2.11 *Reagens*

(667) Employees of Reagens S.p.A. participated in the infringement for tin stabilisers during the period from 20 November 1992 to 21 March 2000 (see recitals (64), (194), and (319) and Annex I). It is therefore held liable for its direct participation in the cartel.

6.2.12 *AC Treuhand*

(668) AC-Treuhand AG participated in the infringement for tin stabilisers during the period from 1 December 1993 to 21 March 2000 (footnotes 169, 294, recitals (111), (205) and (319) and Annex I). It participated in the cartel for ESBO/esters in the period 1 December 1993 to 26 September 2000 (footnotes 169, 294, recitals (111), (212) and (323) and Annex I). AC-Treuhand AG is therefore held liable for its direct participation in the cartels in those periods.

(669) In response to the Statement of Objections, AC-Treuhand AG pointed out that according to Swiss corporate law, it has only existed as a legal entity since 28

761 Case T-43/02 *Jungbunzlauer AG v. Commission* [2006] ECR II-3435, paragraph 132.

December 1993 when it was registered.[762] That argument does not change the Commission's findings regarding AC-Treuhand AG's liability for the infringements. Evidence shows that AC-Treuhand AG was established during the year 1993, that it took over the business from Fides in December 1993 and that it continued the continuous infringements relating to tin stabilisers and ESBO/esters (recitals (205), (212)) with the same individual ([employee]) [763]. The fact that formal registration took place a few weeks later does not relieve AC-Treuhand AG from responsibility for the illegal activities committed.

7 DURATION OF THE INFRINGEMENT

(670) It is considered that with respect to tin stabilisers, the infringement started on 24 February 1987 and ended on 21 March 2000 whereas with respect to ESBO/esters, the infringement started on 11 September 1991 and ended on 26 September 2000.

7.1 Duration of the infringement for each addressee

(671) It is concluded that the duration of the infringement for each of the addressees is as follows:

(a) Akzo

As regards tin stabilisers, the Akzo Group participated in the infringement from 24 February 1987 until 21 March 2000 (see recital (139), (319) and (511) and Annex I). As regards ESBO/esters, the Akzo Group participated in the infringement from 11 September 1991 until 22 March 2000 (see recitals (182), (320) and (511) and Annex I).

More specifically, Akzo Nobel N.V. as the parent company, participated in the infringement for tin stabilisers from 24 February 1987 to 21 March 2000. This conclusion is based on the direct participation of its subsidiaries: Akzo Nobel Chemicals GmbH from 24 February 1987 to 28 June 1993 and Akcros Chemicals Ltd (previously Pure Chemicals Ltd) from 28 June 1993 to 21 March 2000 (see recitals (512), (538) and (582)). It is also based on Akzo Nobel N.V.'s exercise of decisive influence, with Elementis, over the joint venture Akcros Chemicals from 1993 to 1998. Moreover, Akzo Nobel N.V., as the parent company participated in the infringement for ESBO/esters from 11 September 1991 to 22 March 2000. This conclusion is based on the direct participation of its subsidiaries: Akzo Nobel Chemicals B.V. from 11 September 1991 to 28 June 1993 (recital (512)); and Akcros Chemicals Ltd (previously Pure Chemicals Ltd) from 28 June 1993 to 22 March 2000 (see recitals (538) and (582)). It is also based on Akzo Nobel N.V.'s exercise of decisive influence, with Elementis, over the joint venture Akcros Chemicals from 1993 to 1998.

762 [*],[*].
763 See also [*].

The total duration of participation in the tin stabilisers infringement of companies belonging to the Akzo Group therefore amounts to a period of 13 years and 25 days. The total duration of participation in the ESBO/esters infringement of companies belonging to the Akzo Group therefore amounts to a period of 8 years, 6 months and 11 days.

(b) Elementis (previously Harcros)

As regards tin stabilisers, the Harcros/Elementis Group participated in the infringement from 28 September 1988 until 2 October 1998 (see recitals (152), (274) and (528) and Annex I). As regards ESBO/esters, the Harcros/Elementis Group participated in the infringement from 11 September 1991 until 2 October 1998 (see recitals (182), (286) and (528) and Annex I).

More specifically, Elementis Holdings Limited (previously Harrisons & Crosfield plc) as the parent company, participated in the infringement for tin stabilisers from 28 September 1988 until 2 October 1998, together with Elementis plc as the ultimate parent company from 23 February 1998 until 2 October 1998, for the direct participation of their subsidiaries: Elementis UK Limited (previously Harcros Chemicals UK Ltd) from 28 September 1988 until 2 July 1993 (see recitals (529) and (541)); and Elementis Services Limited (previously Akcros Services Ltd) from 2 July 1993 to 2 October 1998 (see recital (541)). The responsibility of Elementis Holdings Limited (previously Harrisons & Crosfield plc) and Elementis plc is also based on their exercise of decisive influence, with Akzo Nobel, over the joint venture Akcros Chemicals from 1993 to 1998. Moreover, Elementis Holdings Limited (previously Harrisons & Crosfield plc) as the parent company, participated in the infringement for ESBO/esters from 11 September 1991 until 2 October 1998, together with Elementis plc as the ultimate parent company from 23 February 1998 until 2 October 1998, for the direct participation of their subsidiaries: Elementis UK Limited (previously Harcros Chemicals UK Ltd) from 11 September 1991 until 2 July 1993 (see recitals (529) and (541)); and Elementis Services Limited (previously Akcros Services Ltd) from 2 July 1993 to 2 October 1998) (see recital (541)). The responsibility of Elementis Holdings Limited (previously Harrisons & Crosfield plc) and Elementis plc is also based on their exercise of decisive influence, with Akzo Nobel, over the joint venture Akcros Chemicals from 1993 to 1998.

The total duration of participation in the tin stabiliser infringement of companies belonging to the Harcros/Elementis Group therefore amounts to a period of ten years and four days. The total duration of participation in the ESBO/esters infringement of companies belonging to the Harcros/Elementis Group therefore amounts to a period of seven years and 21 days.

c) Elf Aquitaine/Arkema France/CECA

As regards tin stabilisers, the Elf Aquitaine Group participated in the infringement from 16 March 1994 until 31 March 1996 and from 9 September 1997 until 21 March 2000 (see recitals (215), (247), (248), (263), (319) and (590) and Annex I). As regards

ESBO/esters, the Elf Aquitaine Group participated in the infringement from 11 September 1991 until 26 September 2000 (see recitals (182), (323) and (591) and Annex I).

More specifically, Elf Aquitaine S.A. as the ultimate parent company together with Arkema France (the intermediate parent company) participated in the infringement for tin stabilisers from 16 March 1994 until 31 March 1996 and from 9 September 1997 until 21 March 2000 together with the directly participating subsidiary CECA SA (see recitals (590), (592) and (597)). Elf Aquitaine S.A. as the ultimate parent company together with Arkema France (the intermediate parent company), participated in the infringement for ESBO/esters from 11 September 1991 until 26 September 2000 together with the directly participating subsidiary CECA SA (see recitals (591), (592) and (597)).

The total duration of participation in the tin stabiliser infringement of companies belonging to the Elf Aquitaine Group therefore amounts to a period of four years, six months and 27 days. The total duration of participation in the ESBO/esters infringement of companies belonging to the Elf Aquitaine Group therefore amounts to a period of nine years and 15 days.

d) Baerlocher

As regards tin stabilisers, the Baerlocher Group participated in the infringement from 24 February 1987 until 21 March 2000 (see recitals (139), (319) and (606) and Annex I).

More specifically, as described in sub-section 6.2.6, the following companies participated directly in the infringement: MRF Michael Rosenthal GmbH from 12 October 1990 to 16 July 1996, Baerlocher GmbH from 24 February 1987 to 16 July 1996, Baerlocher UK Limited from 28 March 1995 to 17 September 1997 and Baerlocher Italia S.p.A. for the period 22 June 1994 to 21 March 2000. MRF Michael Rosenthal GmbH also participated in the period 12 October 1990 - 21 March 2000 as parent company of Baerlocher GmbH, which also participated as parent company of Baerlocher UK Limited in the period 28 March 1995 – 17 September 1997 and of Baerlocher Italia S.p.A. in the period 22 June 1994 – 21 March 2000.

The total duration of participation in the infringement of companies belonging to the Baerlocher Group therefore amounts to a period of 13 years and 25 days.

e) GEA Group/Chemson

As regards ESBO/esters, the GEA Group/Chemson Group participated in the infringement from 11 September 1991 until 26 September 2000 (see recitals (182), (323) and Annex I).

More specifically, as described in sub-section 6.2.7 Metallgesellschaft AG (now GEA Group AG) as parent company participated in the infringement from 11 September

1991 until 17 May 2000, for the direct and indirect participation of its subsidiaries the old Chemson Germany (now ACW) and the old Chemson Austria (now Chemson Polymer -Additive AG). The old Chemson Germany (now ACW) participated directly in the infringement from 11 September 1991 until 17 May 2000 and indirectly in the infringement (as intermediate parent company of the old Chemson Austria (now Chemson Polymer-Additive AG) in the period 30 September 1999 – 17 May 2000. The old Chemson Austria (now Chemson Polymer-Additive AG) participated directly in the infringement in the period 13 March 1997 to 17 May 2000 and indirectly in the infringement (as intermediate parent company of the old Chemson Germany (now ACW) in the period 30 September 1995 – 30 September 1998.

Following Chemson's business buy-out on 17 May 2000, Chemson Polymer-Additive AG, as parent company, participated in the infringement from 17 May 2000 until 26 September 2000 for the direct participation of Chemson GmbH from 17 May 2000 until 26 September 2000.

The total duration of participation in the infringement of companies belonging to the Chemson Group therefore amounts to a period of nine years and 15 days.

f) Chemtura

As regards tin stabilisers, Chemtura Group participated in the infringement from 29 May 1998 until 21 March 2000 (see recitals (273), (319), (654) and (655) and Annex I). As regards ESBO/esters, the Chemtura Group participated in the infringement from 29 May 1998 until 26 September 2000 (see recitals (283), (323), (654) and (655) and Annex I).

More specifically, Chemtura Corporation as the parent company, participated in the infringement for tin stabilisers from 29 May 1998 until 21 March 2000, for the direct participation of its subsidiary Chemtura Vinyl Additives GmbH from 29 May 1998 until 21 March 2000 (see recitals (654) and (658)). Chemtura Corporation, as the parent company participated in the infringement for ESBO/esters from 29 May 1998 until 26 September 2000, for the direct participation of its subsidiary Chemtura Vinyl Additives GmbH from 29 May 1998 until 26 September 2000 (see recitals (654) and (658)).

The total duration of participation in the tin stabiliser infringement of companies belonging to the Chemtura Group therefore amounts to a period of one year, nine months and 21 days. The total duration of participation in the ESBO/esters infringement of companies belonging to the Chemtura Group therefore amounts to a period of two years, three months and 28 days.

g) Ciba

As regards tin stabilisers, the Ciba Group participated in the infringement from 24 February 1987 until 29 May 1998 (see recitals (139), (273) and (659) and Annex I).

As regards ESBO/esters, the Ciba Group participated in the infringement from 11 September 1991 until 29 May 1998 (see recitals (182), (283) and (659) and Annex I).

More specifically, Ciba Holding AG, as the parent company and the continuation of previous parent companies, namely Ciba-Geigy AG and Ciba SC Holding AG (see recital (660)) participated in the infringement for tin stabilisers from 24 February 1987 until 29 May 1998, for the direct participation of its subsidiaries Ciba Lampertheim GmbH from 24 February 1987 to 12 December 1997 and Vinyl Additive GmbH (now named Chemtura Vinyl Additives GmbH) in the period 12 December 1997 to 29 May 1998. Ciba Lampertheim GmbH also participated indirectly in the infringement as parent company of Vinyl Additive GmbH in the period 12 December 1997-29 May 1998. Ciba Holding AG, as the parent company and the continuation of previous parent companies, namely Ciba-Geigy AG and Ciba SC Holding AG (see recital (660)) participated in the infringement for ESBO/esters from 11 September 1991 until 29 May 1998, for the direct participation of its subsidiaries Ciba Lampertheim GmbH from 11 September 1991 to 12 December 1997 and Vinyl Additive GmbH (now named Chemtura Vinyl Additives GmbH) in the period 12 December 1997 to 29 May 1998. Ciba Lampertheim GmbH also participated indirectly in the infringement as parent company of Vinyl Additive GmbH in the period 12 December 1997-29 May 1998.

The total duration of participation in the tin stabiliser infringement of companies belonging to the Ciba Group therefore amounts to a period of 11 years, three months and five days. The total duration of participation in the ESBO/esters infringement of companies belonging to the Ciba Group therefore amounts to a period of six years, eight months and 18 days.

h) Faci

As regards ESBO/esters, the undertaking constituted by Faci S.p.A. participated directly in the infringement from 6 November 1996 until 26 September 2000 (see recitals (182), (323) and (666) and Annex I). The duration of Faci S.p.A.'s participation in the infringement therefore amounts to a period of three years, ten months and 20 days.

i) Reagens

As regards tin stabilisers, the undertaking constituted by Reagens S.p.A. participated directly in the infringement from 20 November 1992 until 21 March 2000 (see recitals (194), (319) and (667) and Annex I). The duration of Reagens S.p.A.'s participation in the infringement therefore amounts to a period of seven years, four months and one day.

j) AC-Treuhand AG

As regards tin stabilisers, the undertaking constituted by AC-Treuhand AG participated in the infringement from 1 December 1993 to 21 March 2000 (see recitals

(205), (319) and (668) and Annex I). As regards ESBO/esters, the undertaking constituted by AC-Treuhand AG participated in the infringement from 1 December 1993 to 26 September 2000 (see recitals (212), (323) and (668) and Annex I).

The duration of AC-Treuhand AG's participation in the infringement for tin stabilisers therefore amounts to a period of six years, three months and 20 days. The duration of AC-Treuhand AG 's participation in the infringement for ESBO/esters therefore amounts to a period of six years, nine months and 25 days.

7.2 Prescription

(672) The five year limitation period for the imposition of fines stipulated in Regulation (EC) No 1/2003 is interrupted by any action taken by the Commission for the purpose of the investigation of an infringement.[764] In this case, the first formal action taken by the Commission for the purposes of the present investigation was notification to Chemtura of the Commission's decision to grant it conditional immunity on [*] (see recital (80)).[765] The Commission's right to impose fines in this case is therefore time-barred for any infringement that ended before [*]. This Decision is therefore not addressed to any undertaking whose infringement was terminated prior to [*].

(673) The definite limitation period of ten years for the Commission's right to impose fines[766] is suspended by the proceedings before the Court of First Instance following Akzo's and Akcros' application for annulment (see recital (84))[767]. Indeed, the Court of Justice ruled in its PVC II judgement[768] that the challenging of a decision of investigatory nature suspends limitation periods. The Court of Justice stated: *"[The Commission is protected] against the effect of the limitation period in situations in which it must await the decision of the Community judicature in proceedings beyond its control before knowing whether the contested act is or is not vitiated by illegality. Article 3 therefore deals with cases in which the inaction of the institution is not the result of a lack of diligence"* and *"In the event that the limitation period is suspended, the suspension period which elapses extends the limitation period of five or ten years by the same length of time…".*[769] In the present case Akzo and Akcros filed the application for annulment on 11 April 2003. The Court of First Instance pronounced

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764 Article 25 of Regulation (EC) No 1/2003.

765 In any event, the Commission carried out inspections on 12 and 13 February 2003 and that event constitutes, at the latest, an interruption of the five year limitation period.

766 Article 25(5) of Regulation (EC) No 1/2003.

767 Article 25(6) of Regulation (EC) No 1/2003.

768 Judgment of the Court of Justice of 15 October 2002 in Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P- C-252/99 P and C-254/99P *Limburgse Vinyl Maatschappij a.o. v Commission*, ECR [2002] p. I-8375, paragraphs 141 – 156.

769 Judgment of the Court of Justice of 15 October 2002 in Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P-, C-252/99 P and C-254/99P *Limburgse Vinyl Maatschappij a.o. v Commission*, ECR [2002] p. I-8375, paragraphs 144 and 155. The article concerned in the judgement was article 3 of Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition, OJ L 319, 29.11.1974 p. 1, see point 31 in the preamble and Article 25 of Regulation (EC) No 1/2003.

its judgement on 17 September 2007, see recital (90). Consequently, the definitive limitation period is suspended by at least a period of 4 years, five months and 6 days.[770]

(674) It should also be noted that the Commission sent numerous Article 18 requests for information to all parties concerned following the Court of First Instance's judgment in the *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission* until to date (see recital (91)).[771] The first group of Article 18 requests for information was sent on 8 October 2007. In addition, during the proceedings before the Court of First Instance, the Commission corresponded with several parties.

7.2.1 Parties' comments in response to the Statements of Objections

(675) Several parties make claims regarding prescription.[772] The two main arguments of the parties on this issue were that first, unlike in the PVC II judgment, the Commission could, and should, have continued the investigation during the proceedings before the Court of First Instance (see recitals (84) to (90)). The parties argue that by not doing so, the Commission demonstrated a lack of diligence and that as a result of this inaction, the limitation period is not suspended. Second, based on the recent *ArcelorMittal* judgment of the Court of First Instance[773], the parties argue that the suspension of the limitation period does not have an effect *erga omnes*. On that basis, the parties argue that suspension of the limitation period should only apply to Akzo/Akcros which instituted proceedings before the Community Judicature and not to the other parties involved in this proceeding.

7.2.2 The Commission's appraisal and conclusion

(676) For the reasons developed in recitals (454) - (458), the Commission could not have used the LPP documents in a Statement of Objections in advance of a judgment by the Court of First Instance. The Commission had committed to the Community Courts not to make those documents available under access to file pending the judgment of the Court of First Instance. Nonetheless during the proceedings before the Court of First Instance, the Commission received a few submissions from immunity/leniency applicants and had correspondence with parties.[774] In addition, during the proceedings before the Court of First Instance, the Commission examined evidence in its file and that is the reason for which it was able to send to all parties known at that point in time, Article 18 requests for information. That was done immediately after the Court of First Instance judgment.[775] This demonstrated the Commission's pro-active stance when it resumed its investigation.

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[770] Akzo has appealed the judgement of 17 September 2007, see Case C-550/07 P.

[771] Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission*, referred to in footnote 128.

[772] [*],[*]; [*],[*]; [*],[*]; [*],[*]; [*],[*]; [*],[*], [*][*] and [*]; [*],[*] and [*],[*] and [*][*].

[773] Case T-405/06 *ArcelorMittal a.o. v Commission*, not yet reported, paragraphs 151-159.

[774] See for instance for 2003, [*] (correspondence) and [*], for 2004, [*], for 2006, [*](correspondence) and for 2007, [*] (correspondence).

[775] The Article 18 requests for information were sent on 8 October 2007.

(677) The Commission has already explained that it could not have finalised its investigation, at least with respect to the Set A and Set B documents, until the Court of First Instance's judgment was handed down (see also section 5.4.5.1 and in particular recitals (453) - (458)). [*]

(678) It is noted that, assuming there was no suspension under Article 25 of Regulation (EC) No 1/2003 during the period when the case was pending on the privileged documents, it would have been impossible for the Commission, in the period after the Court's judgment of September 2007, to have issued an infringement decision imposing fines in advance of the expiry of the prescription period for certain undertakings.[776] [*]. The Commission in fact acted in a diligent manner and resumed its investigation expeditiously once the Court of First Instance handed down its judgment.

(679) As to the argument that the suspension of the limitation period does not have an *erga omnes* effect, it must be noted that the *ArcelorMittal* judgment (which is under appeal)[777] concerned suspension of the limitation period due to an appeal of a final decision imposing fines. In those circumstances, the Court of First Instance found that it is not necessary that the suspension applies *erga omnes*. The Court of First Instance found that an *erga omnes* effect would be counter to the principle that an appeal of one party does not impact on the situation of the other addressees of the Commission's decision.[778] In the case at hand, the situation is all together different. It concerns an appeal of an investigatory measure. Such an appeal does indeed have an impact on the situation of the other parties. The outcome of the judgment determined if the Commission could use the LPP documents, in particular the date (year 2000) of those documents, as evidence to support its objections against *all* parties.

(680) Indeed, the appeal had repercussions on the Commission's inability to advance its investigation [*]. These repercussions concerned all the undertakings involved in the present proceeding and not only Akzo/Akcros. In a multi-party proceeding as the present one, [*].

(681) In *PVC-II*[779], the Court of Justice held that in case of an action before the judiciary, the suspension protects the Commission against the effects of the prescription in situations where it must await the judgment of the Community judicature. The Court of Justice established that suspension would not apply if the Commission was responsible for inaction as a "*result of lack of diligence*". The Commission must be considered to have acted diligently and reasonably in considering that it should put its investigation on hold. [*]In addition, the hypothesis that the documents were used as

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[776] Ciba terminated its participation in the infringement on 29 May 1998 – non-suspended ten year limitation period would have ended on 29 May 2008 and Elementis infringements terminated on 2 October 1998 – non-suspended ten year limitation period would have ended on 2 October 2008.

[777] Case C-201/09 P *ArcelorMittal Luxembourg v Commission* and Case C-216/09 P *Commission v ArcelorMittal and Others*.

[778] Judgment of 31 March 2009 in Case T-405/06 *ArcelorMittal Luxembourg and Others v Commission*, not yet reported, paragraph 156.

[779] Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P-, C-252/99 P and C-254/99P *Limburgse Vinyl Maatschappij a.o. v Commission*, ECR [2002] p. I-8375, paragraph 144.

evidence by the Commission in a final decision imposing fines would have led to all the addressee undertakings attacking the final Decision against them on the ground that the Commission Decision of 8 May 2003 addressed to Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd concerning a claim of legal privilege in the context of an investigation pursuant to Article 14(3) of Council Regulation No 17 in Case No COMP/E-1/38.589, C(2003) 1533 final and the ensuing use of the documents was illegal.

(682) As a result, it is concluded that in view of the specific factual, procedural as well as legal circumstances of the present proceeding, the proceedings instituted by Akzo/Akcros before the Community Judicature have an *erga omnes* effect.

8 REMEDIES AND FINES

8.1 Article 7 of Regulation (EC) No 1/2003

(683) Where the Commission finds that there are infringements of Article 81 of the Treaty and Article 53 of the EEA Agreement, it may by decision require the undertakings concerned to bring such infringements to an end in accordance with Article 7 of Regulation (EC) No 1/2003.

(684) While it appears that the infringements may be considered to have ended on 21 March 2000 (tin stabilisers) and 26 September 2000 (ESBO/esters) respectively, it is necessary to ensure that the infringements have been effectively terminated and are 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 infringements to an end (if they have not already done so) and henceforth to refrain from any agreement, concerted practice or decision of an association which might have the same or a similar object or effect.

8.2 Article 23(2) of Regulation (EC) No 1/2003

(685) Under Article 23(2) of Regulation (EC) No 1/2003[780], the Commission may, by decision, impose upon undertakings fines where, either intentionally or negligently, they infringe Article 81 of the Treaty and/or Article 53 of the EEA Agreement. For each undertaking participating in the infringements, the fine shall not exceed 10% of its total turnover in the preceding business year.

(686) Pursuant to 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 each infringement, which are the two criteria explicitly referred to in that Regulation. In doing so, the Commission will set the fines

[780] Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements of implementing the Agreement on the European Economic Area, “the Community rules giving effect to the principles set out in Articles 85 and 86 [now Articles 81 and 82] of the EC Treaty […] shall apply *mutatis mutandis*”. (OJ L 305/6, 30.11.1994).

at a level sufficient to ensure deterrence. Moreover, the role played by each undertaking party in each infringement will be assessed on an individual basis. The Commission will reflect in the fines imposed any aggravating or mitigating circumstances pertaining to each undertaking.

(687) In setting the fines to be imposed, the Commission will refer to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003[781] (hereafter, "the 2006 Guidelines on fines"). Finally, the Commission will apply, as appropriate, the provisions of the 2002 Leniency Notice.

(688) In response to the Statement of Objections, [*] argues that it is the 1998 Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty[782] (hereinafter the 1998 Guidelines on fines) that should be taken into account. [*] argues that due to the length of the proceedings, the Commission will apply the 2006 Guidelines on fines which will certainly lead to a higher fine as compared to the fine that would have been imposed under the 1998 Guidelines on fines. The 2006 Guidelines on fines breach Article 23(2) and (3) of Regulation (EC) No 1/2003, as they will very often lead to a basic amount far above the 10% limit set by Regulation (EC) No 1/2003. They also run counter to Community law principles of non-retroactivity, legal certainty and legitimate expectations.

(689) These arguments cannot be accepted. Paragraph 38 of the 2006 Guidelines on fines expressly stipulates that the "*Guidelines will be applied in all cases where a statement of objections is notified after their date of publication in the Official Journal, regardless of whether the fine is imposed pursuant to Article 23(2) of Regulation No 1/2003 or Article 15(2) of Regulation 17/62*". The 2006 Guidelines on fines were published in the Official Journal on 1 September 2006 and their application takes place irrespective of the Commission's actions in a certain proceeding. The Court of First Instance delivered its judgment regarding the issue of legal professional privilege on 17 September 2007 (see recital (90)).[783] There were objective reasons preventing the notification of the Statement of Objections before 17 March 2009 (see recitals (454) to (458)). Furthermore, even if there were no such objective reasons, there is no guarantee that such notification could have taken place before the entry into force of the 2006 Guidelines on fines, that is, before 1 September 2006.

(690) As to the 10% limit argument, the 2006 Guidelines on fines do not breach Regulation (EC) No 1/2003. The 2006 Guidelines on fines and their application cannot affect the ceiling of fines that can be imposed on companies which is set by Article 23(2) of Regulation (EC) No 1/2003 (10% of the undertaking's total turnover in the preceding business year) and applies in all cases.

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781 OJ C 210, 1.9.2006, p. 2.

782 Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty, OJ C 9, 14.1.1998, p. 3.

783 In this connection, see recitals (454)-(458) and (675)-(682).

(691) As a general observation, it is settled case law that the fact that the Commission imposed fines of a certain level for certain types of infringements in the past does not mean that it cannot increase that level to ensure implementation of Community competition policy.[784] The Court of Justice has previously established that undertakings involved in an administrative procedure in which fines may be imposed cannot claim a legitimate expectation in the fact that the Commission will not exceed the level of fines previously imposed, so that a legitimate expectation cannot be based on a method of calculating fines. This was also found to be the case for undertakings which had decided to cooperate with the Commission under the Leniency Notice before a new method of fines was adopted, a method which was subsequently applied to calculate the fines to be imposed on the said undertakings. The Court of Justice also held in the same circumstances that the Commission had not breached the principle of non-retroactivity.[785]

(692) This reasoning is not altered by the fact that the 1998 Guidelines on fines already existed when the Commission started its investigation and when Baerlocher applied for leniency. The fact that the Commission cannot depart from its own guidelines without providing any justification,[786] does not mean that it cannot use its discretion and adopt new guidelines within the limits of Regulation (EC) No 1/2003.

(693) Taking into account the special nature of AC-Treuhand AG 's involvement in the anti-competitive infringement, it is considered appropriate not to apply in this case the exact methodology set out in the 2006 Guidelines on fines. The methodology to be applied is set out in recitals (744) – (753).

8.3 The basic amount of the fines

8.3.1 Calculation of the value of sales

(694) The basic amount of the fine to be imposed on the undertakings concerned is to be set by reference to the value of sales[787], that is, the value of the undertaking's sales of goods or services to which each of the infringements directly or indirectly related in the relevant geographic area. The Commission uses the sales made by the undertakings during the last full business year of their participation in the infringements (hereafter "value of sales").[788]

(695) Table 13 contains an overview of the relevant sales in the relevant geographic area of the EEA taken into account for the undertakings involved in this proceeding. The last

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784 Joined Cases 100/80 to 103/80, *Musique Diffusion française a.o. v Commission* [1983] ECR 1825, paragraph 109 and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri a.o. v Commission* [2005] ECR I-5428, paragraphs 169 and 172.

785 Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri a.o. v Commission* [2005] ECR I-5428, in particular paragraphs 213 – 232.

786 See for instance T-224/00 *Archer Daniels Midland v Commission*, [2003] ECR II-2597, paragraph 182 and C-3/06 P, *Groupe Danone v Commission*, [2007] ECR I-1331.

787 Point 12 of the 2006 Guidelines on fines.

788 See Point 13-17 of the 2006 Guidelines on fines. Best available figures were used, as submitted by the parties, see footnote 109.

full business year of the undertakings' participation to the infringements is 1999, except for Elementis and Ciba for which the last full business year is 1997.[789]

(696) As regards the sales within the EEA, the accession of Finland, Sweden and Austria in 1995 will be taken into consideration by adjusting downward the value of sales figures to account for sales realised in those countries before 1995.

(697) In its response to the Statement of Objections,[790] [*] argued that in order to calculate the basic amount of the fine, instead of taking the value of its sales in 1999 -the last full business year of its participation in the infringement - the Commission should calculate this amount for each individual year the infringement lasted, in order to reflect the significant differences between the sales value per year over that period.

(698) This argument cannot be accepted. In accordance with point 13 of the 2006 Guidelines on fines, there is nothing in the file that justifies deviating from the rule that the last full year of participation in the infringement should be used to assess value of sales.

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789 Elementis did not provide any value of sales information to the Commission. The best proxy available is Akzo's value of sales figures for 1999. Ciba's value of sales is based on the information provided by Ciba for 1997.

790 [*].

Table 13: Value of sales (EUR million)

Undertaking	Tin stabilisers	ESBO/esters
Akzo	[5-10]	[10-15]
Elementis	[5-10]	[10-15]
Elf Aquitaine	[5-10]	[5-10]
Baerlocher	[15-20]	
GEA		[0-5]
Chemson		[0-5]
Chemtura	[30-35]	[5-10]
Ciba	[30-35]	[5-10]
Faci		[5-10]
Reagens	[5-10]	

8.3.2 Determination of the basic amount of the fine

(699) The basic amount consists of an amount of between 0% and 30% of a company's relevant sales, depending on the degree of gravity of the infringements and multiplied by the number of years of the company's participation in the infringements, and an additional amount of between 15% and 25% of the value of a company's sales, irrespective of duration.[791]

8.3.2.1 Gravity

(700) In order to determine the specific percentage of the basic amount of the fine, the Commission had regard to a number of factors, such as the nature of the infringements, the combined market share of all the undertakings concerned for the product in question, the geographic scope of the infringements and the fact that the infringements were implemented (albeit not rigorously during the entire duration).[792] Since the two different infringements present common features, the assessment on gravity will be made in parallel.

8.3.2.1.1 Nature

(701) The addressees of this Decision participated in one or two single, complex and continuous infringements of Article 81 of the Treaty and Article 53 of the EEA Agreement. The anti-competitive arrangements had the objective of distorting competition for the tin stabilisers market and the ESBO/esters market.

(702) Both infringements were multi-faceted cartels involving market sharing and customer allocation, fixing of horizontal prices and quotas and exchanges of commercially sensitive information on prices, customers and volumes. Such infringements are by their very nature among the most harmful restrictions of competition, as they distort

[791] See Points 19 – 26 of the 2006 Guidelines on fines.
[792] Points 21-22 of the 2006 Guidelines on fines.

the main parameters of competition. Moreover, the participants in both infringements went to particular lengths to ensure the secrecy of the cartels, including by organising meetings outside the Community, using codenames and by destroying documents.[793]

(703) It is observed that, in accordance with point 23 of the 2006 Guidelines on fines, the fines for such infringements will, as a matter of policy, reflect the seriousness of the infringements.

8.3.2.1.2 Combined market share

(704) The overall combined market shares in the relevant geographic area within the EEA of the undertakings for which the infringements are established are estimated to be above 90% for tin stabilisers and just above 80% for ESBO/esters.

8.3.2.1.3 Geographic scope

(705) As regards the geographic scope, the cartels covered the sales of tin stabilisers and ESBO/esters of the undertakings in almost the entirety of the EEA.

8.3.2.1.4 Implementation

(706) As described in Chapter 4 and recital (447), the arrangements were implemented and monitored. As already indicated in recitals (116) and (447), implementation and monitoring were not uniform throughout the entire duration of the infringements. In particular, audits no longer took place after 1996. In determining the basic amount of the fine, the Commission takes account of the fact that there was rigorous implementation during the period until 1996. It does not apply an increase for implementation for the period thereafter because the implementation was less rigorous (if there had been rigorous implementation during the entirety of the cartels, the increase would have been higher).

(707) Faci joined the ESBO/esters infringement at a relatively late stage (6 November 1996). Chemtura joined both infringements on 29 May 1998. For Arkema France, as indicated in recital (437), only the second part of the tin stabilisers infringement (that is from 9 September 1997 to 21 March 2000) is subject to fines. On this basis, implementation will not be taken into consideration in setting the fines for Faci (ESBO/esters infringement), Chemtura (both infringements) and Arkema France (tin stabilisers infringement).[794]

8.3.2.1.5 Conclusion on Gravity

[793] Case T-69/04 *Schunk GmbH a.o. v Commission*, judgment of 8 October 2008, not yet reported, paragraph 154.

[794] For Arkema France's involvement in the ESBO/esters infringement (September 1991 until September 2000), an increase is applied for implementation.

(708) Given the specific circumstances of this case, taking into account the criteria discussed in recital (699) relating in particular to the nature of the infringement,[795] the combined market share of the participants, the geographic scope and the implementation the proportion of the value of sales to be taken into account should be 20% for the tin stabiliser infringement. As demonstrated in recital (707), the rigorous implementation should not be considered for Chemtura and Arkema France. Therefore, the percentage to be applied for Chemtura and Arkema France should be 19%.

(709) Taking into account the criteria discussed in recital (699) relating in particular to the nature of the infringement, the combined market share of the participants, the geographic scope and the implementation, the proportion of the value of sales to be taken into account should be 19% for ESBO/esters infringement. As demonstrated in recital (707), the rigorous implementation should not be considered for Chemtura and Faci. Therefore, the percentage to be applied for Chemtura and Faci should be 18%.

8.3.2.2 Duration

(710) The amount determined on the basis of the sales made by the undertaking during the last full business year of its participation in the respective infringements (value of sales) will be multiplied by the number of years of participation in each infringement in order to take fully into account the duration of the participation for each undertaking in each infringement individually.[796]

(711) Recital (671) outlined the Commission's conclusions on the duration of the infringements as such and the duration of the individual participation of the undertakings and entities involved in each infringement. The sales made by the undertaking during the last full business year of its participation in the infringements in relation to each product will be multiplied by the individual duration of participation for the product in question.

(712) In the circumstances of the present case, it is considered appropriate to apply a proportional increase of the multiplier on a monthly and *pro rata* basis. Hence, if, for instance, the duration is six years, four months and four days, the calculation will take into account six years and four months without counting the number of days at all. By applying this method, the following multipliers are calculated:

(713) The multipliers for each entity are:

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795 According to established case law of the Court of First Instance, price fixing and market sharing practices may be classified as very serious solely on the basis of their nature, without it being necessary for such conduct to cover a particular geographical area or have a particular impact. See Case T-49/02 to T-51/02 *Brasserie nationale and others v. Commission*, [2005] ECR II-3033, paragraphs 178 and 179; T-38/02 *Groupe Danone v. Commission*, [2005] ECR II-4407, paragraphs 147, 148 and 152 and T-241/01 *Scandinavian Airlines System v. Commission*, [2005] ECR II-2917, paragraphs 84, 85, 122, 130 and 131.

796 Point 24 of the 2006 Guidelines on fines.

Table 14 Duration

Legal entity	Product	Duration	Multiplier
Akzo Nobel N.V.	Tin stabilisers	13y 25d	[*]
	ESBO/esters	8y 6m 11d	[*]
Akzo Nobel Chemicals GmbH	Tin stabilisers	6y 4m 4 d	[*]
Akzo Nobel Chemicals B.V.	ESBO/esters	1y 9m 17d	[*]
Akcros Chemicals Ltd	Tin stabilisers	6y 8m 21d	[*]
	ESBO/esters	6y 8m 22d	[*]
Elementis plc	Tin stabilisers	7m 9d	[*]
	ESBO/esters	7m 9d	[*]
Elementis Holdings Limited	Tin stabilisers	10y 4d	[*]
	ESBO/esters	7y 21d	[*]
Elementis UK Limited	Tin stabilisers	4y 9m 4d	[*]
	ESBO/esters	1y 9m 21d	[*]
Elementis Services Limited	Tin stabilisers	5y 3m	[*]
	ESBO/esters	5y 3m	[*]
Elf Aquitaine S.A.	Tin stabilisers	2y 6m 12d	[*]
	ESBO/esters	9y 15d	[*]
Arkema France	Tin stabilisers	2y 6m 12d	[*]
	ESBO/esters	9y 15d	[*]
CECA SA	Tin stabilisers	2y 6m 12d	[*]
	ESBO/esters	9y 15d	[*]
MRF Michael Rosenthal GmbH	Tin stabilisers	9y 5m 9d	[*]
Baerlocher GmbH	Tin stabilisers	13y 25d	[*]
Baerlocher UK Limited	Tin stabilisers	2y 5m 20d	[*]
Baerlocher Italia S.p.A.	Tin stabilisers	5y 8m 27d	[*]
GEA Group AG	ESBO/esters	8y 8m 6d	[*]
Chemson Polymer-Additive AG	ESBO/esters	4y 11m 27d	[*]
ACW	ESBO/esters	8y 8m 6d	[*]
Chemson GmbH	ESBO/esters	4m 9d	[*]
Chemtura Corporation	Tin stabilisers	1y 9m 21 d	[*]
	ESBO/esters	2y 3m 28 d	[*]

Chemtura Vinyl Additives GmbH[797] (this is the continuation of Vinyl Additives GmbH under the Ciba group)	Tin stabilisers	1y 9m 21 d	[*]
	ESBO/esters	2y 3m 28 d	[*]
BASF Specialty Chemicals Holding GmbH	Tin stabilisers	11y 3m 5d	[*]
	ESBO/esters	6y 8m 18d	[*]
BASF Lampertheim GmbH	Tin stabilisers	11y 3m 5d	[*]
	ESBO/esters	6y 8m 18d	[*]
Faci S.p.A.	ESBO/esters	3y 10m 20d	[*]
Reagens S.p.A.	Tin stabilisers	7y 4m 1d	[*]
AC-Treuhand AG	Tin stabilisers	6y 3m 20d	[*]
	ESBO/esters	6y 9m 25d	[*]

8.3.2.3 The percentage to be applied for the additional amount

(714) In addition, irrespective of the duration of the undertaking's participation in the infringements, the Commission includes in the basic amount a sum of between 15 % and 25 % of the value of sales in order to deter undertakings from even entering into horizontal price-fixing and market-sharing agreements.[798]

(715) Given the specific circumstances of this case, taking into account the criteria discussed in recitals (701) to (708) relating to the nature of the infringements, the combined market shares of the undertakings concerned, the geographic scope and the degree of implementation of the tin stabilisers infringement, the percentage to be applied for the additional amount should be 20% for the tin stabiliser infringement. As demonstrated in recital (707), the rigorous implementation should not be considered for Chemtura and Arkema France. Therefore, the percentage to be applied for Chemtura and Arkema France should be 19%.

(716) Given the specific circumstances of this case, taking into account the criteria discussed in recitals (701) to (708) relating to the nature of the infringements, the combined market shares of the undertakings concerned, the geographic scope and the degree of implementation of the ESBO/esters infringement, the percentage to be applied for the additional amount should be 19% for the ESBO/esters infringement. As demonstrated in recital (707), the rigorous implementation should not be considered for Chemtura and Faci. Therefore, the percentage to be applied for Chemtura and Faci should be 18%.

8.3.2.4 Calculation and conclusion on basic amounts

(717) Based on the criteria explained in recitals (699) to (716), the basic amount of the fine for each infringement is calculated as follows:

797 This is the continuation of the Vinyl Additives GmbH which under the Ciba group had the following duration: tin stabilisers: 5m 17d and ESBO/esters: 5 m 17d).

798 Point 25 of the 2006 Guidelines on fines.

Table 15: Basic amount in EUR

Undertaking	Tin stabilisers	ESBO/esters
Akzo	[*]	[*]
Elementis	[*]	[*]
Elf Aquitaine	[*]	[*]
Baerlocher	[*]	
GEA		[*]
Chemson		[*]
Chemtura	[*]	[*]
Ciba (BASF)	[*]	[*]
Faci		[*]
Reagens	[*]	

8.4 Adjustments to the basic amount

8.4.1 Aggravating circumstances

8.4.1.1 Recidivism

(718) At the time the infringements took place, Arkema France had already been the addressee of previous Commission decisions holding it liable for earlier cartel activities[799]. The fact that Arkema France has repeated the same type of conduct in its business activities (either in the same industry or in different sectors), shows that the first penalties did not prompt it to change its conduct. This constitutes an aggravating circumstance which justifies an increase of 90% in the basic amount of the fine to be imposed on it.

(719) In this regard, it should be mentioned that in the Statement of Objections only two preceding Decisions for Elf Aquitaine were mentioned.[800] As already indicated in recital (718), the increase for recidivism applies to Arkema France and not to Elf Aquitaine, its parent company at the time of the infringement. The latter was not in control of Arkema France at the time of the previous infringements.

(720) Although the Statement of Objections mentioned only two previous Decisions, there were in fact three previous decisions relevant for recidivism (see footnote 799). All three previous decisions should be considered for recidivism.

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799 See Commission Decision of 23 November 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.907 - Peroxygen products) (OJ L 035, 7.2.1985 p.1), Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 – Polypropylene) (OJ L 230, 18.8.1986, p. 1) and Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/31.865 – PVC) (OJ L 239, 14.9.1994, p. 14).

800 The Decisions mentioned in the Statement of Objections were Commission Decision of 23 November 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.907 - Peroxygen products) (OJ L 035, 7.2.1985 p.1) and Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/31.865 – PVC) (OJ L 239, 14.9.1994, p. 14)

(721) In this regard, the Commission is not required specifically to mention any previous decisions in the Statement of Objection.[801] However, for the sake of completeness, Arkema France was sent a letter of facts on 20 October 2009 explaining (i) that the reference to Elf Aquitaine in the Statement of Objections was erroneous; (ii) that Arkema France was the addressee of three previous Commission Decisions; and (iii) that in accordance with established practice, the Commission would treat recidivism as an aggravating factor in respect of Arkema France on the grounds of its participation in three prior infringements. Arkema France did not respond to that letter of facts.

8.4.2 Mitigating circumstances

8.4.2.1 Duration of the investigation

(722) Several parties[802] argue that the excessive duration of the investigation has to be taken into account as a mitigating circumstance. [*] points out in particular that it was unaware of the Commission's investigation for 66 out of the 72 months that have elapsed since the Commission learned of the alleged infringements. [*] also argues that it was discriminated by the Commission as it was contacted only on 8 October 2007 whereas other undertakings were contacted earlier. To compensate that inequality, the Commission should grant it a reduction of the fines.

(723) Those arguments cannot be accepted. In recitals (454)-(458) and (676)-(682), the Commission explained the reasons following which it could not have possibly finalised its investigation. In addition, the parties advancing the above mentioned arguments did not prove how a shorter investigation period could have had an impact on the amount of the fine to be imposed.

8.4.2.2 Limited participation and no implementation/effect

(724) [*], supported by [*],[803] argues that it was only involved in the arrangements on ESBO/esters, it was not involved in the overall restrictive strategy of the cartel, it was not one of the founding members, it was a late entrant and it played a passive role in the infringement. [*] stresses that the Commission should recognise the minor role played by the old Chemson Germany within the Chemson undertaking, whereas the old Chemson Austria was the directing mind. [*][804] argues that it competed on price, that the offences committed had little, if any, effects and that it was not an instigator but on the contrary, it was the latest entrant in the infringement. [*] argues[805] that it

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801 Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407, paragraphs 56-57.

802 [*],[*].; [*],[*]; [*],[*]; [*],[*]; [*],[*] and [*],[*]. [*] and [*] refer to previous Commission Decisions: Commission Decision of 16 May 2000 in Case No IV/34.018 - *Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA),* OJ L 268, 20.10.2000, p.1; Commission Decision of 18 April 2007 in Case No COMP/B/37.766 — *Dutch beer market*, OJ C 122, 20.5.2008, p. 1 and Commission Decision of 26 October 1999 in Case No IV/33.884 - *Nederlandse Federative Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie (FEG and TU)*, OJ L 39, 14.2.2000. p. 1.

803 [*][*]; [*],[*].

804 [*].

805 [*].

was a small competitor, that it was not involved in arrangements on ESBO/esters, that it did not attend country meetings other than those in Italy and that it competed aggressively on the market.

(725) At the outset, it should be recalled that the anti-competitive arrangements concern two different infringements (tin stabilisers and ESBO/esters). As a result of this, each undertaking is assessed in relation to the infringement in which it was involved. On this basis, the non-participation in one set of arrangements does not relieve undertakings from responsibility for the infringement of Article 81 of the Treaty in the other set of arrangements.[806] Chemson's and Faci's involvement in only the ESBO/esters arrangements, Reagens' involvement in only the tin stabilisers arrangements and the duration of their respective involvement is duly taken into account when setting the fine on the basis of the value of sales, see recital (695) and section 8.3.2.2. Furthermore, where the 2006 Guidelines on fines foresee that the fine for undertakings taking role as leader in, or instigator of, the infringement may be increased, this does not require that the fines of undertakings not taking that role should be lowered. The absence of an aggravating circumstance is not a cause for mitigating circumstance. Moreover, the evidence referred to by ACW concerning participation in the overall restrictive strategy,[807] refers to events *before* and *after* Chemson's involvement in the infringement and as such it cannot be taken into account.

(726) The 2006 Guidelines on fines include as a mitigating circumstance the fact of a substantially limited involvement in the infringement.[808] The claims by [*], that it was only a trader of ESBO/esters, that it was not involved in the overall restrictive strategy, that it was not a founding member but joined late, that it attended meetings to a lesser extent than other undertakings (in particular it claims that it did not attend bilateral meetings) and that it was attributed a lower quota than the others, do not constitute evidence that its involvement in the infringement is substantially limited and that it actually avoided applying it by adopting a competitive conduct in the market. On the contrary, evidence in the possession of the Commission does not demonstrate substantially limited involvement as argued by [*]. Chemson participated to the same extent as the other undertakings, see for instance recitals (185) and (281). Furthermore, at the meeting of 21 March 1995, the participants agreed that Chemson would contact Faci to offer it membership in the ESBO and Ester Group, see recital (240). The alleged minor role of the old Chemson Germany amongst the companies of the Chemson/Metallgesellschaft Group cannot constitute a mitigating circumstance for the actions in the infringement since such a circumstance should be assessed in connection to the entire undertaking as a single economic entity. As to [*] and [*] argument that they competed on the market, it should be emphasised that a cartel is a

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806 Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-217/00 P and C-219/00 P *Aalborg a.o. v Commission*, [2004] ECR I-123, paragraph 86.

807 [*] and [*] (document dated 2002).

808 Point 29, third indent of the 2006 Guidelines on fines. See generally Case T-224/99 *Archer Daniels Midland Company and Archer Daniels Midland Ingredients v Commission* [2003] ECR II-2597, paragraph 268.

joint enterprise and each participant in the arrangement may play its own particular role. Internal conflicts and rivalries, or even cheating may occur, but will not however prevent the arrangement from constituting an agreement/concerted practice for the purposes of Article 81 of the Treaty where there is a single, common and continuing objective, see recital (390). [*] and [*] have not provided evidence that they avoided implementing the arrangements by adopting competitive conduct or clearly and substantially breached the obligations relating to the implementation of the cartel to the point of disrupting its very operation.[809]

(727) [*] and [*] did not adduce evidence demonstrating that they publicly distanced themselves vis-à-vis all the participant competitors and with regard to all the elements of the cartel's activities (see recital (449)). On the contrary, [*] and [*] certainly did not withdraw from the respective infringements because they continued to meet and discuss price increases, prices, sales volumes until the end of the cartels as shown in recitals (250), (259) and (301) among others (Reagens) and recitals (256), (269) and (279) among others (Faci).

8.4.2.3 Cessation of the infringement (long) before the Commission intervened

(728) [*] points to the fact that the infringement stopped at least three years before the Commission intervened. [*] points to the fact that it terminated the infringements in 1998, long before the Commission intervened and that it no longer carries out the business to which the infringements relate.[810] [*] also points to the fact that it left the ESBO/esters business many years ago.[811] [*] argues that the fact that the Commission considers Akcros Chemicals Ltd to be the first party to terminate the infringements should be considered as a mitigating circumstance.[812]

(729) These arguments cannot be accepted. The fact that a company terminates the illegal behaviour before any intervention by the Commission does not negate the illegal nature of the anti-competitive practice and certainly does not merit a reward in the form of a reduction of the fine. The duration of the period of infringement is already considered in the calculation of the fine (see section 8.3.2.2). As to [*] and [*] argument (with reference to previous Commission decisions) that they no longer carry out the business concerned, it cannot be accepted. The fact that an undertaking chooses to change its business cannot be considered as a mitigating circumstance for previously committed infringements. Moreover, the fact that the Commission may have considered that certain factors have constituted mitigating circumstances for

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809 Case T-26/02 *Daiichi Pharmaceutical v Commission*, [2006] ECR II-713, paragraph 113.

810 Commission Decision of 30 April 2004 in Cases COMP/D2/32448 and 32450 *Compagnie Maritime Belge SA*, OJ L 171, 2.7.2005, p. 28 (re-adopted following the judgment of the Court of First Instance in Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge v Commission*, [1996] ECR II-1201).

811 [*],[*].

812 [*],[*]; [*],[*]; [*],[*]. It should be noted that Akzo's public withdrawal took place on 21 and 22 March 2000 for tin stabilisers and ESBO/esters respectively (recitals (319) - (320)).

determining the amount of the fine in previous decisions does not mean that it is obliged to make the same assessment in a subsequent decision.[813]

8.4.2.4 [*]

(730) [*].[814]

(731) [*].[815] [*].

8.4.2.5 Effective co-operation outside the 2002 Leniency Notice

(732) [*] and [*][816] point to their co-operation with the Commission during the investigation and argue that this cooperation should be regarded as a mitigating circumstance. [*]. [*] argues that a reduction of 50% should be granted to it as a mitigating circumstance for factual cooperation with the Commission. [*] sold the business in 1998 and was contacted by the Commission only in 2008. [*].

(733) These arguments cannot be accepted.. The cooperation in answering Article 18 requests for information cannot constitute a mitigating circumstance. The undertakings are required to answer Article 18 requests for information and are subject to penalties in case they provide the Commission with incorrect or misleading answers to an Article 18 request for information.[817] Moreover, none of the parties has provided the Commission with additional self-incriminating information in reply to the Article 18 requests for information that should be regarded as evidence with respect to the infringements at issue that is provided on a voluntary basis. The Commission did not deprive either [*]. The decision to make an application for immunity/leniency is a corporate decision that a company undertakes on its own initiative and is based on its own considerations. [*]. As for [*], it should be recalled that [*] applied for leniency [*]. As for [*], it should be highlighted that it was [*]. [*]. [*] [*].

8.4.2.6 General economic situation

(734) [*] and [*][818] refer to the economic crisis and allege that it has hit the chemical industry particularly hard.

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813 Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, paragraph 53, confirmed on appeal in Case C-51/92P *Hercules Chemicals v Commission* [1999] ECR I-4235, and the case law cited therein; Case T-347/94 *Mayr-Melnhof Kartongesellschaft v. Commission* [1998] ECR II-1751, paragraph 368; Case T-23/99 *LR AF 1998 v. Commission* [2002] ECR II-1705, paragraph 337. Case C-510/06 P *Archer Daniels Midland Co. v Commission*, judgment of 19 March 2009, paragraph 82.

814 [*][*]; [*][*].

815 Case T-9/89, *Hüls v Commission* [1992] ECR, p. II-499, paragraph 128, Case T-141/89, *Tréfileurope v Commission*, [1995] ECR, p. II-791, paragraph 51 and T-23/99, *LRAF 1998 v Commission*, [1998] ECR, p. II-1705 paragraphs 142 and 339.

816 [*],[*], [*],[*], supported by [*],[*] and [*],[*].

817 Article 23 (1) of Council Regulation (EC) No 1/2003.

818 [*].

(735) [*] refers to precedents where the Commission has given a reduction for cartels taking place in times of general economic crisis.[819] However, the infringements described in this Decision took place at a time where it is not alleged, even by [*], that the heat stabiliser markets were in crisis. Moreover, the fact that the Commission may have considered that certain factors have constituted mitigating circumstances for determining the amount of the fine in previous decisions does not mean that it is obliged to make the same assessment in a subsequent decision.[820] Furthermore, the examples referred to relate to cases prior to the implementation of the 1998 Guidelines on fines. The Commission has rejected claims with respect to crisis cartels since that time.[821]

(736) In respect of the currently prevailing economic conditions, the Court of First Instance has confirmed that the Commission is not obliged to accept the poor economic state of the industry concerned as an attenuating circumstance.[822] [*] 8.11.

(737) Moreover, in so far as the parties argue that they are affected by the general economic crisis, the Commission's analysis of the ability to pay (see section 8.11) is made on an individual basis and on the basis of the specific data as well as the factual elements demonstrating a specific economic and financial context provided by the undertakings. The Commission does not single out the impact the general crisis may have on an individual undertaking and must take into account the fact that granting a reduction to one undertaking is likely to have a distortive effect, favoring it over others. In so far as the general economic crisis has had an impact, it has not been argued or demonstrated by the undertakings concerned that this had a particular effect in the sector of heat stabilisers.

8.4.3 Conclusion on adjustments of the basic amount

(738) As a result of an aggravating circumstance for recidivism, the fines of Arkema France should be increased by 90% for tin stabilisers to [*] and by 90% for ESBO/esters to [*].

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[819] Commission Decision of 16 December 1985 in Case No IV/30.839 - *Sperry New Holland*, OJ L 376, 31.12.1985, p. 21*;* Commission Decision of 14 December 1984 in Case no IV/30.809 - *John Deere,* OJ L 35, 7.2.1985, p. 58*;* Commission Decision of 6 August 1984 in Case IV/30.350 - Z*inc Producer Group,* OJ L 220, 17.8.1984, p. 27; and Commission Decision of 19 April 1977 in Case No IV/28.841 – *ABG*, OJ L 117, 9.5.1977, p. 1.

[820] Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, paragraph 53, confirmed on appeal in Case C-51/92P *Hercules Chemicals v Commission* [1999] ECR I-4235, and the case law cited therein; Case T-347/94 *Mayr-Melnhof Kartongesellschaft v. Commission* [1998] ECR II-1751, paragraph 368; Case T-23/99 *LR AF 1998 v. Commission* [2002] ECR II-1705, paragraph 337. Case C-510/06 P *Archer Daniels Midland Co. v Commission*, judgment of 19 March 2009, paragraph 82.

[821] See Commission Decision of 18 July 2001 in Case No COMP/E-1/36.490 *Graphite Electrodes* OJ 2002 L100/1, paragraphs 197 and 238.

[822] Case T-16/99, *Lögstör Rör v Commission* [2002] ECR II-1633, paragraphs 319-320; Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and others v Commission* [2004] ECR II-1181, paragraph 345; Case T-109/02 and others, *Bolloré v. Commission* [2007] ECR II-947, paragraphs 461-462 and 657-666 and Case T-30/05 *Prym and Others v. Commission* [2007] ECR II-107, paragraphs 207-208.

8.5 Deterrence

(739) In determining the amount of the fine, the Commission pays particular attention to the need to ensure that fines have a sufficiently deterrent effect. To that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates (point 30 of the 2006 Guidelines on fines). This increase may apply even if it is not possible to estimate the amount of gains improperly made as a result of the infringement (point 31 of the 2006 Guidelines on fines), as the fine imposed must fulfil its objective of disciplining the infringing undertaking having taken into account its overall size.

(740) In this case, the world wide turnover of Elf Aquitaine S.A. in 2008 was EUR 163 390 million. It is therefore appropriate, in order to set the amount of the fine at a level which ensures that it has a sufficient deterrent effect, to apply a multiplication factor to the fines to be imposed on Elf Aquitaine S.A.. On this basis, it is appropriate to apply a multiplier to the fine to be imposed on Elf Aquitaine S.A. of [*]. This multiplier should not be applied for Arkema France and CECA SA as they are no longer part of the same undertaking as Elf Aquitaine S.A., see recital (27).

8.6 Application of the 10% turnover limit

(741) Article 23(2) of Regulation (EC) No 1/2003 provides that the fine imposed on each undertaking shall not exceed 10% of its total turnover relating to the business year preceding the date of the Commission decision.[823]

(742) [*][824] argues that the turnover of the 2009 business year must be taken into account in setting the upper limit of the fine. The turnover in the business year 2008 does not adequately reflect [*] current economic situation which is affected by the economic crisis. [*][825] points to the fact that Akcros Chemicals Ltd is a separate undertaking.

(743) As to [*] argument, Article 23 (2) of Regulation (EC) No 1/2003 stipulates that the fine shall not exceed 10% of an undertaking's total turnover in the business year preceding the Decision. That provision of the Regulation applies equally to all undertakings concerned. With regard to [*] argument that Akcros Chemicals Ltd is now a separate undertaking, the reference turnover for the 10% cap for Akcros Chemicals Ltd is Akcros Chemicals Ltd's turnover.

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[823] See also Case C-76/06 P, *Britannia Alloys & Chemicals v Commission*, [2007], ECR I-4405; Case T-33/02, *Britannia Alloys & Chemicals v Commission*, [2005] ECR II-4973; Commission Decision of 3 December 2003 in Case No C.38.359 — *Electrical and mechanical carbon and graphite products*, OJ L 125, 28.4.2004, p. 45.

[824] [*].

[825] [*].

8.7 AC-Treuhand AG

(744) AC-Treuhand AG played an essential role in both cartels in its capacity as a consultancy firm. The Court of First Instance has confirmed that a consultancy firm that purposely contributes to a cartel may be held liable as a co-perpetrator of an infringement.[826]

(745) The Commission has previously imposed a symbolic fine of EUR 1000 on AC-Treuhand AG for its role as co-perpetrator in the *Organic Peroxides* cartel.[827] At the time, the Commission imposed a symbolic fine because *"addressing a decision to an undertaking ... having a role of this kind in a cartel is to a certain extent a novelty."*[828] It should be pointed out, however, that the Commission was under no obligation to impose such a "minimal amount".[829] Moreover, the fact that the Commission imposed a symbolic fine in the *Organic Peroxides* case does not create a legitimate expectation regarding the level of the fines it may impose in other cases.[830] In this case, the Commission considers it appropriate to impose fines at a level that genuinely reflects the gravity and the duration of the infringements committed by AC-Treuhand AG, as well as the need to ensure that fines have a sufficiently deterrent effect.

(746) The 2006 Guidelines on fines provide only limited guidance on the calculation of the fines which can be imposed on firms like AC-Treuhand AG. As a result, the fine to be imposed on AC-Treuhand AG must be determined in accordance with the requirements of Regulation (EC) No 1/2003, the case-law and paragraph 37 of the 2006 Guidelines on fines.

(747) Article 23(3) of Regulation (EC) No 1/2003 provides that the Commission must take into account the gravity and the duration of the infringement in setting the amount of the fine. The gravity of the infringement has to be determined by numerous factors, such as, in particular, the circumstances of the case, its context, and the dissuasive effects of the fine; there is no binding or exhaustive list of criteria which must be applied.[831] In this case, the Commission has regard both to the seriousness of the cartels in which AC-Treuhand AG participated and to the actual extent of AC-Treuhand AG's participation in those cartels.

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[826] Case T-99/04, *AC Treuhand v Commission*, [2008] ECR II-1501, paragraph 131.

[827] Commission Decision 2005/349/EC of 10 December 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-2/37.857 – Organic peroxides).

[828] *Ibidem*, recital 454.

[829] Case T-99/04 *AC Treuhand AG v Commission* [2008] ECR II-0000, paragraph 155. See also Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paragraph 172.

[830] See, to the same effect, Case T-99/04 *AC Treuhand AG v Commission* [2008] ECR II-0000, paragraph 163. See also Case C-3/06 P *Groupe Danone v Commission* [2007] ECR I-1331, paragraphs 90.

[831] E.g. Case C-137/95 P *SPO and others v Commission* [1996] ECR I-1611, paragraph 54; C-219/95 P *Ferriere Nord v Commission* [1997], ECR I-4411, paragraph 33; Case 100/80 *Musique Diffusion francaise v Commission* [1983] ECR 1825, paragraph 120; Case 322/81 *Michelin v Commision* [1983] ECR 3461, paragraph 111.

(748) The anti-competitive arrangements in which AC-Treuhand AG participated had the objective of distorting competition for the tin stabilisers market and the ESBO/esters market contrary to Article 81 of the Treaty and Article 53 of the EEA Agreement. Both infringements were multi-faceted cartels involving market sharing and customer allocation, fixing of horizontal prices and quotas and exchanges of commercially sensitive information on prices, customers and volumes. Such infringements are by their very nature among the most harmful restrictions of competition, as they distort the main parameters of competition. Moreover, the participants in both infringements went to particular lengths to ensure the secrecy of the cartels, including by organising meetings outside the Community, using codenames and destroying documents.[832] The overall values of sales of the products to which the infringements relate are significant and the overall combined market shares in the relevant geographic area within the EEA of the undertakings for which the infringements are established are estimated to be above 90% for tin stabilisers and just above 80% for ESBO/esters. The cartels covered the sales of tin stabilisers and ESBO/esters of the undertakings in almost the entire EEA. The arrangements were rigorously implemented and monitored up until 1996.

(749) AC-Treuhand AG played a crucial role in the organisation and conduct of the meetings (see, in particular, recitals (356) - (359)). AC-Treuhand AG had precise knowledge of the anti-competitive arrangements and in fact, drafted and disseminated in a very professional way all the information on prices, quotas and customers. It was entrusted with the power to conduct audits of the cartel participants until 1996. Only the data ultimately approved by AC-Treuhand AG became the basis of negotiations and arrangements. AC-Treuhand AG made available its location to conceal the cartel. In both cartels, its role was that of preventing the detection of the infringements. As moderator, its role was that of encouraging compromises with a view to concluding the anti-competitive agreements. AC-Treuhand AG provided its services, its professional expertise and infrastructure to both cartels in order to benefit from them. Such conduct can only be characterized as active participation and involvement conducive to, and facilitating, the anti-competitive arrangements and their implementation.

(750) AC-Treuhand AG participated from 1 December 1993 to 21 March 2000 in the infringement concerning tin stabilisers and from 1 December 1993 to 26 September 2000 in the infringement concerning ESBO/esters.

(751) [*].

(752) [*].

(753) AC-Treuhand AG should also benefit from the 1% ad hoc reduction set out in section 8.9. As a result, a fine of EUR 174 000 should be imposed on AC-Treuhand AG for

[832] Case T-69/04 *Schunk GmbH a.o. v Commission*, judgment of 8 October 2008, not yet reported, paragraph 154.

its participation in the tin stabilisers cartel and of EUR 174 000 for its participation in the ESBO/esters cartel.

8.8 Application of the 2002 Leniency Notice

8.8.1 Immunity from fines

(754) As indicated in recital (79), Chemtura applied for immunity from fines [*] under the 2002 Leniency Notice. Chemtura was the first undertaking to inform the Commission about the secret cartels concerning tin stabilisers and ESBO/esters. The information provided enabled the Commission to adopt a decision to carry out surprise inspections and Chemtura was therefore granted conditional immunity from fines, in accordance with point 8(a) of the 2002 Leniency Notice (see recital (80)).

(755) Chemtura continued to provide the Commission with information in accordance with point 11 of the 2002 Leniency Notice throughout the administrative procedure. Chemtura ended its involvement in the infringements well before the time when it submitted evidence under point 8(a) of the 2002 Leniency Notice. Moreover, Chemtura did not take steps to coerce other undertakings to participate in the infringements. [*].

8.8.2 Reduction of fines

(756) As indicated in recitals (82) and (83), Arkema France, Baerlocher and Akzo applied for leniency and reduction of their fines in 2003 in accordance with the 2002 Leniency Notice. As stated in recital (94), Ciba submitted a Leniency application [*].

(757) The submissions of Arkema France, Baerlocher, Akzo and Ciba are hereafter analysed in chronological order.

8.8.2.1 Arkema France

(758) Arkema France submitted an application for reduction of fines [*] after the inspections which took place on 12-13 February 2003.[833] [*].

(759) [*].

(760) [*].

(761) [*].

833 [*].

8.8.2.2 Baerlocher

(762) Baerlocher submitted an application [*].[834] [*].[835]

(763) [*].

(764) [*].

8.8.2.3 Akzo

(765) Akzo submitted an application on [*].[836] [*].

(766) [*].

8.8.2.4 Ciba

(767) Ciba submitted an application [*].[837] [*].

(768) [*].

(769) [*][838].

8.8.3 Conclusion on the application of the 2002 Leniency notice

(770) As a result of the application of the 2002 Leniency Notice, the fine to be imposed on the immunity/leniency applicants should be decreased with the following percentages to the following amounts:
Chemtura: decrease by 100% for tin stabilisers and by 100% for ESBO/esters;
CECA/Arkema France/Elf Aquitaine: decrease by 30% for tin stabilisers and by 50% for ESBO/esters;
Baerlocher: decrease by 20% for tin stabilisers;
Akzo: decrease by 0% for tin stabilisers and by 0% for ESBO/esters and
Ciba (BASF): decrease by 15% for tin stabilisers and by 25% for ESBO/esters.

8.9 Reduction of the fines due to lapse of time

(771) The general principle of Community law that decisions following administrative proceedings relating to competition policy must be adopted within a reasonable time must be respected. The reasonableness of the period, however, depends of course on the specific circumstances of each case. For the reasons explained above (see recitals

[834] [*].
[835] [*].
[836] [*].
[837] [*].
[838] [*].

(454)-(458) and (676)-(682)), it is considered that, in the circumstances of this case, the investigation was carried out within a reasonable period. Moreover, any lapse of time has not had any effect on the outcome of the investigation, nor have the rights of defence of the parties been infringed in any way. However, the duration of the proceedings has been considerable and this justifies an exceptional 1% reduction of the fine to be imposed on each of the parties. This decision is taken by the Commission in the exercise of its discretion when setting fines and does not affect the finding that the reasonable time principle is not infringed in this case.[839] This reduction applies after the application of the 10% of turnover limit (see recital (741))

(772) However, that reduction should not apply to Akcros Chemicals Ltd and other companies which were identified as part of the Akzo Nobel undertaking for the purposes of this Decision (namely Akzo Nobel N.V., Akzo Nobel Chemicals GmbH, and Akzo Nobel Chemicals BV). Akcros Chemicals Ltd was one of the applicants in the case before the Court of First Instance with respect to privileged documents.[840] Although each undertaking is of course entitled to defend its rights as it sees fit, the actions for annulment were central to the delay in this case. Therefore, it is not appropriate for Akcros Chemicals Ltd to benefit from the reduction in question. Furthermore, at the time of the initiation of the investigation in this case, and for almost the entire period of the action before the Court of First Instance, Akcros Chemicals Ltd was (indirectly) 100% owned by Akzo Nobel N.V.[841] and was, therefore, acting under the decisive influence of Akzo Nobel N.V..[842] The Akzo Group must also be seen as a single undertaking with respect to the initiation of the actions before the Court of First Instance and, therefore, none of the companies in that group should benefit from the 1% reduction in the fine to be imposed.

8.10 Conclusion

(773) The fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 should therefore be as follows

[*]

8.11 Ability to pay

(774) According to point 35 of the 2006 Guidelines on fines "...*the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on*

839 See T-276/04 *Compagnie Maritime Belge* [2008] ECR II-1277, paragraph 46.

840 Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission*, [2007] ECR II-3523 and Joined Cases T-125/03 R and T-253/03 R, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission*, [2003] ECR II-4771.

840 OJ L 1, 4.1.2003, pp. 1–2;

841 See [*].

842 The Commission notes that the applicable Akzo Nobel authority schedules meant that Akzo Nobel N.V. was involved in the decision-making of its subsidiaries with respect to legal issues; [*].

the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that the imposition of the fine as provided for in the Decision would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value." This involves an overall assessment of the undertaking's financial situation, with the primary focus on whether the undertaking has the capacity to pay the fine, in its specific social and economic circumstances.

(775) In this case, three undertakings have invoked their 'inability to pay' under point 35 of the 2006 Guidelines on fines: [*], [*] and [*]. The Commission has considered those claims and carefully analysed available financial data on these undertakings. All undertakings concerned received Article 18 requests for information asking them to submit details about their individual financial situation and the specific social and economic context they are in.

(776) In the past, certain decisions have taken account of the financial situation of undertakings in order to adjust the fine. In *Electrical and Mechanical Carbon Products,*[843] *International Removal Services*[844] and *Calcium Carbide*[845], for reasons of financial difficulties, combined with the element of sufficient deterrence, the fines imposed on an undertaking were reduced by 33%, 70% and 20% respectively.[846] Such reductions of fines were based on an individual assessment of the case under consideration. Point 35 of the 2006 Guidelines on fines, which foresees that in exceptional cases the Commission may take account of the undertaking's inability to pay, was not applied in those decisions.

(777) In recitals (779) to (794), the individual financial position of each of the undertakings concerned and the impact thereon of the fine is assessed in their respective specific social and economic context. Before dealing with those claims individually, it is noted that the respective financial situations are assessed at the moment when the fine is calculated and on the basis of the financial data submitted by the undertakings.

(778) Insofar as the parties merely argue that the fine would have a negative impact on their financial situation, without adducing evidence of genuine inability to pay, the Commission points to settled case law, according to which the Commission is not required when determining the amount of the fine, to take account the poor financial situation of an undertaking, since recognition of such an obligation would be

843 Commission decision of 3 December 2003 in case 38.359 — Electrical and mechanical carbon and graphite products, OJ 2004, L 125/45, at p. 49.

844 Decision of 11 March 2008 in case 38543, paragraph 662. (http://ec.europa.eu /competition/antitrust/cases/decisions/38543/fr.pdf).

845 Commission decision of 22 July 2009 in case 39396 – Calcium carbide and magnesium-based reagents for the steel and gas industries, paragraph 15 of the provisional published summary of the decision (http://ec.europa.eu/competition/antitrust/cases/decisions/39396/en.pdf)

846 See also Commission decision of 23 December 1992 relating to a proceeding pursuant to Article [81] (IV/32.448 and IV/32.450: Cewal, Cowac and Ukwal) and [82] (IV/32.448 and IV/32.450: Cewal).

tantamount to giving unjustified competitive advantages to undertakings least well adapted to the conditions of the market.[847]

(779) [*][848] [*].

(780) [*].[849] [*][850], [*].[851]

(781) [*].

(782) [*].[852].

(783) [*].

(784) [*].[853] [*].[854]

(785) [*].

(786) [*].

(787) [*].

(788) [*].

(789) [*].

(790) [*][855] [*].[856] [*],[857] [*].

(791) [*].

(792) [*].

(793) [*].

(794) [*].

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847 See Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82, *IAZ International Belgium and Others* v *Commission* [1983] ECR 3369, paragraphs 54 and 55, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 327, Case C-308/04 P, *SGL Carbon AG* v *Commission* [2006] ECR I-5977, paragraph 105.

848 [*].

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(795) It follows from the above that the Commission has decided to grant a fine reduction for inability to pay to the entities which form part of the [*] undertaking and to reject the requests for inability to pay from [*] and [*].

HAS ADOPTED THIS DECISION:

Article 1

1) The following undertakings have infringed Article 81(1) of the Treaty and - from 1 January 1994 - Article 53 of the EEA Agreement by participating, for the periods indicated, in a complex of agreements and/or concerted practices in the tin stabilisers sector covering the EEA and consisting of fixing prices, allocating markets through sales quotas, allocating customers and exchanging commercially sensitive information in particular on customers, production and sales:

(a) Akzo Nobel N.V., from 24 February 1987 until 21 March 2000;

(b) Akzo Nobel Chemicals GmbH, from 24 February 1987 until 28 June 1993;

(c) Akcros Chemicals Ltd, from 28 June 1993 until 21 March 2000;

(d) Elementis plc, from 23 February 1998 until 2 October 1998;

(e) Elementis Holdings Limited, from 28 September 1988 until 2 October 1998;

(f) Elementis UK Limited, from 28 September 1988 until 2 July 1993;

(g) Elementis Services Limited, from 2 July 1993 until 2 October 1998;

(h) Elf Aquitaine S.A., from 16 March 1994 until 31 March 1996 and from 9 September 1997 until 21 March 2000;

(i) Arkema France, from 16 March 1994 until 31 March 1996 and from 9 September 1997 until 21 March 2000;

(j) CECA SA, from 16 March 1994 until 31 March 1996 and from 9 September 1997 until 21 March 2000;

(k) MRF Michael Rosenthal GmbH, from 12 October 1990 until 21 March 2000;

(l) Baerlocher GmbH, from 24 February 1987 until 21 March 2000;

(m) Baerlocher Italia S.p.A., from 22 June 1994 until 21 March 2000;

(n) Baerlocher UK Limited, from 28 March 1995 until 17 September 1997;

(o) Chemtura Corporation, from 29 May 1998 until 21 March 2000;

(p) Chemtura Vinyl Additives GmbH, from 12 December 1997 until 21 March 2000;

(q) BASF Specialty Chemicals Holding GmbH, from 24 February 1987 until 29 May 1998;

(r) BASF Lampertheim GmbH, from 24 February 1987 until 29 May 1998;

(s) Reagens S.p.A., from 20 November 1992 until 21 March 2000;

(t) AC-Treuhand AG, from 01 December 1993 until 21 March 2000.

2) The following undertakings have infringed Article 81(1) of the Treaty and - from 1 January 1994 - Article 53 of the EEA Agreement by participating, for the periods indicated, in a complex of agreements and/or concerted practices in the ESBO/esters sector covering the EEA and consisting of fixing prices, allocating markets through sales quotas, allocating customers and exchanging commercially sensitive information in particular on customers, production and sales:

(a) Akzo Nobel N.V., from 11 September 1991 until 22 March 2000;

(b) Akzo Nobel Chemicals B.V., from 11 September 1991 until 28 June 1993;

(c) Akcros Chemicals Ltd, from 28 June 1993 until 22 March 2000;

(d) Elementis plc, from 23 February 1998 until 2 October 1998;

(e) Elementis Holdings Limited, from 11 September 1991 until 02 October 1998;

(f) Elementis UK Limited, from 11 September 1991 until 2 July 1993;

(g) Elementis Services Limited, from 2 July 1993 until 2 October 1998;

(h) Elf Aquitaine S.A., from 11 September 1991 until 26 September 2000;

(i) Arkema France, from 11 September 1991 until 26 September 2000;

(j) CECA SA, from 11 September 1991 until 26 September 2000;

(k) GEA Group AG, from 11 September 1991 until 17 May 2000;

(l) Chemson Polymer-Additive AG, from 30 September 1995 until 26 September 2000;

(m) Aachener Chemische Werke Gesellschaft für glastechnische Produkte und Verfahren mbH, from 11 September 1991 until 17 May 2000;

(n) Chemson GmbH, from 17 May 2000 until 26 September 2000;

(o) Chemtura Corporation, from 29 May 1998 until 26 September 2000;

(p) Chemtura Vinyl Additives GmbH, from 12 December 1997 until 26 September 2000;

(q) BASF Specialty Chemicals Holding GmbH, from 11 September 1991 until 29 May 1998;

(r) BASF Lampertheim GmbH, from 11 September 1991 until 29 May 1998;

(s) Faci S.p.A., from 06 November 1996 until 26 September 2000;

(t) AC-Treuhand AG, from 1 December 1993 until 26 September 2000.

Article 2

For the infringement(s) in the tin stabiliser sector referred to in Article 1, the following fines are imposed:

1) Elementis plc, Elementis Holdings Limited, Elementis Services Limited, Akzo Nobel N.V. and Akcros Chemicals Ltd are jointly and severally liable for: EUR 875 200;

2) Elementis Holdings Limited, Elementis Services Limited, Akzo Nobel N.V. and Akcros Chemicals Ltd are jointly and severally liable for: EUR 2 601 500;

3) Elementis Holdings Limited, Elementis Services Limited and Akzo Nobel N.V. are jointly and severally liable for EUR 4 546 300;

4) Akzo Nobel N.V., Akzo Nobel Chemicals GmbH and Akcros Chemicals Ltd are jointly and severally liable for: EUR 1 580 000;

5) Akzo Nobel N.V. and Akcros Chemicals Ltd are jointly and severally liable for: EUR 944 300;

6) Akzo Nobel N.V. and Akzo Nobel Chemicals GmbH are jointly and severally liable for: EUR 9 820 000;

7) Akzo Nobel N.V. is liable for EUR 1 432 700;

8) Elementis plc, Elementis Holdings Limited, Elementis UK Limited and Elementis Services Limited are jointly and severally liable for: EUR 1 580 000;

9) Elementis Holdings Limited and Elementis UK Limited are jointly and severally liable for: EUR 7 231 000;

10) MRF Michael Rosenthal GmbH, Baerlocher GmbH, Baerlocher Italia S.p.A. and Baerlocher UK Limited are jointly and severally liable for: EUR 1 000 000;

11) Elf Aquitaine S.A., Arkema France and CECA SA are jointly and severally liable for: EUR 3 864 000;

12) Arkema France is liable for: EUR 3 477 600;

13) Elf Aquitaine S.A. is liable for: EUR 2 704 800;

14) Chemtura Corporation and Chemtura Vinyl Additives GmbH are jointly and severally liable for: EUR 0;

15) BASF Specialty Chemicals Holding GmbH and BASF Lampertheim GmbH are jointly and severally liable for: EUR 61 320 000;

16) Reagens S.p.A. is liable for: EUR 10 791 000;

17) AC-Treuhand AG is liable for: EUR 174 000.

For the infringement(s) in the ESBO/esters sector referred to in Article 1(2), the following fines are imposed:

18) Elementis plc, Elementis Holdings Limited, Elementis Services Limited, Akzo Nobel N.V. and Akcros Chemicals Ltd are jointly and severally liable for: EUR 1 115 200;

19) Elementis Holdings Limited, Elementis Services Limited, Akzo Nobel N.V. and Akcros Chemicals Ltd are jointly and severally liable for: EUR 2 011 103;

20) Elementis Holdings Limited, Elementis Services Limited and Akzo Nobel N.V. are jointly and severally liable for: EUR 7 116 697;

21) Akzo Nobel N.V., Akzo Nobel Chemicals B.V. and Akcros Chemicals Ltd are jointly and severally liable for: EUR 2 033 000;

22) Akzo Nobel N.V. and Akcros Chemicals Ltd are jointly and severally liable for EUR 841 697;

23) Akzo Nobel N.V. and Akzo Nobel Chemicals B.V. are jointly and severally for: EUR 3 467 000;

24) Akzo Nobel N.V. is liable for: EUR 2 215 303;

25) Elementis plc, Elementis Holdings Limited, Elementis UK Limited, and Elementis Services Limited are jointly and severally liable for: EUR 2 033 000;

26) Elementis Holdings Limited and Elementis UK Limited are jointly and severally liable for: EUR 3 412 000;

27) Elementis Holdings Limited is liable for: EUR 53 000;

28) Elf Aquitaine S.A., Arkema France and CECA SA, are jointly and severally liable for EUR 7 154 000;

29) Arkema France is liable for: EUR 6 438 600;

30) Elf Aquitaine S.A. is liable for: EUR 5 007 800;

31) a) GEA Group AG, Aachener Chemische Werke Gesellschaft für glastechnische Produkte und Verfahren mbH and Chemson Polymer-Additive AG are jointly and severally liable for EUR 1 086 129[*)]

31) b) GEA Group AG and Chemson Polymer-Additive AG are jointly and severally liable for EUR 827 842[*)];

32) GEA Group AG is liable for: EUR 1 432 229[*)];

33) Chemson Polymer-Additive AG and Chemson GmbH are jointly and severally liable for: EUR 137 606;

34) Chemson GmbH is liable for: EUR 317 794;

35) Chemtura Corporation and Chemtura Vinyl Additives GmbH are jointly and severally liable for: EUR 0;

36) BASF Specialty Chemicals Holding GmbH and BASF Lampertheim GmbH are jointly and severally liable for: EUR 7 104 000;

37) Faci S.p.A is liable for: EUR 5 940 000;

38) AC-Treuhand AG is liable for: EUR 174 000.

*) As amended by decision C(2010)727 of 8 February 2010.

The fines shall be paid in euro within three months of the date of the notification of this decision to the bank account held in the name of the European Commission with:

BBVA
Banco Bilbao Vizcaya Argentaria S.A.
Avenue des Arts, 43

B-1040 BRUXELLES
IBAN: BE76 6420 0290 0095
SWIFT: BBVABEBB

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.

Article 3

The undertakings listed in Article 1 shall immediately bring to an end the infringements referred to in that Article in so far 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

Akzo Nobel N.V., Strawinskylaan 2555, NL-1077 ZZ Amsterdam, Nederland

Akzo Nobel Chemicals GmbH, Kreuzauer Strasse 46, 52355 Düren Niederau, Germany

Akzo Nobel Chemicals B.V., Stationsstraat 77, NL-3811 MH Amersfoort, Nederland

Akcros Chemicals Ltd, Lankro Way, PO Box 1, Eccles, Manchester - M30 OBH, UK

Elementis plc (UK), 10 Albemarle Street, London W1S 4HH, UK

Elementis plc (USA), 329 Wyckoffs Mill Road, Hightstown, NJ 08520, USA

Elementis Holdings Limited, 10 Albemarle Street, London W1S 4HH, UK

Elementis UK Limited, 10 Albemarle Street, London W1S 4HH, UK

Elementis Services Limited, 10 Albemarle Street, London W1S 4HH, UK

Elf Aquitaine S.A., 2, Place Jean Millier, La Défense 6, 92400 Courbevoie, France

Arkema France, 420, rue d'Estienne d'Orves, F-92705 Colombes Cedex, France

CECA SA, 89, Boulevard National, F-92257 La Garenne-Colombes Cedex, France

MRF Michael Rosenthal GmbH, Freisinger Str. 1, D-85716 Unterschleißheim, Germany

Baerlocher GmbH, Freisinger Strasse 1, D-85716 Unterschleißheim, Germany

Baerlocher Italia S.p.A., Via San Colombano 62/A, 26900 Lodi, Italy

Baerlocher UK Limited, Moss Hall Road, Bury, Lancashire BL8 7JJ, UK

GEA Group AG, Dorstener Str. 484, 44809 Bochum, Deutschland

Chemson Polymer-Additive AG, Industriestrasse 19, A-9601 Arnoldstein, Austria

Aachener Chemische Werke Gesellschaft für glastechnische Produkte und Verfahren mbH, Adenauerstraße 20, Europark C3, D-52146 Würselen, Germany

Chemson GmbH, Hermann-Heinrich-Gossen-Str. 3, 50858 Köln, Germany

Chemtura Corporation, 199, Benson Road, Middlebury CT 06749, USA

Chemtura Vinyl Additives GmbH, Chemiestr. 22, 68623 Lampertheim, Germany

BASF Specialty Chemicals Holding GmbH, Klybeckstrasse 141, 4057 Basel, Schweiz

BASF Lampertheim GmbH, Chemiestrasse 22, 68623 Lampertheim, Germany

Faci S.p.A., Via Privata Devoto 36, 16042 Carasco (GE), Italy

Reagens S.p.A., Via Codronchi 4, 40016 San Giorgio di Piano (BO), Italy

AC-Treuhand AG, Tödistrasse 47, CH-8027 Zürich, Switzerland

This Decision shall be enforceable pursuant to Article 256 of the Treaty and Article 110 of the EEA Agreement.

Done at Brussels, 11 November 2009

For the Commission

Member of the Commission