



EUROPEAN COMMISSION

Brussels,

**NON CONFIDENTIAL VERSION OF THE
COMMISSION DECISION**

of 20 July 2010

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

Case COMP/38866 – Animal Feed Phosphates

(Only the English text is authentic)

(Text with EEA relevance)

**To be notified to
Yara Phosphates Oy
Yara Suomi Oy
Kemira Oyj
Tessengerlo Chemie N.V
Quimitécnica.com – Comércio e Indústria Química S.A.
José de Mello SGPS S.A.
FMC Foret S.A.
FMC Chemicals Netherlands B.V.
FMC Corporation**

**Parts of this text have been edited to ensure that confidential information is not
disclosed; those parts are enclosed in square brackets and marked with dots: [...]**

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TABLE OF CONTENTS

1	INTRODUCTION	4
1.1	SUMMARY OF THE INFRINGEMENT	4
1.2	DURATION OF THE INFRINGEMENT	5
1.3	MARKET VALUE	5
2	THE INDUSTRY CONCERNED	6
2.1	THE PRODUCT	6
2.2	INTER-STATE TRADE	6
2.3	THE UNDERTAKINGS SUBJECT TO THE PROCEEDINGS	6
2.3.1	<i>Ercros</i>	6
2.3.2	<i>FMC Foret</i>	7
2.3.3	<i>Kemira</i>	7
2.3.4	<i>Yara Phosphates Oy (formerly Kemira Phosphates Oy), Yara Suomi Oy (formerly Kemira GrowHow Oyj)</i>	7
2.3.5	<i>Timab Industries S.A. (formerly Timac S.A. and Timab S.A.) and Roullier group</i>	7
2.3.6	<i>Tessengerlo</i>	8
2.3.7	<i>Quimitécnica and José de Mello SGPS</i>	8
3	PROCEDURE	9
4	DESCRIPTION OF EVENTS AND EVIDENCE	10
4.1	OVERVIEW OF THE CARTEL ARRANGEMENTS FOR FEED PHOSPATES	10
4.2	BASIC ARRANGEMENTS	12
4.3	MAIN EVIDENCE REGARDING THE EARLY YEARS (1970 TO 1978)	14
4.3.1	<i>Market sharing: Quota fixing, market and customer allocation and monitoring. Integration of French producers</i>	14
4.3.2	<i>Coordination of pricing policy and other sales conditions</i>	15
4.4	EVIDENCE REGARDING YEARS 1978 TO 1988: STRATEGIC CHOICE TO ALLOCATE BY REFERENCE TO REGIONS	15
4.4.1	<i>Measures to ensure interregional co-ordination between 1978 and 1988</i>	16
4.4.2	<i>Evidence specific to Central Europe between 1978 and 1988</i>	17
4.4.2.1	Quota and customer allocation in Central Europe (1978-1988)	17
4.4.2.2	Price fixing and coordination of other sales conditions in Central Europe (1978-1988)	17
4.4.3	<i>Evidence specific to Northern Europe, the United Kingdom and Ireland between 1978 and 1988</i>	18
4.4.3.1	Quota and customer allocation for Northern Europe, the United Kingdom and Ireland (1978-1988)	18
4.4.3.2	Price fixing and coordination of other sales conditions in Northern Europe, United Kingdom and Ireland (1978-1988)	18
4.4.4	<i>Evidence specific to France between 1978 and 1988</i>	18
4.4.4.1	Quota and customer allocation for France between 1978 and 1988	18
4.4.4.2	Price fixing and coordination of other sales conditions in France (1978-1988)	19
4.5	EVIDENCE FOR THE PERIOD 1989 TO 2004: PROGRESSIVE REVERSION TO CENTRALISATION (SUPER CEPA) AND EXPANSION TOWARDS SPAIN AND PORTUGAL	19
4.5.1	<i>Evidence regarding market sharing for the period 1989 to 1996</i>	19
4.5.1.1	Super CEPA region: Central Europe, the United Kingdom, Ireland and Scandinavia (1989-1996)	19
4.5.1.2	France and its coordination with Super CEPA (1989-1996)	20
4.5.1.3	Expansion towards Spain in 1992 prior to its integration in Super CEPA in 1997	21
4.5.1.4	Expansion of the cartel towards Portugal without integrating it in Super CEPA	21
4.5.2	<i>Super CEPA centralised market sharing scheme extends to France and Spain; Portugal parallel allocation remains (1997-2004)</i>	22
4.5.2.1	Super CEPA between 1997 and 2004	22
4.5.2.2	Portugal between 1997 and 2004	23
4.5.3	<i>Coordination of pricing policy and other sales conditions from 1989 to 2004</i>	23

4.6	TERMINATION OF THE ARRANGEMENTS	24
5	APPLICATION OF ARTICLE 101 OF THE TREATY AND ARTICLE 53 OF THE EEA AGREEMENT	24
5.1	JURISDICTION	24
5.2	THE NATURE OF THE INFRINGEMENT	25
5.2.1	<i>Agreements and concerted practices</i>	25
5.2.1.1	Principles	25
5.2.1.2	Application to this case.....	26
5.2.2	<i>Single and continuous infringement</i>	26
5.2.2.1	Principles	26
5.2.2.2	Application to this case.....	27
5.2.3	<i>Restriction of competition</i>	30
5.2.3.1	Principles	30
5.2.3.2	Application to this case.....	31
5.2.4	<i>Effect upon trade between Member States and between Contracting Parties to the EEA Agreement</i> 32	
5.2.4.1	Principles	32
5.2.4.2	Application to this case.....	33
5.2.5	<i>Non-applicability of Article 101(3) of the Treaty</i>	34
5.3	ATTRIBUTION OF LIABILITY	34
5.3.1	<i>Yara/ Kemira</i>	34
5.3.2	<i>Tessenderlo</i>	36
5.3.3	<i>Quimitécnica</i>	37
5.3.4	<i>Ercros</i>	38
5.3.5	<i>Foret</i>	39
6	REMEDIES.....	39
6.1	ARTICLE 7 OF REGULATION (EC) NO 1/2003	39
6.2	ARTICLE 23(2) OF REGULATION (EC) NO 1/2003/ARTICLE 15(2) OF REGULATION NO 17	39
6.3	THE BASIC AMOUNT OF THE FINES	40
6.3.1	<i>Calculation of the value of sales</i>	41
6.3.2	<i>Determination of the basic amount of the fine</i>	41
6.3.2.1	Gravity.....	41
6.3.2.2	Duration.....	42
6.3.3	<i>The percentage to be applied to calculate the additional amount</i>	44
6.3.4	<i>Calculation and conclusion on basic amounts</i>	44
6.4	ADJUSTMENTS TO THE BASIC AMOUNT	45
6.4.1	<i>Aggravating circumstances</i>	45
6.4.2	<i>Mitigating circumstances</i>	45
6.5	APPLICATION OF THE 10% OF TURNOVER LIMIT	45
6.6	APPLICATION OF THE LENIENCY NOTICE.....	46
6.6.1	<i>Immunity from fines</i>	46
6.6.2	<i>Reduction of fines</i>	47
6.6.2.1	Tessenderlo Chemie N.V.....	47
6.6.2.2	Quimitécnica.com – Comércio e Indústria Química S.A./José de Mello SGPS S.A.	47
6.7	APPLICATION OF THE SETTLEMENT NOTICE	48
6.8	ABILITY TO PAY.....	48
6.8.1	<i>Introduction</i>	48
6.8.2	[...].....	50
6.8.3	[...].....	51
6.8.4	<i>Conclusion</i>	51
6.9	CONCLUSION: FINAL AMOUNT OF INDIVIDUAL FINES TO BE IMPOSED IN THIS DECISION	51
7	CONCLUSION.....	52

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

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 Treaty¹, and in particular Article 7 and Article 23(2) thereof,

Having regard to Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases², and in particular Article 10a thereof,

Having regard to the Commission decision of 19 January 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 Article 10a (2) and (3), Article 12(2) and Article 15(1a) of Regulation (EC) No 773/2004, as amended by Commission Regulation (EC) No 622/2008 of 30 June 2008,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions³,

Having regard to the final report of the Hearing Officer in this case⁴,

Whereas:

1 INTRODUCTION

(1) This Decision is addressed to José de Mello SGPS S.A., Quimitécnica.com – Comércio e Indústria Química S.A.; Ercros S.A., Ercros Industrial S.A.; FMC Foret S.A., FMC Chemicals Netherlands B.V., FMC Corporation; Tessenderlo Chemie N.V.; Yara Phosphates Oy, Yara Suomi Oy and Kemira Oyj.

1.1 Summary of the infringement

(2) The addressees of this Decision participated in a single and continuous infringement of Article 101 of the Treaty and, from 1 January 1994, of Article 53 of the Agreement on the European Economic Area (hereinafter 'EEA Agreement'), by which they colluded

¹ OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and, respectively, 102 of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are in substance identical. For the purposes of this Decision references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty when appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this Decision

² OJ L 171, 1.7.2008, p.3.

³ published in the Official Journal.

⁴ published in the Official Journal.

as regards the sale of feed phosphates used in animal feed (hereafter 'FP'). The aim of the cartel was to share a large part of the European feed phosphates market, by allocating sales quotas to cartel members, and to coordinate prices and, to the extent necessary, sales conditions. To this end, the participants generally exchanged sensitive market information in regular meetings and in other contacts in which they happened to allocate customers as well as to compensate or correct deviations from established targets. Sometimes, parties coordinated their reaction towards outsiders.

- (3) The overall infringement covered most of the Union and subsequently also a great part of the EEA territory, and lasted from at least 19 March 1969 until at least 10 February 2004.

1.2 Duration of the infringement

- (4) The overall cartel lasted at least 34 years and 10 months.
- (5) In particular, the following undertakings are considered liable for the infringement for the periods indicated:
- Yara Phosphates Oy: at least from 19 March 1969 to 28 November 2003;
 - Kemira Oyj: at least from 1 April 1989 to 28 November 2003;
 - Yara Suomi Oy: at least from 1 January 1994 to 28 November 2003;
 - Tessenderlo Chemie N.V.: at least from 19 March 1969 to 10 February 2004;
 - Ercros S.A.: at least from 31 January 1992 to 10 February 2004;
 - Ercros Industrial S.A.: at least from 31 January 1992 to 10 February 2004;
 - FMC Foret S.A.: at least from 31 January 1992 to 31 December 2001;
 - FMC Chemicals Netherlands B.V.: at least from 31 January 1992 to 31 December 2001;
 - FMC Corporation: at least from 31 January 1992 to 31 December 2001;
 - Quimitécnica.com – Comércio e Indústria Química S.A.: at least from 21 October 1993 to 10 February 2004;
 - José de Mello SGPS S.A.: from at least 1 January 1997 to 10 February 2004.
- (6) In the description of the facts in this Decision, two other FP undertakings are mentioned, Timab Industries S.A. and Compagnie Financière et de Participation Roullier (also referred to together as "CFPR/Timab"). The participation of those undertakings in the cartel and the Commission's conclusions as to their liability in respect of the infringement is not covered in this Decision. A separate Decision is addressed to those undertakings.

1.3 Market value

- (7) The value of the FP sales made by the undertakings referred to in recital (5) and by CFPR/Timab, in the EEA countries covered by the arrangements in 2003, the last full year of the infringement, is estimated to be EUR 252 million. For the last twenty years, FP producers have faced increasing competition from phytase. The combined market share of the participants in the cartel (the undertakings to which this Decision is addressed, as well as CFPR/Timab) is estimated to have been around 67% in 2003 and around 71% on average from 1989 to 2003.

2 THE INDUSTRY CONCERNED

2.1 The product

- (8) FP are chemical compounds of phosphorus used mainly to balance the phosphorus and calcium contents of feed for animals such as cattle, pigs, poultry, fish and pets.
- (9) A range of FP of varying content and digestibility in powder or granulated form (of different granulation sizes) are offered in the market depending on the raw materials and processes used to produce them. The most commonly marketed products are dicalcium phosphate "DCP", monocalcium phosphate "MDCP" and monocalcium phosphate "MCP" or mixtures matching desired levels of phosphorus content and calcium/phosphorus ratios. FP are used by feed manufacturers and large meat or fish producers.
- (10) The infringement described in this Decision concerns both inorganic and organic FP. Organic FP are produced in relatively small quantities, namely as a by-product, by gelatine manufacturers, for example Tessengerlo.
- (11) Within the EEA, Tessengerlo (with headquarters in Belgium) is the leading FP producer, followed by Kemira and Timab (based in Finland and France, respectively). Other producers with somewhat smaller EEA market shares, include Ercros and FMC Foret (both based in Spain), Fosfitalia (based in Italy) and Quimitécnica (based in Portugal).⁵

2.2 Inter-state trade

- (12) There was a substantial amount of trade in FP between Member States and within the EEA as a whole, throughout the whole duration of the infringement. This is apparent, for example, from regularly exchanged tables used by cartel members to monitor their sales volumes per producer and per country (see section 4).

2.3 The undertakings subject to the proceedings

2.3.1 Ercros

- (13) Ercros S.A.⁶ (hereinafter "**Ercros**") is a Spain-based industrial group formed in June 1989 as the result of the merger of two companies with a long history in the Spanish chemical industry: Unión Explosivos Río Tinto, S.A. and S.A. Cros.
- (14) Ercros's FP business is operated mainly through subsidiary companies which are fully owned by Ercros, such as Erkimia S.A. (1989-1999), which was renamed Ercros Industrial S.A. (1999-2008). In addition, Ercros sold FP products in France, Portugal and Italy through wholly owned subsidiaries dedicated to those territories, amongst others Ercros France S.A.

⁵ Foret and Quimitécnica have rather limited exports and sell FP mainly in Spain and Portugal.

⁶ See for example, [Description of evidence]

2.3.2 FMC Foret

- (15) FMC Foret S.A. (hereinafter “**Foret**”)⁷, based in San Cugat del Vallés, Barcelona, Spain, is wholly owned by FMC Chemicals Netherlands B.V., based in Farmsum, the Netherlands, a (holding) company which in turn is wholly owned by FMC Corporation (hereinafter “FMC”), based in Philadelphia, USA.
- (16) Foret produces FP (namely DCP and MCP) that, at least since 1993⁸, are sold mainly in the Iberian Peninsula (FP sales in Portugal are mainly made through "Foret, S.A." a Portuguese subsidiary of Foret).

2.3.3 Kemira

- (17) Kemira Oyj (hereinafter “**Kemira**”)⁹ is a publicly listed Finnish company based in Helsinki in which the Finnish state holds a share of around 16.5%. The company name has changed several times over the years. Between 1972 and 1997 its name was Kemira Oy, and it was a limited company listed on the Helsinki stock exchange as from 1994. On 1 September 1997 Kemira Oy changed its name to Kemira Oyj (a public limited company).
- (18) Kemira's animal nutrients business, including FP, became part of Kemira GrowHow Oyj, a new company that separated from the Kemira group through a spin-off in 2003 and was renamed Yara Suomi Oy in April 2008 (see section 2.3.4).

2.3.4 Yara Phosphates Oy (formerly Kemira Phosphates Oy), Yara Suomi Oy (formerly Kemira GrowHow Oyj)

- (19) Kemira GrowHow Oyj (hereinafter “**GrowHow**”), renamed Yara Suomi Oy in April 2008, currently manufactures FP for the European market in its plants in Kokkola (Finland) and Helsingborg (Sweden). GrowHow is the result of a spin-off within the Kemira group in 2003. On 7 January 2003 Kemira Agro Oy, a wholly owned subsidiary of Kemira, was renamed Kemira GrowHow Oy in anticipation of the initial public offering of the company. On 16 September 2004 it became a public limited liability company and was renamed Kemira GrowHow Oyj.
- (20) Kemira Phosphates Oy was a subsidiary of GrowHow which ran all the FP business of the Kemira group after the restructuring of 2001. After the acquisition of GrowHow and its subsidiaries by Yara Suomi Oy (hereinafter '**Yara Suomi**'), Kemira Phosphates Oy was renamed Yara Phosphates Oy on 2 May 2008 (hereinafter "**Yara Phosphates**").

2.3.5 Timab Industries S.A. (formerly Timac S.A. and Timab S.A.) and Roullier group

- (21) Timab Industries S.A. (hereinafter "**Timab**")¹⁰, a company created on 30 November 1995, is a subsidiary of Compagnie Financière et de Participations Roullier (hereinafter "CFPR" or "Roullier group"), which is the holding company based in

⁷ . [Description of evidence]

⁸ [Description of evidence]

⁹ See pp. . [Description of evidence]

¹⁰ See pp. [... Description of evidence]

Saint Malo (France). Timab started its FP activities in May 1997, taking over those activities from another company within the Roullier group, Timac S.A. The Roullier group started producing FP in 1977.

2.3.6 *Tessengerlo*

- (22) *Tessengerlo Chemie N.V.* (hereinafter "**Tessengerlo**")¹¹ is a Belgium-based international group, and has, for a long time, been the leading producer and supplier of FP in the EEA. *Tessengerlo* sells FP worldwide, directly or through subsidiaries, based mainly on its three trademark products (*Aliphos*, *Windmill* and *Italphos*, currently being produced respectively in plants located in Ham (Belgium), *Vlaardingen* (the Netherlands) and *Cologna-Veneta* (Italy)).
- (23) From 1967 to January 2005, EMC ("*Entreprise Minière & Chimique*", formerly *Mines de Potasses d'Alsace*), held by the French state (as an EPIC – *établissement public à caractère industriel et commercial*¹²) was *Tessengerlo*'s main shareholder. EMC gained full control over *Pont Brûlé* (which manufactured, amongst other things, gelatine and DCP) in 1964 and subsequently of [...] (hereinafter [A1]). Those companies together with *Produits Chimiques du Limbourg* were the originators of the new group. *Tessengerlo* has amongst others two subsidiaries in France, *Aliphos S.A.* and *Tefipar S.A.*

2.3.7 *Quimitécnica and José de Mello SGPS*

- (24) *Quimitécnica.com – Comércio e Indústria Química S.A.* (hereinafter "**Quimitécnica**") has succeeded in all rights and obligations to *Quimitécnica, Serviços, Comércio e Indústria de Produtos Químicos, S.A.*, one of the addressees of the Statement of Objections. *Quimitécnica* has expressly requested that this Decision be addressed to it¹³.
- (25) *Quimitécnica, Serviços, Comércio e Indústria de Produtos Químicos, S.A.*¹⁴ was based in Barreiro, Portugal, and produced and sold FP, mainly in Portugal, where it was the leading supplier.
- (26) From at least 1998, *Quimitécnica, Serviços, Comércio e Indústria de Produtos Químicos, S.A.* was wholly owned by the holding *José de Mello SGPS S.A.*, sometimes directly, sometimes through the group sub-holding for the chemical businesses (*CUF – Companhia União Fabril, SGPS S.A.*). *Quimitécnica, Serviços, Comércio e Indústria de Produtos Químicos, S.A.* was bought out by its management with effect from 12 February 2009. On 30 December 2009, *Quimitécnica.com – Comércio e Indústria Química S.A.* and *Quimitécnica, Serviços, Comércio e Indústria de Produtos Químicos S.A.* were incorporated into *Orquasa – Origem Química e Ambiente S.A.*, which was renamed *Quimitécnica.com – Comércio e Indústria Química S.A.*, the addressee of this Decision.

¹¹ [Description of evidence]

¹² Essentially a public commercial undertaking.

¹³ [Description of evidence]

¹⁴ [Description of evidence]

3 PROCEDURE

- (27) On 28 November 2003, Kemira applied for immunity under the Commission notice on immunity from fines and reduction of fines in cartel cases (“the Leniency Notice”).¹⁵ The application concerned the period from [...] to [...].
- (28) On 16 December 2003, the Commission granted Kemira conditional immunity from fines pursuant to point 8(a) of the Leniency Notice.¹⁶
- (29) On 10 and 11 February 2004, the Commission carried out unannounced inspections in France and Belgium at the premises of Ercros France (in France), Timab (in France), Aliphos and Tefipar (in France, both subsidiaries of Tessengerlo) and Tessengerlo (in Belgium).
- (30) On 18 February 2004, Tessengerlo submitted an application pursuant to the Leniency Notice [...]
- (31) On 27 March 2007, Quimitécnica submitted an application pursuant to the Leniency Notice.
- (32) Several requests for information were sent to the companies under investigation.
- (33) On 14 October 2008, CFPR/ Timab submitted an application pursuant to the Leniency Notice, further supplemented on 28 October 2008.
- (34) By letters dated 19 January 2009 the Commission notified the addressees of this Decision of the initiation of proceedings with the effects foreseen in Article 11(6) of Regulation (EC) N° 1/2003. Pursuant to Article 10a(1) of Regulation (EC) N° 773/2004, it invited companies to indicate their interest in participating in settlement discussions before a set date.
- (35) By letters of 21 January 2009 and pursuant to point 26 of the Leniency Notice, the Commission informed, as provided for in point 23(b) of the Leniency Notice, the following companies of its intention to apply the following reductions in respect of the fines which would otherwise be imposed on those companies: a) Tessengerlo, a reduction within a band of 30-50% of any fine imposed; b) José de Mello/Quimitécnica a reduction within a band of 20-30% of any fine imposed; and c) CFPR/Timab a reduction not exceeding 20% of any fine imposed.
- (36) During bilateral settlement discussions, all parties had access to the evidence supporting the envisaged objections and the potential fine range, pursuant to Article 10a (2) of Regulation (EC) No 773/2004. During those discussions, parties expressed their views on the envisaged objections, including all those retained in the Statement of Objections and in this Decision.
- (37) In September 2009, the Commission fixed a time limit for the parties to submit formal requests to settle pursuant to Article 10a(2) of Regulation (EC) No 773/2004 (hereinafter referred to as 'settlement submissions'). All parties introduced their

¹⁵ OJ C 45, 19.2.2002, p. 3.

¹⁶ . [Description of evidence]

settlement submissions within their respective timelimits, except for CFPR/Timab who discontinued the settlement procedure. The parties who introduced settlement submissions are referred to in this Decision as "settling parties".

- (38) On 23 November 2009, the Commission adopted a bundle of six Statements of Objections addressed to: (i) Compagnie Financière et de Participation Roullier and Timab Industries S.A.; (ii) Ercros S.A. and Ercros Industrial S.A.; (iii) FMC Foret S.A., FMC Chemicals Netherlands B.V. and FMC Corporation; (iv) José de Mello SGPS S.A. and Quimitécnica, Serviços, Comércio e Indústria de Produtos Químicos S.A. (now Quimitécnica.com – Comércio e Indústria Química S.A.); (v) Yara Phosphates Oy, Yara Suomi Oy and Kemira Oyj; (vi), Tessenderlo Chemie N.V.
- (39) All the parties to which the Statements of Objections were addressed (except for CFPR/Timab) replied by confirming clearly and unequivocally that the Statement of Objections corresponded to the contents of their settlement submissions and that they therefore remained committed to following the settlement procedure.
- (40) CFPR/Timab had access to the file and replied to the Statement of Objections on 2 February 2010 and participated in an Oral Hearing held on 24 February 2010. All the addressees of this Decision, except for Tessenderlo, participated in the Oral Hearing as interested third parties.
- (41) Two undertakings invoked inability to pay within the meaning of point 35 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003¹⁷ (hereinafter the 'Guidelines on fines'). They provided justifications to support their request.
- (42) Having regard to the body of evidence on the Commission's file referred to in recital (36), the clear and unequivocal acknowledgments of the facts and the legal qualification thereof contained in the settlement submissions introduced by the addressees of this Decision, as well as their clear and unequivocal confirmation that the Statement of Objections reflects their settlement submissions, it is concluded that the addressees of this Decision took part in the cartel as described in Section 4 of this Decision.

4 DESCRIPTION OF EVENTS AND EVIDENCE

4.1 Overview of the cartel arrangements for Feed Phosphates

- (43) The major European producers of FP allocated the volumes of FP supplied in large areas of Europe according to agreed rules, respecting quotas largely reflecting estimated historic market shares and fixing price levels, while reserving some territories to certain producers. The traditional stronghold of some companies or groups of companies in certain territories had an impact on how the allocation took place and which implementing mechanisms were deployed.
- (44) The main aim of the coordination was to share the volumes of FP supplied in several European countries, including some which were or became Member States and some which became Contracting Parties to the EEA Agreement. The undertakings also

¹⁷ OJ C 210, 1.9.2006, p. 2.

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

- (45) The cartel also aimed at coordinating prices for each country between the relevant cartel members and, where necessary, sales conditions.¹⁸
- (46) Prices, price increases and other commercial or purchase conditions were discussed and coordinated country by country (sometimes detailed per segment or for specific customers) and on some occasions for all European countries covered by the agreement. The co-ordination of pricing and commercial policy alignment was meant to ensure and facilitate the effectiveness of the cartel. Large price differentials across countries, especially across neighbouring countries, were to be avoided.
- (47) The undertakings had frequent contacts and met regularly to coordinate and facilitate implementation through price monitoring and market sharing agreements at both European and country levels¹⁹. Monitoring and compensation mechanisms were foreseen and used to control the market sharing agreement and to correct and mediate in disputes concerning large deviations from the agreed quotas at European and country levels. This did not prevent the parties from seizing opportunities to supply incorrect data to deceive each other.
- (48) [[Description of evidence]...].²⁰
- (49) [[Description of evidence]...].
- (50) The cartel arrangements, known as the ‘Club’, CEPA (Centre d’Etude des Phosphates Alimentaires) or later Super CEPA²¹ (see also recital (87)), proved to be resilient and able to adapt to different industry and market conditions over the years. Important developments in the arrangements (some of them prompted, amongst other things, by acquisitions of companies, new entrants and episodes and moments of tension between the cartel members) generated logical changes in cartel membership, its geographical scope and its organizational structure in several sub-arrangements at regional and country level.
- (51) The description of the facts and evidence starts with a description of the basic [...] agreement amongst founding members and then describes the main evidence dealing with subsequent periods, first with market sharing aspects (quota fixing, market and customer allocation and monitoring) and then with coordination of pricing and of other sales conditions.
- (52) The Commission relies on the whole body of evidence, including the clear and unequivocal acknowledgements by the settling parties of the facts and the legal

¹⁸ [Description of evidence]

¹⁹ P. [Description of evidence]

²⁰ . [Description of evidence]

²¹ . [Description of evidence]

qualification thereof contained in their settlement submissions, confirmed by them in their respective replies to the Statement of Objections.

4.2 Basic arrangements

- (53) Through the so-called [...] (hereinafter 'the basic arrangements'), dated 19 March 1969, five FP producers agreed to reduce the production of mono- and dicalcium phosphates to adjust to demand and were to agree on the quantities sold and on prices²². The arrangements covered FP obtained from both organic and inorganic origins. The five FP producers which started coordination contacts at least as from 1968²³, based in four countries, were: [V1] (later GrowHow/Yara Suomi Oy, see section 5.3.1) and [X2] (later GrowHow/Yara Suomi Oy, see section 5.3.1) in Germany, Boliden (later GrowHow/Yara Suomi Oy, see section 5.3.1) in Sweden, Tessenderlo in Belgium and ENCK/Windmill²⁴ (later Tessenderlo, see section 5.3.2) in The Netherlands.
- (54) [...] for the agricultural years 1968/69 and 1969/70 indicate that the agreement initially included: Austria, Belgium, Denmark, Finland, France, Western Germany, DDR, Italy, Netherlands, Norway, Poland, Sweden, and the United Kingdom. [...] other European countries were also covered by the agreement, counted into the total for Europe²⁵ and [...] (initially Spain, Ireland, Portugal, Czechoslovakia and Hungary).
- (55) The basic arrangements contained [...]: First, each producer was to be allocated the equivalent of its average percentage of the total FP supply by all participants over the previous two years, expressed as 40% grade P205 for cattle feeding²⁶. Second, prices and sales conditions were to be agreed upon by the participants, for each European country. Third, the market distribution existing at the time was to be preserved and consolidated by agreeing on how concretely to restrict competition and limit unnecessary costs. In order to implement those [...], participants only needed to exchange their figures for the preceding two years, calculate their respective market shares and agree on the part of the production and the price level that could be absorbed by the market at each juncture.
- (56) An agreement on the concrete quotas was reached in a meeting held in Copenhagen in June 1969 ("rules agreed in Copenhagen" or "Copenhagen agreement").²⁷ This followed two preparatory meetings²⁸ and other contacts²⁹ to exchange figures and

²² . [Description of evidence]

²³ . [Description of evidence]

²⁴ "Windmill" makes reference to both a trademark and a number of companies which have been mentioned in the description of the facts. ENCK (Eerste Nederlandse Coöperatieve Kunstmestfabriek) BV was founded in 1917. It produced superphosphate in Vlaardingen in 1921. In 1970, ENCK BV ceased to exist as such and changed into Windmill Holland BV. It was then acquired by an American company called [C1]. In 1978, Windmill was bought back by the local management. In 1986, it was taken over by the [...] fertilizer manufacturer [N1]. During a reorganisation in 1989 the company was renamed [H1]. Since 1995 Tessenderlo Chemie produces FP under the trademark "Windmill" in a plant in Vlaardingen.

²⁵ . [Description of evidence]

²⁶ . [Description of evidence]

²⁷ . [Description of evidence]

²⁸ . [Description of evidence]

²⁹ . [Description of evidence]

discuss the products to be covered. Possible formulas and proposals to divide the estimated increase in demand were discussed. The participants also expressed their views on the agreement (for example, the need to limit production and to fix quotas taking into account the overcapacity already present and the importance of raising prices, etc). [...] exchanged from that time onwards reflected that allocation³⁰[...] occasionally included the estimations of sales volumes made by other competitors ("outsiders") in different markets.

- (57) The basic arrangements foresaw ordinary meetings amongst all participants to be held several times per year, to discuss, implement and monitor the agreements at country or regional level (so-called "local meetings") and at European-wide level. Extraordinary meetings were to be held upon request. In particular the "sale quotas" and the "limitation of production" fixed in the basic arrangements were to be reviewed annually.³¹ Participants were also expected to have close contacts "beside the meetings".³² Those contacts were sporadic, only when needed and often on a bilateral basis (for example, [...] and phone conversations to discuss specific issues such as sales, quotas or prices in given countries or specific customers)³³. The evidence in the file concerns [...] meetings, but also *ad hoc* bilateral contacts to exchange further commercial information and resolve specific operational difficulties in the implementation of the market sharing agreements in a particular country or region. This included discussions of quotas³⁴ but also compensations and allocation of customers in different markets³⁵. A cartel secretariat was set up in Brussels (a task performed at that time by [...]) to which the producers agreed to regularly report data on sales volumes and orders from customers (called "statements concerning quantities shipped and contracts on hand")³⁶.
- (58) Cartel members monitored deviations from the agreed quotas the national and at European level reciprocally. In a not always successful attempt to achieve the target quotas, "compensations" were foreseen through the allocation of customers within each country and each campaign. When the quota in a given country or for specific customers was close to being fulfilled by a given producer, it would increase its prices in that country or for those specific customers (or claim inability to supply), so that the other producers could reach their quotas.³⁷ Although there was continuous monitoring, volume allocation, and correction efforts, if substantial quota deviations occurred, decisions concerning any compensations could be taken at the end of the agricultural year. These would take effect during the following year,³⁸ in accordance with the agreed key for the allocation of unforeseen increases in market demand among the cartel members. The basic monitoring and compensation mechanisms were maintained with some developments throughout the duration of the cartel. Customers were often reallocated to ensure compensation for producers showing a substantial negative deviation from their sales quotas.

³⁰ [Description of evidence]
³¹ [Description of evidence]
³² [Description of evidence]
³³ [Description of evidence]
³⁴ [Description of evidence]
³⁵ [Description of evidence]
³⁶ [Description of evidence]
³⁷ [Description of evidence]
³⁸ [Description of evidence]

- (59) Likewise, questions of general pricing policy, such as price increase targets at national and European level and general orientations for price differentials across countries and between customer segments, were regularly discussed. The implementation of decisions taken in this field was followed up in the European level coordination meetings (which all cartel members usually attended). The same meetings served to discuss and co-ordinate other sales conditions such as the duration of contracts, discounts, changes and restrictions in the export channels and distribution agents used by some producers in some countries, barriers or price increase limitations imposed by contracts or national laws, etc.
- (60) At least until the reorganisation into three intermediate regions in 1978, those European policy coordination meetings³⁹ were held 3 or 4 times per year (sometimes more frequently). Later, the interregional co-ordination was ensured through informal links, reporting by members active in several regions and contacts amongst all producers⁴⁰. Throughout the lifespan of the arrangements, cartel members which had interests in a country or region gathered in “local” meetings (country meetings) to discuss volumes, market shares, prices and other commercial conditions for specific customers⁴¹. From 1970, four French producers participated in the cartel as a group. Their joint position and representation in CEPA meetings therefore required specific local coordination amongst themselves (see section 4.3).
- (61) At the end of the 1970s, the cartel was reorganised on a regional basis with a pan-European coordination (see section 4.4). The basic structure and organisation of the cartel in three interrelated regions remained throughout the 1980s. It progressively merged back into a single structure in the 1990s and the cartel extended to other European regions. That evolution and the evidence of the continuation of cartel activities until 10 February 2004 is explained below (see sections 4.4 and 4.5).

4.3 Main evidence regarding the early years (1970 to 1978)

4.3.1 *Market sharing: Quota fixing, market and customer allocation and monitoring. Integration of French producers*

- (62) Quotas were usually reviewed and reallocated at least at, or immediately before, the beginning of each reference period, taking into account overall market conditions (including demand and supply developments expected by producers outside CEPA).⁴²
- (63) In 1970, negotiations took place regarding the admission of four French producers ([A1], [S2], [R1] and [U1]) to CEPA. The accession of those French producers in 1970 was also reflected in the way in which quotas for the agricultural years 1970/1971 and 1971/1972 were fixed. In 1972/1973 and in 1973/1974, the 1969 Copenhagen agreement continued to be used to fix quotas and target market shares.
- (64) European and country quotas started to be fixed for calendar years (instead of agricultural years) from the beginning of 1975. This had an impact on quota

³⁹ These meetings were initially called "CEPA meetings", see for example p., and later on "BIT", Bureau International Technique, see for example [...]

⁴⁰ See. [Description of evidence]

⁴¹ [Description of evidence]

⁴² [Description of evidence]

reallocation at a European level (based on the rules agreed in 1969 in Copenhagen and the "home market principle"). Detailed reviews of sales volumes and quota realisations at national and at European level took place in several CEPA meetings.⁴³

- (65) Once the adjustments were in place to take into account the calendar year as reference period, the usual procedure was followed to reallocate national and European quotas for 1976 and 1977.⁴⁴

4.3.2 *Coordination of pricing policy and other sales conditions*

- (66) In 1970, pricing policy and its implementation at national and European level, including target price increases and reductions, was discussed. This was to extract higher benefits or reduce price divergences, particularly between neighbouring countries⁴⁵ as well as price increases for specific products in specific countries or prices to be charged for specific customers.⁴⁶ Cartel members agreed in meetings held in 1970 to implement further price increases in France and to try to obtain identical prices in all markets. In order to maximize the efficiency of the cartel they also agreed to avoid large differentials in the prices charged to large and small customers as well as on specific price increases per country to be implemented at the beginning of 1971⁴⁷.
- (67) A new general price increase (detailed country by country and to be implemented in the 1971/1972 period) was decided during a meeting held in 1971.
- (68) Similarly, cartel members agreed in 1972 on price increases for each product, country and producer for January 1973. This followed discussions of their respective prices in several countries, and in some cases for some important customers, as well as the commissions agreed with certain agents⁴⁸. In 1973, sales conditions were reviewed together with past and future price increases for 1973, but also for January 1974.
- (69) The effective exchange, discussion and monitoring of prices at national and European level, and in some cases detailed per customer is [...] in several instances in 1975⁴⁹, 1976⁵⁰ and 1977⁵¹.

4.4 Evidence regarding years 1978 to 1988: Strategic choice to allocate by reference to regions

- (70) Over several months in 1978, CEPA members extensively discussed the difficulties, position and interests of each producer.
- (71) A re-organisation proposal to handle divergent interests by distinguishing three regions in Europe assigned to cartel members with major interests in them, as was

⁴³ [Description of evidence]

⁴⁴ .[Description of evidence]

⁴⁵ [Description of evidence]

⁴⁶ [Description of evidence]

⁴⁷ [Description of evidence]

⁴⁸ [Description of evidence].

⁴⁹ [Description of evidence]

⁵⁰ [Description of evidence]

⁵¹ [Description of evidence]

already the case in France⁵², was adopted and the countries comprised in each region (Central Europe, North Europe and France) were globally allocated to a number of companies as follows:

- Cartel members based in the five countries of Central Europe (Germany, The Netherlands, Belgium, Austria and Switzerland), continued using the term “CEPA” to refer to their sub-arrangements in this region, in which the majority of the CEPA founders participated (four out of five): Tessengerlo, Windmill, [X2], [V1], [X1] (see section 5.3.1), [Z1] (see section 5.3.1). This sub-group will be referred to as “Central Europe” or “core CEPA” hereinafter, in order to avoid confusion with the global cartel.
- Cartel members active in the Nordic countries (Denmark, Finland, Sweden and Norway), United Kingdom and Ireland were Boliden, Tessengerlo, Windmill and Superfos (the latter, fully acquired in 1989 by Kemira- see section 5.3.1- only for Denmark). In the contemporaneous evidence, the Nordic countries covered by this regional arrangement are referred to as “Scandinavia”, covering also Finland. Therefore, the term “Scandinavia” is used in this decision with the same meaning as “Nordic countries” or “North Europe”.
- Tessengerlo, [A1], [R1], [U1], [S1] and [P1]⁵³ participated in the cartel sub-arrangements concerning France.
- FP sales in many other (East-European) countries continued to be discussed *ad hoc* by the producers concerned.

4.4.1 Measures to ensure interregional co-ordination between 1978 and 1988

- (72) The organisation and co-ordination structures of the three regional sub-arrangements had differing levels of sophistication (the "core CEPA" was more structured - for example, it had a formal two level decision-making hierarchy, monthly monitoring of quota achievements, detailed compensation rules - compared to the others, that had a somewhat less formal organisation). The basic structure and cartel organisation in the three main interrelated regions remained throughout the 1980's and then they progressively merged back into a single structure in the 1990's as all three regions became relevant to the few remaining cartel members and new regional arrangements were added to the cartel.
- (73) Despite the regional distribution, inter-regional market sharing co-ordination was ensured in many ways. All producers continued participating in allocations concerning, formally, at least one region. The three sub-arrangements maintained the basic CEPA aims (namely fixing prices and preserving market shares) and a similar “*modus operandi*” (including one or more of the following elements: quota fixing, customer allocation, price and sale volumes monitoring, compensations). All cartel members were aware of developments in the three regions of the cartel and followed them closely, because some companies sold some quantities in countries within one or more of these regions without formally participating in the meetings related thereto. Core

⁵² [Description of evidence]

⁵³ [P1] participated at least in the regional coordination for France as from 1979. Its FP business was taken over later by [A1] [Description of evidence]

CEPA producers often discussed other cartel regions outside Central Europe in their meetings and maintained contacts or information exchanges with producers belonging exclusively to the other cartel regions, such as the United Kingdom⁵⁴ or France⁵⁵.

- (74) Pan-European co-ordination of the price policy was ensured in the period between 1978 and 1988 by efforts to obtain a certain alignment in prices across the different cartel regions. For example, price increases in the core CEPA countries and a comparison with prices in France and the United Kingdom were discussed and analysed in 1979.⁵⁶ Price increases in Northern Europe and a comparison with prices in all other European markets were also discussed in 1979⁵⁷.

4.4.2 Evidence specific to Central Europe between 1978 and 1988

4.4.2.1 Quota and customer allocation in Central Europe (1978-1988)

- (75) At Central-European level, effective monitoring and compensation rules and frequent and extensive contacts between all participants were ensured by the "political" and the "expert" groups. Representatives of all companies, at management level, met once to three times a year in the political group to decide strategic and general policy issues, such as general price levels, compensation rules, policy vis-à-vis other competitors and co-ordination with the other two sub-regional groups. Decisions adopted by the political group were implemented at operational level (for example concerning specific prices, volumes, offers or customer allocations) by the group of experts, who were normally employees of some or all producers responsible for national or regional sales. In order to improve communication between the two groups, it was decided in an "experts" meeting held in 1979 that a member of the "political group" (from X2) should attend experts meetings, or an "expert" could attend the "political group" meetings⁵⁸.

- (76) [...].⁵⁹ [Description of evidence]

4.4.2.2 Price fixing and coordination of other sales conditions in Central Europe (1978-1988)

- (77) At Central-European level, effective coordination and frequent and extensive contacts between all participants were ensured by the "political group" of high managers to decide strategic and general policy issues, including general price levels, policy vis-à-vis other competitors and co-ordination with the other cartel regions. The "experts groups" would implement those decisions at operational level for example by fixing specific prices, price increases or price reductions, or coordinating contractual conditions or allocating distribution channels (sale agents).⁶⁰ Occasionally a member of the "political group" would attend an expert group meeting.⁶¹

⁵⁴ [Description of evidence]

⁵⁵ [Description of evidence]

⁵⁶ [Description of evidence]

⁵⁷ [Description of evidence]

⁵⁸ [Description of evidence]

⁵⁹ [Description of evidence]

⁶⁰ [Description of evidence]

⁶¹ .[Description of evidence]

(78) Cartel members selling in Central Europe discussed and monitored the implementation of price increases as well as other agreements on sales conditions in and for 1978, 1979, 1980, 1981, 1982 and 1983. Tessengerlo, Windmill and [X1] continued to have regular contacts and exchange sensitive information for the core CEPA countries in the period from 1984 to December 1988.

4.4.3 *Evidence specific to Northern Europe, the United Kingdom and Ireland between 1978 and 1988*

4.4.3.1 Quota and customer allocation for Northern Europe, the United Kingdom and Ireland (1978-1988)

(79) As elsewhere, the co-ordination in this region was mainly aimed at preserving historic market shares in a given country or in a group of countries and ensuring a price level. To this end, *ad-hoc* compensations and re-allocation of specific customers in one country or several neighbouring countries were often agreed upon.

(80) During the late 1970s and the early 1980s, sales volumes (sometimes detailed per customer), market sharing rules, compensations or customer allocations were discussed globally for all (or several) Northern European countries and/or for the United Kingdom and Ireland in many meetings. Other meetings focused on the discussion and implementation of the agreements in just one country or two neighbouring countries.⁶²

(81) [...] for this area were exchanged throughout the 1980s, although meetings became less frequent in the mid1980s⁶³.

4.4.3.2 Price fixing and coordination of other sales conditions in Northern Europe, United Kingdom and Ireland (1978-1988)

(82) [...] Boliden, Tessengerlo and Windmill co-ordinated their price policies and fixed price increases and other sales conditions (for example contract duration) in Northern European countries, in the United Kingdom and in Ireland.⁶⁴

(83) The coordination and exchange of information on prices within Northern Europe, United Kingdom and Ireland regional sub- arrangement were regularly maintained throughout the 1980's.⁶⁵

4.4.4 *Evidence specific to France between 1978 and 1988*

4.4.4.1 Quota and customer allocation for France between 1978 and 1988

(84) When France became one of the three regions of the cartel after the re-organisation of the arrangements in 1978, participants in the cartel sub-arrangement concerning France shared a joint quota and prepared their joint position on quotas and customers for the French market. Cartel members which did not belong to the French region, but

⁶² -. [Description of evidence]

⁶³ . [Description of evidence]

⁶⁴ For instance [Description of evidence]

⁶⁵ [Description of evidence]

sold some quantities in France, had to do this in liaison with the relevant companies and following the rules agreed upon by the French companies⁶⁶.

4.4.4.2 Price fixing and coordination of other sales conditions in France (1978-1988)

- (85) Prices were coordinated in France mainly through meetings held twice or three times a year, with the participation of Tessenderlo and other of Tessenderlo's predecessors or same group companies, [R1], EMC/[A1], [P1], [U1], in 1979⁶⁷ and 1980 and the first three companies as from 1981⁶⁸.

4.5 Evidence for the period 1989 to 2004: Progressive reversion to centralisation (Super CEPA) and expansion towards Spain and Portugal

4.5.1 Evidence regarding market sharing for the period 1989 to 1996

4.5.1.1 Super CEPA region: Central Europe, the United Kingdom, Ireland and Scandinavia (1989-1996)

- (86) Between 1989 and 1992 collusive contacts and exchanges of sensitive information continued to take place.⁶⁹
- (87) In 1992 the market sharing and pricing arrangements which were previously implemented in two separate regions (core CEPA on the one hand and the United Kingdom, Ireland and Scandinavia on the other) were integrated into a single group which the participants named "Super CEPA". An Eastern European region was also integrated into the Super CEPA group.
- (88) The countries covered by the Super CEPA arrangements were thus Germany, the Netherlands, Belgium, Austria, the United Kingdom, Ireland, Denmark, Sweden, Finland, Norway, Poland and Hungary. Other Member States, such as France and Spain, were not initially included in the Super CEPA arrangements. However, those Member States (France initially and later on Spain) continued to be linked to the overall collusive scheme (see sections 4.5.1.2 and 4.5.1.3 on France and Spain, respectively). In those Member States, the main cartel members (which usually included one or more participants in the Super CEPA arrangements) exchanged local market information and coordinated prices and volumes of FP supplied at national level. Thus, in parallel to the meetings within the Super CEPA scheme, meetings were held at national level among all or some of the participants in the Super CEPA arrangements and all or some national suppliers to discuss market sharing and price fixing in a specific country.
- (89) The participants in the Super CEPA arrangements were Tessenderlo, Kemira, [X1], Windmill and [N1] (a [...] company that acquired Windmill in 1986). Kemira⁷⁰ was not part of the local discussions concerning Ireland.

⁶⁶ [Description of evidence]

⁶⁷ . [Description of evidence]

⁶⁸ . [Description of evidence]

⁶⁹ [Description of evidence]

- (90) As regards Timac/Timab, its participation and integration in the Super CEPA arrangements and in the overall FP cartel is established from 16 September 1993 onwards.
- (91) The participants in the Super CEPA arrangements continued to fix quotas for FP through regular meetings and to exchange sales volumes and other sensitive market data. There was an understanding that the supply shares by country should remain stable over time and that certain suppliers should abstain from supplying certain countries. Thus, for example, Kemira was supposed to supply low volumes in Spain, whereas Timab, at a later stage, was to stay out of Sweden and Denmark
- (92) As was the case in previous periods, at meetings participants reported and exchanged sales information by volume and supplier in a number of countries.
- (93) The participants in the arrangements also continued to implement a correction or compensation mechanism where significant deviations from sales targets occurred. According to the compensation mechanism, participants that had sold above agreed volumes within one period (of one or more years) had to ensure that other participants could recover their losses by selling additional volumes in the following period.⁷¹
- (94) Participants in the arrangements met in a variety of locations. Invitations for the meetings were made informally, usually by telephone. No agendas for the meetings were prepared and no common minutes were kept.⁷²

4.5.1.2 France and its coordination with Super CEPA (1989-1996)

- (95) From the end of the seventies, domestic meetings were held among French producers (see section 4.4.4) and continued throughout the period from 1989 to 1996.
- (96) Although there are indications that Timab participated in meetings with other French producers from an earlier date, its participation and integration in the Super CEPA arrangements and in the overall FP cartel is established from 16 September 1993 onwards.
- (97) At least from 1994⁷³, French suppliers met within two kinds of meetings: (i) the annual bilateral or multilateral meetings, the so-called "political meetings", the aim of which was to analyse the market situation, exchange information, discuss compensations and take general policy decisions such as price increases and (ii) the "expert meetings", which involved an exchange of information on quantities sold to specific customers and a regular communication of prices charged. Participants also exchanged information over the telephone mainly with the aim of verifying information reported, for example, by customers.

⁷⁰ Following its acquisition of Superfos and Boliden- see section 5.3.1- Kemira participation expanded when its sales developed in Scandinavia and the United Kingdom.

⁷¹ [Description of evidence]

⁷² [Description of evidence]

⁷³ [Description of evidence]

- (98) Participants at the above meetings (see recital (97)) initially included Tessenderlo (directly and/or through its French sister company [A1]), [N1] (Windmill), [X1], Timac/Timab and [F1].⁷⁴ Some meetings in 1996 were attended by Tessenderlo, Timac/Timab, Ercros and [X1].⁷⁵
- (99) As in previous periods, some individuals continued to attend meetings for coordination regarding France, and also participated in meetings for the coordination of other cartel areas⁷⁶.

4.5.1.3 Expansion towards Spain in 1992 prior to its integration in Super CEPA in 1997

- (100) Market discussions (on customers and prices) among suppliers in Spain parallel to discussions held at Super CEPA level started in 1992. Ercros, Foret and Tessenderlo met initially on a regular basis (mainly bimonthly in 1992, but subsequently twice or three times a year), most of the time in Barcelona or Madrid. It is established that Timab joined the discussions at least from 16 September 1993 onwards.
- (101) A compensation mechanism also operated in Spain amongst cartel members, when necessary, to correct deviations, sometimes through customer allocation. In order to ensure that a customer would be effectively allocated to the designated supplier, a higher 'protection price' or 'cover price' was quoted when another supplier was approached by the customer.⁷⁷

4.5.1.4 Expansion of the cartel towards Portugal without integrating it in Super CEPA

- (102) Parallel meetings between suppliers in Portugal were held at least from 1993 and attended by Foret, Quimitécnica, Tessenderlo and Ercros (the latter at least from March 1998). Sometimes, Tessenderlo and Quimitécnica met bilaterally. Suppliers in Portugal were aware of the overall market sharing and price coordination arrangements, and their incidence on the Portuguese coordination. Kemira ended its participation in the meetings and exchanges concerning Portugal as from 1996 as it no longer sold in that Member State.⁷⁸
- (103) Meetings concerning Portugal mainly took place in Lisbon, although at least one meeting took place in Brussels, and were normally held in November or December. Mid-year contacts were also maintained to review the market situation. Although held in Lisbon, meetings were normally convened by Ercros or Tessenderlo. Also, on the occasion of meetings of EMFEMA⁷⁹ or CEFIC⁸⁰, participants discussed market

⁷⁴ [F1] only sold organic (meat and bone) feed phosphates. [F1] has not been active on the market since the ban on meat and bone phosphate sales was introduced in 2001.

⁷⁵ . [Description of evidence]

⁷⁶ . [Description of evidence]

⁷⁷ . [Description of evidence]

⁷⁸ [Description of evidence]

⁷⁹ The International Association of the European (EU) Manufacturers of Major, Trace and Specific Feed Mineral Materials (hereinafter "EMFEMA") is a trade association representing a large number of European manufacturers of various mineral feed ingredients.

⁸⁰ The European Chemical Industry Council ("CEFIC") is the European trade association for the chemical sector representing a large number of chemical producers in Europe and it has one Sector Group referred to as "Inorganic Feed Phosphates" to which the major European FP producers are affiliated, including in 2003: Timab, Quimitécnica, Tessenderlo Chemie (Belgium) and Tessenderlo Chemie

problems, attacks on customers, joint price increases or the implementation of what had been previously agreed, in casual corridor conversations. Those meetings were also used to exchange data for subsequent meetings between participants.⁸¹

4.5.2 *Super CEPA centralised market sharing scheme extends to France and Spain; Portugal parallel allocation remains (1997-2004)*

4.5.2.1 Super CEPA between 1997 and 2004

- (104) Discussions among participants⁸² led to the involvement of the Spanish suppliers Ercros and Foret in the Super CEPA arrangements from 1997, when the geographic scope of the Super CEPA arrangements was enlarged to cover Spain.
- (105) While France and Spain were both incorporated into the Super CEPA arrangements from 1997, parallel meetings to discuss the specificities of each of these national areas continued to take place, as was the case for the other countries and regions covered by the Super CEPA arrangements (such as core CEPA, the United Kingdom/Ireland and Scandinavia).
- (106) In connection with the market sharing discussions and price coordination for **Central Europe** it should be recalled that, in 1998, only three undertakings remained active: Tessengerlo, Kemira and Timab. [X1] ceased its feed phosphates activities and sold its market share to Kemira, with effect from 1 April 1998, and Windmill had been integrated into Tessengerlo in 1995.
- (107) Kemira, Tessengerlo and Timab also coordinated their behaviour with regard to the **United Kingdom and Ireland**⁸³. With regard to **Scandinavia**, Kemira and Tessengerlo discussed tonnages and prices regarding Finland, Denmark and Sweden, and tried to estimate the real position of Timab in Europe.⁸⁴
- (108) Ercros started participating in the coordination meetings concerning **France** at least from 1996. Kemira participated in the meetings concerning France from 1998, after it acquired [X1]'s feed phosphate business in 1997/1998,⁸⁵ and the last evidence of Kemira's participation in cartel meetings concerning France dates from 15 September 2003.⁸⁶ Coordination meetings for France were generally held once to three times a year, more frequently in some years, in order to implement decisions previously adopted concerning the distribution of volume shares at European level.⁸⁷ Participants in the meetings concerning France continued to share information on volumes supplied and prices charged to individual customers (sometimes through phone calls), allocate customers among different suppliers, and to discuss compensations as well as

Rotterdam BV (the Netherlands), GrowHow, Ercros, Foret and [R1] (whose membership ended in 31/12/2003).

⁸¹ [Description of evidence]

⁸² [Description of evidence]

⁸³ [Description of evidence]

⁸⁴ [Description of evidence]

⁸⁵ [Description of evidence]

⁸⁶ [Description of evidence]

⁸⁷ [Description of evidence]

minimum prices and general price increases to be followed by all participants⁸⁸. Often, a table of prices was prepared per customer or group of customers, including a 'cover price' for different customers or categories of customers, which was the higher price to be offered by suppliers which had not been designated to obtain the contract with a given customer.⁸⁹ There is evidence of cartel meetings concerning France until 2004⁹⁰.

- (109) Regarding **Spain**, in 1997, the parallel meetings held among suppliers in Spain became better structured and more frequent. Discussions concerning customers related to both volumes and prices and were carried out by region. In addition, market shares were established for each participant on the basis of the market share division agreed upon at the meetings held at Super CEPA level. The parallel meetings concerning Spain served to monitor whether the agreed market shares had been respected.⁹¹ Sales information concerning Spain was normally exchanged during such meetings⁹². Participants checked whether allocated market shares were respected in Spain during the period from 1994 to 2003 by means of tables in which their names were replaced by numbers: 1: Ercros, 2: Foret, 3: Tessengerlo and 4: Timab. The row entitled 'target %' indicates the market share allocated to each participant at Super CEPA level. As from 1999, a second table included Kemira, designated as '5', although Kemira's quota is zero.⁹³

4.5.2.2 Portugal between 1997 and 2004

- (110) In the period from 1997 to 2001 contacts were held by those with an interest in Portugal, at least once or twice a year.⁹⁴ Ercros participated in the arrangements concerning Portugal at least from 1998.⁹⁵
- (111) Quimitécnica, Tessengerlo, Ercros and Foret monitored quotas by comparison with monthly sales made in Portugal by each of the participants.⁹⁶ Prices and volumes per customer were often discussed.⁹⁷
- (112) The latest evidence of cartel arrangements for Portugal dates from 25 November 2003 and 12 December 2003.⁹⁸

4.5.3 Coordination of pricing policy and other sales conditions from 1989 to 2004

- (113) Besides discussions on market sharing, meetings within the Super CEPA scheme sometimes also served to coordinate price increases for certain products in various countries. In addition, as was the case in connection with market sharing discussions,

⁸⁸ .[Description of evidence]

⁸⁹ [Description of evidence]

⁹⁰ [Description of evidence]

⁹¹ [Description of evidence]

⁹² [Description of evidence]

⁹³ [Description of evidence]

⁹⁴ [Description of evidence]

⁹⁵ [Description of evidence]

⁹⁶ [Description of evidence]

⁹⁷ [Description of evidence]

⁹⁸ [Description of evidence]

prices were discussed in parallel on a country or regional basis by suppliers active in each country or region.

- (114) Information on prices and price increases was sometimes exchanged, although less often than information on sale volumes. Meetings often resulted in "oral recommendations" on the level of price increases to be implemented,⁹⁹ which are sometimes reflected in handwritten notes.
- (115) Prices were likewise discussed in parallel meetings concerning Spain. There is evidence of price discussions concerning Portugal¹⁰⁰, sometimes in connection with Spain.¹⁰¹

4.6 Termination of the arrangements

- (116) The Commission has no evidence that the anti-competitive arrangements continued beyond 10 February 2004, the date when the Commission inspections were carried out.

5 APPLICATION OF ARTICLE 101 OF THE TREATY AND ARTICLE 53 OF THE EEA AGREEMENT

- (117) The legal assessment in this section is based on the body of evidence in the Commission's file, the facts as described in section 4, the parties' clear and unequivocal acknowledgements of the facts and of their legal qualification contained in their settlement submissions and their replies to the Statement of Objections.

5.1 Jurisdiction

- (118) The Commission has jurisdiction to apply Article 101 of the Treaty to infringements which affect the territory of the Member States. Because the geographic scope of the Union varied during the period of the infringement concerned (from March 1969 to 10 February 2004), the relevant geographic areas in respect of which the Commission has jurisdiction to apply Article 101 of the Treaty in this case have to be distinguished as follows:
- (a) In respect of the period from at least March 1969, the Commission has jurisdiction to apply Article 101 of the Treaty to the infringement to the extent that it affected Belgium, France, Germany and the Netherlands;
 - (b) In respect of the period from 1 January 1973, the Commission has jurisdiction to apply Article 101 of the Treaty to the infringement to the extent that it affected the territories referred to in point (a) as well as Denmark, Ireland and the United Kingdom;
 - (c) In respect of the period from 3 October 1990, the Commission has jurisdiction to apply Article 101 of the Treaty to the infringement to the extent that it affected the territories referred to in point (b) as well as the territory of the former German Democratic Republic;

⁹⁹ [Description of evidence]

¹⁰⁰ [Description of evidence]

¹⁰¹ [Description of evidence]

- (d) In respect of the period from 31 January 1992, the Commission has jurisdiction to apply Article 101 of the Treaty to the infringement to the extent that it affected the territories referred to in point (c), as well as Spain and Portugal;
 - (e) In respect of the period from 1 January 1995, the Commission has jurisdiction to apply Article 101 of the Treaty to the infringement to the extent that it affected the territories referred to in point (d), as well as Austria, Finland and Sweden.
- (119) The Commission also has jurisdiction to apply Article 53 of the EEA Agreement, that was signed in 1992. However, a number of Contracting Parties to the EEA Agreement joined the Union in 1995. The Commission therefore has jurisdiction to apply Article 53 of the EEA Agreement to an infringement affecting:
- (a) Austria, Finland, Norway and Sweden, from 1 January 1994 to 31 December 1994;
 - (b) Norway and Iceland, from 1 January 1995 and Liechtenstein from 1 May 1995

5.2 The nature of the infringement

5.2.1 Agreements and concerted practices

5.2.1.1 Principles

- (120) Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement prohibit anti-competitive *agreements* between undertakings, *decisions of associations* of undertakings and *concerted practices*.¹⁰²
- (121) An 'agreement' may be considered 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. Although Article 101(1) of the Treaty and Article 53 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 those 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.¹⁰³
- (122) 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 those forms of illegal behaviour. The concepts of agreement and concerted practice are fluid and may overlap. It would 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.¹⁰⁴

¹⁰² The case-law of the Court of Justice of the European Union in relation to the interpretation of Article 101 of the Treaty applies equally to Article 53 of the EEA Agreement. See recitals 4 and 15 as well as Article 6 of the EEA Agreement and Article 3(2) of the Agreement between the EEA States on the Establishment of a Surveillance Authority and a Court of Justice.

¹⁰³ See Case 48/69, *Imperial Chemical Industries Ltd v Commission* [1972] ECR 619, paragraph 64.

¹⁰⁴ See to that effect Case T-7/89 *Hercules Chemicals NV v Commission*, [1991] ECR II-1711, paragraph 264.

5.2.1.2 Application to this case

- (123) As described in section 4, the cartel consisted inter alia of agreements to share a large part of the European FP market (part of the Union and the EEA territory), allocating sales quotas according to geographic regions in Europe (per country and at broader regional European level) and customers, and to fix and coordinate prices and sales conditions, when necessary. In particular, in the basic arrangements of 1969, the five producers agreed not only on a production quota and market share allocation for each of them, but also on a key for allocating any possible increase in demand for the following agricultural year. The arrangements were intended to freeze the respective market positions of each cartel member, limiting existing and potential competition between them. The basic arrangements required subsequent, more specific agreements or the renewal of existing ones on the different aspects of the cartel to ensure the operation and the permanence of the cartel. The undertakings adapted the original arrangements to market circumstances to ensure their continued existence applied the mechanisms foreseen to facilitate and monitor implementation and enforced the agreements and corrected important deviations when they became apparent (in particular through compensation) for the whole duration of the infringement. Even if the undertakings concerned seized opportunities to supply incorrect figures to each other, and sometimes managed to get away with it, or were free to compete for some customers in Spain, they clearly adhered to a common strategy which limited their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market place.
- (124) As a result, it is concluded that the overall conduct constitutes an agreement and/or concerted practice between undertakings within the meaning of Article 101 of the Treaty and Article 53 of the EEA Agreement.

5.2.2 *Single and continuous infringement*

5.2.2.1 Principles

- (125) A complex cartel may properly be viewed as a single and continuous infringement for the time frame in which it exists. The cartel 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 101 of the Treaty . It would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which progressively would manifest itself in both agreements and concerted practices.
- (126) 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 anti-competitive object or 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 it and was prepared to take the risk.¹⁰⁵

5.2.2.2 Application to this case

- (127) The cartel arrangements in this case present the characteristics of a single, complex and continuous infringement. The cartel arrangements amongst FP producers proved to be resilient and able to adapt themselves to different industry and market conditions (including acquisitions of companies, new entrants and episodes and moments of tension between the cartel members) over the years. The cartel experienced different levels of complexity or simplification regarding, for example, the geographical and structural organisation, without losing its coherence as a tool to implement the single and continuous purpose of restricting competition in Europe amongst FP producers.
- (128) The infringement maintained a consistent pattern of collusive contacts aimed at restricting competition, as follows: a) the object of the infringement remained the same; b) sales volumes, sales to important customers and prices were reported, discussed, allocated and coordinated; c) contacts and meetings took place to exchange confidential information; d) compensation mechanisms existed to correct deviations; e) traditional stronghold positions were preserved; f) the individuals and companies participating in the cartel showed a high degree of continuity; g) existing cartel rules continued to apply during any negotiations aimed at modifying the terms of the cartel arrangements. The facts described in this Decision can therefore be regarded as continuous conduct, characterised by a single and common aim, which manifested itself in the various agreements and concerted practices.

A coherent set of measures to achieve a single purpose of restricting competition in Europe amongst FP producers

A single anti-competitive object

- (129) The agreements and concerted practices described in this Decision were part of an overall scheme according to which the major European producers of FP laid down the lines of action or of abstention by the members of the cartel in all the geographic areas covered, including Member States and other Contracting Parties to the EEA Agreement. The objective of the cartel was mainly to share a large part of the European market and to coordinate prices. In order to achieve that objective, the cartel participants agreed to allocate sales quotas and customers per geographic region and to fix and coordinate prices and also sales conditions, when necessary. In addition, the cartel participants made arrangements to monitor and enforce their arrangements.

Modus operandi

- (130) The allocation of quotas and customers and the coordination of prices for FP applied throughout all the territories covered by the arrangements. In all the sub-arrangements the cartel participants systematically allocated the volumes of FP supplied according to agreed rules, respecting quotas which reflected estimated historic market shares (including reserving some territories to certain producers), allocating customers, fixing

¹⁰⁵ See *Commission v Anic Partecipazioni*, at paragraph 83.

price levels and aligning other trading conditions towards customers and agents, when necessary.

- (131) The cartel ensured European wide coordination according to the objective needs at all stages and for all geographic areas. Compensations for volumes sold beyond/below the allocated quotas and targets were evaluated and operated at national level or between specific countries or specific operators, deciding even on the particular commercial channel or customer that could serve to attain the target (see section 4.3). Prices and sales conditions were coordinated at country level irrespective of whether or not intermediate regional sub-arrangements applied in a given period. However, that practice was simply implementing the [...]basic arrangements.
- (132) Pan-European coordination and information flow was ensured by those who participated in several sub-arrangements and by direct contacts amongst participants in different regions. During their respective periods of participation in the cartel all cartel members were aware of developments in the three cartel regions and followed them closely in respect of those regions to which they exported, without necessarily formally participating in the regional allocation and regional meetings.

Awareness of the global cartel developments

- (133) From 1978, effective interregional coordination for sales volumes replaced centralisation. All cartel members were aware of the developments in the three regions of the cartel and followed them closely. Compensations continued to operate within each country or between countries (and operators) in the same or different regions. This was due to the fact that some companies sold certain quantities (usually or as a result of compensations) in countries in more than one region and other companies participated in several or all regional sub-arrangements and because price differentials between regions were to be kept under control.
- (134) In 1992, the Nordic, Central European and Eastern European sub-arrangements were combined in the Super CEPA alongside the sub-arrangement for France, and later also for Spain. The sub-arrangements between France and the Super CEPA regions were linked and most parties participated in meetings for both regions or were aware of the larger dimension of the cartel. In the sub-arrangements for Spain “European directions” were available and in Portugal, the other cartel sub-arrangements had an impact as many of the parties involved were the same (only Quimitécnica did not participate in other allocations, and was prevented from exporting outside of Portugal).
- (135) The awareness and coordination between regions was also demonstrated by the fact that some individuals, representing their companies, consistently participated in meetings concerning different regional settings.
- (136) The measures agreed and taken at regional or national level can therefore be considered as one coherent set of measures together with the arrangements agreed at European level.
- (137) The conduct of cartel members was influenced by the information exchanged and the overall cartel scheme which enabled them to anticipate and monitor their behaviour on the market on which they were active in a concerted way.

Continuity throughout the whole duration of the infringement

Continuity of purpose and key features

- (138) Fluctuations and changes concerning the cartel took place at various times and concerned only aspects of a superficial nature, regarding logistics and/or reflecting changes in the market place (such as new competitors), acquisitions of cartel members by other cartel members and the difficulties in meeting the expectations of cartel members with different levels of interest and presence in the many countries covered by the arrangements.
- (139) In the late 1970's, the pressure of new competitors in Central Europe and France and increasing imports contributed to exposing some differences and cartel members made a deliberate, meditated and consensual choice to introduce intermediate regional sub-arrangements.
- (140) By 1992, acquisitions amongst cartel members had started to simplify the constellation of companies and multiplied the interest of their members in various areas. Super CEPA was therefore constituted alongside the French region (a French group with reallocation amongst French producers had operated since 1970).
- (141) By 1996, as a result of a series of acquisitions, only two of the original cartel members remained, Tessenderlo and Kemira, together with more recent additions of Timab, Foret, Ercros and Quimitécnica. In that setting, parties opted to monitor all countries together (except for Portugal, which was still monitored in parallel meetings) by reverting to a Super CEPA arrangement linked to the Portuguese sub-arrangement.
- (142) For the whole duration of the cartel, allocation was expressed as 40% grade P2O5 (MCP and DCP) for cattle feeding, irrespective of the proportion of that substance in the different final products (see the [...] in the basic arrangements referred to in recital (55)). Market shares were usually computed and sales were reported in those terms.
- (143) For the whole duration of the cartel compensations were negotiated. As early as 1973, the need to establish clearer compensation rules was felt and, progressively, compensation rules became more specific and could be invoked. Compensation schemes were applied mainly to ensure the respect of the allocated quotas throughout the whole duration of the cartel.
- (144) For the whole duration of the cartel, prices and sales conditions, where necessary, were agreed upon by participants for each European country, as established in the second provision of the basic arrangements. One of the main objectives of the co-ordination was to increase price levels and reduce price divergences particularly between neighbouring countries or regions.
- (145) For the whole duration of the cartel, the traditional stronghold of companies or groups of companies in certain territories was reflected in how allocation and pricing took place, in the implementing mechanisms deployed and in the negotiations leading to deliberate changes in the logistics (changing first to the regional setting, then progressive reversion towards a more centralised model) and in keys for quota sharing. Hence, the principle that "home markets" were to be respected and that each producer was to be allocated the equivalent of its prior level of sales so that the market

distribution existing at the time of the basic arrangements or of subsequent revisions, was to be preserved as agreed in [...]the basic arrangements, was consolidated in the so-called "Copenhagen quotas". They were the basis for subsequent renegotiations (as seen in Section 4). Those examples also show that changes in the cartel were not abrupt but that they took place only when consensus had been reached amongst the parties, after joint preparation and negotiation and the rules under discussion continued to apply during negotiations. Therefore, the cartel as such was never discontinued until its termination.

Members' awareness of the evolving nature of the cartel

- (146) The successive changes in quota allocations and other aspects of the cartel during its evolution were subject to renegotiations based on the previous status quo.

Geographic scope

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

Participants

- (148) There was a high degree of continuity in the individuals and companies participating in the cartel, notwithstanding the long duration of the infringement, since the undertakings concerned either participated in the infringement from its inception or acquired the FP business from the founding members, or became integrated into the on-going infringement without major disruptions. A description of the acquisitions and internal reorganisations of the production operations of the undertakings to which this Decision is addressed can be found in Section 5.3.
- (149) The previously mentioned elements show that the cartel maintained its nature and purpose throughout, undergoing a logical evolution to ensure its survival for almost 35 years between at least 19 March 1969 and 10 February 2004. During that period, cartel members restricted their individual commercial conduct in order to pursue a single anticompetitive economic aim, namely the distortion of normal competitive conditions for FP to ensure the preservation of existing market shares and increasing sales volumes and prices to the extent possible according to the demand and limiting costs for the producers concerned. Implementation required cartel members to agree on the part of the production and the price level that could be absorbed by the market at each juncture. At all stages cartel members adapted their strategy and organisation pragmatically.

5.2.3 Restriction of competition

5.2.3.1 Principles

- (150) Article 101 of the Treaty and Article 53 of the EEA Agreement expressly mention, in a non-exhaustive list, as restrictive of competition agreements and concerted practices which:

- directly or indirectly fix selling prices or any other trading conditions;
- limit or control production, markets or technical development;
- share markets or sources of supply.

(151) It is settled case-law that, for the purpose of the application of Article 101 of the Treaty, 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 internal market. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved.¹⁰⁶ The same applies to concerted practices.¹⁰⁷

5.2.3.2 Application to this case

(152) The principal aspects of the cartel described in this Decision which can be characterised as restrictions of competition in breach of Article 101 of the Treaty and Article 53 of the EEA Agreement are:

- market sharing amongst cartel members;
- allocation of sales volume quotas amongst cartel members,
- allocation of customers to cartel members;
- price fixing;
- ad hoc coordination of other sale conditions, when necessary;
- ad hoc concertation on how to react towards other competitors, customers and suppliers.

(153) To this end, cartel members:

- exchanged sensitive market information in regular meetings and via other contacts to ensure, update and monitor the implementation of the practices referred to in recital (152);
- established compensation mechanisms to be able to correct deviations from the targets agreed regarding the practices referred to in recital (152).

(154) The agreements and concerted practices amongst cartel members were intended to restrict competition and they were also applied and enforced. As a result, the major European producers of FP allocated the volumes of FP supplied to large areas of Europe according to agreed rules, at agreed price levels, under agreed sales conditions, while reserving some territories to certain producers.

¹⁰⁶ See, for example, Case T-62/98 *Volkswagen AG v Commission* [2000] ECR II-2707, paragraph 178 and case-law cited therein.

¹⁰⁷ See Case C-199/92 *P Hüls v Commission*, [1999] ECR I-4287, at paragraphs 158-166.

- (155) They agreed to restrict competition amongst themselves and to alter competition conditions on the FP market in the [...]also referred to above as 'basic arrangements'), which had been drawn up by five founding members. They agreed to limit stand-alone production of FP, to respect production quotas, to allocate customers and share the market preserving the *status quo* and to further agree amongst themselves compensations for deviations, price levels and other trading conditions, when necessary (see section 4).
- (156) Cartel members actively co-ordinated their pricing policy including general target price increases, reductions and differentials across countries and between customer segments, specific price increases per product and country or prices to be charged to specific customers and price monitoring. This is extensively documented for the whole duration of the infringement (see section 4). Cartel members also actively co-ordinated other trading conditions, such as duration of contracts, discounts, revision periods and restrictions in the export channels when necessary to reach their aims. Coordination on prices and sales conditions concerned both customers and other parties' counterparts. The evidence shows that cartel members frequently agreed on prices or negotiated conditions to counter competitive pressure from outsiders. Harmonizing prices between neighbouring countries or regions was not only a direct means to limit competition, in particular potential competition, between "neighbouring" companies, and obtain higher margins, but also a means to consolidate market sharing and quota allocation.
- (157) Cartel members actually implemented and updated the original agreement by reaching and implementing new agreements, by behaving according to cartel rules both towards other cartel members and on the market place throughout the whole duration of the infringement. By its very nature, the implementation of a cartel agreement of the type described in this Decision distorts competition to the exclusive benefit of producers participating in the cartel and to the detriment of their customers.
- (158) It is concluded that in line with the relevant case law, the behaviour of the undertakings concerned can be characterised as a complex infringement consisting of various actions which can either be classified as an agreement or as a concerted practice, within which the competitors knowingly substituted practical co-operation between them for the risks of competition falling under Article 101(1) of the Treaty even in the absence of anti-competitive effects on the market.

5.2.4 *Effect upon trade between Member States and between Contracting Parties to the EEA Agreement*

5.2.4.1 Principles

- (159) Article 101 of the Treaty prohibits agreements, decisions of associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, such as those which might harm the attainment of a single market between the Member States, whether by partitioning national markets or by affecting the structure of competition within the internal market.

- (160) For an agreement, decision or concerted practice to be capable of affecting 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*”.¹⁰⁸ In any event, whilst Article 101 of the Treaty “*does not require that agreements referred to in that provision have actually affected trade between Member States, it does require that it be established that the agreements are capable of having that effect*”.¹⁰⁹
- (161) In the period from 1 January to 31 December 1994, the provisions of the EEA agreement applied to the EFTA Member States (see section 5.1) which had joined the EEA: Austria, Finland, Norway and Sweden. Restrictions of competition in those EFTA States undermining the achievement of the EEA during that year fall under Article 53 of the EEA Agreement, as do, from 1 January 1995, restrictions of competitions affecting Norway and Iceland, and as from 1 May 1995, Liechtenstein.

5.2.4.2 Application to this case

- (162) As explained in section 2.2, there was a substantial amount of trade in FP within the Member States and Contracting Parties to the EEA Agreement throughout the whole duration of the infringement. The cartel affected the FP supplied in several European countries, some of which were or became Member States, some of which first became Contracting Parties to the EEA Agreement and then became Member States and some of which only became Contracting Parties to the EEA Agreement.
- (163) The existence of volume and customer allocation mechanisms, market sharing and coordination on prices and other sales conditions, and actual compensations between cartel members intended to make up for sales made beyond the terms of the agreement must have resulted, or were likely to result, in the automatic diversion of trade patterns from the course they would otherwise have followed.¹¹⁰ Compensations often took place between actual and future sales concerning different Member States, and also Contracting Parties to the EEA Agreement as from 1 January 1994, including Norway (see section 4).
- (164) The co-ordination and alignment of pricing and commercial policy ensured and facilitated the market partitioning organised by means of the allocation of quotas, markets and customers, since large price differentials across countries, especially neighbouring countries, were to be avoided.
- (165) In view of the foregoing, it is concluded that the agreements and/or concerted practices between the producers of FP were capable of having an appreciable effect upon trade

¹⁰⁸ Joined Cases C-215/96 and C-216/96, *Bagnasco and others*, [1999] ECR I-135, at paragraphs 47 and 48.

¹⁰⁹ Joined Cases C-215/96 and C-216/96 *Bagnasco and others* [1999] ECR I-135, paragraph 48; see also Case T-374/94, *European Night Services (ENS), Eurostar (UK) Ltd, formerly European Passenger Services Ltd (EPS), Union internationale des chemins de fer (UIC), NV Nederlandse Spoorwegen (NS) and Société nationale des chemins de fer français (SNCF) v Commission*, [1998] ECR II-3141, paragraph 136.

¹¹⁰ Joined Cases 209 to 215 and 218/78, *Van Landewyck and others v. Commission* [1980] ECR 3125, at paragraph 170.

between Member States and between Contracting Parties to the EEA Agreement as referred to in Article 101 of the Treaty and Article 53 of the EEA Agreement.

5.2.5 *Non-applicability of Article 101(3) of the Treaty*

- (166) On the basis of the facts before the Commission, there is nothing to suggest that the conditions of Article 101(3) of the Treaty could be fulfilled with regard to the cartel in this case.

5.3 Attribution of liability

- (167) Having regard to the body of evidence in the Commission's file, the facts as described in section 4, the parties' clear and unequivocal acknowledgements of the facts and of their legal qualification contained in their settlement submissions, as well as their replies to the Statement of Objections, this Decision should be addressed to the undertakings referred to in recitals (169) to (192) in respect of the periods of involvement in the cartel specified in those recitals.
- (168) A separate decision is addressed to Timab Industrial S.A. and Compagnie Financière et de Participation Roullier in respect of their participation in the infringement to which this Decision relates, for the period from 16 September 1993 until 10 February 2004.

5.3.1 *Yara/ Kemira*

- (169) Yara Phosphates, Kemira and Yara Suomi are the existing entities currently liable for the involvement in the infringement of several companies which were acquired as legal entities by Kemira Oy (later Kemira Oyj), for example Boliden Kemi AB and Superfos Gødning A/S which became subsidiaries of the Kemira group as Kemira Kemi AB and Kemira Denmark A/S respectively. The three undertakings should be held liable for their involvement in the infringement for different periods of time.
- (170) The following companies, which were present at the beginning of the cartel, have withdrawn from the FP market:
- Boliden Kemi AB, which was one of the founding members of the cartel in 1969 and which remained a cartel member until its acquisition by Kemira Oy in 1989 when it was renamed Kemira Kemi AB;
 - Superfos Gødning A/S which participated in the cartel from 1982 and which was fully acquired by Kemira Oy in 1989 when it was renamed Kemira Denmark A/S;
 - [[X1]] which was active in the FP market, mainly through its subsidiary [X2] which was one of the founding members of the cartel in 1969¹¹¹. Also, at least from 1978, a representative of [[X1]] itself attended certain cartel meetings, and continued to be a cartel member until Kemira acquired [[X1]]'s assets in the FP sector in 1998. In the

¹¹¹ [X2] was founded in 1858 under the name [...] and was renamed [...] in 1892. As this company was located in [...], some [...] also refer to this company as [X2]. In 1958 the company became part of the [X1] Group. In the late eighties, [X2]'s financial situation worsened and as a consequence, the feed phosphates production was stopped in 1993. Nowadays, [X2] is a trading company for chemicals and belongs to [K1].

meantime (around 1983/84) [[X1]] had acquired the assets of [Z1]¹¹² and all shares in [V1]¹¹³, also founding members of the cartel. Some of [[X1]]'s assets in the FP market (but not the legal entity exploiting them) were acquired by Kemira Kemi AB, a subsidiary of Kemira Oy, in 1998¹¹⁴. Certain of those assets were ultimately transferred to Kemira through a purchase agreement effective on 1 April 1998.

- (171) Kemira Oy, which changed its name to Kemira Oyj in September 1997, merged all its FP activities in Kemira Phosphates Oy which continued the FP activities of both Kemira Kemi AB and Kemira Denmark A/S and became a subsidiary of Kemira Agro Oy.
- (172) In 2003, Kemira Agro Oy was renamed Kemira GrowHow Oy, later Kemira GrowHow Oyj and, on 25 April 2008, Yara Suomi Oy.
- (173) At the end of 2004, Kemira Oyj progressively sold its shares in Kemira GrowHow Oyj to different shareholders who, upon taking control of the entity, renamed it Yara Suomi Oy. All Kemira GrowHow Oyj's subsidiaries, including Kemira Phosphates Oy, were acquired at the same time by the Yara group. Kemira Phosphates Oy was then renamed Yara Phosphates Oy.
- (174) Until the end of their involvement in the infringement (on 28 November 2003, the date of Kemira's immunity application), Kemira Denmark A/S, Boliden Kemi AB, Kemira Kemi AB, Kemira Agro Oy, Kemira Chemicals Oy, Kemira Phosphates Oy, Kemira GrowHow Oy and Kemira GrowHow Oyj together with the ultimate parent company Kemira Oy (later Kemira Oyj) constituted the same economic entity for the purposes of applying Article 101 of the Treaty, under the direction of the ultimate parent company Kemira Oyj.
- (175) Having regard to the unequivocal acceptance of liability by the relevant parties, it is concluded as follows:
- Yara Phosphates Oy (previously Kemira Phosphates Oy, a subsidiary of the Kemira group created on 13 December 2000) should be held solely liable for the infringement from 19 March 1969 to 31 March 1989, because all the FP business activities of both Kemira Kemi AB (originally Boliden Kemi AB) and Kemira Denmark AS (originally Superfos Gødning AS), two subsidiaries within the Kemira group, were transferred to Kemira Phosphates Oy.
 - Yara Phosphates Oy (previously Kemira Phosphates Oy) and Kemira Oyj should be held jointly and severally liable for the infringement from 1 April 1989 to 31 December 1993, because on 1 April 1989, Kemira Oyj (previously Kemira Oy) took

¹¹² [Z1] was created in 1929 in [...] and became a major player on the [...] market. It also developed chemical activities and in 1970 [Z1] established a distinct chemical branch, the[...]. In 1979, the [Z1] was sold to [Y1]. Around 1983-1984, the [Z1] feed phosphates business was sold to [X1] (which was later on resold to Kemira).

¹¹³ [V1] was founded in 1929 in [...]. At least as from 1973 (see p. [...]), [V1] was a 50/50 subsidiary of [Z1] and [X1]. As explained above, [Z1]'s FP assets were acquired by [X1] in the eighties.

¹¹⁴ Also during that period, Kemira Kemi AB bought all of [X1]'s FP assets [...confidential terms of the agreement between [X1] and Kemira Kemi AB].

over Boliden Kemi AB, which was renamed Kemira Kemi AB until the creation of Kemira Agro Oy on 1st January 1994;

- Yara Phosphates Oy (previously Kemira Phosphates Oy), Kemira Oyj and Yara Suomi Oy should be held jointly and severally liable for the infringement from 1 January 1994 to 28 November 2003 for the following reasons: (1) on 1 January 1994, within the context of an internal restructuring, the Kemira group created Kemira Agro Oy, which became the parent company of Kemira Phosphates Oy when the latter was created in 2001; (2) on 7 January 2003, Kemira Agro Oy was renamed Kemira GrowHow Oy which was later renamed Yara Suomi Oy, on 25 April 2008.

5.3.2 *Tessenderlo*

- (176) As a result of the merger of the former Tessenderlo Chemie, Produits chimiques du Limbourg N.V., PB Gelatins N.V. and Benzyl Chemie¹¹⁵, Tessenderlo Chemie N.V. fully or jointly owned the following companies at least until 2004:
- Aliphos, through its wholly owned subsidiary Société Artésienne de Vinyl, from 1986 (Aliphos acquired the assets of Rhône-Poulenc in the sector concerned).
 - Acquisition in 1995 of the assets of [N1]/ Windmill in the FP sector and creation of a wholly owned subsidiary Tessenderlo Chemie Rotterdam BV.
 - Britphos Ltd, fully acquired in 1998.
- (177) In addition, Tessenderlo Chemie N.V. acquired the following assets from EMC (Entreprise Minière et Chimique):
- in 1988 the assets of Produits chimiques de Loos (these assets were acquired from [U1] in 1982-1983¹¹⁶).
 - in 2002, the assets and activities of [A1] in the FP sector, previously fully owned by EMC.
- (178) Produits Chimiques de Tessenderlo N.V., renamed Tessenderlo Chemie N.V. in 1972, was present from the beginning of the cartel (Club, CEPA or Super CEPA) that began at the latest in March 1969. According to the Commission's file, Tessenderlo participated in the multilateral arrangements from 1969 until 10 February 2004. Within that period, Tessenderlo was also present at country meetings with other

¹¹⁵ In 1983, after a complex restructuring, the different group companies (namely Tessenderlo Chemie N.V., Produits Chimiques du Limbourg, PB Gelatins NV (ex Pont Brûlé) and Benzyl Chemie) were merged into (a new) Tessenderlo Chemie N.V. and the group initiated a new phase of expansion and internationalization per business area (Chemicals, Specialities and Plastics Converting).

¹¹⁶ [U1] and [S1] had participated in the cartel from the beginning of the 1970's. Documents [...] refer indistinctly to [S1], and to [S2]. Documents [...] sometimes refer to [U1]. Before [U1]'s animal feed phosphate activities were sold to Tessenderlo Chemie in 1988, it had also integrated [S1] activities in this sector. [R1], another company that also had participated in the cartel from the beginning of the 1970's to around 1991, appears to have become part of the [...] Group [B1] in 2002 (see p. [...]).

competitors active in France, Spain, Portugal, the United Kingdom, Ireland, Sweden, Denmark, Finland, Germany, Belgium, the Netherlands and Austria. In a number of meetings concerning mainly the French market, [A1] was represented, sometimes together with Tessenderlo Chemie N.V.¹¹⁷.

- (179) During the period of the infringement EMC¹¹⁸ was the main shareholder of Produits chimiques de Tessenderlo and, subsequently, Tessenderlo Chemie N.V. EMC has never held 100% of either of those companies. However, between 1969 and 1971, EMC held 37% of Produits Chimiques de Tessenderlo N.V., through its wholly owned subsidiary Société de Gestion de Participations Minières et Chimiques, the remaining 63% being held by institutions and the public. Over the period from 1972 to 2004, a large number of members of the board of Tessenderlo Chemie N.V. were also members of the board of EMC¹¹⁹.
- (180) It is considered that EMC exercised a decisive influence on Tessenderlo Chemie N.V. and hence on [A1], and that those companies can be considered as belonging to the same economic unit.
- (181) , [...] Tessenderlo Chemie N.V. should be held liable for the infringement from 19 March 1969 until 10 February 2004.

5.3.3 *Quimitécnica*

- (182) Quimitécnica, Serviços Comércio e Indústria de Produtos Químicos, S.A., set up on 29 June 1990, was privatized on 12 March 1993, and partially and successively (re)acquired by different companies, some of which were partially owned, at different levels, by José de Mello SGPS S.A.
- (183) Quimitécnica, Serviços, Comércio e Indústria de Produtos Químicos, S.A. subsequently consolidated its annual accounts within the José de Mello SGPS S.A. group, as wholly owned subsidiary, from 1 January 1997.¹²⁰

¹¹⁷ From at least 1967, EMC held a wholly owned subsidiary, [A1] which acted as an agent for Tessenderlo Chemie on the French market. Tessenderlo Chemie determined the commercial policy of [A1] on the French territory for the product concerned.

¹¹⁸ EMC was held by the French state as an EPIC (établissement public à caractère industriel et commercial). It has been under liquidation since 1 January 2006

¹¹⁹ Between 1972 and 1982, more than 40% of the members of Tessenderlo Chemie N.V.'s board were also members of EMC. This may amount to more than 50% (58,33% in 1973). From 1983 to 2004, this proportion was lower: the average range is 25%-30%. The President of Tessenderlo Chemie N.V.'s board is systematically a member of EMC: Mr [...] from 1972 to 1975, [...] from 1976 to 1979, Mr [...] from 1980 to 1986 and Mr [...] from 1987 to 2002. [...] had responsibilities in the management committee of EMC. [...] remained President of Tessenderlo Chemie N.V.'s board after 2002 but was no longer a member of EMC's board.[...] member of EMC's board was "administrateur délégué" of the "Direction générale" from 1973 to 1976.[...], member of EMC's board, was at the same time President of the board of Tessenderlo Chemie N.V. and President of the "Comité de direction" from 1988 to 2004.

¹²⁰ Initially, in 1997 and 1998, Quimitécnica, Serviços, Comércio e Indústria de Produtos Químicos, S.A. consolidated its accounts with a company in which José de Mello SGPS S.A. had an ultimate very high majority participation in this period. As from 1st January 1999, Quimitécnica's accounts were consolidated with CUF – Companhia União Fabril SGPS, S.A. whose account were in turn consolidated with José de Mello SGPS S.A..

- (184) Quimitécnica, Serviços, Comércio e Indústria de Produtos Químicos, S.A. maintained frequent contacts and participated regularly in meetings with the other companies involved in fixing prices, quotas and the allocation of customers in Portugal in the period from 21 October 1993 at the latest (the date of the first meeting according to the Commission's file) until 10 February 2004. Quimitécnica, Serviços, Comércio e Indústria de Produtos Químicos, S.A. also admitted that, throughout that period, it was aware of the existence of the price fixing and market sharing coordination in other European countries.
- (185) Quimitécnica.com – Comércio e Indústria Química S.A. has succeeded to all rights and obligations of Quimitécnica, Serviços Comércio e Indústria de Produtos Químicos S.A., the addressee of the Statement of Objections. It expressly indicated by letter of 23 March 2010 that it replaces the latter in the current proceedings, taking over the settlement submission and reply to the Statement of Objections introduced by Quimitécnica, Serviços, Comércio e Indústria de Produtos Químicos, S.A., and it accepts that this Decision be addressed to it¹²¹.
- (186) As unequivocally acknowledged by Quimitécnica.com – Comércio e Indústria Química S.A. itself and by José de Mello SGPS S.A., Quimitécnica.com – Comércio e Indústria Química S.A. should be held:
- solely liable for the infringement committed from 21 October 1993 until 31 December 1996, and
 - jointly and severally liable with its former ultimate parent company, José de Mello SGPS S.A. for the infringement committed from 1 January 1997 until 10 February 2004.

5.3.4 *Ercros*

- (187) Ercros S.A. is an industrial group that was created on 30 June 1989 after the merger of two Spanish chemicals companies, namely Unión Explosivos Rio Tinto S.A. and S.A. Cros. In December 1989, Ercros created a fully owned company, Erkimia S.A. that was in charge of producing and selling FP¹²². On 29 September 1999, Erkimia S.A. changed its name to Ercros Industrial S.A.
- (188) Erkimia S.A. (later on called Ercros Industrial S.A.) was mainly active in Spain and to a lesser extent in Portugal and France. Erkimia S.A. participated in the cartel arrangements at least from 31 January 1992 until 28 September 1999. Ercros Industrial S.A. continued to participate in the arrangements between 29 September 1999 and 10 February 2004.

¹²¹ [...], submission of 23 March 2010.

¹²² At least from 1992, Ercros sold FP in France and Portugal through two fully owned subsidiaries: Ercros France and Ercros Portugal. Following a reorganisation of the group, these two companies became fully owned subsidiaries of Erkimia S.A.

(189) As unequivocally acknowledged by Ercros S.A. and Ercros Industrial S.A, Ercros S.A. should be held jointly and severally liable with Ercros Industrial S.A. for the infringement committed:

- by Erkimia S.A. from 31 January 1992 to 28 September 1999.
- by Ercros Industrial S.A. from 29 September 1999 and 10 February 2004,

5.3.5 *Foret*

(190) Foret is a company based in Spain. It is currently wholly owned by FMC Chemicals Netherlands B.V., a holding company which is wholly owned by FMC Corporation, a company based in Philadelphia (United States of America).

(191) Foret was mainly active in Spain and Portugal. Foret participated in the cartel arrangements at least from 31 January 1992 onwards until 31 December 2001.

(192) [...] FMC Corporation should be held jointly and severally liable with FMC Chemicals Netherlands B.V. and FMC Foret S.A. for the infringement committed by FMC Chemical Netherlands B.V. (under its successive names) and FMC Foret S.A. between 31 January 1992 and 31 December 2001.

6 REMEDIES

6.1 Article 7 of Regulation (EC) No 1/2003¹²³

(193) Where the Commission finds there is an infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement it may require the undertakings concerned to bring such infringement to an end in accordance with Article 7(1) of Regulation (EC) No 1/2003.

(194) Given the secrecy in which the cartel arrangements were carried out, it is not possible to determine with absolute certainty that the infringement has ceased. It is therefore necessary for the Commission to require the undertakings to which this Decision is addressed to bring the infringement to an end (if they have not already done so) and henceforth to refrain from any agreement or concerted practice which might have the same or a similar object or effect.

6.2 Article 23(2) of Regulation (EC) No 1/2003/Article 15(2) of Regulation No 17

(195) Under Article 23(2) of Regulation (EC) No 1/2003¹²⁴, the Commission may by decision impose fines on undertakings and associations of undertakings where, either

¹²³ Previously Article 3 of Regulation No 17.

¹²⁴ 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

intentionally or negligently, they infringe Article 101 of the Treaty and/or Article 53 of the EEA Agreement. Under Article 15(2) of Regulation No 17 which was applicable during a part of the duration of the infringement, the fine for each undertaking participating in the infringement could not exceed 10% of its total turnover in the preceding business year. The same limitation is laid down in Article 23(2) of Regulation (EC) No 1/2003.

- (196) 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 the infringement, which are the two criteria explicitly referred to in that Regulation. In doing so, the Commission will set the fines at a level sufficient to ensure deterrence. Moreover, the role played by each undertaking party to the infringement will be assessed on an individual basis. In particular, the Commission will reflect in the fines imposed any aggravating or mitigating circumstances pertaining to each undertaking.
- (197) In setting the fines to be imposed, the Commission will refer to the principles laid down in the Guidelines on fines. Finally, the Commission will apply, as appropriate, the provisions of the Leniency Notice and its Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases¹²⁵ (hereafter, "the Settlement Notice").
- (198) The calculation of the fine to be imposed on the settling companies should follow the same methodology set out in the Guidelines on fines as that applied to the non-settling companies Timab/CFPR in the separate decision referred to in recital (6). However a reduction under the Settlement Notice should only be applied to the settling companies.

6.3 The basic amount of the fines

- (199) In applying the Guidelines on fines, the basic amounts of the fines to be imposed on each party result from the sum of a variable amount and an additional amount. The variable amount of the fine is related to a proportion, between 0% and 30%, of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement. The additional amount is a sum of between 15% and 25% of the value of sales of goods or services to which the infringement relates in a given year (normally, the last year of the infringement).

¹²⁵ 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, 30.11.1994, p.6).
OJ C 167, 2.7.2008, p. 1.

6.3.1 Calculation of the value of sales

- (200) The basic amount of the fine to be imposed on the undertakings concerned is to be set by reference to the value of sales¹²⁶, that is the value of the undertaking's sales of the goods or services to which the infringement is directly or indirectly related in the relevant geographic area within the EEA. The relevant value of sales is the undertakings' sales of Animal Feed Phosphates in the countries within the EEA concerned by the infringement. Due to the particularly long duration of this cartel, the geographic areas concerned by the cartel and the Commission's jurisdiction to apply Article 101 of the Treaty and Article 53 of the EEA Agreement on the territories covered by the infringement have varied significantly as the values of sales for the parties. Taking that into account, the relevant value of sales should be calculated by adding up the actual (real) value of sales made by the undertakings during the period of the infringement, where those data are available. Where undertakings have not been able to provide data corresponding to historical real sales, the relevant value of sales should be calculated by multiplying the sales made in the last full business year of the infringement by the duration of the company's participation in the infringement, an approach which was also acknowledged by the undertakings concerned in their respective settlement submissions. The fact that the geographic territory of the cartel and the Commission's jurisdiction evolved over time, is also duly taken into account in the calculation of the value of sales based on the last full business year.

6.3.2 Determination of the basic amount of the fine

- (201) The variable amount consists of an amount of between 0% and 30% of a company's relevant sales, depending on the degree of gravity of the infringement and multiplied by the number of years of the company's participation in the infringement.¹²⁷ For cartels the percentage is set at the higher end of the scale.

6.3.2.1 Gravity

- (202) In order to determine the specific percentage to be applied in calculating the basic amount of the fine to be imposed, the Commission may have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.¹²⁸ The relevant elements in this case are assessed as follows.
- (203) Regarding the nature of the infringement, the Commission has regard to the main aim of the overall cartel, which was ultimately to share a large part of the European feed phosphates market and to coordinate prices. Such coordination is by its very nature a very serious violation of Article 101 of the Treaty and Article 53 of the EEA Agreement.

¹²⁶ Point 12 of the Guidelines on fines.

¹²⁷ See Points 19 – 24 of the Guidelines on fines.

¹²⁸ Point 21-22 of the Guidelines on fines.

(204) The geographic scope of the infringement covers most of the Member States and Contracting Parties to the EEA Agreement.

(205) Taking into account the criteria discussed in recitals (202) to (204), the proportion of the value of sales to be taken into account should be 17 %.

6.3.2.2 Duration

(206) According to point 24 of the Guidelines on fines, the amount determined on the basis of the value of sales made by the undertaking during the last full business year of its participation in the infringement (value of sales) is multiplied by the number of years of participation in the infringement in order to take fully into account the duration of the participation for each undertaking in the infringement individually¹²⁹.

(207) For the application of point 24 of the Guidelines on fines, the starting and ending dates of the participation in the infringement by each addressee should be as follows:

- Tessengerlo Chemie N.V.: from 19 March 1969 to 10 February 2004;
- Yara Phosphates Oy: from 19 March 1969 to 28 November 2003;
- Kemira Oyj: from 1st April 1989 to 28 November 2003;
- Yara Suomi Oy: from 1st January 1994 to 28 November 2003;
- Ercros S.A.: from 31 January 1992 to 10 February 2004;
- Ercros Industrial S.A.: from 31 January 1992 to 10 February 2004;
- FMC Foret S.A.: from 31 January 1992 to 31 December 2001;
- FMC Chemicals Netherlands B.V.: from 31 January 1992 to 31 December 2001;
- FMC Corporation: from 31 January 1992 to 31 December 2001;
- Quimitécnica.com – Comércio e Indústria Química S.A.: from 21 October 1993 to 10 February 2004;
- José de Mello SGPS S.A.: from 1st January 1997 to 10 February 2004.

(208) The following undertakings are also held liable in a separate decision for the periods indicated:

- Timab Industries S.A.: from 16 September 1993 to 10 February 2004;
- Compagnie Financière et de Participation Roullier: from 16 September 1993 to 10 February 2004

(209) When the fine is based on the value of sales of the last year of the infringement, the resulting amount is to be multiplied by the number of years of the involvement of the individual companies, according to point 24 of the Guidelines on fines (and excluding the period for which *de facto* immunity applies, namely for Tessengerlo, see section 6.6.2.1). In this case, account should be taken of the actual duration of participation in the infringement of the undertakings concerned, rounded down to the month. In the circumstances of this case, it is considered appropriate to apply a proportional increase of the multiplier on a monthly and pro rata basis. For example, a duration of 2 years, 3 months and 2 weeks will not lead to an increase of 250% (point 24 of the Guidelines on fines) but to an increase of 225% (rounding down to the month, 2 years corresponding to 200% and three months to a quarter of a year, that is to say, 25%, amounting altogether to 225%). The period of two weeks is not counted. This leads to

¹²⁹ Point 24 of the Guidelines on fines.

the following multipliers for duration as set out in the Table 1 below. When the fine is based on real sales, the relevant real sales made during the duration of the infringement are simply added up (see Table 2 below). Within some groups, different entities were involved for different durations, as reflected in the tables below (Table 1 and 2):

Table 1: Last full business year

Entity	Value of sales*	Actual duration	Multiplier for duration
Yara Phosphates Oy	[0-100 000 000]	34 years and 8 months	34,66
Yara Suomi Oy	[0-100 000 000]	9 years and 10 months	9,83
Kemira Oyj	[0-100 000 000]	14 years and 7 months	14,58
Tessenderlo Chemie N.V.	[50 000 000-150 000 000]	14 years and 10 months**	14,83

* 2003 for Tessenderlo and 2002 for Yara Phosphates Oy, Yara Suomi Oy and Kemira Oyj.

** Applying point 23 last indent of the 2002 Leniency Notice.

Table 2: Real sales of the undertakings during the period of their involvement in the infringement where the data were available (cumulated throughout the relevant periods)¹³⁰

Entity	Value of sales	Relevant period
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¹³⁰ For information purposes, the value of sales and the relevant periods in respect of the two undertakings-part of the same proceedings but addressees of a separate decision- are as follows:

Entity	Value of sales	Relevant period
Timab Industries S.A.	[200 000 000-400 000 000]	16/09/1993 until 10/02/2004
Compagnie Financière et de Participation Roullier	[200 000 000-400 000 000]	16/09/1993 until 10/02/2004

Quimitécnica.com – Comércio e Indústria Química S.A.	[0-50 000 000]	21/10/1993 until 10/02/2004
José de Mello SGPS S.A.	[0-50 000 000]	1/01/1997 until 10/02/2004
FMC Foret S.A	[0-100 000 000]	31/01/1992 until 31/12/2001
FMC Chemicals Netherlands B.V.	[0-100 000 000]	31/01/1992 until 31/12/2001
FMC Corporation	[0-100 000 000]	31/01/1992 until 31/12/2001
Ercros Industrial S.A.	[200 000 000-400 000 000]	31/01/1992 until 10/02/2004
Ercros S.A.	[200 000 000-400 000 000]	31/01/1992 until 10/02/2004

6.3.3 *The percentage to be applied to calculate the additional amount*

(210) Point 25 of the Guidelines on fines provides that irrespective of the duration of the undertaking's participation in the infringement, the Commission includes in the basic amount of the fine to be imposed a sum of between 15% and 25% of the value of sales in order to deter undertakings from even entering into horizontal price-fixing collusion. Given the specific circumstances of this case, taking into account the criteria discussed above in section 6.3.2.1 relating to the nature of the infringement and the geographic scope of the infringement, the percentage to be applied for the purposes of calculating the additional amount to be imposed pursuant to point 25 of the Guidelines on fines should be 17 %.

6.3.4 *Calculation and conclusion on basic amounts*

(211) The basic amount of the fine to be imposed on each undertaking should be as set out in Table 3.

Table 3: Basic amount¹³¹

¹³¹ Regarding the two other undertakings- part of the same proceedings but addressees of a separate decision- here are provided the following data, for information (Basic amount):

Undertakings	Basic amount (EUR, rounded)
Yara Phosphates Oy	[200 000 000-400 000 000]
Yara Suomi Oy	[50 000 000-150 000 000]
Kemira Oyj	[50 000 000-150 000 000]
Tessenderlo Chemie N.V.	[200 000 000-400 000 000]
Ercros Industrial S.A.	[0-100 000 000]
Ercros S.A.	[0-100 000 000]
Quimitécnica.com – Comércio e Indústria Química S.A.	[0-100 000 000]
José de Mello SGPS S.A.	[0-100 000 000]
FMC Foret S.A	[0-50 000 000]
FMC Chemicals Netherlands B.V.	[0-50 000 000]
FMC Corporation	[0-50 000 000]

6.4 Adjustments to the basic amount

6.4.1 Aggravating circumstances

(212) There are no aggravating circumstances in this case.

6.4.2 Mitigating circumstances

(213) There are no mitigating circumstances in this case.

6.5 Application of the 10% of turnover limit

(214) Article 23(2) of Regulation (EC) No 1/2003 provides that the fine imposed on each undertaking must not exceed 10% of its total turnover relating to the business year preceding the date of the Commission decision. Given that the basic amounts of

Timab Industries S.A.	[0-100 000 000]
Compagnie Financière et de Participation Roullier	[0-100 000 000]

Tessengerlo Chemie N.V., Yara Suomi Oy, Yara Phosphates Oy and Quimitécnica.com – Comércio e Indústria Química S.A. exceed the cap of 10% of 2009 turnover, the basic amounts of the fines to be imposed on them should therefore be adjusted in accordance with Article 23(2) of Regulation (EC) No 1/2003. In conclusion, the total turnover figures and the 10% ceiling in this case are as follows:

	Total Turnover	10% ceiling (EUR)	Undertakings
1.	EUR 660 million EUR 660 million EUR 2 500 million	EUR 66 million EUR 66 million EUR 250 million	Yara Phosphates Ou Yara Suomi Oy Kemira Oyj
2.	EUR 2 093, 8 million	EUR 209 380 000	Tessengerlo Chemie N.V.
3.	EUR 595 million	EUR 59 500 000	Ercros Industrial S.A./ Ercros S.A.
4.	EUR 26, 937 million EUR 852, 1618 million	EUR 2 693 700 EUR 85 216 180	Quimitécnica.com – Comércio e Indústria Química S.A. J. de Mello SGPS S.A.
5.	EUR 1 971,1 million	EUR 197 110 000	FMC Foret S.A., FMC Chemicals Netherlands B.V., FMc Corporation
6.	EUR 1 105 million	EUR 110 500 000	Timab Industries S.A./ Compagnie financière et de participation Roullier

6.6 Application of the Leniency Notice

6.6.1 Immunity from fines

(215) Kemira applied for immunity from fines on 28 November 2003 on the basis of the Leniency Notice. Kemira was the first to inform the Commission about a secret cartel concerning FP for the period from [...] to [...] Kemira was granted conditional immunity from fines on 16 December 2003. The cooperation of Kemira fulfilled the requirements under the Leniency Notice. Kemira should therefore be granted immunity from fines in this case. Yara Phosphates and Yara Suomi, which formed part of the same undertaking as Kemira at the time of the immunity application, benefit from the same immunity from the fine.

6.6.2 *Reduction of fines*

(216) By letters of 21 January 2009, Tessengerlo and Quimitécnica/ José de Mello were informed that the fine which would otherwise be imposed on them would be reduced in accordance with the Leniency Notice within the respective bands (Tessengerlo 30-50% and Quimitécnica/José de Mello 20-30%). All undertakings which submitted applications under the Leniency Notice have cooperated with the Commission throughout the procedure and terminated their involvement in the infringement before submitting their respective applications under the Leniency Notice¹³².

6.6.2.1 Tessengerlo Chemie N.V.

(217) On 18 February 2004, supplemented at later dates, Tessengerlo filed an application pursuant to the Leniency Notice covering [...].

(218) The evidence submitted by Tessengerlo constitutes **significant added value** in the sense of the Leniency Notice as it was decisive for the Commission's ability to prove the facts pertaining to the cartel in this case. Tessengerlo was the first to submit information and evidence for the period from [...] until [...]. Regarding the period from [...] the facts were not entirely new to the Commission, but the overall quality and quantity of the [...] evidence provided by Tessengerlo decisively strengthened, both by its very nature and by its level of detail, the Commission's ability to prove the infringement from [...]to [...].

(219) For these reasons, a reduction of **50%** of the fine which would otherwise have been imposed should be granted to Tessengerlo in respect of the period after 31 March 1989. Pursuant to point 23 of the Leniency Notice, no fine should be imposed on Tessengerlo in respect of the period [...]until [...].

6.6.2.2 Quimitécnica.com – Comércio e Indústria Química S.A./José de Mello SGPS S.A.

(220) The evidence submitted by Quimitécnica, on 27 March 2007 and later supplemented, constitutes **significant added value** in the sense of the Leniency Notice. Before Quimitécnica submitted their application for leniency, the Commission's file contained abundant evidence for the whole duration of the infringement, including some evidence regarding the existence of local anticompetitive arrangements in Portugal in the period from October 1993 until at least December 2003. However, the leniency application allowed the Commission to establish a single and continuous infringement extending to Portugal and corroborated previous incriminating information, mainly the extent and continuity of the participation of certain undertakings in the cartel and in the coordination meetings for the Portuguese market.

¹³² Two other undertakings- parties in the same proceedings but to which a separate decision is addressed - Timab Industrie S.A. and Compagnie Financière et de Participation Roullier, have submitted applications under the Leniency Notice. By letters of 21 January 2009 they were informed that they qualify for a reduction within the band 0-20%. The Commission considers that the two undertakings qualify for a reduction of 5% for the reasons set out in detail in the decision addressed to those undertakings.

- (221) Therefore, a reduction of **25%** of the fine which would otherwise have been imposed should be granted to Quimitécnica. José de Mello, which formed part of the same undertaking as Quimitécnica at the time of the leniency application, benefits from the same reduction of the fine.

6.7 Application of the Settlement Notice

- (222) According to point 32 of the Settlement Notice, the reward for settlement results in the reduction by 10 % of the amount of the fine to be imposed after the 10 % cap has been applied having regard to the Guidelines on fines. When settled cases involve also leniency applicants, the reduction of the fine granted to them for settlement will be added to their leniency reward pursuant to point 33 of the Settlement Notice.
- (223) As a result of the application of the Settlement Notice, the fine to be imposed on all addressees of this decision is reduced by **10%**.

6.8 Ability to pay

6.8.1 Introduction

- (224) According to point 35 of the Guidelines on fines, *'In exceptional cases, 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 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 these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.'*
- (225) In exercising its discretion under point 35 of the Guidelines on fines, the Commission carries out an overall assessment of the undertaking's financial situation, with the primary focus on the undertaking's capacity to pay the fine in a specific social and economic context.
- (226) Two undertakings have invoked their 'inability to pay' under point 35 of the Guidelines on fines: [...] and [...]. The Commission has considered those claims and carefully analysed the available financial data on those undertakings. The undertakings concerned received requests for information asking them to submit details about their individual financial situation and the specific social and economic context they are in.
- (227) Insofar as the undertakings argue that the estimated fine would have a negative impact on their financial situation, without adducing credible evidence demonstrating their inability to pay the expected fine, there is settled case law according to which the Commission is not required, when determining the amount of the fine to be imposed, to take into account the poor financial situation of an undertaking, since recognition of such an obligation would be tantamount to giving unjustified competitive advantages to undertakings least well adapted to the conditions of the market.¹³³

¹³³ 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

- (228) Accordingly, in recitals (233) to (239) the individual financial position of each undertaking concerned and the impact of the fine are assessed in the respective specific social and economic context. The respective financial situation of the undertakings concerned is assessed at the time this Decision is adopted and on the basis of the financial data and information submitted by the undertakings.
- (229) In assessing the undertakings' financial situation, the Commission considers the financial statements (annual reports, consisting of a balance sheet, an income statement, a statement of changes in equity, a cash-flow statement and notes) of the last (usually five) financial years, as well as their projections for 2010 to 2012¹³⁴. The Commission takes into account and relies upon a number of financial ratios measuring the solidity of the undertakings (in this case, the proportion which the expected fine would represent of the undertakings' equity and assets), their profitability, solvency and liquidity, all of which are commonly used when evaluating risks of bankruptcy. In addition, the Commission takes into account relations with outside financial partners such as banks, on the basis of copies of contracts concluded with those partners in order to assess the undertakings' access to finance and, in particular, the scope of any undrawn credit facilities they may have. The Commission also includes in its analysis the relations with shareholders in order to assess their confidence in the undertakings' economic viability (shareholder relations may be illustrated by recent dividend payments and other outflows of cash paid to the shareholders), as well as the ability of those shareholders to assist the undertakings concerned financially.¹³⁵ Attention is paid both to the equity and profitability of the undertakings and, above all, to their solvency, liquidity and cash flow. The analysis is in other words both prospective and retrospective but with a focus on the present and immediate future of the undertaking. The analysis is not purely static but rather dynamic, whilst taking into account consistency over time of the submitted projections. The analysis takes into account possible restructuring plans and their state of implementation.
- (230) The Commission also assesses the specific social and economic context for each undertaking whose financial situation is found to be sufficiently critical following the analysis described in recital (229). The Commission also attempts to take into account the impact of the global economic and financial crisis (hereinafter 'the economic crisis') affecting the chemical sector, and the expected consequences for the undertaking concerned in terms of, for instance, falling demand and falling prices, but also in terms of access to finance. One undertaking in this case stated that the economic crisis has had a particularly severe impact on the construction sector and on all undertakings that directly or indirectly offer products or services to that industry, such as chemical producers (in this case PVCs). The undertakings in question also argued that there was

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.

¹³⁴ [Description of evidence]

¹³⁵ By analogy to the assessment of "*serious and irreparable harm*" in the context of interim measures, the Commission bases its assessment of the undertaking's ability to pay on the financial situation of the undertaking as a whole, including its shareholders, irrespective of the finding of liability (Case C-335/99 P (R), *HFB v. Commission*, [1999] ECR I-8705; Case C-7/01 P(R), *FEG v. Commission*, [2001] ECR I-2559), and Case T-410/09 R *Almamet v. Commission* (not yet reported), at paragraphs 47 *et seq.*

a dramatic drop in demand for chemical products in 2009 due to the economic crisis. In addition, as a result of the economic crisis, undertakings are experiencing difficulty in maintaining their credit lines with banks and obtaining sufficient financing. These arguments are, for the chemical sector in general, supported by studies such as the report produced by the Directorate General for Enterprise and Industry of the European Commission entitled "*Impact of the economic crisis on key sectors of the EU – the case of the manufacturing and construction industries*" of February 2010.¹³⁶ The question whether the specific economic context as described in this recital and the specific social context apply to each individual undertaking is assessed in recitals (233) to (239) for each applicant which has invoked an inability to pay.

- (231) The fact that an undertaking goes into liquidation does not necessarily mean that there will always be a total loss of asset value and, therefore, this may not, in itself, justify a reduction in the fine which would have otherwise been imposed.¹³⁷ This is because liquidations sometimes take place in an organised, voluntary manner, as part of a restructuring plan in which new owners or new management continue to develop the undertaking and its assets. Therefore, each applicant which has invoked an inability to pay needs to demonstrate that good and viable alternative solutions are not available. If there is no credible indication of alternative solutions being available within a reasonably short period of time, which would ensure that it would be possible to maintain the undertaking as a going concern, the Commission considers that there is a sufficiently high risk that the undertaking's assets would lose a significant part of their value if, as a result of the fine to be imposed, the undertakings were to be forced into liquidation.
- (232) Consequently, where the conditions laid down in point 35 of the Guidelines on fines are met, the reduction of the final amount of the fine to be imposed on each of the undertakings concerned should be established on the basis of the financial and qualitative analysis described in recitals (229) and (231), also taking into account the ability of the undertaking concerned to pay the final amount of the fine to be imposed and the likely effect such payment would have on the economic viability of each undertaking.

6.8.2 [...]

- (233) The inability to pay claim submitted by [...] should be partly accepted, for the reasons set out in this section.
- (234) [...].
- (235) While the fact that an undertaking goes into liquidation does not necessarily mean that there will always be a total loss of asset value (see recital (231)), [...], there is no credible indication of alternative solutions being available within a reasonably short period of time, which would ensure that [...]. There is, therefore, a sufficiently high

¹³⁶ Report by DG Enterprise and Industry, available at http://ec.europa.eu/enterprise/newsroom/cf/getdocument.cfm?doc_id=5633

¹³⁷ See case law above as well as 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 372 and Case T-64/02 *Heubach v Commission* [2005] ECR II-5137, paragraph 163.

likelihood that, if the full amount of the fine is imposed, [...] economic viability would be jeopardised and that, as a consequence, its assets would lose a significant part of their value.

- (236) Regarding the specific economic context, [...] has provided concrete and credible information showing that the difficulties, as summarised in recital (230), apply to its individual situation, in particular that [...].
- (237) Regarding the specific social context, it should be noted that [...] . In view of the generally difficult economic situation in the sector concerned [...], it can be expected that a forced liquidation of [...] would lead to an increase in unemployment¹³⁸ .
- (238) On the basis of the evidence described in this section and in order to avoid the imposition of a fine which would be very likely to seriously jeopardise the economic viability of[...], the final amount of the fine to be imposed on [...] is reduced to EUR [...] in application of point 35 of the Guidelines on fines.

6.8.3 [...].

(239) [...].

6.8.4 *Conclusion*

- (240) It follows from the analysis in section 6.8.2 that a reduction of the fine which would otherwise be imposed should be granted on the grounds of inability to pay, to avoid the risk of forced liquidation[...]. [...] the request for a reduction of the fine to be imposed on those undertakings on the grounds of inability to pay should be rejected.

6.9 Conclusion: final amount of individual fines to be imposed in this Decision

- (241) The fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 should therefore be as follows:

1.	EUR 0	Jointly and severally on Yara Phosphates Oy, Yara Suomi Oy and Kemira Oyj.
2.	EUR 83 752 000	on Tessenderlo Chemie N.V.
3.	EUR 2 795 000	on José de Mello SGPS S.A., of which Quimitécnica.com – Comércio e Indústria Química S.A. is held jointly and severally liable for the amount of EUR 1 750 905.
4.	EUR 14 400 000	Jointly and severally on FMC Foret S.A., FMC Chemicals Netherlands B.V. and FMC Corporation
5.	EUR 14 850 000	Jointly and severally on Ercros Industrial S.A. and

¹³⁸ [...] [Description of evidence]

		Ercros S.A.
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(242) As set out in a separate decision, the following fines have been imposed on another undertaking for the same infringement:

6.	EUR 59 850 000	Jointly and severally on Timab Industries S.A. and Compagnie Financière et de Participation Roullier
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7 CONCLUSION

HAS ADOPTED THIS DECISION:

Article 1

The following entities infringed Article 101 of the Treaty and, from 1 January 1994, Article 53 of the EEA Agreement by participating, for the periods indicated, in an anti-competitive arrangement covering most of territory of the Union and the EEA in order to share a large part of the European feed phosphates market, by allocating sales quotas and customers amongst cartel members, and in order to coordinate prices and, to the extent necessary, sales conditions:

- Yara Phosphates Oy: from 19 March 1969 to 28 November 2003;
- Yara Suomi Oy: from 1 January 1994 to 28 November 2003;
- Kemira Oyj: from 1 April 1989 to 28 November 2003.
- Tessengerlo Chemie N.V.: from 19 March 1969 to 10 February 2004.
- Ercros Industrial S.A.: from 31 January 1992 to 10 February 2004.
- Ercros S.A.: from 31 January 1992 to 10 February 2004.
- FMC Foret S.A.: from 31 January 1992 to 31 December 2001.
- FMC Chemicals Netherlands B.V.: from 31 January 1992 to 31 December 2001.
- FMC Corporation: from 31 January 1992 to 31 December 2001.
- Quimitécnica.com – Comércio e Indústria Química S.A.: from 21 October 1993 to 10 February 2004;
- José de Mello SGPS S.A.: from 1 January 1997 to 10 February 2004.

Article 2

The following fines are imposed for the infringement referred to in Article 1:

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

The fines shall be paid in EURO, within three months of the date of notification of this Decision, to the following account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT
1–2, Place de Metz
L-1930 Luxembourg
IBAN: LU02 0019 3155 9887 1000
BIC: BCEELULL
Ref.: European Commission – BUFI / COMP/38866

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.

Pending an appeal, the undertaking has the option of covering the fine by the due date either by providing a bank guarantee acceptable to the Accounting Officer of the Commission or by making a provisional payment of the fine

Article 3

1. The fine imposed on the undertaking referred to in Article 2(2) may be paid in instalments provided that 1/3 of the amount of the fine is paid within three months of the date of notification of this Decision. The remaining amount, including interest calculated for the whole payment period in accordance with paragraph 2 of this Article, shall be paid in two equal annual instalments, on the anniversary of the first payment
2. The outstanding amount of the fine imposed on the undertaking referred to in paragraph 1 shall bear interest. The interest shall be calculated 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 1.5 percentage points

3. The outstanding amount of the fine imposed on the undertaking referred to in paragraph 1, interest included, shall be covered by bank guarantee, issued by a bank with an AA-rating and situated within the European Union.
The undertaking referred to in Article 2 (2) may, at any time, replace the bank guarantee, in whole or in part, by a payment for some or all of the amount outstanding.

Article 4

The undertakings referred to 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 5

This Decision is addressed to:

1. Yara Phosphates Oy Mechelininkatu 1a 00181 Helsinki Finland	7. FMC Foret S.A. Plaza Xavier Cugat 2 Edificio C, planta 3 ^a Parque de Oficinas Sant Cugat Nord 08174 San Cugat del Vallés (Barcelona) Spain
2. Yara Suomi Oy Mechelininkatu 1a, 00181 Helsinki Finland	8. FMC Chemicals Netherlands B.V. Oosterhorn 14 9936 HD Farmsum / Delfzijl Nederland
3. Kemira Oyj Porkkalankatu 3 00180 Helsinki Finland	9. FMC Corporation 1735 Market Street Philadelphia, PA 19103 USA
4. Tessenderlo Chemie N.V. rue du Trône 130 B-1050 Brussels	10. Quimitécnica.com- Comércio e Indústria Química S.A. Rua nº 35, nº 27 Parque Industrial do Barreiro 2831-904 Barreiro Portugal
5. Ercros Industrial S.A. Av. Diagonal 595, planta 10 08014 Barcelona Spain	11. José de Mello SGPS S.A. Avenida 24 de Julho, 24 1200-480 Lisboa Portugal

6. Ercros S.A. Av. Diagonal 595, planta 10 08014 Barcelona Spain	
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This Decision shall be enforceable pursuant to Article 299 of the Treaty and Article 110 of the EEA Agreement.

Done at Brussels,

For the Commission

Joaquín Almunia
Vice-President of the Commission