COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,

COMMISSION DECISION

Of [1 October 2008]

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

Case COMP/39181 – Candle Waxes

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

(Text with EEA relevance)

to be notified to:

ENI S.p.A.

Esso Deutschland GmbH, Esso Société Anonyme Française, ExxonMobil Petroleum and Chemical B.V.B.A. and Exxon Mobil Corporation

H&R ChemPharm GmbH, H&R Wax Company Vertrieb GmbH and Hansen & Rosenthal KG

Tudapetrol Mineralölerzeugnisse Nils Hansen KG

MOL Nyrt.

Repsol YPF Lubricantes y Especialidades S.A., Repsol Petróleo S.A. and Repsol YPF S.A.

Sasol Wax GmbH, Sasol Wax International AG, Sasol Holding in Germany GmbH and Sasol Limited

Shell Deutschland Oil GmbH, Shell Deutschland Schmierstoff GmbH, Deutsche Shell GmbH, Shell International Petroleum Company Limited, the Shell Petroleum Company Limited, Shell Petroleum N.V., and the Shell Transport and Trading Company Limited

RWE-Dea AG and RWE AG

Total France S.A. and Total S.A

Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets […].

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

Case COMP/39181 - Candle Waxes

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[1], and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission decision of 25 May 2007 to initiate proceedings in this case,

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

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

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

Whereas:

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1 OJ L 1, 4.1.2003, p.1. Regulation as last amended by Regulation (EC) No. 1419/2006 (OJ L 269, 28.9.2006, p.1).

2 OJ L 123, 27.4.2004, p. 18. Regulation as amended by Regulation (EC) No 1792/2006 (OJ L 362, 20.12.2006, p. 1).

3 OJ C 295, 04.12.2009, p.15.

1. INTRODUCTION

1.1. Addressees

(1) The addressees of this Decision are the following legal entities which belong to 10 different undertakings as indicated below

(1) ENI S.p.A.;

(2) Esso Deutschland GmbH, Esso Société Anonyme Française, ExxonMobil Petroleum and Chemical B.V.B.A. and Exxon Mobil Corporation;

(3) H&R ChemPharm GmbH, H&R Wax Company Vertrieb GmbH and Hansen & Rosenthal KG;

(4) Tudapetrol Mineralölerzeugnisse Nils Hansen KG;

(5) MOL Nyrt.;

(6) Repsol YPF Lubricantes y Especialidades S.A., Repsol Petróleo S.A. and Repsol YPF S.A.;

(7) Sasol Wax GmbH, Sasol Wax International AG, Sasol Holding in Germany GmbH and Sasol Limited;

(8) Shell Deutschland Oil GmbH, Shell Deutschland Schmierstoff GmbH, Deutsche Shell GmbH, Shell International Petroleum Company Limited, the Shell Petroleum Company Limited, Shell Petroleum N.V. and the Shell Transport and Trading Company Limited;

(9) RWE-Dea AG and RWE AG;

(10) Total France S.A. and Total S.A.

1.2. Summary of the infringement

(2) The addressees of this Decision participated in a single, complex and continuous infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement, covering the EEA territory, consisting of agreements and/or concerted practices aimed at price fixing and exchanging and disclosing commercially sensitive information. In the case of Dea (later Shell), ExxonMobil, MOL, Repsol, Sasol and Total, the infringement also consisted of customer and/or market allocation. In the case of Dea (later Shell), ExxonMobil, Sasol and Total, the infringement also related to slack wax sold to end-customers on the German market.

2. THE INDUSTRY SUBJECT TO THE PRESENT PROCEEDINGS

2.1. The Products

(3) The anti-competitive behaviour described in this Decision concerns the markets for paraffin waxes and – for those undertakings identified in recital (1) – slack wax. All these products are manufactured in refineries from crude oil.

(4) Paraffin waxes comprise fully-refined paraffin waxes and semi-refined paraffin waxes (depending on the content of oil) as well as hydro-finished waxes, wax blends, wax specialties and hard paraffin waxes. They are used for the production of a variety of products such as candles, chemicals, tyres and automotive products as well as in the rubber, packaging, adhesive and chewing gum industries. In Europe, 60-70% of paraffin wax is used for candle production.

(5) Slack wax is the raw material required for the manufacture of paraffin waxes. It is produced in refineries as a by-product in the manufacture of base oils from crude oil. It is also sold to end-customers, to producers of particle boards for instance.

2.2. […]

(6) […].

2.3. Undertakings Subject to the Present Proceedings

2.3.1. The ENI group (ENI S.p.A.)[4]

(7) ENI is an international company active in oil, natural gas, electricity, engineering and construction and the petrochemical business. The three main business areas of ENI are: Exploration & Production, Gas & Power, and Refining and Marketing. ENI S.p.A. is the ultimate parent company of the ENI group.

(8) The sale of paraffin waxes and slack wax was conducted by AgipPetroli S.p.A. from 1977 until 2002. AgipPetroli S.p.A has been a 100% subsidiary of ENI S.p.A. since 1997 and was previously 99,9%-100% owned by Agip S.p.A., which in turn was 100% owned by ENI S.p.A. As of 1 January 1998, Agip S.p.A. was merged into ENI S.p.A. AgipPetroli S.p.A. was merged into ENI S.p.A. on 31 December 2002 and thus it ceased to exist. From 1 January 2003 onwards, ENI's refining & marketing division was in charge of the sale of paraffin waxes and slack wax.

(9) Between 1975 and 1992, ENI was owned by the Italian state, acting through the Ministero delle Partecipazione statali. In 1992, ENI became a public company and 100% of its shares were transferred to the Ministero del Tresoro (National Treasury) ENI was then subsequently privatized on a gradual basis. Today, the Ministero dell'Economia e delle Finanze (Ministry of Economy and Finance) holds 20,31 % of ENI's shares.

(10) According to ENI, the ENI group's total worldwide turnover amounted to EUR 87 256 000 000 in 2007. The yearly average value of sales of paraffin waxes in the EEA was EUR [10-30 million] in the years 2002-2004 according to ENI.

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[4] […].

(11) Individuals who were in charge of the management of ENI's paraffin waxes and slack wax business and represented ENI or were aware of the arrangements described in this Decision include:[5]

– […].

(12) In this Decision, and unless otherwise specified, companies of the ENI group which participated in the cartel will be referred to as 'ENI'.

2.3.2. The ExxonMobil group (Esso Deutschland GmbH, Esso Société Anonyme Française, ExxonMobil Petroleum and Chemical B.V.B.A, Exxon Mobil Corporation)[6]

(13) ExxonMobil is a global energy company. The group is headed by Exxon Mobil Corporation, located in the USA. The current corporate structure of the ExxonMobil group is the result of a series of multi-stage corporate developments, most notably the merger of Exxon and Mobil in 1999.

(14) Prior to the merger, both Exxon and Mobil were active in the paraffin wax and slack wax sector in Europe. The Exxon group was, and remains, involved in the wax business through a number of affiliates such as: Esso N.V./S.A. (Belgium), Esso Societé Anonyme Française (France), Esso Deutschland GmbH (Germany), Esso Nederland B.V. (the Netherlands) and Esso Petroleum Company, Limited (UK).

(15) Mobil was active in the wax sector in the majority of European countries through a number of affiliates including Mobil Oil B.V. (Belgium), Mobil Oil Française (France), Mobil Schmierstoff GmbH (Germany), Mobil Oil B.V. (the Netherlands), Mobil Oil AG (Germany), Mobil Oil Company Ltd (UK) and Mobil Services Company Ltd (UK).

(16) Between August 1996 and November 2000, Mobil's wax business participated in a joint venture with BP plc.. […].

(17) In 2000, the Mobil/BP joint venture was dissolved. The dissolution was a condition for obtaining clearance of the future Exxon/Mobil merger[7]. […]. Concerning the wax business, BP acquired control over certain refineries while the rest of the wax business remained with Mobil[8] .

(18) Following the merger in 1999, the combined ExxonMobil Group was active in the paraffin waxes and slack wax sector. […]. EMPC, like all companies in the ExxonMobil group, form part of a chain of subsidiaries and intermediaries ultimately owned by Exxon Mobil Corporation.

(19) According to ExxonMobil, the ExxonMobil group's total worldwide turnover amounted to EUR 261 656 000 000 in 2007. The yearly average value of sales of paraffin waxes in the EEA was EUR [10-30 million] in the years 2000-2002 according to ExxonMobil. The yearly average value of sales of slack wax to end-customers in Germany was EUR [<5 million] in the years 2000-2001[9] according to ExxonMobil.

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5 […].
6 […].
7 See Case No COMP/M.1822 – *Mobil/JV Dissolution.*
8 […].
9 […].

(20) Individuals who were in charge of the management of ExxonMobil group's paraffin waxes and slack wax business and represented ExxonMobil or were aware of the arrangements described in this Decision include :[10.]

– […];

– […];

– […];

– […];

– […];

– […];

– […][11].

(21) In this Decision, and unless otherwise specified, companies of the ExxonMobil group which participated in the cartel will be referred to as 'ExxonMobil'.

2.3.3. The Hansen & Rosenthal/Tudapetrol group (Tudapetrol Mineralölerzeugnisse Nils Hansen KG, H&R ChemPharm GmbH, H&R Wax Company Vertrieb GmbH, Hansen & Rosenthal KG)[12]

(22) The Hansen & Rosenthal Group ("Hansen & Rosenthal") is active world-wide in petroleum based products. Tudapetrol Mineralölerzeugnisse Nils Hansen KG ("Tudapetrol") was a sales and distributing company for Hansen & Rosenthal of paraffin waxes and slack wax. The investigation shows that Hansen & Rosenthal and Tudapetrol are two separate and independent undertakings, however due to both the close personal links […] and distribution links between Hansen & Rosenthal and Tudapetrol, they are hereafter referred to as 'H&R/Tudapetrol'. The H&R/Tudapetrol group is located primarily at two sites in Germany - Hamburg and Salzbergen.

(23) H&R/Tudapetrol's entry into the paraffin business took place on 24 March 1994, when, as part of a joint acquisition, Hansen & Rosenthal KG acquired a refinery (SRS GmbH) for lubricants in Salzbergen (Germany) from Wintershall AG, a subsidiary of BASF, and transformed it into a production company.

(24) The Salzbergen refinery (SRS GmbH) is run by H&R Chemisch-Pharmazeutische Spezialitäten GmbH, a 100% subsidiary of H&R ChemPharm GmbH. H&R ChemPharm GmbH is in turn a 100% subsidiary of H&R Wasag AG. The main shareholder of H&R Wasag AG is H&R Beteiligung GmbH (the remaining shares are dispersed among many owners).[13] H&R Beteiligung GmbH is in turn owned by H&R Wax Company Vertrieb GmbH, a 100% subsidiary of Hansen & Rosenthal KG (the ultimate parent company of Hansen & Rosenthal).

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10 […].
11 […].
12 […].
13 […].

(25) Paraffin waxes and slack wax were originally distributed by Tudapetrol Mineralölerzeugnisse Nils Hansen KG, which is an independent company (Komplementäre (general partners) are […], and Kommanditist (limited partner) is […]. On 1 May 2000, the distribution was transferred to H&R Wax Company Vertrieb Komplementär GmbH & Co. KG, and since 1 January 2001, the distribution has been managed by H&R Wax Company Vertrieb GmbH, a 100% subsidiary of Hansen & Rosenthal KG. However, the investigation has revealed that even if Tudapetrol to a large extent left the paraffin business on 1 May 2000, it retained some paraffin customers.[14]

(26) According to Hansen & Rosenthal, Hansen & Rosenthal's total worldwide turnover amounted to EUR [< 1000 million] in 2007. The average value of sales of paraffin waxes in the EEA was EUR [20 – 40 million] in 2002-2004 according to Hansen & Rosenthal.

(27) According to Tudapetrol, Tudapetrol's total worldwide turnover amounted to EUR [200 – 400 million] in 2007. The yearly average value of sales of paraffin waxes in the EEA was EUR [< 10 million] in the years 1999-2001 according to Tudapetrol.

(28) Individuals who were in charge of the management of H&R/Tudapetrol group's paraffin waxes and slack wax business and represented H&R/Tudapetrol or were aware of the arrangements described in this Decision include:[15]

– […];

– […];

– […].

(29) In this Decision, and unless otherwise specified, companies of the Hansen & Rosenthal/Tudapetrol group which participated in the cartel will be referred to as 'H&R/Tudapetrol'.

2.3.4. The MOL group (MOL Nyrt.)[16]

(30) MOL is one of the leading integrated oil and gas companies in Central and Eastern Europe, and the largest company in Hungary by sales revenues. Its products and services include, *inter alia*, autogas, bitumens, chemicals, fuels, LPG and lubricants.

(31) MOL Nyrt.[17] in its current form did not exist until 1991, when it was established by decree of the Hungarian Government.

(32) As of 1 April 2002, both the export and the domestic sale of paraffin was handled by MOL Rt. (now MOL Nyrt., and for the purposes of this Decision, will only be referred to as MOL Nyrt.). From 1991 until 1996, domestic sales of paraffin were conducted by MOL Nyrt. and export sales were conducted by Mineralimpex Kft. Between 1996 and 2002, both the domestic and export sales were conducted by MOL-Chem Kft. Since

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14 […].
15 […].
16 […].
17 […].

30 May 1995, MOL Nyrt. is the owner of Mineralimpex Kft., which was renamed MOLTRADE-Mineralimpex Kft. in 1996 (before 1995, Mineralimpex was an independent state-owned company[18]). MOLTRADE-Mineralimpex Kft. is still a 100% owned subsidiary of MOL Nyrt. MOL Nyrt. became the owner of MOL-Chem Kft. in 1992, but sold its shares in 2003.[19]

(33) According to MOL. the MOL group's total worldwide turnover amounted to EUR 10 320 000 000 in 2007. The yearly average value of sales in the EEA of paraffin waxes was EUR [<10 million] in 2002-2004 according to MOL.

(34) Individuals who were previously in charge of the management of MOL's paraffin waxes and slack wax business and represented MOL or were aware of the arrangements described in this Decision include:[20]

– […];

– […].

(35) In this Decision, and unless otherwise specified, companies of the MOL group which participated in the cartel will be referred to as 'MOL'.

2.3.5. The Repsol group (Repsol YPF Lubricantes y Especialidades S.A., Repsol Petróleo S.A., Repsol YPF S.A.)[21]

(36) Repsol YPF S.A. is an international group of oil and gas companies. Until 1 January 2002, Repsol Derivados S.A. was the company within the Repsol group which was active in the production and sale of paraffin waxes and slack wax.

(37) Repsol Derivados S.A. was owned by Repsol Petróleo S.A. from 1975 until 24 October 2001, and by Repsol Productos Asfalticos S.A., which changed its name to Repsol YPF Lubricantes y Especialidades S.A. (Rylesa) from 24 October 2001 until 1 January 2002. On 1 January 2002, Repsol Derivados S.A. was absorbed by its sole shareholder Rylesa. Rylesa is in turn owned by Repsol Petróleo S.A. During the investigated period, Repsol YPF S.A. was the 99,97 % shareholder of Repsol Petróleo S.A. Repsol YPF S.A. is the ultimate parent company within the Repsol group. From 1 January 2002, all production and sale of paraffin waxes and slack wax was conducted by Rylesa.

(38) According to Repsol, the Repsol group's total worldwide turnover amounted to EUR 52 098 000 000 in 2007. The yearly average value of sales in the EEA of paraffin waxes was EUR 10 779 214 in 2001-2003 according to Repsol.

(39) Individuals who were in charge of the management of Repsol's paraffin waxes and slack wax business and represented Repsol or were aware of the arrangements described in this Decision include :[22]

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18 […].
19 […].
20 […].
21 […].
22 […].

– […];

– […];

– […];

– […];

– […];

– […].[23]

(40) In this Decision, and unless otherwise specified, companies of the Repsol group which participated in the cartel will be referred to as 'Repsol'.

2.3.6. The Sasol group (Sasol Wax GmbH, Sasol Wax International AG, Sasol Holding in Germany GmbH, Sasol Limited)[24]

(41) Sasol is a global energy company, active in the paraffin business in Europe. Sasol's European paraffin waxes and slack wax business is operated today by Sasol Wax GmbH. The companies involved in the paraffin waxes and slack wax business and participants in the infringement described in this Decision were referred to, over time, under the name TerHell, HOS, Schümann Sasol GmbH & Co. KG and Sasol Wax GmbH.

(42) Sasol Wax GmbH is a wholly-owned subsidiary of Sasol Wax International AG (previously named Schümann Sasol International AG). Sasol Wax International AG is 100% owned by Sasol Holding in Germany GmbH. Today, all companies in the Sasol group form part of a chain of subsidiaries and intermediaries ultimately owned by Sasol Limited the ultimate parent company of the Sasol group.

(43) According to Sasol, the Sasol group's total worldwide turnover amounted to EUR 10 439 000 000 in 2007. The yearly average value of sales of paraffin waxes in the EEA was EUR [160-180 million] in the years 2002-2004 according to Sasol. The yearly average value of sales of slack wax to end-customers in Germany was EUR [5-10 million] in the years 2001-2003 according to Sasol.

(44) Individuals who were in charge of the management of Sasol's paraffin waxes and slack wax business and represented Sasol or were aware of the arrangements described in this Decision include :[25]

– […];

– […];

– […];

– […];

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[23] […].
[24] […].
[25] […].

– […].

(45) In this Decision, and unless otherwise specified, companies of the Sasol group which participated in the cartel will be referred to as 'Sasol'.

2.3.7. The Shell group (Shell Deutschland Schmierstoff GmbH, Shell Deutschland Oil GmbH, Deutsche Shell GmbH, Shell International Petroleum Company Limited (SIPC), the Shell Petroleum Company Limited (SPCO), Shell Petroleum N.V, the Shell Transport and Trading Company Limited)[26]

(46) The Shell Group is a global group of energy and petrochemical companies. Within the Shell group, the companies which participated in the infringement described in this Decision originate from a joint venture between RWE-Dea AG für Minearlöl und Chemie ("RWE/Dea"), a subsidiary of RWE-Dea AG which is in turn a subsidiary of RWE AG, and Shell, in 2002. The relevant structure of RWE/Dea and Shell pre-joint venture and of Shell post-joint venture is explained below.

2.3.7.1. RWE/Dea and Shell pre-joint venture

(47) The petroleum business (including waxes) of RWE/Dea was operated by RWE-Dea Aktiengesellschaft für Mineralöl und Chemie (previously named Deutsche Texaco AG), a subsidiary of RWE AG (the ultimate parent company within the group), and RWE-Dea Aktiengesellschaft für Mineralöl und Chemie's 100% owned subsidiary Dea Mineralöl GmbH (previously named Dea Mineralöl AG). From 31 December 1988 until 2002 (creation of the joint venture with Shell), the petroleum business of RWE/Dea was conducted by Dea Mineralöl AG, which is also the entity that participated in the infringement.

2.3.7.2. Shell and RWE/Dea post-joint venture

(48) On 2 January 2002[27], Deutsche Shell GmbH assumed joined control of Dea Minerlöl GmbH together with RWE/Dea which thus became a joint venture, renamed Shell & Dea Oil GmbH, combining their respective oil and petrochemicals business[28]. Shell contributed its oil business in Germany to this joint subsidiary, and as a result Shell & Dea Oil GmbH included the entire downstream oil business and petrochemicals business of both Shell and RWE-Dea in Germany. Shell & Dea Oil GmbH (renamed Shell Deutschland Oil GmbH in 2003) was initially a 50/50% subsidiary of Deutsche Shell GmbH and RWE-Dea AG für Mineralöl und Chemie, but since 1 July 2002, is 100% owned by Shell.

(49) As of 1 April 2004, the wax business part of Shell Deutschland Oil GmbH was transferred to its 100% owned subsidiary Shell Deutschland Schmierstoff GmbH.

(50) Shell International Petroleum Company Limited (SIPC) is not directly involved in the production or sales of waxes. It still, however, performs certain functions of a head office, in that it develops the sales, marketing and supply strategy for the wax business and is formally in charge of pricing. SIPC was 100% owned by the Shell Petroleum Company Limited (SPCO) throughout the infringement, which in turn was owned by

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[26] […].
[27] […].
[28] Case No COMP/M.2389-*Shell/Dea*.

the Royal Dutch Petroleum Company N.V. (Netherlands) with 60% and the Shell Transport and Trading Company plc (UK) with 40%.

(51) While the Shell group originally had two ultimate parent companies - the Royal Dutch Petroleum Company N.V. (Netherlands) and the Shell Transport and Trading Company plc (UK) - it has been owned by a single parent company, the Royal Dutch Shell plc, since 20 July 2005. Under the new structure, Shell Petroleum N.V. is a 100% subsidiary of the Royal Dutch Shell plc and serves as a holding company for the rest of the group. Prior to the restructuring, Shell Petroleum N.V. was one of the main holding companies of the Shell group. Today, all companies in the Shell group form part of a chain of subsidiaries and intermediaries ultimately owned by the Royal Dutch Shell plc.

(52) As pointed out by Shell in its reply to the Statement of Objections, prior to 1 April 2004, the wax business was always conducted by one and the same company. Over the years however, the company underwent several changes with regard to its shareholder structure and its legal name. Shell also points out that RWE and Shell did not "create" a new joint venture company in 2002, but that the pre-existing Dea Mineralöl GmbH and its business came under joint ownership until the transfer of sole control from RWE to Shell. Shell also states that as Shell Deutschland Oil GmbH is the same company as Dea Mineralöl GmbH/AG, it would be incorrect to state that the former has "taken over liability" of the latter. The Commission acknowledges these remarks and wishes to clarify that this has been, and remains, the Commission's understanding throughout the administrative procedure as well. There is thus no difference in substance between Shell's and the Commission's understanding in this respect, and therefore the Commission will continue to use the same terminology in the Decision as in the Statement of Objections.

(53) According to Shell, the Shell group's total worldwide turnover amounted to EUR 259 600 000 000 in 2007. The yearly average value of sales of paraffin waxes in the EEA was EUR [10-30 million] in the years 2002-2004 according to Shell. The yearly average value of sales of slack wax sold to end-customers in Germany was EUR [<5 million] in the years 2001-2003 according to Shell.

(54) Individuals who were in charge of the management of Shell's paraffin waxes and slack wax business and represented Shell or were aware of the arrangements described in this Decision include :[29]

- […];
- […];
- […];
- […].[30]

(55) In this Decision, and unless otherwise specified, companies of the Shell group (including Dea Mineralöl GmbH/AG, under this and subsequent denominations,

[29] […].
[30] […].

including the period prior to the joint venture with Shell) which participated in the cartel will be referred to as 'Shell'.

2.3.8. The RWE group[31]

(56) The RWE group is an international utility group with core business activities in energy supply including gas exploration, electricity production, trading, retail and grid activities. The RWE group is currently not active in the paraffin waxes and slack wax business since the paraffin waxes and slack wax business was completely transferred to the Shell group in 2002.

(57) The petroleum business (including waxes) of RWE/Dea was operated by RWE-Dea Aktiengesellschaft für Mineralöl und Chemie (previously named Deutsche Texaco AG), a subsidiary of RWE AG (the ultimate parent company within the group), and RWE-Dea Aktiengesellschaft für Mineralöl und Chemie's 100% owned subsidiary Dea Mineralöl GmbH (previously named Dea Mineralöl AG). From 31 December 1988 until 2002 (creation of the joint venture with Shell), the petroleum business of RWE/Dea was conducted by Dea Mineralöl AG.

(58) On 2 January 2002[32], Deutsche Shell GmbH and RWE AG entered into a joint venture that combined their respective oil and petrochemicals business.[33] On 1 July 2002, RWE/Dea's shares of the joint venture (which was named Shell & Dea Oil GmbH and, subsequently, Shell Deutschland Oil GmbH) were completely transferred to the Shell group. With the dissolution of the joint venture, RWE exited the paraffin waxes and slack wax business.

(59) According to RWE, the RWE group's total worldwide turnover amounted to EUR 42 507 000 000 in 2007. The yearly average value of sales of paraffin waxes in the EEA was EUR [10-30 million] in the years 1999-2001 according to Shell[34]. The yearly average value of sales of slack wax in the EEA was EUR [<5 million] in the years 1999-2001 according to Shell[35].

2.3.9. The Total group (Total France S.A., Total S.A.)[36]

(60) The Total group is a global energy group that has emerged, *inter alia*, from the subsequent mergers/acquisitions of Total (France), Fina (Belgium) and Elf (France). Total S.A. is the parent company of the Total group. Within the Total group, the company which directly participated in the infringement described in the Statement of Objections is Total France S.A.. Total France S.A. has been throughout the infringement directly or indirectly owned (more than 98%) by Total S.A.[37]

(61) The corporate developments in the Total group's paraffin waxes and slack wax business date back to the 1920's when the Compagnie Française des Pétroles created the Compagnie Française de Raffinage ("CFR"). On 20 December 1985, CFR merged

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31 […].
32 […].
33 Case No COMP/M.2389-*Shell/Dea*.
34 […].
35 […].
36 […].
37 […].

with the Total Compagnie Française de Distribution and became the Compagnie de Raffinage et de Distribution – Total France S.A. ("CRD-Total France"). On 6 June 1991, CRD-Total France was renamed as Total Raffinage Distribution S.A. ("TRD"). On 1 April 2002, TRD changed its name to TotalFinaElf France, and on 12 May 2003, it became Total France S.A..

(62) On 31 July 2005, Total France S.A. closed its paraffin waxes and slack wax business. Currently production and sales of paraffin products is undertaken by Total Lubrifiants, a subsidiary of Total France S.A..

(63) According to Total, the Total group's total worldwide turnover amounted to EUR 158 752 000 000 in 2007. The yearly average value of sales in the EEA of paraffin waxes was EUR [20-40 million] in the years 2002-2004 according to Total. The yearly average value of sales in Germany of slack wax was EUR [<5 million] in the years 2001-2003 according to Total.[38]

(64) Individuals who were in charge of the management of Total's paraffin waxes and slack wax business and/or were involved or aware of the arrangements described in the Decision include :[39]

– […];

– […];

– […];

– […].

(65) In this Decision, and unless otherwise specified, companies of the Total group which participated in the cartel will be referred to as 'Total'.

2.4. Other Market Players

(66) To the Commission's knowledge, the addressees of this Decision are the main paraffin wax producers that are or were active on the EEA market. However, there are also imports from particularly China in the EEA market.

2.5. Description of the Market

2.5.1. Supply

(67) The undertakings concerned, except for H&R/Tudapetrol and Sasol, are among the biggest players in the oil business. H&R/Tudapetrol concentrates on the oil refinery business and Sasol on waxes. As indicated in the Statement of Objections, the undertakings concerned together hold a joint share of around 75% of the paraffin waxes and slack wax markets. This estimation was not contested by the parties in their replies to the Statement of Objections.

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[38] […].
[39] […].

(68) Moreover, the wax industry is characterised by considerable exports by Chinese manufacturers to Europe and the US. The majority of these waxes were imported by […] companies: […] and […].[40]

2.5.2. Demand

(69) The demand for paraffin is mainly subject to seasonal cycles with sales peaks in the autumn as paraffin is mainly used in the candle industry and the sales of candles increase during the winter period. This is particularly the case in Northern European countries where the use of candles significantly increases during the winter months.

2.5.3. Trade between Member States

(70) The products to which the anti-competitive behaviour related are traded between the EEA Member States on at least a Europe-wide market. Typically, the undertakings concerned produce paraffin waxes and/or slack wax at one or two sites in Europe, but trade the products throughout the whole of the EEA or at least between some Member States. There are no indications that the anti-competitive behaviour extends beyond the EEA. None of the addressees of the Statement of Objections have questioned that the products to which the infringement related are traded across the EEA.

(71) The market value for paraffin waxes and slack wax was estimated in the Statement of Objections at around EUR 485 000 000 in the EEA in 2004. None of the addressees of the Statement of Objections have contested this estimation.

3. PROCEDURE

3.1. The Commission's Investigation

(72) The Commission's investigation began as a result of the information received from an immunity application under the 2002 Commission notice on immunity from fines and reduction of fines in cartel cases[41] (the "2002 Leniency Notice"). […].[42] [...].[43] [...].[44]

(73) […].[45]

(74) On […], the Commission granted Shell conditional immunity from fines in accordance with point 15 of the 2002 Leniency Notice.[46]

(75) On 28 and 29 April 2005, the Commission carried out inspections at the premises of Sasol (Germany), H&R/Tudapetrol (Germany), Esso/ExxonMobil (Netherlands and Germany), Total (France), Repsol (Spain), ENI (Italy), and MOL (Hungary).

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40 […].

41 OJ No C 45 of 19.2.2002, page 3. Point 28 of this notice states that *"From 14 February 2002, this notice replaces the 1996 notice for all cases in which no undertaking has contacted the Commission in order to take advantage of the favourable treatment set out in that notice".*

42 […].

43 […].

44 […].

45 […].

46 […].

(76) In its reply to the Statement of Objections, [...] claims that its fundamental rights were breached during the inspections at its premises because a search warrant was not presented.[47]

(77) The Commission observes, firstly, that […] has not lodged an appeal against the inspection decision and, secondly, that, as […] did not oppose the inspections at the time they were carried out, Community law does not require the production of a search warrant. It is only if the assistance of national authorities is requested pursuant to Article 20(6) of Regulation (EC) 1/2003, because the undertaking refuses to submit to the inspection that such assistance needs to fulfil the corresponding national procedural rules, which may, in certain Member States, require a search warrant by a domestic court.

(78) Following the inspections, the Commission received applications for immunity and alternatively, applications for a reduction of fines, under the 2002 Leniency Notice from Sasol, Repsol and ExxonMobil.

(79) Sasol submitted a leniency application on […].[48] […][49] and on […].[50]

(80) Repsol applied for immunity/lenciency on […] .[51]

(81) ExxonMobil applied for immunity/leniency on […][52], […].[53] […].[54] […].[55] […].[56]

(82) […].[57]

(83) Prior to the Statement of Objections, the Commission addressed several requests for information to the undertakings concerned by the present Decision.[58] The Commission also addressed a Decision to MOL pursuant to Article 18 of Regulation (EC) 1/2003.[59]

(84) In addition, the Commission sent requests for information pursuant to Art. 18 (2) of Regulation (EC) 1/2003 to [undertakings not addressees of this Decision].[60]

3.2. Statement of Objections and Oral Hearing

(85) On 25 May 2007, the Commission initiated proceedings in this case and adopted a Statement of Objections against ENI S.p.A.; Esso Deutschland GmbH, Esso Nederland B.V., Esso Société Anonyme Française, ExxonMobil Petroleum and Chemical

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B.V.B.A. and Exxon Mobil Corporation, Tudapetrol Mineralölerzeugnisse Nils Hansen KG, H&R ChemPharm GmbH, H&R Wasag AG, H&R Beteiligung GmbH, H&R Wax Company Vertrieb GmbH and Hansen & Rosenthal KG; MOL Nyrt.; Repsol YPF Lubricantes y Especialidades S.A. (Rylesa), Repsol Petróleo S.A. and Repsol YPF S.A.; Sasol Wax GmbH, Sasol Wax International AG, Sasol Holding in Germany GmbH and Sasol Limited Shell Deutschland Oil GmbH, Shell Deutschland Schmierstoff GmbH, Deutsche Shell GmbH, Shell International Petroleum Company Limited (SIPC), the Shell Petroleum Company Limited (SPCO), Shell Petroleum N.V., the Shell Transport and Trading Company Limited and the Royal Dutch Shell plc; RWE-Dea AG and RWE AG; and Total France S.A. and Total S.A.

(86) All the parties to which the Statement of Objections had been addressed submitted written comments in response to the objections raised by the Commission.

(87) […].

(88) […] and […] complained in their reply to the Statement of Objections about the structure of the file and that access was granted to the documentary evidence in its original language, which for a number of documents, was […]. The Commission observes in this respect that all addressees of the Statement of Objections received the file in the same format and that it is for the undertakings concerned to organise their defence. The Commission is not obliged to provide translations of evidence.[61]

(89) After the adoption and receipt by the addressees of the Statement of Objections, the Commission received an application for immunity or alternatively, reduction of fines, from RWE.[62] The Commission informed RWE […] that immunity was not available and that regarding a reduction of the fine, the Commission would evaluate the final position of each undertaking, including RWE, at the end of the administrative procedure in any Decision adopted.

(90) Following the responses to the Statement of Objections, the Commission addressed a request for information to [undertakings not addressees of this Decision].[63] […].[64]

(91) An Oral Hearing was held on 10 and 11 December 2007. All the undertakings to which the Statement of Objections had been addressed, with the exception of Repsol Petróleo S.A. and Repsol YPF S.A., took part in the Hearing.

(92) Following the Oral Hearing, the Commission received written clarifications from Sasol and MOL.[65] It requested that H&R/Tudapetrol and MOL clarify some issues and received a response.[66]

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61 Point 46 of the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ C 325 of 22.12.2005, p. 7 and Case T-25/95 et al. *Cimenteries*, para. 635.

62 […].

63 […].

64 […].

65 […].

66 […].

(93) The Commission addressed requests for information to all the addressees of this Decision in order to establish the value of sales in the relevant products as well as the turnover of the groups. All addressees have responded to these requests.

(94) In view of the elements brought forward by Esso Nederland B.V. in its reply to the Statement of Objections, the Commission has decided to close proceedings against this company. The Commission has also decided to close the proceedings against H&R Wasag AG, H&R Beteiligung GmbH and the Royal Dutch Shell plc.

4. DESCRIPTION OF THE EVENTS

(95) The Commission has evidence that the majority of the producers of paraffin waxes and slack wax in the EEA, namely RWE/Dea (later Shell), Sasol, H&R/Tudapetrol, Total, ExxonMobil, Repsol, MOL and ENI, participated in meetings and other contacts to fix prices and, for those undertakings identified in recital (1), to allocate markets and customers in the EEA. In addition, the individuals representing the companies involved exchanged and disclosed commercially sensitive information relating to paraffin waxes, such as pricing policies, production capacities and sales volumes,, and, for those undertakings as identified in recital (1), exchanged and disclosed commercially sensitive information regarding slack wax sold to end-customers on the German market.

(96) […] confirm, in their reply to the Statement of Objections, the general finding that the contacts between the undertakings had an anti-competitive purpose.

(97) Before setting forth the details of these events chronologically in section 4.2, the basic principles of the arrangements of the cartel are described below.

4.1. The Basic Principles and Functioning of the Cartel

(98) The Commission has received [evidence] that the anti-competitive conduct followed largely the same pattern and had largely the same content and purpose of fixing prices (and in certain cases allocation of markets and customers and exchange of information) from its instigation […] to its conclusion in 2005.[67] Representatives of the undertakings normally met two to six times a year in what they referred to as "Technical Meetings". […].[68] These meetings usually lasted half a day and took place in hotels at different locations around Europe, but mainly in Germany, Austria, France and Hungary. The Commission is aware of around 50 Technical Meetings of the undertakings involved between 1992 and 2005 (for dates, venues and participation of these meetings see section 4.2). Details of these meetings are set out in the Annex.

(99) […].

(100) […][69] […]. Thus, based on the evidence in the Commission's possession, the starting date of the infringement is taken as 3 September 1992 (for all the undertakings involved except for H&R/Tudapetrol, Repsol and some entities within the Shell group), and the end date as 28 April 2005 (for all the undertakings involved except for ExxonMobil, Tudapetrol, RWE, Repsol and Shell) when inspections were carried out. The last

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67 […].
68 […].
69 […].

Technical Meeting before the inspections took place was on 23-24 February 2005, but another meeting had been planned for the end of May 2005.[70]

(101) All undertakings to which the present Decision is addressed have generally acknowledged that the meetings took place as well as their respective dates and venues without, however, necessarily giving an opinion on the nature of the meetings.[71] […] states in its response to the Statement of Objections that it has not acknowledged that the meetings were of an anti-competitive nature.[72] However, such acknowledgement was made by […], whose employees attended the meetings on behalf of the […] undertaking.[73]

(102) The Technical Meetings were usually organised and chaired by the representative of Sasol.[74] During the early years, the invitation was normally extended by telephone, while in the 1990's it was by fax and as of 2002, by e-mail.[75] However, […] states that the meetings that took place in Budapest were organised by MOL and the meetings that took place in Paris were organised by Total. […], [Shell] also organised one Technical Meeting […] and another one was organised by H&R/Tudapetrol.[76] While […] and […] do not contest this, […] argues that its organising role was limited to making hotel, dinner and meeting room reservations[77] while not contesting its organising role as such.

(103) If MOL was not represented at a meeting, Sasol would usually undertake to inform that representative of the results of the Technical Meeting.[78] […] it also informed ENI's representative when he could not attend a Technical Meeting. ENI has not responded to this statement.

(104) MOL denies that it was informed by Sasol when it did not attend meetings itself, and submits that [...] statements are not mutually corroborating as regards whether MOL was informed about the anti-competitive content of the Technical Meetings.[79] It must be said in this regard that […].[80] there is no reason to believe that, when such information was passed on to MOL, it did not cover the whole of the respective Technical Meeting, which includes its anti-competitive part. […].[81] […].[82]

(105) The individuals representing the companies generally arrived the evening before the meeting and had dinner and drinks together sometimes. There is no evidence that the undertakings also engaged in anti-competitive behaviour during these dinners although it cannot be excluded.

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81 […].
82 […].

(106) The Technical Meetings have been divided into two parts: an initial discussion on technical issues, which was followed by discussions of an anti-competitive nature such as price fixing, market and customer allocations (in certain cases), and exchange and disclosure of commercially sensitive information including present and future pricing policies, customers, production capacities and sales volumes.

(107) Discussions about prices and potential price increases normally took place at the end of the Technical Meetings. Usually, Sasol would instigate the discussions about prices, but then prices and pricing strategies were discussed by all the attendees in the form of a round table discussion.[83] The discussions concerned both price increases and target prices for specific customers and general price increases as well as minimum and target prices for the whole market.[84] Price increases were normally agreed upon in terms of absolute numbers, not percentages (for example 60 € per ton for fully-refined paraffin waxes).[85] Minimum prices were not only agreed upon when there was an agreement of a price increase but also when a price increase was not feasible (for example in times of falling prices).[86]

(108) Concerning market and customer allocation discussions, there was a […][87] […].[88] In addition, the companies active on the German market had bilateral allocation agreements in place.[89] An example of such an agreement is a bilateral customer allocation agreement between […] which stipulated that the main customers of each producer were to be respected.[90]

(109) Furthermore, the individuals representing the companies exchanged commercially sensitive information and disclosed their general business strategies.[91]

(110) The companies, except for MOL, were represented by managers that had the power to determine their respective company's pricing strategy and set prices with respect to individual customers. As for Shell, all pricing decisions taken by its representative in the meetings (since 2002 this was […]) had, theoretically, to be approved by his superior, however prices were *de facto* determined by […].[92] MOL's representative, […], although not a sales manager, was sent to the Technical Meetings because he spoke English and German. As explained below (see recital (238)) MOL is liable for the behaviour of that employee.

(111) In most of the Technical Meetings the price discussions concerned paraffin waxes in general[93] and only rarely the different kinds of paraffin waxes (such as fully-refined paraffin waxes, semi-refined paraffin waxes, wax-blends/specialties, hard paraffin waxes or hydro-finished paraffin waxes) were specified. Moreover, it was understood by all

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the companies that prices for all types of paraffin waxes would be increased by the same amount or percentage.[94]

(112) Slack wax was mentioned at some Technical Meetings.[95] In particular, on two occasions - 30 and 31 October 1997 and 11 and 12 May 2004 - slack wax was discussed at normal Technical Meetings.[96] In addition, agreements relating to slack wax sold to end-customers on the German market were reached at least once outside the Technical Meetings when representatives of Shell, Sasol, ExxonMobil and Total, and perhaps others, met and further discussed slack wax, i.e. fixed prices and exchanged commercially sensitive information.[97] For instance, there is evidence of one such meeting on 8-9 March 1999 in Düsseldorf.[98] The individuals representing the companies at the specific meeting dedicated to slack wax were, for most of the companies, the same as at the Technical Meetings[99], except for Total.[100]

(113) The outcome of the Technical Meetings was mainly implemented through price increase announcements to customers or by cancelling existing pricing schemes.[101] Occasional cases of cheating or non-implementation were discussed at subsequent meetings (see, for example, recitals (149) and (157)). Usually, one of the companies represented would take the lead and start increasing its prices. Usually, that would be Sasol, but sometimes Sasol asked another participant to take the lead. Shortly after one company announced its intention to raise prices to its customers, the other suppliers would follow suit by announcing price increases as well.[102] The individuals representing the companies at the Technical Meetings informed each other of the steps they took to implement the results of the Technical Meetings. This information was transmitted orally[103] or by sending a copy of the relevant price increase or price cancellation announcements to one or all of the other companies represented at the Technical Meetings, sometimes to the same persons who represented the companies at the Technical Meetings, and therefore not to the department in charge of purchasing.[104] The Commission indeed found that such announcements were exchanged between the parties. A sample of around 150 such letters have been identified as having been exchanged within six weeks after Technical Meetings.[105] Also, an agreement has been reported where the companies represented should not profit from the implementation of an agreed price increase to increase their own market share.[106] This statement was not contested in the replies to the Statement of Objections.

(114) In […] view, the Commission has conceded in the Statement of Objections that some of these pricing letters were sent only to customers.[107] This view relies on an

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107 […].

unfortunate translation error in the German version of the Statement of Objections which inserted the word "*Abnehmer*" (customers) in the translation of the first sentence of the relevant paragraph of the Statement of Objections (recital 151 of the Statement of Objections). The Commission clarifies that it has only analysed pricing letters sent between the undertakings involved as is apparent from paragraph (113) and the letters listed in footnote 105.

(115) […] argues that one of the pricing letters […] sent to […] was sent within the context of a cross-supply relationship.[108] Even if that were true, it cannot negate the fact that objectively the letter served to signal that […] was adhering to the common agreements reached.

(116) […] argues that it only received two such pricing letters and appears to conclude that it was therefore not part of the implementation efforts.[109] The Commission does not accept this conclusion. The sending of pricing letters among the undertakings involved did not constitute the implementation of the arrangements of itself, but rather, informed the relevant parties as to the implementation of the arrangements. That […] may perhaps not have been a regular receiver of such letters therefore does not exclude that it implemented the anti-competitive arrangements.

(117) There is also evidence of other regular bilateral meetings and other contacts between at least some of the undertakings involved.[110] In particular Sasol had extensive bilateral contacts with its competitors in various European countries.[111] These contacts served the purpose of *inter alia* supervising the implementation of the decisions taken at the Technical Meetings and to further discuss specific markets and customers. In addition to the Technical Meetings, the individuals representing the companies had regular contact by phone or, later, by e-mail. For example, in cases where the announced price increases were not fully accepted by the customers without further negotiations, the individuals representing the companies at the meetings tried to coordinate their actual price increases in telephone conversations.[112]

4.2. Details on the Technical Meetings

(118) The Commission is aware of around 50 Technical Meetings of the undertakings involved between 1992 and 2005, […]. The dates and venues of these meetings and their attendance are summarised in the table in recital (124). […].

(119) […].[113]

(120) […] questions the reliability of the […] debriefing notes because they were not taken at the Technical Meetings and not taken by a participant to the meetings. Moreover, the notes necessarily contain, according to […], an interpretation of the meeting by […]

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108 […].
109 […].
110 […].
111 […].
112 […].
113 […].

representative. […] views this "cascade of perceptions" as diminishing the note's probative value.[114]

(121) The Commission considered the available evidence including the […] debriefing notes according to its individual probative value and took the points raised by […] into account when it assessed the evidence and drew its conclusions. The Commission does not, however, share […] view that the […] debriefing notes are generally not reliable. They were drafted *in tempore non suspecto* and relatively soon after the Technical Meetings. The documents are not reconstructions of the facts made after months or years. As confirmed by other evidence, in particular the […] notes, they generally appear to be authentic records of the events at the Technical Meetings (see also the discussions of the meetings in the following). The […] debriefing notes are largely consistent with the […] notes, with other documentary evidence and with the immunity and leniency statements. The fact that they were taken after the report given by […] representative at the Technical Meetings does not as such call into question their accuracy.[115]

(122) […] kept handwritten minutes taken by […][116] at the Technical Meetings dating back to […] which were found during the inspections. In this Decision, they are referred to as "[…] notes".

(123) Several parties point at differences between the […] debriefing notes and the […] notes and contest the Commission's conclusions as to the contents of several Technical Meetings. As a general observation, it is to be pointed out that the authors of the notes naturally had diverging interests when taking the notes and therefore may have placed different emphasis on issues discussed at the Technical Meetings or presented them differently according to their specific interests in the matter. The notes are not official, mutually agreed minutes of the Technical Meetings but rather summary notes by the authors. It is therefore not surprising that the notes are not exact copies. The notes are nevertheless consistent as to the general set-up of the meetings and, at various instances, contain the same information. Their probative value is therefore high.

(124) The following table is an overview of the dates, venues and companies represented at the Technical Meetings since September 1992. An "X" indicates that the respective company was represented at the meeting.

Meeting (Venue)	ENI	ExxonMobil	H&R/ Tuda-petrol	MOL	Repsol	Sasol	Dea (Shell)	Total
3/4 September 1992		**X**	[117]	**X**		**X**	**X**	**X**
23/24 November 1992 (Vienna)		**X**		**X**		**X**	**X**	**X**
26 March 1993 (Budapest)		**X**		**X**		**X**	**X**	**X**
2 June 1993 (London)				**X**		**X**	**X**	

[114] […].
[115] […].
[116] […].
[117] […].

Meeting (Venue)	ENI	ExxonMobil	H&R/ Tuda-petrol	MOL	Repsol	Sasol	Dea (Shell)	Total
25 October 1993 (Hamburg)				**X**		**X**	**X**	
24 June 1994 (Budapest)			**X**	**X**	**X**	**X**	**X**	**X**
30 September 1994 (Paris)		**X**	**X**	**X**	**X**	**X**		**X**
27 January 1995 (Hamburg)		**XXX**[118]	**X**	**X**		**X**		**X**
16/17 March 1995 (Paris)				**X**	**X**	**X**	**X**	
22/23 June 1995 (Munich)					**X**	**X**		
7/8 September 1995 (Strasbourg)			**X**	**X**	**X**	**X**	**X**	**X**
16/17 November 1995 (Munich)				**X**	**X**	**X**		**X**
22/23 February 1996 (Budapest)			**X**	**X**	**X**	**X**		**X**
14/15 May 1996 (Paris)					**X**	**X**		
17/18 September 1996 (Hamburg)			**X**	**X**	**X**	**X**		**X**
14/15 November 1996 (Vienna)				**X**		**X**		**X**
20/21 February 1997 (Paris)		**X**				**X**		**X**
19/20 June 1997 (Budapest)				**X**	**X**			**X**
30/31 October 1997 (Hamburg)	**X**		**X**	**X**	**X**	**X**	**X**	**X**
12/13 February 1998 (Milan)						**X**		**X**
5/6 May 1998 (Budapest)		**X**	**X**	**X**	**X**	**X**		**X**
2/3 September 1998 (Paris)					**X**	**X**		**X**
3/4 November 1998 (Vienna)				**X**		**X**	**X**	**X**
12/13 January 1999 (Paris or Munich)						**X**	**X**	
2/3 March 1999 (Paris)						**X**	**X**	
8/9 March 1999 (Düsseldorf)		**X**				**X**	**X**	**X**
13/14 April 1999 (Munich)		**X**	**X**	**X**	**X**	**X**	**X**	**X**
8/9 July 1999 (Vienna)		**X**	**X**	**X**	**X**	**X**	**X**	**X**
23/24 September 1999 (Budapest)			**X**		**X**	**X**	**X**	**X**

[118] […].

Meeting (Venue)	ENI	ExxonMobil	H&R/ Tuda-petrol	MOL	Repsol	Sasol	Dea (Shell)	Total
27/28 October 1999 (Munich)			**X**		**X**	**X**	**X**	**X**
3/4 February 2000 (Paris)			**X**	**X**	**X**	**X**	**X**	**X**
30/31 March 2000 (Munich)			**X**			**X**	**X**	**X**
25/26 May 2000 (Hamburg)			**X**		**X**	**X**	**X**	**X**
2/3 November 2000 (Paris)			**X**		**X**	**X**	**X**	
22/23 February 2001 (Budapest)		**X**	**X**	**X**	**X**	**X**		
26/27 April 2001 (Munich)		**X**	**X**		**X**		**X**	
26/27 June 2001 (Paris)		**X**	**X**		**X**	**X**	**X**	**X**
4/5 September 2001 (Vienna)		**X**	**X**	**X**		**X**	**X**	**X**
21/22 February 2002 (Budapest)	**X**	**X**	**X**	**X**		**X**	**X**	**X**
5 June 2002 (Budapest)	**X**		**X**	**X**		**X**	**X**	**X**
26/27 September 2002 (Vienna)	**X**		**X**		**X**		**X**	**X**
17/18 December 2002 (Budapest)	**X**	**X**	**X**	**X**	**X**	**X**	**X**	**X**
27/28 February 2003 (Munich)	**X**	**X**	**X**	**X**	**X**	**X**	**X**	**X**
16/17 April 2003 (Vienna)	**X**		**X**			**X**	**X**	**X**
10/11 July 2003 (Vienna)	**X**		**X**			**X**	**X**	**X**
24/25 September 2003 (Vienna)	**X**		**X**	**X**	**X**	**X**	**X**	**X**
14/15 January 2004 (Budapest)			**X**	**X**		**X**	**X**	**X**
11/12 May 2004 (Hamburg)			**X**	**X**		**X**	**X**	**X**
3/4 August 2004 (Vienna)	**X**		**X**	**X**		**X**	**X**	
3/4 November 2004 (Vienna)	**X**		**X**	**X**		**X**	**X**	
23/24 February 2005 (Hamburg)	**X**		**X**	**X**		**X**	**X**	

(125) For the purpose of this Decision the Commission considers the starting date of the infringement to be 3 September 1992 (for all the undertakings involved except for ENI, H&R/Tudapetrol, Repsol and some entities within the Shell group), when the first anti-competitive meeting (described in the following recital) took place for which the Commission has corroborating evidence.

(126) A […] note and a […] debriefing note show that a meeting took place on 3 and 4 September 1992.[119] It was attended by at least the representatives of ExxonMobil, […],[120] MOL, Sasol, Dea (today Shell) and Total.

The last line of the […] debriefing note reads […].[121] This shows that an agreement not to change prices was reached at that meeting. Sasol expected that the topic would be discussed again at the next Technical Meeting that was planned, according to the note found at […],[122] on 23/24 November 1992.[123]

A table produced by […][124] and found at […][125] contains information about past and planned future production volumes for a number of companies attending the meeting, as well as other companies. Handwritten notes taken by the […] representative show that these figures were discussed and, when appropriate, clarified at least with respect to Mobil (today ExxonMobil) and Agip (today ENI).[126] This confirms that the attendees to the meeting received and discussed information on volumes.

A second table found at […][127] contains import figures for paraffin wax and handwritten information on prices. This confirms that the attendees of the meeting discussed prices of imports. Shell, Sasol and ExxonMobil have not contested this finding.

The […] note of that meeting *inter alia* reads: […][128]. This shows that at least some of the attending representatives also disclosed prices charged by their undertakings to a particular sector.

(127) A meeting was planned for 20 October 1992 in Milan[129] but it is not known if it took place.

(128) A meeting took place as planned[130] on 23 and 24 November 1992 in Vienna. It was attended by at least representatives of ExxonMobil, […],[131] MOL, Sasol, Dea (today Shell) and Total.

A […] note taken at that meeting reads *inter alia*: […].[132] It was thus agreed that for the first quarter prices would be at least maintained ("minimal prices") and that information was to be exchanged.[133] The note also shows that the individuals

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130 […].
131 […].
132 […].
133 […].

representing the companies at the meeting exchanged information about planned volumes […][134]).

[…] contests the Commission's interpretation of the line in the […] note quoted in this recital, arguing that it is not clear which participant at the meeting made the noted statement. As no price is mentioned, it is, according to […], not possible to link this statement to a particular price. […] observes that […] has not confirmed the Commission's interpretation and suggests that the note could also mean that one of the participants announced its unilateral intention to fix minimum prices.[135]

The quoted line appears at the very end of the […] note, which suggests that a conclusion was reached at the end of the meeting after the undertakings represented had made individual statements in what appears to have been a round table discussion.[136] Given the recurring style of the […] notes – including the notes in question here –, any unilateral declaration would either have been made during that round table discussion or would have been attributed to one undertaking. The Commission therefore concludes that the line does not reflect a unilateral statement but an agreement reached at the end of the meeting after individual statements by the undertakings and discussions occurred. Given that the participants to the meeting charged differing prices, it is not surprising that the note does not mention uniform minimum prices. Rather, the note defines the prices (as charged by the different undertakings) of the […] of 1993 as the prices which should be kept, thus as minimum prices. While it is true that [...] has not confirmed this interpretation, such confirmation is not necessary for the Commission to be able to rely on a document which is self-explanatory. The Commission also observes that when a party informed others of its future conduct or when the conduct of a non-present company was predicted, the author of the […] notes usually attributed such statements to the undertaking in question or used expressions to identify one or several undertakings (for instance […]), see also recital (129). A statement which is not attributed to an undertaking in this way can therefore be assumed to reflect a general consensus of all those present.

(129) The next meeting took place in Budapest, however not as planned[137] on 4 and 5 March 1993 but on 26 March 1993.[138] Representatives of at least ExxonMobil, […],[139] MOL, Sasol, Dea (today Shell) and Total were present.[140]

The […] note taken at that meeting reads: […].[141] This shows that the individuals representing the companies at the meeting exchanged information on production capacities.

(130) A Technical Meeting took place on 2 June 1993 in London which was attended by at least representatives of […],[142] MOL, Sasol and Dea (today Shell).[143] The content of the discussions could not be clarified.

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134 […].
135 […].
136 […].
137 […].
138 […].
139 […].
140 […].
141 […].

(131) On 25 October 1993, a meeting took place in Hamburg.[144] That meeting was attended by at least representatives of MOL, Sasol (at the time HOS) and Dea (today Shell). Sasol also represented […].[145]

The […] debriefing note reads:[146] […]

This shows that the participating undertakings exchanged information on their future pricing policy and also agreed on that policy and on the prices themselves. Sasol confirms that the individuals representing the companies pushed for sought an agreement on prices.[147] It also confirms that, while the individuals representing the companies could not agree on prices regarding the candle business, Sasol, MOL and Shell/Dea agreed on prices for fully-refined paraffins and on semi-refined paraffins.[148] These results were to be communicated to, and discussed with Total, Mobil and Repsol.[149]

Total France S.A., while acknowledging that prices were discussed, denies that it was informed of this discussion. The Commission has, according to Total France S.A., confirmed that only Sasol, MOL and Shell/Dea came to an agreement.[150] The Commission observes that according to the notes, Total was expected to participate and only failed to do so for reasons outside its control (airline strike). Total was represented at the following meeting as well as at some of the previous ones and its participation in the arrangements was therefore assumed as a given by the other parties. Also, the Commission observes that the parties represented at the meeting agreed to decide on the goal for the first quarter of 1994 after consultation of the excused parties including Total. This is in line with the findings on the subsequent information of the absentees (see recital (102)).

As is apparent from the figures contained in that note, at least the absent representative of Mobil had submitted information on pricing that was discussed at the meeting.

This is confirmed by the […] note which reads:[151] […]

The […] note also shows that past price developments were discussed:[152] […]

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142 […].
143 […].
144 […].
145 […].
146 […]

147 […].
148 […].
149 […].
150 […].
151 […].

152 […].

(132) On 24 June 1994, a meeting took place in Budapest. It was attended by at least representatives of H&R/Tudapetrol,[153] MOL, Repsol, Sasol, Dea (today Shell) and Total.[154]

The […] note taken at the meeting shows that the individuals representing the companies exchanged information on maintenance of plants (for example […][155]). It was apparently also at that meeting that a table was distributed of which a copy was found at […].[156] According to its headline, it reflects the status quo as of 18 March 1994 and shows import and export figures for each undertaking.

(133) On 30 September 1994, a meeting took place in Paris. The meeting was attended by at least representatives of ExxonMobil, H&R/Tudapetrol, MOL, Repsol, Sasol and Total.[157]

A line in the […] note taken at the meeting reads[158] […]

indicating that the undertakings informed each other of planned price increases and took account of the situation of competitors when deciding on such increases. This is behaviour amounting to an agreement not to change prices, or at the very least, it can be considered a concerted practice.

[…] does not contest its participation at the meeting but denies that it had an anti-competitive content and states that […] was not aware of the above mentioned discussion.[159] As […] was present at the meeting, it cannot credibly deny knowledge of Mobil's statement which shows that Mobil and Total coordinated their market behaviour.

(134) It is not known if the meeting that was planned for 17 and 18 November 1994 in Paris[160] took place. A Technical Meeting took place on 27 January 1995 in Hamburg which was attended by at least representatives of H&R/Tudapetrol, MOL, Sasol, Total and most likely[161] ExxonMobil.[162] The […] note taken at the meeting mentions, *inter alia*, that German warehouses in general (and […], a paraffin wax customer, in particular) were asking for price cuts of […].[163]

[…] does not deny being present at that meeting but denies its anti-competitive content.[164] However, the exchange concerned commercially sensitive information which

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153 […].
154 […].
155 […].
156 […].
157 […].
158 […].
159 […].
160 […].
161 […].
162 […].
163 […].
164 […].

moreover cannot be considered in isolation as it was part of the overall plan to distort competition.

(135) On 16 and17 March 1995, a Technical meeting took place in Paris. An undated […] note[165] was produced at that meeting as demonstrated by a line that reads […][166] which is the next Technical Meeting known to the Commission. The meeting was attended by representatives of at least MOL, Repsol, Sasol and Dea (today Shell).[167]

A line of the […] note found reads […].[168] This shows that the individuals representing the companies fixed (or at the very least discussed) minimum prices. The individuals representing the companies also exchanged information about maintenance periods and their general pricing policy.[169]

[…].[170]

(136) A Technical Meeting took place on 22 and 23 June 1995 in Munich which was attended by representatives of at least Repsol and Sasol and most likely[171] ExxonMobil.[172]

[…].[173]

(137) A Technical meeting was organised on 7 and 8 September 1995 in Strasbourg. It was attended by at least representatives of H&R/Tudapetrol, MOL, Repsol, Sasol, Dea (today Shell) and Total.[174]

The respective […] note reads *inter alia*:[175] […]

This demonstrates that the individuals representing the companies at the meeting exchanged information on their future pricing policy and discussed and fixed price increases as well as minimum prices. This is corroborated by the […] debriefing note which *inter alia* reads:[176] […]

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165 […].
166 […].
167 […].
168 […].
169 […].
170 […].
171 […].
172 […].
173 […].
174 […].
175 […]

176 […]

[…] has confirmed that when asked at the meeting to give their view, the participants revealed their intention to increase prices by 1 January 1996.[177]

[…].[178]

[…] does not contest its participation at that meeting but denies its anti-competitive nature by arguing that no agreement was reached at the meeting because the […] note shows different prices for different undertakings and that the […] note reflects the author's own impressions of the discussion.[179] Contrary to […] assertion, however, the different prices for different undertakings do not show disagreement. The undertakings did not agree a uniform price level for all undertakings but rather specific prices for each undertaking. The […] note has probative value as it constitutes a debriefing of the discussions at the cartel meeting. […] argument that it merely contains the author's own impression is a mere assertion and is contradicted by […].[180] Moreover, the note shows the replies of individual participants to a specific question which were recorded after the usual round table discussion.

[…]., while acknowledging that information on prices, future pricing and prices increases was exchanged, denies that the participants reached agreement with respect to the actual increase, its amount and its timing.[181] When read in connection with […], however, the two notes reveal that at least some of the undertakings committed to a price increase for end 1995/1 January 1996. It is not surprising that the individual amounts (as mentioned in the […] note) differ for the individual undertakings as the goal of the participants was not to reach uniform prices but to achieve a price increase in the market while departing from different levels and operating in different conditions.

[…] declares that the information in that note stems from Moroccan customers of […] and is […].[182] […] also argues that […] generally left the Technical Meetings after technical issues were discussed and never attended any anti-competitive discussions.

This argument cannot be accepted. It follows from a number of indicia that the notes that were found during the inspections in […] were taken by […] in their entirety at the Technical Meetings. This consideration is based on the fact that most of the notes begin with a list of attendees, a venue and a date on the first page, and end with the date and venue of the next scheduled Technical Meeting on the last page. This also applies to the note on the September 1995 meeting.[183] The notes from one meeting were often taken on the same type of paper, sometimes with a letterhead of the hotel were the meeting took place. The various pages of the notes were sometimes numbered and all were found during the inspections in the order in which they appear in the file. It cannot be true, therefore, that […] left the meetings before such discussions began. Moreover, such behaviour has not been reported by any of the other companies represented at the

177 […].
178 […].
179 […].
180 […].
181 […].
182 […].
183 […].

Technical Meetings which would be expected at least with respect to those meetings that were organised by […] himself in Budapest. […] has confirmed that since 1999, […] has not left the Technical Meetings after technical issues were discussed, […].[184] Also, […] and […] have confirmed that […] did not leave the Technical Meetings early.[185]

[…] interpretation of […] notes of the meeting on 7 and 8 September 1995 is in the Commission's view equally put into doubt by the fact that the list noted down by […] counts 19 points of which at most three relate to information concerning the Moroccan market. Even with regard to these last points, and even if […] interpretation could be accepted, this exchange nevertheless shows that […], firstly, did leave the meeting after what […] calls technical discussions and that, secondly, he participated at the discussions by providing information.

(138) The next meeting took place as planned[186] on 16 and 17 November 1995 in Munich. It was attended by representatives of at least MOL, Repsol, Sasol and Total and most likely, ExxonMobil[187].[188]

The […] debriefing note[189] reveals that MOL was apparently planning to offer paraffin wax at Hungarian prices in Western Europe. According to the note, […] was […].[190] As MOL was present at the Technical Meeting, this journey was apparently planned after the Technical Meeting, possibly at the time when […] gave the debriefing at which the note was taken. The note reads: […].[191] This demonstrates that the individuals representing the companies at the meeting discussed their future pricing policy (although these strategies were ultimately not revealed[192]), had an agreement on market allocation in place and agreed to maintain prices in the period immediately after 1 January 1996 and to increase them during the course of 1996. The participants thus discussed and agreed upon their future attitude on the market. A decision not to change prices is also a decision to fix these prices.

[…], in addition to questioning the probative value of the […] debriefing note,[193] denies that prices were fixed at that meeting arguing that the line in the […] debriefing note quoted in this recital merely reflects […] wish to agree but is not evidence of an ultimate agreement.[194] Given that this debriefing note mirrors other, similar notes which accurately reflect the content of the anticompetitive meetings, […] argument is a mere assertion not supported by further information or evidence, the Commission maintains its finding that the quoted line of the […] debriefing note refers to the discussions at the Technical Meeting. Even if it were true that only […] had the desire to increase prices, the quoted line indicates at least an agreement on a common basis […] to maintain prices. That a discussion took place but may not have lead to a conclusion is further

184 […].
185 […].
186 […].
187 […].
188 […].
189 […].
190 […].
191 […].
192 […].
193 […].
194 […].

demonstrated by the next line of the document which reads: […].[195] In addition, […].[196] The content of the May 1996 meeting (see recital (140)) supports this view as a price increase was indeed fixed for the second half of 1996.

(139) A meeting took place on 22 and 23 February 1996 in Budapest. Attendees were representatives of at least H&R/Tudapetrol, MOL, Repsol, Sasol and Total.[197]

The individuals representing the companies agreed on the prices of paraffin wax and dipping wax as shown by the […] note which reads *inter alia*:[198] […]

[…].[199]

[…] contests its participation in that meeting and denies its anti-competitive content arguing that the […] note does not necessarily lead to the conclusion that an agreement was reached.[200] As to […] presence, the contemporaneous […] note, taken by […] who himself participated in the meeting, lists […], who worked for […] at the time.[201] […] criticises the Commission for not further substantiating its conclusion that […] was present at that meeting. Given that the name of […] is mentioned as a participant in a document that was written in *tempore non suspecto* and given that […] has not presented any evidence to support its position, the Commission concludes that since […] has not presented any evidence for its position to the contrary, the Commission maintains its view that […] was represented at this meeting. As to the content of the meeting, apparent from the self-explanatory content of the […] note, it must be noted that […] claim is not further substantiated, nor supported by any evidence, while according to both […], the meeting had an anti-competitive content.

(140) The following Technical Meeting took place as planned[202] on 14 and 15 May 1996 in Paris. It was attended by representatives of at least Repsol and Sasol[203] and most likely, ExxonMobil.[204]

The […] debriefing note, *inter alia* reads:[205] […]

The aim of that meeting was to fix a price increase for the second half of 1996.[206] The expression […] shows that at that meeting a round table discussion was also held and

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195 […].
196 […].
197 […].
198 […].
199 […].
200 […].
201 […].
202 […].
203 […].
204 […].
205 […]

206 […].

that there was consensus regarding a price increase. The information attributed to […] and […] indicates what was agreed for specific countries in this respect. The note further shows that the German and French undertakings involved agreed during the discussions to increase prices in the second half of 1996 in planning the increase of paraffin wax for candles on 1 August 1996. […].[207]

The agreement was further broken down to increases for paraffin wax used for tealights and gravelights respectively. An increase for Hungary was also foreseen, even though the exact date for this was left open. Although MOL did not participate in this meeting, it later agreed, according to Sasol (during a bilateral contact with Sasol), to increase its prices with effect of 15 August 1996 or 1 September 1996.[208]

[…].[209]

(141) The next Technical Meeting was organised on 17 and 18 September 1996 in Hamburg. That meeting was attended by representatives of at least H&R/Tudapetrol, MOL, Repsol, Sasol and Total.[210]

The […] debriefing note reads: […].[211] This shows that the individuals representing the companies at that meeting discussed and disclosed future pricing intentions.[212] The […] note taken at the meeting confirms that the individuals representing the companies also discussed their pricing strategies in relation to particular customers such as […].[213]

[…] appears to question the anti-competitive content of the meeting.[214] […].[215]

(142) A Technical Meeting took place as planned[216]on 14 and 15 November 1996 in Vienna. It was attended by representatives of at least MOL, Sasol and Total.[217]

The […] debriefing note reads: .[218] This demonstrates that at least the French producers (i.e. Mobil and Total) had agreed on prices.[219] Other undertakings exchanged information on prices.[220] This last conclusion is supported by the […] note showing, for example, that Esso charged […] to the customers […], that is to say ExxonMobil disclosed information on its pricing.[221]

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207 […].
208 […].
209 […].
210 […].
211 […].
212 […].
213 […].
214 […].
215 […].
216 […].
217 […].
218 […].
219 […].
220 […].
221 […].

[…] denies that it agreed on prices arguing that the […] note does not confirm the […] debriefing note which is, according to […], unreliable.[222] The Commission observes the generally high probative value of the […] debriefing notes[223] which were drafted in *tempore non suspecto* and that […] does not offer any support for its blank assertion that there was no agreement on price increases. The Commission also observes that an identical match between the […]ebriefing note and the […] note is not necessary for a finding of mutual support. It is normal that different drafters focus on different aspects of a meeting.

[…].[224]

(143) The next Technical Meeting was organised as planned[225] on 20 and 21 February 1997 near Paris. It was attended by representatives of at least ExxonMobil, Sasol and Total.[226]

The […] debriefing note[227] shows[228] that there was a discussion on volumes supplied by the French producers to German customers. […] appears to have asked the French producers to identify who supplied which volumes through which dealer.

(144) A Technical Meeting took place on 19 and 20 June 1997 in Budapest which was attended by representatives of at least MOL, Repsol and Total.[229]

The […] note taken at the meeting shows that the individuals representing the companies, at the very least, discussed sales to customers and the price of slack wax: […].[230]

[…].[231]

(145) On 30 and 31 October 1997, a Technical Meeting was held as planned[232] in Hamburg which was attended by representatives of at least Agip (today ENI), H&R/Tudapetrol, MOL, Repsol, Sasol, Dea (today Shell) and Total.[233]

The […] note contains a table[234] which reads: […]

The column titles refer to various product classes: […].[235] It contains prices (presumably quoted in DEM per ton) for large customers (more than 5 000 t

222 […].
223 […].
224 […].
225 […].
226 […].
227 […].
228 [...].
229 […].
230 […].
231 […].
232 […].
233 […].
234 […]

[presumably per year]), medium-size customers (2 000 to 5 000 t) and small customers (less than 2 000 t) as well as for slabs for these wax qualities.

This table corresponds to a large extent to the upper part of the table contained in a document titled […] which was found at […]. This document reads.[236] […]

The only difference between the upper part of this table and the one in the […] note is that the prices in the […] note appear to be quoted in DEM 1 ton while in this table, they are quoted per 100 kg.. As only parts of the documents match, it can be concluded that the table was partially read out by one of the undertakings present (presumably Sasol which often took the lead in the discussion on price increases) which explains why […] noted only part of it in the […] note and used prices per 100 kg instead of per ton.[237] […] appears to have subsequently obtained a paper copy of the document .

It should also be noted that […] stated at a later meeting on 5 and 6 May 1998 that it was […] (for 1 ton; see recital (147)) which corresponds to one of the figures displayed in the […] note. Moreover, at the meeting of 3 and 4 November 1998 (see recital (149)), […]. Both notes thus confirm that, during the meeting of 30 and 31 October 1997, there was an agreement to fix minimum prices.

The […] note further reads:[238] […]

As the line […] refers to the future, this note confirms that the participating companies agreed on a strategy to harmonise and to raise prices. The note concerns both paraffin waxes and slack wax. The note moreover reveals that the undertakings exchanged information about maintenance and general pricing strategy and allocated the customers […].

The small table at the end of the above quote shows that the participating companies committed to price increases and specific dates between 15 November 1997 and 1 January 1998. They thus coordinated their pricing behaviour.

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235 […].
236 […].
237 […].
238 […]

This is corroborated by the […] debriefing note which contains the following table:[239] […]

The price listed in the column […] of – […] corresponds to the one mentioned in the […] note and in the […] document quoted in this recital. The two tables corroborate each other at least with respect to the dates set for MOL, Total and Agip (today ENI) (for the latter also with regard to the extent of the price increase).

According to Sasol this table shows that all individuals representing the companies committed themselves to increase prices by […], that Total and Agip wanted to increase prices by […] and that this was to lead to a minimum price of […] (at least for Total).[240] The price increases by MOL, Total and Agip were to be implemented as of […],[241] as confirmed by […].[242]

While […] does not deny that it participated in that meeting as such, it contests that it committed itself to the increase, arguing that its name is not connected with a date or price in the […] note. […] contests the conclusions the Commission drew from the almost identical tables found at […], arguing that they merely contain prices for paraffin waxes and that the note taker from […] later drafted the second table. […] also contests the connection the Commission has identified between that meeting and the meeting on 5 and 6 May 1998, arguing that the discussion during the latter shows that no agreement was reached but merely a discussion took place on […].[243] With respect to the […] note on […], […] argues that it shows disagreement and that the small table at the end of that page does not prove who determined the increases and that the undertakings in question – who had cross-supply relationships – knew about it. On customer allocation, […] argues that the […] note does not constitute sufficient proof because it does not display any ratio of deliveries to the customers mentioned. According to […] interpretation of the note, the author has noted the prices that some producers charge for these customers.[244]

The Commission observes that […] has not provided supporting evidence for its claim. The documentary evidence displayed in this recital, when read together and with the […], show that […] also participated in the discussions leading to an agreement on the increase of prices. Even if, as […] argues, the second table was later drafted by […], both tables have an almost identical content and corroborate each other to a large extent. The Commission considers that a table with prices containing expressions such as […] that was drawn up during or shortly after the meeting must be taken to reflect anti-competitive discussions. As to the connection of this meeting with the one in May 1998, the Commission observes that it is not necessary for finding an agreement in the

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239 […]

240 […].
241 […].
242 […].
243 […].
244 […].

sense of Article 81(1) EC that such an agreement be concluded in any specific form or that it be implemented. […] contention that an event of non-implementation was discussed at the meeting in May 1998 does not, therefore, alter the Commission's conclusion. On the contrary, this supports the Commission's finding that the results of the Technical Meetings were monitored. Even […] itself concedes that […] may have been discussed. This leaves open the possibility that price increases were desirable for all those present. In both cases, the Commission's understanding is confirmed by […]. […] interpretation of the […] note on […] as not showing agreement is not convincing. Contrary to […] allegation, the note, reading […]. As to the small table at the end of that note, […] allegation that the dates of the price rise were determined without […] knowledge - despite their presence during the discussion – is not convincing, especially considering that the table in the […] note which shows the same dates for three of the present undertakings demonstrates that another participant, Sasol, was informed about the planned increases. That the […] note may be fragmentary does not alter its probative value as it was produced in *tempore non suspecto*. The two documents do not contradict each other, but rather do not focus on the same issue, depending on the interest of the drafter. Handwritten notes are often taken in telegraphic style and mention only some elements of what was said. Still, this does not mean that they could not be used as evidence, or that the Commission could not draw inferences from such notes in its assessment of all the evidence

[…] does not deny that it was represented at the meeting but argues that its representative, […], attended the meeting merely as a matter of courtesy to Sasol but did not play an active part at the meeting. […] maintains that […] made it clear to Sasol that he was not interested in such meetings. […] further argues that the information contained in the documents quoted in this recital cannot be traced back to […] and that, as far as the documents found at […] are concerned, they do not contain commercially relevant information. […] presumes that the documents are the result of market research. Furthermore, […] maintains that it did not increase its prices in 1998 for most of its products except for one, and that the increase of this latter product was not […] as suggested by the documents but rather approximately […]. […] also observes that the price differences between […] and the other companies mentioned in the quoted documents reveals that […] prices were low, a situation which would in […] view not be consistent with a participation in a cartel.[245]

Given that it is not denied that […] participated in the meeting, or claimed that he openly distanced himself, his motivation to do so is not relevant for the establishment of the existence of an infringement. […] had the option of leaving the meeting when anti-competitive matters were discussed but decided not to do so. With respect to the information contained in the documents found, such information cannot be considered to be commercially irrelevant. Given that the figures were discussed at the meeting, […] unsupported contention that the information was gained through market research is not credible. Whether […] indeed increased its prices is not relevant for the finding that […] was involved, at this meeting, in the fixing of prices. Whether or not […] participation in the cartel was commercially reasonable is equally irrelevant. The Commission also observes that […] does not deny that it increased its price for one

[245] […].

product which reinforces the conclusion based on the document on […] that […] was going to increase its prices on 1 January as confirmed by […].[246]

[…] shares the Commission's conclusion that the two largely identical tables quoted in this recital[247] were read out at the meeting, but it also infers from this that the information was in fact distributed by one participant at the meeting rather than exchanged between participants. The headline of the document […] supports, according to […], this conclusion. […] further argues that the Commission's interpretation of the small table at the end of the […] note[248] is erroneous because this table does not, according to […], show any agreement. […] does not support such a finding in […] view because of the general weakness of these statements which were in addition later modified and because […] on this issue. With respect to the […] at the meeting of 5 and 6 May 1998, […] offers the alternative explanation that […] had declared its wish to sell at […] but was not able to reach that price and therefore had to stick to its minimum price of […].[249]

All pieces of evidence concerning that meeting are to be viewed together: the two tables, the […] note (in particular the small table at its end), the […] debriefing note, […] and the […] note of the meeting of 5 and 6 May 1998. […] would be sufficient to establish the anti-competitive nature of the meeting. When put in context, all the individual pieces of evidence become mutually supportive and lead to the Commission's finding. It should also not be forgotten, that the Technical Meetings generally had the same structure (see recital (107)).

That a price increase was agreed upon is demonstrated by both the […] note and the […] debriefing note. Its amount is shown by the two tables, the […] debriefing note and the note concerning the meeting in May 1998. Even the precise amount of […] is quoted time and again with remarkable consistency. That one party may have read out the table does not exclude that its content became the subject of a discussion and agreement.

Equally, the headline of the document […] does not conflict with this understanding as the termination of prices and the internal notification of new prices in October 1997 naturally took place before the announcement of new prices which were, according to the table in the […] note, foreseen for late 1997 to early 1998. That such preparatory measures were taken before the Technical Meeting merely shows that at the very least […] expected that a new round of price increases would be agreed upon at the meeting. With respect to the interpretation of the small table at the end of the […] note, it should be noted that its context […] shows agreement on a price raise. The participants subsequently agreed on the time frame for its implementation as reflected in the small table.

[…] allegation that […] on this issue are contradictory cannot hold. […]. […]. […] alternative explanation of […] is, when seen against the background of the other evidence, not credible. As to […], it would not have made sense for […] to a specific price if such a price was not agreed upon beforehand.

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246 […].
247 […].
248 […].
249 […].

[…].[250]

(146) A Technical Meeting took place as planned[251] on 12 and 13 February 1998 in Milan which was attended by representatives of at least Sasol and Total.[252]

[…].[253] This was not contested by […].

(147) On 5 and 6 May 1998, a Technical Meeting was organised in Budapest.[254] It was attended by representatives of at least ExxonMobil, H&R/Tudapetrol, MOL, Repsol, Sasol and Total.

The […] note reads *inter alia*:[255] […]

This shows that […] had attempted to implement the price increase of […] agreed at the Technical Meeting of 30 and 31 October 1997 (see table quote above in recital (145)) - - this corresponds to the minimum price of […] for smaller units in the table). Furthermore, it shows that there was a discussion as to the link between the extent of the price increase and the existing price level (starting level) and thus as to what price increase was feasible. While […] appears to have agreed with the price increase as such, it pointed to the situation in 1997 when the apparently targeted price of […] (presumably DEM) was not possible to reach from the then existing price level. […] price at the time of the meeting was even lower, thereby making an increase of […] appear difficult to achieve. The note also shows that supply–sharing with regard to […], an important customer, was discussed. […] share was agreed while […] were apparently also interested. A sheet prepared by […] shows that the individuals representing the companies also discussed the volumes each of them sold in Europe.[256]

[…] argues that it was not involved in the allocation of supply quota or the fixing of prices for the above-mentioned customers.[257] The Commission observes, however, that […] does not deny that it was present at a meeting at which customer allocation and price fixing took place. […] also argues that it did not participate in an exchange of information, and in particular, that it did not provide input for the sheet prepared by […].[258] The Commission observes that the most likely explanation of how the data concerning […] was entered into […] is that […] provided such data. In any event, the note indicates that the data was indeed a point of discussion during the meeting.

[…]. argues that the Commission's finding that there was a discussion whether the next price increase should begin at a lower level is unfounded.[259] However, […] does not offer any alternative explanation to the part of the […] note which reads: […].

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250 […].
251 […].
252 […].
253 […].
254 […].
255 […]
256 […].
257 […].
258 […].
259 […].

[…].[260]

(148) The following Technical Meeting was convened as planned[261] on 2 and 3 September 1998 near Paris and was attended by representatives of at least Repsol, Sasol and Total.[262]

The […] debriefing note reads:[263] […]

This shows that the participants expressed their intention to increase prices by approximately […] in 1999 and that the details of that agreement were to be discussed in November, when, as the note also reveals, a […] was planned.[264]

[…].[265]

(149) The next Technical Meeting took place as planned[266] on 3 and 4 November 1998 in Vienna. It was attended by representatives of at least MOL, Sasol, Dea (today Shell) and Total.[267]

The […] note *inter alia* reads:[268] […]

This demonstrates that the individuals representing the relevant companies agreed on the price for the customers […], or at least exchanged prices for these customers.

The note found at […] *inter alia* reads:[269] […]

[…] indicating an agreement in October 1997 to fix certain minimum prices at […] which was thus still regarded as a valid benchmark at that meeting).[270] Customers were to be told that scarcity of raw materials was the cause of the price increase. The individuals representing the companies agreed that in any event prices should not decrease.

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260 […].
261 […].
262 […].
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264 […].
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269 […].
270 […].

[…] suggests that the prices mentioned in the […] notes were only those for […] itself.[271] This suggestion is not supported by the evidence and conflicts with the analysis in this recital. The note shows a clear link to previous discussions, in particular the […] benchmark, which certainly did not apply only to […]. In fact, other notes link it to […].

[…].[272]

(150) The following Technical Meeting took place on 12 and 13 January 1999 in Paris or Munich[273] and was attended by representatives of at least Sasol and Dea (today Shell).[274]

[…].[275] […].[276]

(151) A Technical Meeting took place on 2 and 3 March 1999 in Paris which was attended by representatives of at least Sasol and Dea (today Shell).[277]

[…].[278]

(152) On 8 and 9 March 1999, a meeting took place in Düsseldorf that concerned, *inter alia*, slack wax.[279] It was attended by representatives of at least Dea (today Shell) and Total.[280] Sasol does not exclude its participation.

[…].[281] […].[282] Therefore, the Commission considers that ExxonMobil also attended this meeting.

[…] denies that it was represented at this meeting and argues that […] on the nature of the contact is not corroborated as a fax from […] concerning the hotel reservation of […] only refers to a "visit" rather than to a "meeting". […] suggests that […] came to visit […]. […] further argues that no travel expense records exist for a trip of […] to Düsseldorf for these dates and that on 9 March 1999 he was in China[283]. […] and the fax show that […] had a meeting. Even […] does not deny that […] and a representative of […] met. That this meeting was labelled as a visit does not alter this finding. The evidence submitted by […] only shows that […] stayed in China from 9 to 11 March 1999. This does not exclude that he participated in a meeting on 8 March 1999. […] may also have been represented by another (or more than one) person.[284] Given that Sasol has not excluded being represented at the meeting and that […] took

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284 […].

part in discussions about slack wax, the Commission maintains its findings with respect to […] participation in this meeting.

[…] submits a handwritten note[285] which, it declares, has been written by […] in preparation for that meeting.[286] This would explain the last line of this note which reads […].[287] […] states that […], the label […] was using to refer to the companies usually participating in Technical Meetings.[288] The note contains the date at which the meeting took place which makes […] explanation that it was produced in preparation of the meeting plausible and consistent with other evidence. The note taken by […] shows that he expected individuals representing the different companies to exchange information on the supply of some large customers with slack wax. The day after that meeting, […] sent an e-mail to his superior, […], stating that […] intended to […].[289] A handwritten note on that e-mail reads […].[290] This shows that the individuals representing the companies at the meeting agreed on a price raise for slack wax in the particle board industry and that […] was going to implement that agreement as of June 1999. The reference to […] also shows that other undertakings, apart from […], must have participated in the meeting.

[…] maintains that the last line of […] note with the date was written with a different pen and that therefore this note has not been written in preparation of the meeting. As to the handwritten note on […] claims that this is only a unilateral declaration by […].[291]

The Commission observes, firstly, that both pieces of documentary evidence were produced in *tempore non suspecto*. When viewed together and taking into account […] explanation, the description presented above as to the content of the meeting appears to be the most plausible interpretation. Contrary to […] allegation, the price increase foreseen in […] was not a unilateral decision but, as can be seen from his handwritten note, reflected a common understanding among all cartel participants which, it must be assumed, had been expressed in the meeting the day before.

(153) A Technical Meeting took place on 13 and 14 April 1999 in Munich.[292] It was attended by representatives of at least ExxonMobil, H&R/Tudapetrol, MOL, Repsol, Sasol, Dea (today Shell) and Total.[293]

The […] note contains the following table:[294] […]

A similar but undated table was also found at […][295]: […]

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285 […].
286 […].
287 […].
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289 […].
290 […].
291 […].
292 […].
293 […].
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The Commission notes the following similarities and differences between the tables: […].

The Commission further considers that the tables show that the representatives at the meeting exchanged information on their products. […] argues that the table shows whether a producer had surplus amounts or large surplus amounts, without however substantiating such a position.[296] […] disputes the Commission's interpretation arguing that […] did not sell paraffin waxes and that its prices for hydrofinished wax were not increased in 1999; […] therefore suggests that the participants at the meeting made assumptions as […]. Furthermore, […].[297]

It can be inferred from the figures below the table of the first note that the discussion focused on price developments, not surplus amounts. As in previous meetings, this probably concerned strategies for the future and commitments for upcoming price increases which ultimately might not have been achieved (in all cases). This would explain why the table might not always have coincided with actual price developments which were later-on observed. […] does not deny its presence at the meeting, so there is no reason to consider that others needed to make assumptions as to […] behaviour (rather than requesting it directly from its representative at the meeting).

Further, the note shows that the individuals representing the companies agreed on prices for dipping wax as is demonstrated by the line in the […] note below the table as quoted in this recital.

[…] challenges the interpretation that the lines below the table quoted in this recital show agreement on prices[298]. Likewise, […] contests the finding that the participants agreed on prices for dipping wax.[299] However, neither […] nor […] submit any alternative interpretation of the information contained in the document.

[…].[300]

(154) The next Technical Meeting took place as planned[301] on 8 and 9 July 1999 in Vienna. Representatives of at least ExxonMobil, H&R/Tudapetrol, MOL, Repsol, Sasol, Dea (today Shell) and Total were present.[302]

An internal e-mail dated 28 June 1999 found at […][303] reads: […]. The Commission concludes that the participants discussed production limits and that […] promoted an agreement but no conclusion can be drawn on the actual outcome of the discussion. […].[304].[…].[305]

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302 […].
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304 […].
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(155) A Technical Meeting took place on 23 and 24 September 1999 in Budapest which was attended by representatives of at least H&R/Tudapetrol, Repsol, Sasol, Dea (today Shell) and Total.[306]

[…].[307]

(156) A Technical Meeting took place on 27 and 28 October 1999 near Munich with representatives of at least H&R/Tudapetrol, Repsol, Sasol, Dea (today Shell) and Total present.[308]

The […] debriefing note *inter alia* reads:[309] […]

[…].[310] […].[311] […].[312] […].[313]

The last two lines of that […] debriefing note demonstrate that there was an agreement to increase the prices […] by […] per 100 kg for liquid paraffin and by […] per 100 kg for packed paraffin. The symbol […] was used in the industry as shorthand for […].[314]

According to […], given that the indicated prices vary, this note merely shows that the undertakings announced the prices which they determined independently. Accordingly, the prices differ.[315] The Commission however observes firstly, that for packed paraffin only one common amount […] is mentioned, and, secondly, it was not unusual for participants of the cartel to agree on price increases with different price levels. This was due to a variety of reasons including the fact that they did not begin from the same starting base price. The Commission also stresses that the presentation of the facts in the document follows the usual round table procedure leading to an overall final conclusion. Even if the mentioned range of […] was the personal conclusion of the author of the note based on the declarations of the participants, this would not explain the statement in brackets following […], that the price increase could not be less than […] for liquid paraffin. Furthermore, the price increase for packed paraffin is the same for all participants and is not referred to in the previous declaration of the participants. The note is therefore an accurate account of the meeting's conclusion.

[…] further assumes that the note is the personal conclusion of the author rather than a true account of the meeting, because a general increase for all industries could not have

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been implemented.[316] However, the fact that a general price increase could not have been implemented has not been proven and in any case, the question of subsequent implementation does not alter the probative value of a document produced in *tempore non suspecto*. Moreover, the note at various points refers to input from third-parties […] which clearly reflects discussions with other cartel participants rather than personal conclusions.

[…], questioning the probative value of the […] debriefing note,[317] contests the Commission's interpretation by arguing that the information in the note was at least partly obtained outside the Technical Meeting. […] further suggests that the note merely shows an exchange of information or an appraisal by […] and that an agreement cannot be demonstrated by the note because of its generality.[318] For the reasons already stated, these claims are not convincing. In particular, the note is neither general (as it indicates precise prices increases/ranges) nor exclusively based on input received after the meeting. Moreover, other notes indicate when a participant disagreed during the normal round table discussion which is not the case in this note. In the following meeting, the problems with increasing prices for a particular customer as foreseen, were discussed (see recital (157)).

(157) A Technical Meeting was organised on 3 and 4 February 2000 in Paris.[319] It was attended by representatives of at least H&R/Tudapetrol, MOL, Repsol, Sasol, Dea (today Shell) and Total.[320]

Handwritten notes taken by […] *inter alia* read: "[…].[321]

[…] confirms that this means that the next price increase was to be implemented in May/June 2000.[322] […] assumes that that note merely reflects […] internal considerations on a price increase.[323] This is contradicted by the remaining part of the document.

The note reads further[324] […]

This shows that the individuals representing the companies discussed their strategy towards the customer […].[325] […] argues that the note refers to the past which does not increase market transparency and that no indications of future conduct can be deduced.[326] This is contradicted by the wording of the note that alludes to the present […] or to the future […]. This is supported by […] according to which MOL,

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320 […].
321 […].
322 […].
323 […].
324 […].
325 […].
326 […].

H&R/Tudapetrol and Total reported at that meeting about the ongoing implementation of a price increase that was previously agreed upon.[327]

This is corroborated by the […] debriefing note which *inter alia* reads:[328] […]

According to Sasol, the individuals representing the companies at the meeting discussed the possibility of increasing prices for the candle industry. They were not able to reach consensus on a price increase but intended to consider whether further increases as of 30 June 2000 were to be made.[329] The individuals representing the companies also tried to convince MOL of a future price increase of […] per 100 kg which would have led to a minimum price of […].[330] The document also shows that the individuals representing the companies discussed prices for a specific customer […] and exchanged views on the possibilities and difficulties of increasing prices for that customer. Also, MOL and Repsol announced past price increases. With respect to the other industries, it was decided not to increase prices generally for the time being, presumably after such an option had been discussed.

[…] contest these findings arguing that there was only a discussion on possible price developments which is to be regarded as a normal exchange of views and experiences. […] further argues that the word […] shows that a price increase at MOL was uncertain and that therefore there cannot have been an attempt to convince MOL. As to MOL's and Repsol's announcements of prices, […] argues that they only relate to one single customer and that from such announcements no information on the general future market behaviour can be deduced.[331]

The Commission does not consider a discussion focussing *inter alia* on whether the […] to be a normal exchange of views and experiences. The Commission observes that the meeting took place on 3 and 4 February 2000, that is, after the price increase of 1 February 2000 took place. But the document shows that MOL indeed increased its prices by […] as decided at the meeting of 27 and 28 October 1999 (see recital (156)). The expression […] meant that the participants thought it was likely that MOL would increase its prices.[332] As to MOL's and Repsol's announcement, […] interpretation that they only relate to one customer appears unfounded because in the line mentioning MOL, no customer name is mentioned and, with respect to Repsol, the reference to […] appears to be a mere example […] of a customer who continued to pay the old price.

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327 […].
328 […].

329 […].
330 […].
331 […].
332 […].

[…].[333]

(158) On 30 and 31 March 2000, a Technical Meeting took place in Munich which was attended by representatives of at least H&R/Tudapetrol, Sasol, Dea (today Shell) and Total.[334] Although […] point out that the content of the meeting is not known,[335] […].[336]

(159) On 25 and 26 May 2000, a Technical Meeting was organised in Hamburg and attended by representatives of at least H&R/Tudapetrol, Repsol, Sasol, Dea (today Shell) and Total.[337] […].[338] […] has also stated that prices for a specific customer were discussed at that meeting and that during that discussion, […] was accused of selling at prices that were too low, which it denied.[339] This is not contested by […].

[…] denies that prices were discussed, arguing that […].[340] At least for the general anti-competitive nature of the meeting, however, […]. further claims that this meeting shows that […] was the victim of agreements between […] directed against […].[341] There is no proof of such behaviour and should […] have considered itself a victim it could have brought the issue to the attention of the competition authorities, rather than to continue its participation in anti-competitive meetings.

(160) On 2 and 3 November 2000, a Technical Meeting took place in Paris which was attended by representatives of at least H&R/Tudapetrol, Repsol, Sasol and Dea (today Shell).[342] […].[343]

(161) On 22 and 23 February 2001, a Technical Meeting took place in Budapest and was attended by representatives of at least ExxonMobil, H&R/Tudapetrol, MOL, Repsol and Sasol.[344]

[…] denies that the meeting had an anti-competitive content.[345] […].[346] […].[347]

(162) A Technical Meeting took place on 26 and 27 April 2001 in Munich which was attended by representatives of at least ExxonMobil, H&R/Tudapetrol, Repsol and Dea (today Shell).[348]

[…] denies that the meeting had an anti-competitive content.[349] […].[350] […].[351]

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339 […].
340 […].
341 […].
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344 […].
345 […].
346 […].
347 […].
348 […].
349 […].

(163) A Technical Meeting was organised on 26 and 27 June 2001 in Paris. It was attended by representatives of at least ExxonMobil, H&R/Tudapetrol, Repsol, Sasol, Total and Dea (today Shell).[352]

[…] denies that it participated in the meeting arguing that the evidence concerning its presence is not corroborated.[353] However, the […] debriefing note[354] was drafted on 29 June 2001, thus only a few days after the event by […] who was himself not present at the Technical Meeting but took notes of a debriefing given by […] who represented […] at the meeting. The note thus constitutes indirect contemporaneous evidence – drafted *in tempore non suspecto*. It is a detailed account of the debriefing and is even initialled, presumably by […]. […] reinforces the findings of the Commission.

The […] debriefing note *inter alia* reads:[355] […]

This shows that the individuals representing the companies agreed on price increase for paraffin[356] of […] by 1 October 2001, preceded by a cancellation of all existing price arrangements beginning in the second half of that year and concluded by 30 September (apparently for customers of lesser interest first, then across the board, so that the first wave of increases for less important customers prepared the more valuable customers for the increase). […] confirms that a price increase was discussed at that meeting or in phone calls afterwards.[357]

[…] contests these findings by arguing that […] merely states that prices were discussed and that the […] debriefing note, according to […], merely reports subjective conclusions rather than an agreement. […] argues that the […] debriefing note displays the personal conclusions of the author of the note. According to […], an exchange of views on the necessity to increase prices does not constitute an infringement. Furthermore, […] points out that the […] note cannot have been an account of such a discussion because the progress of the discussion was not noted. The mention of special customers shows, according to […], that the note reflects unilateral views because each company would have different customers. Moreover, […] argues that the exchange of views on possible reasons for a price increase does not amount to an infringement – especially not among companies with cross-supply relationships – because the factors mentioned are obviously price-enhancing.[358]

[…] bases its arguments *inter alia* on the reply […] gave to a request for information by the Commission. […] argument that […] itself has qualified the note as a subjective conclusion is flawed. The relevant part of the question by the Commission reads: […].

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350 […].
351 […].
352 […].
353 […].
354 […].
355 […]

356 […].
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358 […].

[359] […] does not suggest that the note contains the author's conclusions, but unambiguously states that it displays the outcome […] of the meeting. […] […] can thus only refer to a common understanding reached during that meeting. The Commission therefore does not consider that the meeting was limited to exchanging views on the necessity to increase prices. Contrary to […], the fact that only the results or conclusions of the discussion were noted down, as […] confirms in […], does not mean that no discussion took place and that no agreement was eventually reached. Also, different cancellation dates for different types of customers does not necessarily lead to the conclusion that the notes were merely […] given that the factors that made these customers "special" were clearly spelt out and thus applied to all participants. Also, the cancellation for a certain type of customers was, as is apparent from the […] note quoted, only the first step before all other prices were to be cancelled at the end of August. As the note does not attribute a specific company to the statements, it can be concluded that they reflect the consensus reached at the meeting. In any event, even the discussion regarding the necessity to increase prices is anticompetitive, as it is, at least, a concerted practice.

[…] contests the Commission's finding on the ground that the […] debriefing note is not a reliable type of evidence.[360] This argument will be dealt with below.[361] The Commission furthermore observes that […] neither offers an alternative interpretation of the quoted note, nor denies its presence at the meeting.

[…].[362] […].[363]

(164) A Technical Meeting took place on 4 and 5 September 2001 in Vienna which was attended by representatives of at least ExxonMobil, H&R/Tudapetrol, MOL, Sasol, Dea (today Shell) and Total.[364]

[…] denies that the meeting had an anti-competitive content.[365] However, […].[366] […].[367]

(165) A Technical Meeting took place on 21 and 22 February 2002 in Budapest which was attended by representatives of at least ENI, ExxonMobil, H&R/Tudapetrol, MOL, Sasol, Dea/Shell (today Shell) and Total.[368]

With respect to the meeting's content, an internal note found at […] reads: […].[369] This shows that discussions on price levels took place. The result of this discussion was in line with […] previously adopted strategy of introducing new contractual models and new prices. […] did not therefore consider that it was required to change its strategy.

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[360] […].
[361] […].
[362] […].
[363] […].
[364] […].
[365] […].
[366] […].
[367] […].
[368] […].
[369] […].

[…] denies this finding, arguing that […] merely stated the possibility of increasing prices rather than a necessity to do so. […] further argues that the note found at […] accepted that there were differences between the markets and thus no concertation was aimed at or realised.[370] However, according to the note, the meeting […]. This shows that pricing strategies were discussed and that the discussion gave […] sufficient confidence that its pricing objectives could be achieved.

[…].[371] […].[372]

(166) A Technical Meeting was organised on 5 June 2002 in Budapest and attended by representatives of at least ENI, H&R/Tudapetrol, MOL, Sasol, Dea/Shell (today Shell) and Total.[373] The content of this meeting could not be ascertained.

(167) The next Technical Meeting took place on 26 and 27 September 2002 in Vienna and was attended by at least ENI, H&R/Tudapetrol, Repsol, Shell and Total.[374] […] denies the anti-competitive nature of this meeting.[375] […].[376]

(168) A Technical Meeting was held on 17 and 18 December 2002 in Budapest.[377] It was attended by representatives of ENI, ExxonMobil, H&R/Tudapetrol, MOL, Repsol, Sasol, Shell and Total.[378]

The Commission is in the possession of a […] debriefing note dated […]. Although it mentions no year,[379] it can be assumed that it reports from this Technical Meeting because no other known Technical Meeting was held on a 17 and 18 December.[380]

[…] denies its presence at that Technical Meeting. The […] debriefing note, however, with respect to […] which apparently wanted to increase its volumes, reads: […].[381] This shows that there was a discussion between […]. The Commission therefore concludes that […] was represented at that meeting. This is confirmed by […].[382]

The […] debriefing note reads, *inter alia*: […].[383] This shows that the individuals representing the companies at the meeting discussed MOL's pricing policy even though this discussion apparently did not (fully) clarify the situation, at least not from Sasol's perspective at the time of the debriefing. There is also a dated chart entitled […] which was distributed at the meeting.[384] The copy found at […] contains handwritten additions which show that the export figures were discussed during the meeting.[385] This

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382 […].
383 […].
384 […].
385 […].

note also contains other handwritten comments which read, *inter alia*: […].[386] This shows that the price of slack wax was discussed during that meeting.

[…] denies the anti-competitive content of that meeting and suggests that the […] note shows disagreement rather than agreement.[387] If information on maintenance was exchanged – of which […] claims to have no knowledge – […] argues that this was done in the normal course of business in relation to cross supplies.[388] The note nevertheless shows that the individuals representing the companies at the meeting discussed the allocation of volumes, exchanged information on future sales strategies, commented on each other's strategies and were expected and prepared to take the other participants' views into consideration. […].[389] […].[390]

(169) On 27 and 28 February 2003, a Technical Meeting was held in Munich and attended by representatives of ENI, ExxonMobil, H&R/Tudapetrol, MOL, Repsol, Sasol, Shell and Total.[391]

[…] denies that it was present at this meeting, arguing that it was not able to find travel expense records for any of its employees for these dates.[392] The Commission considers, however, that […] presence is established by the evidence quoted in the Annex.

[…].[393]

[…] contests that the meeting had an anti-competitive content.[394] […].[395] […].[396]

(170) A Technical Meeting was held on 16 and 17 April 2003 in Vienna. This meeting was attended by representatives of at least ENI[397], H&R/Tudapetrol, Sasol, Shell and Total.[398]

A dated manuscript note was found at […].[399] This note reads, *inter alia*: […].[400] This shows that the supply of the customer […] was discussed and that it was agreed that Sasol (at the time HOS) and Shell (who distributed paraffin under the trade mark of […]) would share this supply.[401]

[…] denies the anti-competitive content of this meeting[402] but, in addition to the content of the note, […].[403]

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401 […].
402 […].

(171) On 10 and 11 July 2003, a Technical Meeting was organised in Vienna which was attended at least by ENI[404], H&R/Tudapetrol, Sasol, Shell and Total.[405]

[…].[406]

(172) A Technical Meeting took place on 24 and 25 September 2003 in Vienna which was attended by representatives of at least ENI, H&R/Tudapetrol, MOL, Repsol, Sasol, Shell and Total.[407]

[…].[408]

(173) A Technical Meeting was held on 14 and 15 January 2004 in Budapest and attended by representatives of at least H&R/Tudapetrol, MOL, Sasol, Shell and Total.[409]

[…] declares that […] announced a price increase for 1 March 2004 by […] at this meeting, but never implemented this increase.[410] That […] announced a price increase is corroborated by a handwritten note taken by […] which reads: […] l[411]] […].[412] Another handwritten note by […]. Although this note is not dated, […] submits that it was taken at this meeting[413] which is supported by the fact that it mentions the next meeting to be held on 11 and 12 May 2004 in Hamburg which, according to the information available, was the indeed the Technical Meeting that followed the 14 and 15 January 2004 meeting.[414] The note shows that the individuals representing the companies exchanged information on their pricing policy in relation to customers […].[415]

[…] denies that it announced a price increase. With respect to the note by […] suggests that […] does not mean […]. It also refers to an e-mail by […] stating that no price increase was announced.[416] However, there is documentary evidence which demonstrates that […] indeed announced a price increase at the meeting: first the handwritten note by […][417] which […] has declared refers to […][418] and second an e-mail sent by […] which reads as follows: […].[419] Although this e-mail was written after […] which ultimately led to […] had started, […] appears to be credible as it relates to events that occurred only four months earlier. […] reference to […] as indicating that no price increase was announced is flawed because […] states that the increase was announced at the meeting but not to the market (as a first step to indeed increase the

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prices). Such implementation was however not necessary for demonstrating an agreement at the Technical Meeting. It is therefore immaterial if, as […], the meeting was not followed by an attempt to increase prices.[420] […].[421]

(174) On 11 and 12 May 2004, a Technical Meeting was held in Hamburg. It was attended by representatives of at least H&R/Tudapetrol, MOL, Sasol, Shell and Total.[422]

[…] states that […].[423] […] that a price increase was discussed at that meeting[424], and according to […], such an increase was agreed upon.[425] A manuscript note was found at […] which reads, *inter alia*:[426] […]

The Commission considers that the last line of this document shows that a price increase for slack wax was also agreed upon. From the overall context of the note, it can be inferred that the arrow preceding the price figure points to an agreed strategy for the future, namely, an envisaged price increase. The Commission observes that none of the parties have offered an alternative interpretation of the note.

[…] contests the anti-competitive nature of this meeting, arguing that […] merely announced its previous internal decision to raise prices, an announcement which […] considers to be innocent within cross-supply relationships.[427] […] confirms however, that the note reflects information on price increases which […] or another one of the […] producers disclosed[428] and […].[429]

[…] argues that the […] and contradicted by the note found at […].[430] The Commission, however, observes that […]. […], on the other hand, only relates to the note found at […] premises and fits within […] insofar as it confirms that a discussion on price increases took place.

(175) A Technical Meeting took place as planned[431] on 3 and 4 August 2004 in Vienna which was attended at least by representatives of ENI, H&R/Tudapetrol, MOL, Sasol and Shell.[432]

[…].[433]

[…] argues that the discussions during the meeting were merely a vague exchange of views.[434] […].[435]

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427 […].
428 […].
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431 […].
432 […].
433 […].

(176) On 3 and 4 November 2004, a Technical Meeting was organised as planned[436] in Vienna which was attended by representatives of at least ENI, H&R/Tudapetrol, MOL, Sasol and Shell.[437]

[…] that at that meeting, "[…].[438] […] that its representative […] announced a price increase of […] at that meeting.[439]

[…] contests the anti-competitive content of that meeting and questions in particular […],[440] however, not only […][441] but also […].[442] […] argues that […] announcement of prices took place within a cross-supply relationship.[443] […] cannot, however, explain why this announcement was made in the presence of companies that did not have a cross-supply relationship with […].

(177) The last Technical Meeting the Commission is aware of that took place before the inspections were carried out, was organised on 23 and 24 February 2005 in Hamburg. It was attended by representatives of at least ENI, H&R/Tudapetrol, MOL, Sasol and Shell.[444]

[…] that a price increase of […] was discussed at that meeting but declares that no agreement was reached.[445] A line on the […] note reads: […].[446]

[…] contests that the meeting had an anti-competitive content[447] but […].[448]

(178) Another Technical Meeting was planned for May 2005.[449]

5. APPLICATION OF ARTICLE 81 OF THE TREATY AND ARTICLE 53 OF THE EEA AGREEMENT TO THE PRESENT CASE

5.1. Applicability of the Treaty and the EEA Agreement

(179) The arrangements described in this Decision applied to the entire territory of the EEA where a demand for paraffin waxes and – for those undertakings identified in recital (1) slack wax existed, as the cartel members had sales in practically all the Member States and in the EFTA States that are parties to the EEA Agreement. The restrictive arrangements set out in this Decision therefore applied to all countries in the EEA,

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namely, the current EC Member States together with Norway, Liechtenstein and Iceland.

(180) Insofar as the arrangements affected competition in the Common Market and trade between Member States, Article 81 of the Treaty is applicable.

(181) The arrangements in question covered Austria, Sweden and Finland prior to their accession to the EC on 1 January 1995 and Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia prior to their accession to the Community on 1 May 2004.

(182) As regards the operation of the cartel in EFTA States which are part of the EEA ("EFTA/EEA States") and its effect upon trade between Member States and EFTA/EEA States or between EFTA/EEA States themselves, this falls under Article 53 of the EEA Agreement. The EEA Agreement, which contains provisions on competition analogous to the Treaty, came into force on 1 January 1994. The infringement described in this Decision is deemed to have started on 3 September 1992. The present Decision therefore includes the application as of 1 January 1994 of those rules (primarily Article 53(1) of the EEA Agreement) to the arrangements to which objection is taken. For the period prior to that date, during which the cartel operated, the only applicable provision for the present proceedings is Article 81 of the Treaty. Insofar as the cartel arrangements covered Austria, Finland, Iceland, Norway and Sweden (EFTA countries at the time), they were not caught by Article 81 of the Treaty.

(183) During the period 1 January to 31 December 1994, the provisions of the EEA Agreement applied to the EFTA countries which had joined the EEA (Austria, Finland, Iceland, Norway and Sweden). The cartel was thus a violation of Article 53 of the EEA Agreement as well as Article 81 of the Treaty, and the Commission is competent to apply both provisions. The restriction of competition in these five EFTA states during this one year period falls under Article 53 of the EEA Agreement.

(184) After the accession of Austria, Finland and Sweden to the EC on 1 January 1995, Article 81 of the Treaty became applicable to the cartel insofar as it affected those markets. The operation of the cartel in Norway and Iceland remained in violation of Article 53 of the EEA Agreement. As of 1 May 1995, Article 53 of the EEA Agreement became applicable insofar as the cartel affected the market of Liechtenstein.

(185) After the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia on 1 May 2004, Article 81 of the Treaty became applicable to the cartel insofar as it affected those markets.

(186) In practice, it follows that insofar as the cartel affected the markets of Austria, Finland, Norway and Sweden, it constituted a violation of the EEA and/or Community competition rules as of 1 January 1994. Insofar as it affected the markets of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia it constituted a violation of the EEA and/or Community competition rules as of 1 May 2004.

(187) The fact that MOL was based outside the Community for a part of the time of the infringement does not rule out the applicability of both Article 81 of the Treaty and Article 53 of the EEA Agreement to it, as for these provisions to be applicable it

suffices that the anti-competitive conduct in question affects trade within the Community and the EEA.[450]

(188) Consequently, MOL's participation in the cartel was, prior to the enlargement of the European Community on 1 May 2004, an infringement of Article 81 of the Treaty and of Article 53 of the EEA Agreement as MOL participated in a cartel that affected markets within the Community and EEA that were covered by these provisions.

(189) MOL claims that the Statement of Objections does not properly establish jurisdiction prior to May 2004 as the Commission does not identify a test (single entity doctrine[451], implementation doctrine[452] and effects doctrine[453]) which would allow it to exercise extraterritorial jurisdiction. MOL states that, firstly, the Statement of Objection cannot show that Mineralimpex, Mol-Chem or MOL had a subsidiary in the Community prior to Hungary's accession to the Community in May 2004 as such foreign subsidiaries did not exist. Secondly, MOL states that the Statement of Objections fails to demonstrate that MOL implemented the alleged cartel in the sense of the *Woodpulp* judgment. Thirdly, MOL states that the Statement of Objections also fails to demonstrate an effect of MOL's action in the Single European Market prior to Hungary's accession to the Community. MOL argues that when the Commission tries to establish effect on trade between Member States, it only refers to judgments relating to companies which had a presence in the Community at the time of the infringement.

(190) The Commission does not share MOL's view as Article 81 of the Treaty applies irrespective of where an undertaking is located. Article 81 of the Treaty may apply to agreements and practices that also cover third countries and are entered into or conducted by undertakings established in those countries provided that the agreements and practices are capable of restricting competition in the Community.[454] Under the effects doctrine, as cited by MOL, jurisdiction can be established on the basis of economic effects within a territory, and MOL, as well as the other cartel participants, had sales in several Member States.[455] When agreements and practices produce effects within the Community, they may well affect trade within the Community. The fact that the Statement of Objections does not explicitly refer to the *Gencor* judgment does not mean that the effects argument cannot be relied upon, as the relevant issue is whether the agreements produced or could produce an effect within the Community or not.

(191) In addition, the Commission is also of the view that the agreements were partially implemented, although not always successfully or at least produced an effect inside the Community. Thus, it can be concluded that the Commission has jurisdiction to hold MOL liable for the infringement of Article 81 prior to its accession to the Community.

(192) MOL claims that the activities of Mineralimpex and Mol-Chem were actively encouraged by the Hungarian State. MOL argues that it is settled case law that Article

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450 See Joined Cases 89/85, 104/85, 114/85, 116/85,117/85 and 125/85 to 129/85, *Åhlström and Others v Commission* [1988] ECR 5193.

451 Case 48/69, *Imperial Chemical Industries Ltd v. Commission*, [1972] ECR 619.

452 See Joined Cases 89/85, 104/85, 114/85, 116/85,117/85 and 125/85 to 129/85, *Åhlström and Others v Commission* [1988] ECR 5193.

453 Case T-102/96, *Gencor Ltd v. Commission*, [1999] ECR II-753.

454 See Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, Official Journal C 101, 27.04.2004, p. 81-96, para 100.

455 […].

81 of the Treaty does not apply if the anti-competitive conduct is required under national legislation or policy. MOL further explains that competition legislation was only introduced in Hungary in 1996, that Hungary is an ex-communist country and that a change only came about in 1989 and that in practice it took years to change the socialist market system into a market-based economy. Moreover, MOL states that the predecessors of MOL, Mineralimpex and Mol-Chem started their business activities under the socialist economic system, which was characterised by strong State control, and that MOL continued to be effectively controlled by, and was required to follow the instructions of entities of the Hungarian Government which expected MOL to meet previously established production and trading targets and to use all possible means in order to do so. Thus, MOL was simply not free to decide its own business behaviour until at least 1996.[456]

(193) The Commission notes that MOL has not adduced evidence that MOL was subjected to any binding regulation imposing anti-competitive conduct upon MOL by the State or that it was otherwise under irresistible pressure to do so.[457] The Commission thus considers that MOL was in a position to respect the law but chose not to do so. MOL's argument cannot, therefore, be accepted. The Commission also considers that MOL has not demonstrated that it was indeed not free to decide its business behaviour in the post-communist system before 1996.

5.2. Jurisdiction

(194) In the present case, the Commission is the competent authority to apply both Article 81 of the Treaty and Article 53 of the EEA Agreement on the basis of Article 56 of the EEA Agreement, as the cartel had an appreciable effect on trade between Member States (see also section 5.7).

5.3. The Nature of the Infringement in the Present Case

5.3.1. Principles

(195) Article 81 of the Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production and markets, or share markets or sources of supply.

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

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456 […].

457 See Case T-65/99 *Strintzis Lines Shipping SA v Commission* [2003] ECR II-05433, paragraphs 119-123.

(197) Article 81 of the Treaty and Article 53 EEA prohibit agreements between undertakings, decisions of associations of undertakings and concerted practices.[458]

(198) An agreement can be said to exist when parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The agreement may be express, or implicit in the behaviour of the parties. Furthermore, it is not necessary for the participants to have agreed in advance upon a comprehensive common plan in order for there to be an infringement of Article 81 of the Treaty. The concept of agreement in Article 81 of the Treaty would apply to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement.

(199) In its judgement in *PVC II* case[459], the Court of First Instance stated that *"it is well established in the case law that for there to be an agreement within the meaning of Article [81] of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way"*.[460]

(200) Although Article 81 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 these Articles a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition.[461]

(201) The criteria of co-ordination and co-operation laid down by the case law of the Court, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must independently determine the commercial policy which it intends to adopt in the common market. Although that requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.[462]

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458 The case law of the Court of Justice and the Court of First Instance in relation to the interpretation of Article 81 of the Treaty applies equally to Article 53 of the EEA Agreement. See recitals No 4 and 15 as well as Article 6 of the EEA Agreement and Article 3(2) of the EEA Surveillance and Court Agreement. Reference will therefore be made only to Article 81 in the following, it being understood that the same considerations apply to Article 53 of the EEA Agreement.

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

460 The case law of the Court of Justice and the Court of First Instance in relation to the interpretation of Article 81 of the Treaty applies equally to Article 53 of the EEA Agreement. See recitals No 4 and 15 as well as Article 6 of the EEA Agreement, Article 3(2) of the EEA Surveillance and Court Agreement, as well as Case E-1/94 of 16.12.1994, recitals 32-35. References in this text to Article 81 therefore apply also to Article 53.

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

462 Joined Cases 40-48/73 etc. *Suiker Unie and others v Commission* [1975] ECR 1663.

(202) Thus, conduct may fall under Article 81 of the Treaty as a concerted practice even where the parties have not explicitly subscribed to a common plan defining their action in the market, but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour.[463] Furthermore, the process of negotiation and preparation effectively culminating in the adoption of an overall plan to regulate the market may well also (depending on the circumstances) be correctly characterised as a concerted practice.

(203) Although in terms of Article 81 of the Treaty the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period of time. Such a concerted practice is caught by Article 81 of the Treaty even in the absence of anti-competitive effects on the market.[464]

(204) Moreover, it is established case law that the exchange, between undertakings in pursuance of a cartel falling under Article 81 of the Treaty, of information concerning their respective deliveries, which not only covers past deliveries but is intended to facilitate the constant monitoring of current deliveries in order to ensure that the cartel is sufficiently effective, constitutes a concerted practice within the meaning of that article.[465]

(205) However, it is not necessary for the Commission to characterise the conduct as exclusively one or other of these forms of illegal behaviour, particularly in the case of a complex infringement of long duration. The concepts of agreement and concerted practice are fluid and may overlap. The anti-competitive behaviour may well have varied from time to time, or its mechanisms may have been adapted or strengthened to take account of new developments. Indeed, it may not even be possible to make such a distinction, as an infringement may simultaneously present the characteristics of each form of prohibited conduct, while when considered in isolation, some of its manifestations could accurately be described as one rather than the other. It would be analytically artificial, however, to sub-divide what is clearly a continuing common enterprise with a single overall objective into several different forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time. Article 81 of the Treaty lays down no specific category for a complex infringement of the type described in this Decision.[466]

(206) In circumstances where there are several cartel members and their anti-competitive behaviour over time can be characterised as either agreements or concerted practices

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463 See also Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, paragraph 256.

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

465 See, in this sense, Cases T-147/89, T-148/89 and T-151/89, *Société Métallurgique de Normandie v Commission, Trefilunion v Commission* and *Société des treillis et panneaux soudés v Commission*, respectively, paragraph 72.

466 See again Case T-7/89 *Hercules v Commission*, paragraph 264.

(complex infringements), the Commission is not required to classify each type of behaviour.[467]

(207) An agreement for the purposes of Article 81 of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract at civil law. Moreover, in the case of a complex cartel of long duration, the term "agreement" can properly be applied not only to any overall plan or to the terms expressly agreed upon, but also to the implementation of what has been agreed upon on the basis that they are characterised by the same mechanisms and are in pursuance of the same common purpose. As the Court of Justice has stated, it follows from the express terms of Article 81 of the Treaty that an agreement may consist not only of an isolated act but also in a series of acts or a course of conduct.[468]

(208) If, for instance, an undertaking is present at meetings in which the parties agree on certain behaviour on the market, it may be held liable for an infringement even where its own conduct on the market does not comply with the conduct agreed.[469] It is also well-settled case law that "*the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose is not such as to relieve it of full responsibility for the fact that it participated in the cartel, if it has not publicly distanced itself from what was agreed in the meetings"*.[470] Such distancing should have taken the form of an announcement by the company, for instance, that it would take no further part in the meetings (and therefore did not wish to be invited to them).

(209) According to the case law, the Commission must show precise and consistent evidence to establish the existence of an infringement of Article 81 of the Treaty. It is not necessary, however, for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the Commission, viewed as a whole, meets that requirement. It is in fact normal that agreements and practices prohibited by Article 81 of the Treaty assume a clandestine character and that associated documentation is fragmentary and sparse. In most cases therefore, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.[471]

5.3.2. Application

(210) It is demonstrated by the facts described in Chapter 4 of the present Decision that all undertakings subject to the present procedure were involved in collusive activities

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[467] See Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and others v Commission* (PVC II), [1999] ECR II-931, paragraph 696: *"[i]n the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by article [81] of the Treaty"*.

[468] See Case C-49/92P *Commission v Anic Partecipazioni SpA*, [1999] ECR I-4125, paragraph 81.

[469] Case T-334/94 *Sarrió v Commission* [1998] ECR II-01439, paragraph 118.

[470] Case T-56/99 *Marlines SA v Commission*, [2003] ECR II-5225, paragraph 61.

[471] Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg and others v Commission*, [2004] ECR p. I-123, paragraphs 53-57 and joined cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP *Dresdner Bank AG and Others v Commission*, judgement of 27 September 2006 (not yet published), paragraphs 59-67.

concerning paraffin waxes and, for those companies identified in recital (1), slack wax during the periods identified in recital (610) and regularly attended meetings at which the following items were at issue:

(1) price fixing, see section 5.3.2.2;

(2) for those companies identified in recital (2), customer and/or market allocation, see section 5.3.2.3;

(3) disclosure and exchange of commercially sensitive information, in particular information relating to customers, pricing, production capacities and sales volumes, see section 5.3.2.4.

5.3.2.1. General Arguments of the Parties and Assessment

(211) Insofar as the undertakings concerned contest the Commission's findings regarding the anti-competitive content of specific Technical Meetings, these arguments have been dealt with in section 4.2. In this section, the Commission has concentrated on arguments of a more general scope.

(212) […] generally claim that the evidence in the Commission's possession is not sufficient to establish their participation in the cartel as described by the Commission.

(213) Taking into account the principles described in recital (209), the Commission observes that the overall participation of these undertakings in the cartel is established on the basis of the contemporaneous evidence gathered during the investigation and the […]. Even […] do not, and in view of the evidence cannot, contest that they participated in numerous Technical Meetings as described in chapter 4. The arguments of these undertakings as regards the anti-competitive content of the Technical Meetings have also been dealt with in Chapter 4.

(214) Several undertakings have questioned the probative value of the available evidence, particularly the corporate statements of the immunity applicant and the leniency applicants. They also point to instances of alleged inconsistencies in such statements.[472]

(215) The Commission has weighted the available evidence according to its respective probative value. Inconsistencies between different pieces of evidence were taken into account when the evidence was evaluated. While it is true that the […] debriefing notes do not constitute the most direct evidence because they were not taken by a participant during the Technical Meetings, they nevertheless have a high probative value as contemporaneous documentary evidence which was drafted *in tempore non suspecto* and shortly after each Technical Meeting. The fact that a person writing a contemporaneous note about a meeting did not himself attend that meeting (but was informed about its content by a participant) does not affect the evidentiary value of the document.[473] Given that […] had no reason to mislead his colleagues or superiors as to the issues of the meeting, the content of the note can be considered reliable. This holds even more true for the […] notes because they were prepared during the meetings and they therefore constitute direct contemporaneous evidence. As to the […], the

[472] […].

[473] Cf. paragraph 86 of the CFI judgment of 10 March 1992 in case T-11/89, *Shell / Commission*, [1992] ECR II-757: "*The fact that the information is reported second hand is immaterial.*"

Commission observes that they contain highly self-incriminating information and were independently submitted by the undertakings after mature reflection and in the context of the 2002 Leniency Notice which contains, at point 12, certain obligations for the applicant the violation of which can lead to a refusal of beneficial treatment under the Notice. While all the available evidence may differ in the details (which was taken into account when the evidence was assessed), it is, when viewed together, mutually supportive as to the general features and many details of the cartel. Moreover, even if the content of certain meetings or certain other details are not fully documented, the anti-competitive purpose of the general arrangements is well established.[474]

(216) More specifically, […] question the credibility of […] and refer to inconsistencies, a tendency to incriminate other parties and pressure to provide evidence of significant added value.

(217) The Commission cannot accept that reasoning. There is no provision or any general principle of Community law that prohibits the Commission from relying, as against an undertaking, on statements made by other incriminated undertakings.[475] Admittedly, […] after the material events and for the purpose of application of the 2002 Leniency Notice. They cannot however be regarded as devoid of probative value. Statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence.[476] The fact that they were seeking to benefit from the application of the 2002 Leniency Notice in order to obtain a reduction of the fine does not as such create an incentive to submit distorted evidence. Indeed, any attempt to mislead the Commission could call into question the sincerity and completeness of cooperation of the person seeking to benefit, thereby jeopardising his chances of benefiting from the 2002 Leniency Notice.[477] Where statements containing inaccuracies are corrected in a later statement, this merely means that the probative value of such statements must be carefully analysed, but does not in itself render the testimony worthless. In fact, recollection of facts does not need to be perfect in order to be credible. Moreover, […] do not tend to exculpate themselves or tone down their roles in the cartel. […]. The Commission further notes that evidence of the infringement is also found in the parties' replies to the requests for information. It is clear from the case law that answers given on behalf on an undertaking are of high probative value.[478]

(218) As to the […] notes and the […] debriefing notes, […] argued that they do not reflect the true content of the discussions. The Commission does not accept these arguments. Both the […] notes and the […] debriefing notes are contemporaneous documents found during the inspections. The […] notes constitute minutes of meetings […]

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474 As the Court of First Instance has ruled in *JFE, "it would be too easy for an undertaking guilty of an infringement to escape any penalty if it was entitled to base its argument on the vagueness of the information produced regarding the operation of an illegal agreement in circumstances in which the existence and anti-competitive purpose of the agreement had nevertheless been sufficiently established'* (paragraph 203).

475 Joined cases T-67/00, T-68/00, T-71/00 and T-78/00, *JFE Engineering Corp a.o v Commission*, [2004] ECR p. II-02501, paragraph 192.

476 Joined Cases T-67/00, T 68/00, T-71/00 and T-78/00, *JFE Engineering v Commission*, [2004] ECR II-2501, paragraph 211.

477 Judgement of 16 November 2006 in Case T-120/04, *Peróxidos Orgánicos, SA v Commission*, not yet reported, paragraph 70.

478 Joined cases T-67/00, T-68/00, T-71/00 and T-78/00, *JFE Engineering Corp a.o v Commission*, [2004] ECR p. II-02501, paragraph 205.

attended himself and a record of the discussions during such meetings. The notes are detailed, structured (some times with tables, bullets or numbered items) with a relatively high level of precision. The Commission observes that despite their claims, neither […] nor […] have been able to provide evidence of the same qualitative value providing an alternative explanation.

(219) […] argues that the evidence regarding the structure of the Technical Meetings is contradictory.[479] The Commission considers however that the evidence demonstrates that the meetings usually followed the pattern described in section 4.1 […].[480] […] further claims that the evidence does not support the conclusion that all participants to the meeting were involved in anti-competitive discussions, arguing that […], upon which the Commission relied, were contradictory in this respect and that […] alone could not support the Commission's allegation as the other leniency statements were too vague to corroborate this.[481] Prior to the Statement of Objections however, […].[482] […], this demonstrates that all attendants at the meeting were involved in the anti-competitive discussions and were aware of what they were doing.

(220) […] suggests that the cartel took place via bilateral contacts outside the Technical Meetings in which […] was not involved.[483] This is contradicted by both the […] and by documentary evidence, including those pieces of evidence originating from […], showing that the Technical Meetings themselves had an anti-competitive content (see for details section 4.2).

(221) […] claims that it was only interested in and understood only the first part of the Technical Meetings when technical issues were discussed.[484] The Commission observes that […] does not, and given the evidence described in chapter 4 indeed cannot, claim not to have attended the parts of the meetings devoted to anti-competitive discussions. Even if it were true that […] was not interested in or did not understand these discussions, this would not alter the Commission's findings. It is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs.[485]

(222) […] claims that it only participated in innocent technical discussions. […] relies in this respect on an affidavit of […] and questions the consistency of the evidence on the general structure of the meetings.[486] […] offers an alternative explanation of the facts and relies in particular on the affidavit by […] stating that he did not witness any anti-competitive discussions during the meetings but only participated in technical

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479 […].
480 […].
481 […].
482 […].
483 […].
484 […].
485 See Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 155, and Case C-49/92 P *Commission* v *Anic* [1999] ECR I-4125, paragraph 96.
486 […].

discussions which were dominated by […]. […] states that some participants in the Technical Meetings would meet up in the hotel bar the evening before the Technical Meeting but that […] would rarely join. […] suggests that, after the Technical Meeting, the other participants may have stayed behind at the meeting room after […] had left and that the anti-competitive discussions may have taken place after he had left.[487]

(223) The Commission observes that […] is the only undertaking offering this alternative interpretation of the facts. […] the facts as presented in the Statement of Objections that the meetings were held as a single meeting. Given that a number of […] notes also show significant similarities with the […] debriefing notes (see section 4.2 for details), the Commission considers that the Technical Meetings took place as a single meeting where the anti-competitive discussions were an integral part. The Commission considers that the notes that were found during the inspections in […] were taken by […] in their entirety at the Technical Meetings. First, this consideration is based on the fact that most of the notes begin with a list of attendees, a venue and a date on the first page and end with the date and venue of the next scheduled Technical Meeting on their last page. Such appointments are normally made at the end of the meetings, which clearly suggests that […] was present for the entire duration of the meetings. At the hearing, […] argued that the appointments for the next meeting were determined at the end of the technical part of the meeting. […] notes, however, contain a lot of information that does not correspond to the technical part before he noted down the details of the next meeting. Second, the notes from one meeting were often taken on the same type of paper, sometimes with a letter head of the hotel were the meeting took place. The various pages of the notes were sometimes numbered and all were found during the inspections in the order in which they appear in the file. It cannot be, therefore, that […] left the meetings before such discussions began. Third, systematically leaving the meeting after the technical part was not reported by any of the other companies represented at the Technical Meetings as would be expected. As […] organised a number of meetings which took place in […],[488] the Commission considers that his alleged early departure from the meeting would have certainly be noted by the other participants which is not the case. Fourth, the Commission also observes that the […] notes, in particular when viewed in context with other evidence, show that anti-competitive discussions took place in the presence of […]. Fifth, certain pieces of evidence explicitly show that […] left the venue of the meetings in the afternoon, that is to say, at a time when the entire meeting had usually ended.[489] […] was also occasionally invited to the hotel bar or elsewhere.[490] […] does not deny that […] occasionally joined his colleagues.[491] Finally, as to […], the Commission observes that it was drafted, unlike much of the evidence the Commission relies on, after the investigation started, that is to say, not *in tempore non suspecto*. It is contradicted by the bulk of the other available evidence. With respect to […], the Commission has assessed the available evidence including […] as shown in section 4.2.

(224) When confronted by the letter of 17 January 2008 and the inconsistencies between the evidence as presented in the Statement of Objections and […], […] maintained that

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487 […].
488 […].
489 […].
490 […].
491 […].

[…] was reconcilable with the findings of the Statement of Objections[492] and that […] was […]. […] explains further that the Technical Meetings […].[493] The Commission observes that this latter statement is, at least in relation to the meetings to which the documents quoted in footnote 489 relate, not correct.

(225) […] maintains that, while it was interested in the technical aspects of the Technical Meetings it was not able to contextualise the possible mentioning of commercial information or prices.[494] […] also observes that the Technical Meetings had differing structures.[495]

(226) As demonstrated in chapter 4, […] was represented at numerous Technical Meetings which also served, in addition to discussing technical subjects, to fix prices, – for those companies identified in recital (1) to allocate customers and markets, and to exchange commercially sensitive information. Even if it were true that […] was not able to fully appreciate the discussion – for which no evidence is available – this would not change the Commission's findings as […] was, by virtue of its participation at the Technical Meetings, a member of the cartel. While it is true that the structure of the Technical Meetings slightly evolved over time, this does not alter the Commission's findings as the anti-competitive content of the meetings was maintained. The Commission observes that […] does not – and in view of the available evidence indeed cannot – suggest that its representative left the Technical Meetings after the technical issues were discussed. Had that occurred, it would have been noted by at least one of the other participants which is not the case.

(227) […] claims that it was only interested in the technical part of the meetings and considered the meetings to have no anti-competitive content.[496] […] nevertheless participated in a number of meetings at which anti-competitive issues were discussed as demonstrated in chapter 4.

(228) […] also claimed at the oral hearing that its representative at the Technical Meetings after 2002 believed the Technical Meetings to be meetings of […]. The Commission does not understand how such a misconception could have occurred given that the invitation, the organisation and the operation of the Technical Meetings were quite different from meetings organised by […]. In any event, this would not alter […] liability, as it is the content of the discussions that constitutes the infringement, rather than the format of those discussions.

(229) Thus, on the basis of the inspection documents, […] and the parties' replies to the Commission's request for information, the Commission has established that the undertakings in question have participated in an anti-competitive practice. In such circumstances, it is for […] and […] to produce evidence that explains their conduct in a way that is consistent with competitive behaviour.[497] In the Commission's view, no such proof has been provided. […] have not produced a different, coherent explanation

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492 […].
493 […].
494 […].
495 […].
496 […].
497 Joined cases C-204/00 P etc *Aalborg Portland and others v Commission* [2004] ECR I-123, paragraph 132.

of the circumstances and indications than that on which the Commission relies.[498] In particular, they have not given any convincing explanation or justification as to another purpose (and content) of the meetings and discussions.

(230) […] argue that they were not involved in the anti-competitive discussions.

(231) The Commission cannot accept these arguments. Considering that there are several undertakings involved, that the cartel concerns several product categories, that in the handwritten notes relating to the meetings there are not only expressions such as "agreed", "agreement" or "to lead" but also reports on exchange of information, that the discussions relate to a range of countries and that the participants attempted to prevent detection, the Commission is not required to precisely define, for each occasion, whether the conduct of each undertaking constitutes an agreement or a concerted practice. As to the argument that […] did not enter any agreement or concerted practice, it is sufficient to state that it is established that they participated in the cartel meetings and that it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs. Since the undertakings have not provided such evidence, it can be concluded that they are liable for the infringement. The Commission also notes that the case law states that the condition of reciprocity of a concerted practice is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it.[499]

(232) […] claims that there was no concurrence of wills between […] and the other undertakings involved and, hence, no agreement.[500] The Commission considers that, in application of the standards mentioned in section 5.3.1 and 5.4.1, the necessary subscription to the overall economic plan of the cartel by […] has been demonstrated (see recital (272)). Moreover, the Commission observes that […] was one of the most regular participants at the Technical Meetings and considers that […] involvement in the anti-competitive discussions has been sufficiently demonstrated. The Commission observes that […] has not put forward any evidence showing that […] representative was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs. To the contrary, none of the available evidence suggests any such disagreement of […] with the discussions in the meetings. The Commission therefore concludes that […] was also involved in the agreement.

(233) […] argues that monitoring would have been necessary for supervising whether undertakings involved adhered to the agreements reached. Claiming that no such monitoring can be demonstrated, […] concludes that no agreement was reached.[501] The Commission does not share the view that absence of monitoring shows absence of an

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498 See Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, Aalborg Portland and others v Commission, [2004] ECR I-123, paragraph 132.

499 Joined cases T-25/95 etc, *Cimenteries CBR SA and others v Commission* [2000] ECR II-491, paragraph 1849.

500 […].

501 […].

agreement. As will be shown below, the Commission is not required to demonstrate implementation to find an agreement.

(234) […] emphasise that their actions on the market were competitive.

(235) The Commission observes that it is in the nature of market transactions that general price increases are first announced by the different suppliers and that final prices are thereafter negotiated between the suppliers and the individual customers. The cartel mainly concerned the general price increase announcements. It is irrelevant that final prices were eventually negotiated with individual customers as what was important for the cartel is that the announcements that resolved that prices will be increased on the market. In addition, the fact that an undertaking does not act on the outcome of a meeting having an anti-competitive purpose is not such as to relieve it of responsibility for the fact of its participation in the cartel, unless it has publicly distanced itself from what was agreed in the meeting.[502]

(236) The Commission also notes that the Court of First Instance has already stated that price announcements always have an impact on the final outcome even if the final price is negotiated with the customer. Indeed, *"[t]he fact that the undertakings actually announced the agreed price increases and that the prices so announced served as a basis for fixing individual transaction prices suffices in itself for a finding that the collusion on prices had both as its object and effect a serious restriction of competition"*.[503] It is also clear from the case law that the implementation of an agreement on price objectives, rather than on fixed prices, does not mean that prices corresponding to the agreed price objective are to be applied, but rather that the parties endeavour to get close to their price objectives.[504]

(237) […] also emphasised that […] was not authorised to make – and in fact does not make – any price setting decisions.

(238) The Commission notes that the Court of Justice has already disregarded the argument that the Commission is required to show that the partners or managers of a company committed the infringement intentionally or negligently. In order to attribute liability, it is not necessary *"for there to have been action by, or even knowledge on the part of the partners or principal managers of the undertaking concerned; action by a person who is authorized to act on behalf of the undertaking suffices"*.[505] Also, […] does not contest that […] was authorised to act on behalf of […]. Moreover, by participating in the meeting where prices were discussed, the impression was given that […] adhered to the arrangements regardless of the actual powers […] may have had to set prices.

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[502] See Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraph 50, and *Aalborg and Others v Commission* [2004] ECR I-123, paragraph 85.

[503] Judgement of 26 April 2007 in joined cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, *Bolloré and others v Commission*, not yet reported, paragraphs 450-453.

[504] Case T-64/02, *Dr. Hans Heubach GmbH & Co. KG v Commission*, [2005] ECR p. II-05137, paragraph 111.

[505] Cases 100-103/80, *SA Musique Diffusion Française v. Commission* of 7 June 1983, ECR 1983 p. 1825, paragraph 97. See also Case T-9/99, *HFB and others v Commission*, [2002] ECR II-1487, paragraph 275, Case T-15/99, *Brugg Rohrsysteme v Commission*, [2002] ECR II-1613, paragraph 58, Case T-236/01 *Tokai Carbon v Commission*, [2004] ECR II-1181, paragraph 277.

(239) Even if not all contacts amounted to agreements in the sense of Article 81(1) EC, it is clear that certain discussions which fell short of constituting/leading to an agreement can still be characterised as a concerted practice. Three undertakings involved in the present case, […], have indicated that usually, Sasol would instigate the discussions about prices, but then prices and pricing strategies were discussed by all the attendees.[506] Even if such […][507] would not always lead to formal agreements, it would allow the participants to the meetings to understand each others' intentions in terms of commercial policy and therefore reduced significantly the uncertainty on future market conditions. Given the purpose of the meetings and the way they were conducted, this can be considered as a concerted practice by object. As explained at recital (204) such practice falls within the scope of application of Article 81(1) EC. In any event, the exchange of pricing letters that were sent after the meetings by the various participants at the Technical Meetings to their competitors constitutes coordinated market behaviour. […] have explained that the implementation of the results decided upon at the Technical Meetings was mainly carried out through announcing price increases to customers or by cancelling existing pricing schemes along the modalities described in recital (113). Even if there was not necessarily a perfect alignment of prices, this is sufficient to demonstrate that collusion was followed by action on the market. The Commission, limiting its review to a period of six weeks after a Technical Meeting, found numerous instances of pricing letters sent from competitor to competitor (see recital (113) and footnote 105).The producers in question were thus able to monitor the applicable prices in order to ensure adequate effectiveness of the pricing arrangements as well as the joint control of the market. Given the existence of this system of information exchange and co-ordination, the Commission concludes that the parties could not continue to operate on the market without using the knowledge and contents of the information exchanged.

5.3.2.2. Price Fixing

(240) Recitals (98), (107), (126), (128), (131), (133), (135), (137), (139), (140), (142), (145), (147), (149), (152), (153), (156), (157), (163), (168), (174), (176) and (177) demonstrate that the undertakings involved fixed minimum prices and agreed on price increases ("price fixing").

(241) […][508] and […].

(242) […] claims that it was not involved in price fixing because it was not present at meetings when price fixing may have occurred or it was not involved in the actual discussions.[509] […] arguments regarding its presence at instances of price fixing have been dealt with in chapter 4. That […] was absent at certain meetings does not exclude its involvement in such practices (see also section 5.4).

5.3.2.3. Customer and/or Market Allocation

(243) It follows from the evidence described in recitals (98), (108), (137), (145), (147), (168) and (170) that ExxonMobil, MOL, Repsol, Sasol, Dea (later Shell) and Total allocated

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506 […].
507 […].
508 […].
509 […].

customers and/or volumes to be sold to particular customers ("customer allocation") and/or allocated geographic areas as "home markets" ("market allocation").

(244) […].[510] […].

(245) MOL was an active participant in at least one Technical Meeting where the allocation of a customer was determined. The Commission therefore considers that MOL was aware or could at least have reasonably foreseen that the common arrangements comprised such practices, and that it was prepared to accept this risk, and therefore also holds MOL liable for customer allocation.

(246) […] deny having participated in such practices. As demonstrated in recital (168), a […] debriefing note found at […] reports one instance when […] quarrelled about the possibility of increasing volumes of […]. […].[511] This incident is also confirmed by […].[512] Neither […] nor […] have contested the Commission's finding in the Statement of Objections that this occurrence constituted an example of customer and/or market allocation. This incident substantiates […] that the arrangements also comprised customer and market allocation.

(247) […] claims that the existence of inter-Community trade shows that an allocation of markets could not have occurred and that the focus on certain geographic areas was due to the high transport costs of paraffin waxes.[513] The Commission observes that […] confirms, in the second part of its argument, that markets were indeed partitioned. It is not necessary for the Commission to demonstrate that all markets and all customers were allocated or that no trade between Member States occurred in order to find an infringement.

5.3.2.4. Disclosure and Exchange of Commercially Sensitive Information

(248) The events described in recitals (109), (126), (128), (129), (131), (132), (133), (134), (135), (137), (141), (142), (143), (145), (147), (148), (149), (153), (156), (157), (159), (165), (168), (173) and (174) are examples of disclosure and exchanges of commercially sensitive information. Such disclosure also involved the sending of pricing letters (see recital (113)). Community courts have held that the mere fact of exchanging competitors' information which an independent operator keeps strictly secret as confidential business information is sufficient to demonstrate that it had an anti-competitive intention.[514]

(249) […][515] and […]. Also […] that information was exchanged.[516]

(250) […] refer to the general pricing transparency in the paraffin waxes sector and argue that it cannot be assumed that information reflected in the notes concerns sensitive commercial data exchanged by competitors as such information might already have

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510 […].
511 […].
512 […].
513 […].
514 See Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907 at para 100; T-202/98, *Tate & Lyle v Commission* [2001] II-2035 at para 66
515 […].
516 […].

been known to […]through their customers. […] does not contest that it participated in a number of meetings where information was exchanged but denies the anti-competitive nature of those meetings. […] claims that the discussions were held within the framework of cross-supply relationships.[517]

(251) The Commission does not share the view that the very precise figures, recorded in documents such as minutes or records of discussions with cartel members, would be already known to […] – or to the other participants – and would not constitute sensitive commercial information. The figures were discussed within the framework of anti-competitive arrangements and were written down so that the author could recall the agreements and discussions. In addition, the Commission observes that such a continuous exchange of commercially sensitive information complemented and supported these agreements and concerted practices. Moreover, as the Court of First Instance, in *Thyssen Stahl AG v Commission*[518], has established that a system for the exchange of individual data can of itself be anti-competitive if *"the information distributed, relating to participants' orders and deliveries on the main Community markets, was broken down by undertaking and Member State [and] thus made it possible to identify the position occupied by each undertaking in relation to the total sales by the participants on all of the geographical markets in question"* and if, *"since the information distributed was updated and sent out frequently, undertakings were in a position to follow closely each change in market share held by the participants on the markets in question"*. The Court of First Instance found that, *"having regard to all the circumstances of the case, in particular the fact that the information distributed was up-to-date, broken down and intended only for producers, the product characteristics, and the degree of market concentration, the arrangements in question clearly affected the participants' decision-making independence"* and that the systems substituted practical co-operation between the participants for the normal risks of competition. The Commission also notes that the Court of First Instance has disregarded as irrelevant similar arguments that information revealed to competitors could already have been gathered by these competitors on the market. First, even if a price leader first notifies its customers, individually and on a regular basis, of the prices it intends to charge, that fact does not imply that at the time, those prices constituted objective market data that were readily accessible. Second, through direct information exchanges, the participants became aware of that information more simply, rapidly and directly than they would have via the market. Third, the systematic participation of undertakings in competitor meetings allows them to create a climate of mutual certainty as to their future pricing policies.[519] Regarding the exchange of information that is not publicly known, it should be noted that *"the fact that an exchange of information involves information which an independent operator scrupulously preserves as business secrets is sufficient to demonstrate the existence of an anti-competitive intention"*.[520] That […] may have had cross-supply relationships with some of the other

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[517] […].

[518] See Case T-141/94 *Thyssen Stahl AG v Commission* [1999] ECR II-347, paragraphs 379-412, upheld by the judgment of the Court of Justice in Case C-194/99P *Thyssen Stahl AG v Commission* [2003] ECR I-10821, paragraphs 58-107.

[519] Joined cases T-202/98, T-204/98 and T-207/98, *Tate & Lyle and Others v Commission*, [2001] ECR II-2035, paragraphs 60-61.

[520] Joined cases T-202/98, T-204/98 and T-207/98, *Tate & Lyle and Others v Commission*, [2001] ECR II-2035, paragraph 66. See also judgement of the Court of First Instance on 12 September 2007 in case T-36/05, *Coats Holdings Ltd and J & P Coats Ltd, v Commission*, not yet reported, paragraph 113.

participants of the Technical Meetings does not diminish the anti-competitive nature of the exchanges because the exchanged information went beyond that needed to be exchanged within a cross-supply relationship and because the information was also disclosed to undertakings that were not in cross-supply relationships. When asked during the oral hearing why the discussions on alleged bilateral cross-supply prices were held in a multilateral setting, […] responded: […]. The Commission does not consider this to be a valid explanation. If it were indeed only cross-supply prices that were discussed, these discussions could have almost as easily been held bilaterally.

(252) […] states that the sensitive information it may have gained access to was not useful for […]. The Commission considers that this would not alter the Commission's finding because the fact that […] maintained contact with its competitors and participated in the exchange of information is, as such, sufficient to find an infringement of Article 81. Liability for the infringement cannot depend on the degree of usefulness which the information had for each participant. If information was actually exchanged it was because the participating undertaking thought that such an exchange was somehow useful. The document quoted in recital (165) shows that […] benefited from the discussions.

(253) […] generally claims that all information was gathered through its own market intelligence.[521] This is not credible because the information was noted during meetings with competitors. […] explains that its representative, […], would scribble market information on note pads during his almost daily contacts with customers and that his notes reflect the compilation of several smaller notes that were not all taken at the Technical Meetings.[522] The Commission observes, however, that many of the […] notes are taken on the same type of paper, often with a letterhead from the hotel in which the Technical Meeting took place and in the same handwriting. The […] notes usually start with a date, venue and list of participants and end with a date and venue of the next meeting. The notes are therefore continuous minutes of the same meeting. The Commission thus rejects […] suggestion that the notes are in fact a compilation of notes taken at other occasions. […] claims that the market was very transparent and aims to show that the information was not exchanged at the Technical Meetings by comparing the […] notes with the […] debriefing notes of the same meeting.[523] Even if […] allegation that the two sets of notes are too different to originate from the same meetings were true, (*quod non;* see discussion at recitals (126), (131), (137), (141), (142) and (145) dealing with the meetings in question), this would not explain why […] noted down his knowledge allegedly gained through market intelligence during meetings with competitors. Seeing the evidence in its entirety, the Commission considers that information noted down during a meeting with competitors originated from these competitors rather than from another source. […].

(254) […], while not denying that information was exchanged, claims that the exchanged information was not commercially sensitive and was publicly available. […] relies in this respect on several documents it submitted as annex to its reply to the Statement of Objections. […] also maintains that the amount of information that needs to be exchanged when an anti-dumping investigation is prepared is larger than what was

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521 […].
522 […].
523 […].

exchanged in this case, without, however, specifying what kind of information in its view could legally have been exchanged.[524]

(255) The Commission observes that the publicly available information submitted by […] to underpin its defence generally consists of estimates and aggregated figures and is mostly not as detailed and up-to-date as the information exchanged at the Technical Meetings. Even one of the public sources of which […]submitted copies in its reply to the Statement of Objections reads with respect to production capacities: […].[525] As to prices, the publicly available sources that were submitted as a defence by […] show estimates of ranges rather than the prices charged by individual undertakings. […] further relies on an announcement by […] of a report on the wax business which is to contain […] ".[526] […] argues that this shows that the exchange of production capacities is not an exchange of sensitive information. The Commission is unable to comprehend how an announcement of a publication of not further specified information or "supplier profiles" shows that information of the kind discussed at the Technical Meetings was publicly available. In addition, the Commission also observes that the information has been discussed at the Technical Meetings rather than in a formal forum such as […]. Finally, the announcements of the information at the Technical Meetings made this information faster and more easily accessible to the participants to the meetings and thereby enhanced market transparency. The fact that information may later be public cannot negate the fact that, at the time when information was exchanged, it was not yet public, and that is what is important to assess the legality of the behaviour at issue. Even an exchange of information which is in the public domain or related to historical and purely statistical prices infringes Article 81(1) EC where it underpins another anti-competitive arrangement. That interpretation is based on the consideration that the circulation of price information limited to the members of an anti-competitive cartel has the effect of increasing transparency on a market where competition is already much reduced and of facilitating control of compliance with the cartel by its members. [527]

(256) […] claims that the information exchange was necessary for the cross-supply relationships that were maintained for legitimate reasons.[528] The Commission observes, firstly, that the information exchanged went well beyond what is needed to maintain a bilateral cross-supply relationship and, secondly, that the information was multilaterally exchanged and thereby also information on parties outside a cross-supply relationship was disclosed and exchanged.

5.4. Single and Continuous Infringement

5.4.1. Principles

(257) A complex cartel may properly be viewed as a *single and continuous infringement* for the time frame during which it existed. The Court of First Instance points out, *inter alia*, in the *Cement* cartel case that the concept of 'single agreement' or 'single

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524 […].
525 […].
526 […].
527 Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 281.
528 […].

infringement' presupposes a complex of practices adopted by various parties in pursuit of a single anti-competitive economic aim.[529] The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. The validity of this assessment is not affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute a violation of Article 81 of the Treaty.

(258) It would be artificial to divide 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 manifested itself in agreements and/or concerted practices.

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

(260) The mere fact that each participant in a cartel may play a role which corresponds to its own specific circumstances does not exclude that participant's responsibility for the infringement as a whole, including acts committed by other participants that share the same unlawful purpose and/or the same anti-competitive effect. An undertaking which takes part in a common unlawful enterprise through 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 committed by the other participants pursuant to the same infringement. This is certainly the case where it is established that the undertaking in question was aware of the unlawful behaviour of the other participants or could have reasonably foreseen or been aware of them and was prepared to take the risk[530].

(261) In fact, as the Court of Justice stated in its judgement in Case *Commission v Anic Partecipazioni*[531], the agreements and concerted practices referred to in Article 81 of the Treaty necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged. It follows, as recently reiterated by the Court in the *Cement* cases, that an infringement of Article 81 may result not only from an isolated act but also from a series of acts or from a continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute of themselves, and taken in isolation, an infringement of Article 81 of the Treaty. When the different actions form part of an 'overall plan', because their identical object distorts competition within the common market, the Commission is

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

530 See See Case C-49/92P *Commission v Anic Partecipazioni SpA*, [1999] ECR I-4125, paragraph 83.

531 Case C-49/92.

entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.[532]

(262) Although Article 81 of the Treaty does not refer explicitly to the concept of single and continuous infringement, it is established case-law of the Community courts that "*an undertaking may be held responsible for an overall cartel even though it is shown that it participated directly only in one or some of the constituent elements of that cartel, if it is shown that it knew, or must have known, that the collusion in which it participated was part of an overall plan and that the overall plan included all the constituent elements of the cartel"*.[533]

(263) The Commission is entitled to base its description of the relevant market in cartel cases on the conduct of the participating undertakings. At paragraph 90 of its judgment in *Tokai Carbon and others v Commission*,[534] the Court of First Instance states: "*It is not the Commission which arbitrarily chose the relevant market but the members of the cartel in which* [the Applicant] *participated who deliberately concentrated their anti-competitive conduct on* [the identified] *products."* The Commission equally recalls that following the consistent jurisprudence of the Community courts[535] the Commission was, in the circumstances, under no duty to define the relevant market, given that the agreements or concerted practices in question were liable to affect trade between Member States and had as their object the restriction and distortion of competition within the common market.

(264) The Commission also recalls that the Court of Justice has ruled "*that an undertaking that had taken part in such an infringement through conduct of its own which formed an agreement or concerted practice having an anti-competitive object for the purposes of Article 85(1) of the Treaty and which was intended to help bring about the infringement as a whole was also responsible, throughout the entire period of its participation in that infringement, for conduct put into effect by other undertakings in the context of the same infringement. That is the case where it is established that the undertaking in question was aware of the offending conduct of the other participants or that it could reasonably have foreseen it and that it was prepared to take the risk."*[536]

(265) The fact that an undertaking concerned did not participate directly in each of the constituent elements of the overall cartel cannot relieve it of responsibility for an infringement of Article 81 of the Treaty. Such a circumstance may nevertheless be taken into account when assessing the seriousness of the infringement which it is found

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[532] See Joint cases C-204/00 and others, *Aalborg Portland et al.*, paragraph 258 (not yet published). See also Case C-49/92, *Commission v Anic Partecipazioni*, paragraphs 78-81, 83-85 and 203.

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

[534] Joined Cases T-71/03, T-74/03, T-87/03 and T-93/03 *Tokai Carbon and others v Commission* [2005] ECR II-10, paragraph 90.

[535] See for example Case T-38/02 *Groupe Danone v Commission*, [2005] ECR II-4407, paragraph 99, and Case T-48/02 *Brouwerij Haacht NV v Commission*, [2005] ECR II-5259, paragraph 58 and the jurisprudence cited in these paragraphs.

[536] See Case C-49/92P, *Anic Partecipazioni*, paragraph 83.

to have committed. Such a conclusion is not at odds with the principle that responsibility for such infringements is individual in nature, nor does it neglect an individual analysis of the evidence adduced or the applicable rules of evidence, nor does it infringe the rights of defence of the undertakings involved.

5.4.2. Application

(266) The Commission considers that the different anti-competitive practices committed during the period from 3 September 1992 until 28 April 2005 constituted a single and continuous infringement. the Commission considers that this single and continuous infringement related to fully-refined paraffin waxes, semi-refined paraffin waxes, wax blends, specialties, hydro-finished wax and hard paraffin waxes, the Commission considers that for those companies identified in recital (1), the infringement between 1997 and 2004 also related to slack wax sold to end-customers on the German market and formed thus part of the single and continuous infringement.

5.4.2.1. Single and Continuous Infringement between 3 September 1992 and 28 April 2005

(267) In the present case, the conduct in question constitutes a single and continuous infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement. The Technical Meetings, the arrangements agreed upon at these meetings, their (attempted) implementation through (announcements of) price increases, – for some undertakings – the non-approaching of other participants' customers, the non-activity on particular markets and the monitoring by way of the exchange of pricing letters were a series of efforts consisting of a complex of collusive arrangements, specific agreements and/or concerted practices. The agreements and/or concerted practices in question form part of an overall scheme which, for the participants, established the line of action in the market and restricted individual commercial conduct. The common overall plan, identical anti-competitive object and single economic aim of these efforts was to reduce and prevent competition on price, to stabilise or raise prices by agreeing on minimum prices and price increases, and for some undertakings, to secure customer relations and certain markets. In summary, the objective of these efforts was to significantly reduce or even eliminate competitive pressure with the ultimate goal of achieving higher profits in order to ultimately stabilise or increase profits. The effect of such actions was therefore to significantly reduce and distort competition by distorting the normal movement of prices in the EEA-market for paraffin waxes and – for those undertakings identified in recital (1) – slack wax and to restrict competition in the EEA by the allocation of customers and markets.

(268) The parties expressed their joint intention to behave in a certain way on the market and adhered to a common plan to limit their individual commercial conduct with respect to pricing – and for some – to markets and customers. The origin of this plan with a view to restrict competition, agreed among most of the undertakings at the time and adhered to by the remaining undertakings later on, can be dated back to at least 23 September 1992 (see for details section 7).

(269) Taking 3 September 1992 as the latest starting date of the infringement, the plan, subscribed to by ENI, ExxonMobil, H&R/Tudapetrol, MOL, Repsol, Sasol, Dear (today Shell) and Total for different periods, was developed and implemented over close to thirteen years at least.

(270) It would be artificial to divide 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 manifested itself in both agreements and concerted practices.

(271) […] states that it did not subscribe to the overall economic aim pursued by the other companies. Also, […] states that it did not subscribe to the overall economic aim of the cartel.[537]

(272) The Commission considers, firstly, that […] statements are contradictory: […] states, on the one hand, that it did not continue to participate in the Technical Meetings after the meeting on 30 and 31 October 1997 because the interests of the group did not correspond to the overall interests of […] and that it started to participate in Technical Meetings again in 2002, once […] strategy was adapted. If this is true, […] must have had an idea of the objectives of the Technical Meetings – otherwise, […] would not have participated in the Technical meetings at all or, at the very least, would not have continued to participate after the first meeting it attended. The same consideration applies to […]. […] argument that it was only interested and, in fact, only understood the technical part of the meetings has already been deemed as irrelevant as […] nevertheless attended, participated in and contributed to the anti-competitive part of more than thirty meetings. The Commission excludes that […] could have been represented at numerous Technical Meetings without being aware of the objective of those meetings. The Commission considers, secondly, that the agreements that were reached at the Technical Meetings were not kept secret from […]. As […] continued to participate in meetings after their first attendance at a Technical Meeting (for which there is no doubt regarding its anti-competitive nature, see recital (133) for […] and recitals (145) and (165) for […]) and they did not distance themselves from the anti-competitive objectives of those meetings, it is clear that they shared the aims and purposes pursued by the other participants in the meetings.

(273) The Commission finds that all companies involved in the present infringement attended, participated in and contributed to acts of price fixing and exchange of commercially sensitive information (see sections 5.3.2.2 and 5.3.2.4). These two manifestations of the infringement were practiced at the same meetings by the same persons, concerned the same products and were complementary in that the enhanced transparency of the market achieved through the exchange of information facilitated price fixing. In terms of time, the Commission considers that all manifestations of the infringement between 3 September 1992 and 28 April 2005 formed part of this single and continuous infringement. Both manifestations contributed to the same economic aim throughout the whole infringement period (see recital (267)). At the same time, given the straight-forward nature of the discussions by which this aim was pursued, the Commission considers all companies involved to have been aware of price fixing and the exchange of commercially sensitive information and consequently finds all companies involved responsible for these two manifestations of the infringement for their respective period of involvement (see chapter 7).

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[537] […].

(274) […] argues that the Commission is wrong in finding a single and continuous infringement because, according to […], the Commission should have taken into account the contacts that occurred outside the Technical Meetings.[538]

(275) As stated also in recital (648), the Commission has chosen not to investigate bilateral contacts as this would have required disproportionate efforts to prove additional components of this infringement without any obvious effect of altering the final outcome. For the same reason, the Commission has chosen not to investigate other contacts that occurred outside the Technical Meetings. The Commission also considers that it has sufficiently established the existence of a single and continuous infringement for those practices it has investigated.

(276) As described in section 5.3.2.3, the Commission finds that ExxonMobil, MOL, Repsol, Sasol, Dea (later Shell) and Total also engaged in and were aware of market and/or customer allocation. There is not sufficient evidence to conclude that the other companies involved in the infringement contributed to market and/or customer allocation. There is also not sufficient evidence to conclude that any of the other companies was aware of such market and/or customer allocation. The Commission therefore finds that only ExxonMobil, MOL, Repsol, Sasol, Dea (later Shell) and Total were responsible for market and/or customer allocation - in addition to the responsibility of these companies with regard to price fixing and exchange of commercially sensitive information.

5.4.2.2. Paraffin Waxes, in particular Fully-refined Paraffin Waxes, Semi-refined Paraffin Waxes, Wax Blends, Specialties, Hydro-finished Wax and Hard Paraffin Waxes

(277) Several undertakings question the Commission's findings on the product scope of the agreement and/or concerted practice.[539] They argue, *inter alia*, that slack wax and paraffin waxes are not economically linked and that both products belong to distinct markets, and that a distinction should be made between different types of paraffin waxes depending on their economic, commercial or physical characteristics. […] observe that the Commission has applied a certain market definition in its decision in the merger case of Total/Sasol and argue that the Commission should apply the same market definition in this case[540]. […] argues that its commercial strategy was to concentrate on the niche market of specialties which were not the subject of the Technical Meetings.[541] […] maintains that the object of the Technical Meetings was only to discuss paraffin waxes as a raw material for candle production, and not specialties.[542]

(278) On the alleged absence of an economic link between slack wax and paraffin waxes, the Commission observes not only that slack wax is the raw material for the production of paraffin waxes, but also that the file contains documentary evidence showing that the participants to the cartel agreed to justify price increases of paraffin waxes by reference to price increases of slack wax.[543] The Commission therefore concludes that the

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538][…].
539 […].
540 Commission Decision in case M.3637 of 12 April 2005 – *Total/Sasol/JV*.
541 […].
542 […].
543 […].

economic link between the two products is certainly obvious to the consumers and users of paraffin waxes.

(279) The Commission observes that it is not obliged to engage in any market definition when conducting cartel investigations. Instead, it is the subject of the contacts between the companies involved in a cartel which defines the products to which the infringement relates (see recital (263)). It is therefore not surprising that such a definition may be different from a market definition used in a merger control procedure. That the Commission may have defined a market in a certain way in a merger decision bears no relevance for a cartel decision.

(280) The Commission considers that the definition of the product scope must follow objective criteria. As mentioned in recital (111), the Commission observes in this regard that the Technical Meetings, as demonstrated by the evidence and as explained in section 4 centred mainly around what was labelled by the participants as *"paraffin waxes"*, *"paraffins"* or similar terms. What was meant by this label must have been clear to the participants of the Technical Meetings who used these labels as overarching terms for the more specific products referred to in the available documentary evidence and in the submissions of the immunity and leniency applicants. The Commission takes the view that, as the Technical Meetings had the overall aim to reduce the competitive pressure on the individual undertakings by fixing prices, exchanging information and – for those undertakings identified in recital (1) – allocating markets and customers, the undertakings understand *"paraffin waxes"* to comprise all products they sell and which can reasonably fall under this label. The usage of the term *"paraffin waxes"* during the Technical Meetings was not necessarily a technical one. The Commission therefore applies a wide understanding of *"paraffin waxes"*.

(281) […] explains that it produces hydro-finished wax which is used as an input component for candle manufacturers for the production of tea-lights and outdoor jar candles. On the one hand, […] describes this product as being neither slack wax nor semi-refined paraffin wax but, on the other hand, […] states that it was marketed as semi-refined wax although it is in reality closer to slack wax. […] also states that this product was viewed by its competitors as a threat to their products.[544] Given these characteristics, and that hydro-finished wax was – as conceded by […][545] – discussed at some Technical Meetings[546], the Commission considers that hydro-finished wax indeed formed part of what the participants understood when they talked about *"paraffin waxes"* . In addition, The Commission observes that […] also sell a product which they call hydro-finished wax and that neither […] have put forward arguments as to why this product should not be included in the product scope to which the infringement relates.[547]

(282) The Commission therefore considers that the following products were at issue at the Technical Meetings: fully-refined paraffin waxes, semi-refined paraffin waxes, wax blends, specialties, hydro-finished wax and hard paraffin waxes.

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544 […].
545 […].
546 […].
547 […].

(283) As to […] argument that it was only active in specialties, the Commission observes that […] has not put forward any argument as to why these specialties were not considered part of the wide, non-technical understanding of "*paraffin waxes*". The Commission also observes that specialties are further processed fully-refined paraffin waxes produced from slack wax and thus arrangements regarding fully-refined paraffin waxes had direct repercussions on specialties as well.

(284) As to […] claim that only paraffin waxes as a raw material were discussed, the Commission observes that this claim is, contrary to what […] maintains, not supported by other undertakings involved. Other undertakings merely state that the focus of the Technical Meetings was on products that were ultimately sold to candle wax producers. This is to be expected given that this class of products is the most important and, moreover, this does not exclude that other products were also discussed. The Commission further observes that […] is not able to provide any other evidence to support its claim that only paraffin waxes as a raw material were discussed. Whether or not the wide understanding of paraffin waxes at the Technical Meetings was reasonable from a commercial or technical point of view does not alter the fact that such a wide understanding was applied.

(285) As to the arguments of several undertakings that some of these products "are" not paraffin waxes, the Commission observes that the determination of the products to which an infringement relates cannot depend on the *ex-post* definition of such products by involved undertakings which have a natural tendency to narrow down the scope of the infringement. The Commission observes also that in their replies to the Statement of Objections, almost each of the undertakings involved puts forward its own definition of paraffin waxes and specialties which is often not in accordance with what the other undertakings maintain. Contrary to this, none of the contemporary documents reflect diverging views as to the products concerned by the cartel arrangements. The Commission concludes that such *ex-post* definitions were designed to ultimately reduce the fine imposable on the undertakings and cannot, therefore, be used as a basis for the Commission's findings.

(286) In conclusion, the Commission finds that the products covered by the single and continuous infringement in which ENI, ExxonMobil, H&R/Tudapetrol, MOL, Repsol, Sasol, Dea (later Shell) and Total participated comprised fully-refined paraffin waxes, semi-refined paraffin waxes, wax blends, specialties, hydro-finished wax and hard paraffin waxes. In any case, should an addressee of this Decision not produce one of the products that were subject to the arrangements of the Technical Meetings, it will not be penalised in that respect as such products will not be included in the value of sales for the purpose of the determination of its fine.

5.4.2.3. Between 1997 and 2004 the Single and Continuous Infringement Related also to Slack Wax Sold to End-customers on the German Market

(287) The Commission considers that there is not enough evidence to hold all undertakings that were represented at the Technical Meetings liable for the infringement as far as it relates to slack wax. As regards ExxonMobil, Sasol, Dea (later Shell) and Total, however, the Commission finds that during the years 1997 to 2004 these undertakings were at times also involved in arrangements affecting slack wax sold to end-customers on the German market.

(288) Both […] concede that prices for slack wax were discussed between competitors, especially from the late 1990's, and have provided details of contacts with that objective (see also recital (112)).[548] At a meeting of 30 and 31 October 1997 (see recital (145)) at least ENI, H&R/Tudapetrol, MOL, Repsol, Sasol, Dea (after 2002 Shell) and Total discussed slack wax and agreed to a price increase. Shell and Total are found to have been represented at least at one meeting specifically dedicated to a discussion on slack wax on 8 and 9 March 1999 (see recital (152)). Sasol and ExxonMobil do not, in their reply to the Statement of Objections, exclude having been present at this meeting, and their presence indeed appears likely given that a handwritten note on an Shell-internal e-mail sent the following day refers to […]. Sasol, Shell and Total were also represented at a Technical Meeting on 11 and 12 May 2004 (see recital (174)) where a price for slack wax was agreed upon. In addition, the Commission observes that slack wax was a point of discussion during some Technical Meetings[549] at which ExxonMobil, Sasol, Shell and Total were present. […].[550] […] [551] and in general confirms that slack wax sold to end-customers was discussed as part of the cartel arrangements.[552] Likewise, […] reports that discussions regarding an increase of prices for slack wax took place.[553] […] and […] also confirm that meetings relating to slack wax were held outside the Technical Meetings.[554] […]. Moreover, although some pieces of evidence appear to relate to other periods and markets, the Commission considers that the available evidence only allows for the conclusion that the infringement related to slack wax sold to end-customers on the German market in the years 1997 to 2004.

(289) The Commission further considers that these discussions only concerned slack wax that was sold to end-customers (such as particle board producers) and not, for instance, producers of paraffin waxes. While the corporate statements mostly fail to distinguish between different uses of slack wax, the e-mail referred to in recital (152) only mentions slack wax sold to particle board producers. The Commission therefore considers that there exists doubt as to whether slack wax sold to customers other than end-customers was subject to the infringement and therefore limits its findings to slack wax sold to end-customers. These considerations are confirmed by […].[555]

(290) The available evidence suggests that the occasional discussions on slack wax focused principally on the German market.[556] ExxonMobil, Sasol, Shell and Total all had sales on the German market and the meetings where slack wax was discussed took place in Germany. The Commission considers that there are not enough indications to support the conclusion that the arrangements regarding slack wax also related to slack wax sold to end-customers in other countries.

(291) The Commission considers that the infringement, insofar as it relates to slack wax sold to end-customers on the German market, began with the meeting of 30 and 31 October 1997 and ended with the meeting of 11 and 12 May 2004.

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548 […].
549 […].
550 […].
551 […].
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553 […].
554 […].
555 […].
556 […].

(292) The Commission therefore considers that the discussions on slack wax sold to end-customers on the German market led to agreements and/or concerted practices in the sense of Article 81 of the EC Treaty and Article 53 of the EEA Agreement. This finding is based on […].[557] The documentary evidence confirms this finding.[558]

(293) The Commission therefore finds that, as far as the undertakings ExxonMobil, Sasol, Dea (later Shell) and Total are concerned, the infringement between 30 October 1997 and 12 May 2004 also relates to slack wax sold to end-customers on the German market.

(294) The Commission considers that, in relation to these undertakings, the aspects relating to slack wax sold to end-customers formed, together with those relating to paraffin waxes, a single and continuous infringement.

(295) Slack wax was at least twice the subject of Technical Meetings - at the meetings of 30 and 31 October 1997 and of 11 and 12 May 2004. The participants at the meeting dedicated to slack wax on 8 and 9 May 1999 were largely the same as those that usually represented their undertakings at the Technical Meetings. Slack wax and paraffin waxes are closely interlinked products: slack wax is the only raw material for paraffin waxes and it is produced and/or sold largely by those undertakings that also produce and/or sell paraffin waxes. The mechanism that was used and tested for paraffin waxes (namely, periodic meetings, discussions, and fixing of prices) was similarly applied to slack wax. At least some of the individuals that were involved in the infringement regarding paraffin waxes were also responsible for slack wax within their respective companies. Both the aspects relating to paraffin waxes and those relating to slack wax had the same overall economic aim, namely to control and determine the prices for both products, thereby shielding the undertakings from competition in order to ultimately stabilise or increase their profits at reduced competitive pressure, supplemented by increased transparency on the market.

(296) The circumstances of this case, in particular the organisational and substantive links between the discussions on both products, are such that it would not be justified to consider the agreements and/or concerted practices regarding slax wax as a separate infringement.

(297) […].

5.4.3. The Case of ENI

(298) As is demonstrated in chapter 4, ENI participated in one meeting in 1997 and at eleven meetings between February 2002 and February 2005. At the meeting in 1997 (see recital (145)) the participants reached an agreement on prices in the sense of Article 81 of the Treaty and Article 53 of the EEA Agreement. As regards the meetings after February 2002 (see recitals (165)-(178)), the Commission concludes, in light of the available evidence coupled with the general description of the usual structure of the Technical Meetings, that ENI attended, participated in and contributed to price fixing and an exchange of sensitive information. As ENI participated in eleven out of thirteen meetings after 2002, the Commission considers that ENI was aware or ought to have

[557] […].
[558] […].

been aware of the anti-competitive aim and measures that were adopted at the Technical Meetings. Although there is no evidence that ENI participated in the meetings of 14 and 15 January 2004 and of 11 and 12 May 2004, the Commission considers ENI's continuous involvement in the infringement to be demonstrated between 21 and 22 February 2002 and 28 April 2005 (for futher discussion on the end date, see section 7.2 below). In particular, the Commission considers that the events described in recital (165) show that ENI took into account the information obtained on its competitors' conduct in the market and adapted its own conduct, taking implementing steps. This can be characterised as concerted practice.

5.5. Implementation

(299) Although the Commission is not obliged to demonstrate the implementation of an anti-competitive agreement, such implementation can be demonstrated in this case. The exchange of pricing letters as well as oral information about pricing (see recital (248)) also served as a means for monitoring the agreement. By informing each other of forthcoming price increases or price cancellations, cartel members were able to verify if an undertaking was living up to the commitments it undertook at the Technical Meetings. In addition, implementation was occasionally discussed at the Technical Meetings, for instance at those described in recitals (147) and (149). The fact that the cartel members also had cross-supply relationships among themselves, which in principle could explain certain communications among them, does not alter this consideration. The issue is not whether certain communications would have occurred anyway as a consequence of such bilateral cross-supplies, but whether or not these communications objectively helped ensure the monitoring of the implementation of the infringement.

(300) Several addressees of the Statement of Objections have in their replies argued that they did not implement the agreements or that implementation was not successful. The fact that an undertaking does not act on the outcome of a meeting having an anti-competitive purpose does not relieve it of responsibility for participation in a cartel. In any event, an unsuccessful implementation still shows an attempt to give effect to the agreements.

(301) Several of the addressees of the Statement of Objections claim in their replies thereto that they have neither received nor sent pricing letters, or that a particular pricing letter was sent or received strictly in a cross-supply relationship. In the Commission's view, the sending of pricing letters was a means by which an undertaking demonstrated that it took steps to implement the results of the Technical Meetings even if such evidence may not always be decisive in proving whether the undertaking in fact implemented or attempted to implement the agreements. The fact that some of these pricing letters were sent in cross-supply relationships does not change this, particularly since the actual prices charged to customers were in most cases individually negotiated on the basis of the price agreements reached at the Technical Meetings and reflected in the pricing letters. Moreover, the European courts have established that there is a presumption that "*the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market. That is all the more true where the undertakings concert together on a regular basis over a long period*

(…)".[559] This presumption can be rebutted. However, in order to do so, the undertaking must show that it did not engage in any activities linked to the concertation and that it did not in any way take into account the commercial information it had learned at the meeting.[560]

5.6. Restriction of Competition

(302) It has been demonstrated that the complex of agreements and concerted practices had as their object the restriction of competition within the meaning of Article 81 of the Treaty and Article 53 of the EEA Agreement. This object was pursued by fixing prices, disclosing and exchanging information and – for some undertakings – by allocating customers and/or markets. Price being the main instrument of competition, the various collusive arrangements and mechanisms adopted by the producers were all ultimately aimed at stabilising or inflating prices to their benefit. By allocating markets and customers, the producers would be prevented from competing for market share and would gradually succeed in increasing the market price beyond the competitive level. Price fixing and allocation of markets and customers by their very nature restrict competition within the meaning of Article 81 of the Treaty and Article 53 of the EEA Agreement.

(303) It is settled case-law that for the purpose of application of Article 81 of the Treaty and Article 53 of the EEA Agreement there is no need to take into account the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proven.[561] The same principle applies to concerted practices.[562]

(304) In this case, however, the undertakings concerned continuously disclosed their respective business strategies and sent pricing letters shortly after the meetings. Even if it is not necessary to show actual anti-competitive effects where the anti-competitive object of a conduct is proven, this indicates that the cartel agreements were at least partly implemented which implies that actual anti-competitive effects of the cartel arrangements are likely to have taken place. The precise magnitude of such effects is, however, not measurable.

(305) Whilst the object of the arrangements is sufficient to support the conclusion that Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement apply, an examination of the effects of those arrangements leads to the same conclusion.

(306) […] claims that a restriction of competition was neither intended nor brought about, but that on the contrary, efficiency was enhanced through cross-supplies.[563] As has been shown in section 5.4, […] was involved in the single and continuous infringement and subscribed to the overall economic aim of the cartel.

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559 See for example Case C-199/92 P *Hüls AG v Commission*, [1999] ECR 1-4287, paragraph 162.

560 See Case C-199/92 P *Hüls AG v Commission*, [1999] ECR 1-4287, paragraph 167.

561 Case T-62/98 *Volkswagen AG v Commission* [2000] ECR II-2707, paragraph 178.

562 See also the Court's judgment in cases C-199/92 P *Hüls AG v Commission*, [1999] ECR 1-4287 paras. 158 to 166 and of 21 September 2006, *FEG v Commission*, C-105/04 P, paragraphs 137-139, and the judgment of the CFI in Case T-9/99, *HFB Holding and others v Commission*, [2002] ECR.II-1487, para. 217.

563 […].

(307) The Commission cannot, therefore, accept […] arguments. As noted in recital (302), the arrangements had an anti-competitive object and effect. This argument is also irrelevant in the context of Article 81(3) and Article 53(3) respectively, according to which the provisions of Article 81(1) of the Treaty and of Article 53(1) of the EEA Agreement may be declared inapplicable if an agreement or concerted practice contributes to improving the production or distribution of goods or to promoting technical or economic progress, provided that it allows consumers a fair share of the resulting benefit, does not impose restrictions that are not indispensable to the attainment of those objectives and does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question. The Commission observes that Article 81(3) of the Treaty lists four cumulative conditions which must be fulfilled in order for agreements or concerted practices to be exempted from the prohibition of Article 81(1) of the Treaty. The Commission further observes that, even if […] arguments were well-founded, they only address two of these four conditions. In particular, the Commission does not consider that the agreements and concerted practices at issue in the present Decision are indispensable in the sense of Article 81(3) of the Treaty. As noted above, […] has not explained why discussions on pricing in cross-supply relationships were held in a multilateral setting.

5.7. Effect upon Trade between Member States and between EEA Contracting Parties

(308) The infringement described between the suppliers had an appreciable effect upon trade between Member States and between contracting parties of the EEA Agreement.

(309) Article 81 of the Treaty is aimed at agreements 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 common market. Similarly, Article 53 of the EEA Agreement is directed at agreements that undermine the achievement of a homogeneous European Economic Area.

(310) The European Court of Justice and the Court of First Instance have consistently held that, *"in order that an agreement between undertakings may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States"*.[564] In any event, whilst Article 81 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"*.[565]

(311) As demonstrated in the "Trade between Member States" section in section 2.5.3 of this Decision, the markets for paraffin waxes and slack wax are characterised by a

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[564] See Case 56/65 *Société Technique Minière* [1966] ECR 282, paragraph 7; Case 42/84 *Remia* and Others [1985] ECR 2545, paragraph 22 and Joined Cases T-25/95 and others, *Cimenteries CBR* [2002] ECR II-491.

[565] Case C-306/96 *Javico*, [1998] ECR I-1983, paragraphs 16 and 17; see also Case T-374/94, *European Night Services*, [1998] ECR II-3141, paragraph 136.

substantial volume of trade between Member States and between the Community and EFTA countries belonging to the EEA.

(312) The application of Article 81 of the Treaty and Article 53 of the EEA Agreement to a cartel is not, however, limited to that part of the members' sales that actually involve the transfer of goods from one State to another. Nor is it necessary, in order for these provisions to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States.[566]

(313) In the present case, the cartel arrangements covered paraffin waxes and – for those undertakings identified in recital (1) – slack wax. The existence of a price fixing mechanism and – for those undertakings identified in recital (1) – a market and customer allocation system was capable of resulting in the automatic diversion of trade patterns from the course they would otherwise have followed.[567]

5.8. Application of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement

(314) The provisions of Article 81(1) of the Treaty and of Article 53(1) of the EEA Agreement may be declared inapplicable pursuant to Article 81(3) and Article 53(3) respectively where an agreement or concerted practice contributes to improving the production or distribution of goods or to promoting technical or economic progress, provided that it allows consumers a fair share of the resulting benefit, does not impose restrictions that are not indispensable to the attainment of those objectives and does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

(315) Restriction of competition being the sole object of the price fixing and – for those undertakings identified in recital (1) – of market sharing arrangements which are the subject of this Decision, there is no indication that the agreements and/or concerted practices between the paraffin waxes and/or slack wax suppliers entailed any efficiency benefits or otherwise promoted technical or economic progress. Hardcore cartels are, by definition, the most detrimental restrictions of competition, as they benefit only the participating suppliers but not consumers.

(316) […] claims that Article 81(3) of the Treaty applies to this case, arguing that the restriction of competition was an unintended effect of cross-supplies between producers of paraffin which contributed to a higher security of supply and lower prices for the consumer. […] argues that efficiency gains could only be realised by such cross-supplies because without them, producers would have to keep stocks in order to be able to continuously produce which would lead to price increases. In addition, […] argues that the market was competitive.[568]

(317) The Commission observes that Article 81(3) of the Treaty lists four cumulative conditions which must be fulfilled in order for agreements or concerted practices to be exempted from the prohibition of Article 81(1) of the Treaty. The Commission further

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566 See Case T-13/89 *Imperial Chemical Industries v Commission* [1992] ECR II-1021, paragraph 304.

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

568 […].

observes that, even if […] arguments were well-founded, they only address two of these four conditions. In particular, the Commission does not consider that the agreements and concerted practices at issue in the present Decision are indispensable in the sense of Article 81(3) of the Treaty. As noted above, […] has not explained why discussions on pricing in cross-supply relationships were held in a multilateral setting.

(318) Accordingly, on the basis of the facts before the Commission, there are no indications that suggest that the conditions of Article 81(3) and Article 53(3) could be fulfilled in this case.

5.9. Economic Arguments

(319) […] submit economic studies in order to support their arguments. As a preliminary remark, it should be noted that, from a conceptual standpoint, according to Community case law, the impact of a cartel does not have to be assessed at the level of one undertaking or even a group but at the level of the cartel as a whole. The Court of Justice has indeed ruled that "*the effects to be taken into account in setting the general level of fines are not those resulting from the actual conduct which an undertaking claims to have adopted, but those resulting from the whole of the infringement in which it had participated*"[569]. It should therefore be concluded that a report which examines the impact of the cartel on a single or few undertakings is irrelevant in this respect. This also applies to arguments provided by the other parties regarding the impact they claim they experienced individually.

(320) The Commission also observes that the infringement (in particular instances of agreements on prices) is demonstrated by contemporaneous evidence. The fact that in their replies to the Statement of Objections certain parties rely on economic studies intended to demonstrate that there was no infringement does not appear to have the same probative value. The case-law, according to which it is sufficient for the applicants to prove circumstances which cast the facts established by the Commission in a different light and thus allow another 'plausible explanation' of the facts to be substituted for the one adopted by the Commission, is applicable only where the Commission's reasoning is based on the supposition that the facts established cannot be explained other than by concerted action between undertakings. It is not, therefore, applicable where the Commission's findings are based on documentary evidence,[570] in particular where such evidence indicates the existence of anti-competitive agreements.

(321) […] puts forward a number of economic arguments to support the assumption that there was no economic incentive for […] to engage in anti-competitive arrangements and that […] prices were determined by other factors than these arrangements. […] arguments essentially maintain that, firstly, it was economically reasonable for […] to engage in the exchange of information and that this led to market efficiencies. Secondly, it is argued that the market was not sealed, especially considering that Chinese imports were available and that the later withdrawal of Chinese imports shows that the price level in Europe was low, supporting the argument that the price fixings

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569 *Commission v Anic Partecipazioni SpA*, paragraph 152.

570 See, to that effect, Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931 ('*PVC II*'), paragraphs 725 to 727, and Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501 ('*JFE Engineering*'), paragraphs 186 and 187.

were not effective. Thirdly, it is argued that buyers can exercise considerable power, impeding the raising of prices including those that were fixed. Fourthly, it is argued that paraffin products are not homogenous which hampers price fixing; in addition, it is claimed that the characteristics of the market make the implementation of fixed prices impossible. Fifthly, […] claims that 94% of […] prices can be explained by the increase in raw material prices and reduction of production capacities. […] claims that prices significantly declined during the cartel infringement period. Finally, it is argued that the decline of raw material prices was passed on to the customer by […] both during and after the cartel.[571]

(322) The Commission cannot accept these arguments. On a general note, the issue whether […] conduct was economically rational is irrelevant in assessing whether or not it participated in the infringement. Equally, the question of whether or not […] prices were effectively influenced by the arrangements does not alter the fact that […] was, as is demonstrated, involved in those arrangements. The Commission is not required to demonstrate that undertakings participating in a cartel actually use the information exchanged in the cartel. In fact, there is a presumption, subject to proof to the contrary, that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market. That is all the more true where the undertakings concert together on a regular basis over a long period.[572] Moreover, the data used in the economic study only cover the years after 2000, that is to say, only the last five years of the infringement.[573] […] itself concedes that the economic analysis does not constitute evidence that a cartel had not existed.[574] That some competition may have existed on parts of the markets does not support the argument that no cartel existed. The Commission does not have to demonstrate that the cartel covered 100% of the market in order to find an infringement, or that the cartel excluded all competition. Therefore, the existence of imports is irrelevant to the Commission's finding of an infringement. This is also the case in relation to buyer power. Such buying power may limit the impact of an infringement, but it may not be relied upon to negate the existence of an infringement itself. In fact, the perceived existence of buyer power may actually explain the need felt to organize a cartel, in order to maintain prices at a level which would be higher than the one resulting from market forces. With regard to the important role of the prices of slack wax for the prices of paraffin waxes, the Commission agrees with […]. However, the fact that product prices may be explained by increases in prices of raw materials cannot negate the infringement insofar as discussions took place precisely in order to pass such increases on to the downstream level.

(323) […] argues that it was dependent on imports from China for a part of its supply of raw material, including fully-refined paraffin, and, therefore, was not a competitor with the other undertakings involved in this product. Furthermore, […] states that it only had legitimate cross-supply relationships with the other undertakings involved. Finally, […]

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571 […].

572 Case C-199/92P *Hüls* v *Commission*, [1999] ECR I-4287, paragraphs 158 to 166, and Case T-9/99 *HFB* v *Commission*, [2002] ECR II-1487, paragraphs 213 and 216.

573 […].

574 […].

claims that its position on the market was more comparable to that of a blender or manufacturer of specialties than to that of the other undertakings involved.[575]

(324) As the Commission is applying a wide understanding of the term *"paraffin waxes"* (see section 5.4.2), it considers that it is sufficient that […] and the other undertakings involved are competitors with respect to some products covered by this infringement. Regardless of […] position in the industry and independent of possible cross-supply relationships, it has been established that representatives of the company regularly participated in, and contributed to, the Technical Meetings. The Commission also observes that […] is not offering an explanation why it was represented at, and contributed to, these meetings despite its alleged special circumstances.

(325) […] submits an economic analysis regarding slack wax prices of […], essentially arguing that prices for slack wax sold to other customers than end-customers were unrelated to prices for slack wax sold to end-customers and different types of paraffin waxes. It is furthermore argued that the likelihood of a price increase in slack wax sold to other customers than end-customers was not greater after a Technical Meeting than at any other point in time. Finally, it is argued that changes in pricing between […] were unrelated to the Technical Meetings. […] concludes that this shows that the infringement was limited to slack wax sold to end-customers.[576]

(326) The Commission has come to the same conclusion. On the alleged absence of an economic link between slack wax and paraffin waxes, the Commission observes that not only is slack wax the raw material for the production of paraffin waxes but also that the file contains documentary evidence showing that the participants to the cartel agreed to justify the price increases in paraffin waxes by reference to price increases in slack wax.[577] The Commission concludes that the economic link between the two products is therefore certainly obvious to the end-users of paraffin waxes.

(327) […] maintain that the arrangements had a minimal effect on the market as the arrangements were not honoured and there was no sanctioning mechanism.[578] The Commission considers that it is not necessary to demonstrate such effects in the order to establish an infringement of the Community competition rules.

5.10. Conclusion on the Application of Article 81 of the Treaty and Article 53 of the EEA Agreement

(328) In the light of the above, the Commission concludes that:

(1) Dea (later Shell), ENI, ExxonMobil, H&R/Tudapetrol, MOL, Repsol, Sasol and Total committed a single and continuous infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement consisting of price fixing and exchange of commercially sensitive information affecting paraffin waxes, in particular fully-refined paraffin waxes, semi-refined paraffin waxes, wax blends, specialties, hydro-finished wax and hard paraffin waxes;

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575 […].
576 […].
577 […].
578 […].

(2) for Dea (later Shell), ExxonMobil, MOL, Repsol, Sasol and Total this single and continuous infringement also consisted of customer and/or market allocation;

(3) for Dea (later Shell), ExxonMobil, Sasol, and Total this single and continuous infringement also related to slack wax that is sold to end-customers on the German market for the period between 30 October 1997 and 12 May 2004

6. ADDRESSEES OF THE PRESENT DECISION

6.1. Principles Concerning Addressees

(329) The subjects of EC competition rules are undertakings, a concept which is not identical with that of corporate legal personality for the purposes of national commercial or fiscal law. The undertaking that participated in the infringement is therefore not necessarily identical with the precise legal entity within the group of companies whose representatives actually took part in the cartel meetings. The term 'undertaking' is not defined in the Treaty. Community case law has confirmed that Article 81 of the Treaty is aimed at economic units which consist of a unitary organisation of personal, tangible and intangible elements which pursue a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision.[579]

(330) Despite the fact that Article 81 of the Treaty is applicable to undertakings and that the concept of undertaking is of an economic nature, only entities with legal personality can be held liable for its infringement.[580] Measures enforcing EC competition rules must thus be addressed to a legal entity. Where an infringement of Article 81 is found to have been committed, it is therefore necessary to identify the natural or legal person who was responsible for the operation of the undertaking at the time when the infringement was committed so that it can answer for it.

(331) Accordingly, it is necessary to define the undertaking that will be held accountable for the infringement of Article 81 by identifying one or more legal persons to represent the undertaking. According to case law, *"Community competition law recognises that different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Articles 81 EC and 82 EC if the companies concerned do not determine independently their own conduct on the market"*.[581] If a subsidiary does not independently determine its own conduct on the market, the company which directed its commercial policy forms a single economic entity with the subsidiary and may thus be held liable for an infringement on the ground that it forms part of the same undertaking.

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[579] See Case T-11/89 *Shell International Chemical Company Ltd v Commission* [1992] ECR II-00757, paragraph 311 and Case T-352 *Mo Och Domsjö AB v Commission* [1998] ECR II-01989, paragraph 87-96.

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

[581] See Case T-203/01 *Michelin v Commission* [2003] ECR II-4371, paragraph 290.

(332) According to established case-law, the Commission can generally assume that a wholly-owned (or almost wholly-owned) subsidiary essentially follows the instructions given to it by its parent company without needing to check whether the parent company has in fact exercised that power.[582] However, the parent company and/or subsidiary can rebut this presumption by producing sufficient evidence that shows that the subsidiary *"decided independently on its own conduct on the market rather than carrying out the instructions given to it by its parent company"*.[583]

(333) In response to the Statement of Objections and referring to case law[584], several of the addressees of the Statement of Objections argued that 100% ownership does not, on its own, create any presumption, but that additional elements are required. In the Commission's view, as already stated in recital (332), the attribution of liability to the parent company can indeed be sufficiently based on a presumption following from near 100% ownership.[585] Additional indicia can be used to corroborate the presumption. Recent case-law also explicitly states that "*In the specific case of a parent company holding 100% of the capital of a subsidiary which has committed an infringement, there is a simple presumption that the parent company exercises decisive influence over the conduct of its subsidiary…., and that they therefore constitute a single undertaking within the meaning of Article 81 EC"* and that "*it is sufficient for the Commission to show that the entire capital of a subsidiary is held by the parent company in order to conclude that the parent company exercises decisive influence over its commercial policy"*.[586] It is thus clear that it is sufficient for the Commission to show that the entire capital of a subsidiary is held by the parent company and that this creates a presumption that the parent company exercises decisive influence, with no need of any additional indicia. Consequently a 100% parent company is liable unless the presumption is rebutted by the parent company by proving that the subsidiary acts autonomously. In particular, the court stressed the allocation of powers relating to the decision-taking procedure within the group, namely that "*the competent personnel, and in particular the management of [the parent company], play a significant role in several essential aspects of the strategy of the subsidiaries in question and reserve the power of final decision with respect to a range of matters that define their course of*

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582 Case 107/82 *AEG v Commission* [1983] ECR 3151, paragraph 50; Case C-310/93P, *BPB Industries & British Gypsum* v *Commission* [1995] ECR I-865, paragraph 11; Case T-354/94 *Stora Kopparbergs Bergslags AB* v *Commission*, [1998] ECR II-2111, paragraph 80; Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/*94 LVM and others* v *Commission* (PVC II), [1999] ECR II-931, paragraphs 961 and 984; Case T-203/01 *Michelin v Commission*, [2003] ECR II-4371 paragraph 290; Joined cases T-71, 74, 87 and 91/03 *Tokai Carbon Co. Ltd and others* v *Commission* [2005] ECR II-10, paragraphs 59-60; Case T-325/01, *DaimlerChrysler* v *Commission* [2005] ECR-II 3319, paragraph 219, see also the more recent judgments of 12 September 2007 in case T-30/05, *William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG v Commission*, not yet reported, paragraphs 146 and 147, and of 12 December 2007 in case T-112/05, *Akzo Nobel and Others v. Commission*, not yet reported.

583 Case 91/03 *Tokai Carbon Co. Ltd and others v Commission* [2005] ECR II-10, paragraph 61.

584 In particular judgment of 26 April 2007 in joined cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, *Bolloré and others v Commission*, not yet reported, Case T-325/01, *DaimlerChrysler* v *Commission* [2005] ECR-II 3319 and Case T-259/02 to T-264/02 and T-271/02 *Lombard Club* Judgment of the Court of First Instance of 14 December 2006 (not yet published).

585 See judgment of 12 September 2007 in case T- 30/05, *William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG, v Commission*, not yet reported, paragraphs 146 and 147, and judgement of 12 December 2007 in case T-112/05, *Akzo Nobel and Others v. Commission*, not yet reported.

586 See judgment of 12 December 2007 in case T-112/05, *Akzo Nobel and Others v. Commission*, not yet reported.

conduct on the market." With regard to the issue of pricing autonomy of subsidiaries, the court ruled that *"[t]he argument that decisions relating to pricing and price increases are in principle taken by the marketing managers for the products concerned, who act within their respective subsidiaries […] cannot refute that conclusion."*[587] Moreover, the *"attribution of an infringement by a subsidiary to the parent company does not require proof that the parent company influences its subsidiary's policy in the specific area in which the infringement occurred, in the present case distribution and pricing. On the other hand, the economic and legal organisational links between the parent company and its subsidiary may establish that the parent exercises influence over the subsidiary's strategy and therefore that they can be viewed as a single economic entity."* Thus, to prove autonomy, more must be shown than merely independence in commercial policy in the narrow sense (that is to say, distribution and pricing). The same principles hold true, *mutatis mutandis*, for the purposes of the application of Article 53 of the EEA Agreement.

(334) As the Court of Justice pointed out in *Avebe*, it is settled case-law that the anti-competitive conduct of an undertaking can be attributed to another undertaking where it has not decided independently upon its own conduct on the market but carried out, in all material respects, the instructions given to it by that other undertaking, having regard in particular to the economic and legal links between them.[588] The Court also found in *Avebe*, on the basis of established case-law, that it is, in principle, for the Commission to demonstrate such decisive influence on the basis of factual evidence, including, in particular, any management power one of the undertakings may have over the other.[589] In *Avebe* the Court accordingly found that the joint venture agreement established joint management power over the joint venture. Given the joint management power and the fact that the parent companies each held a 50% stake in the joint venture and, therefore, controlled all of its shares jointly, the Court found that the situation in that case was analogous to that in Case T-354/94 *Stora Kopparbergs Bergslags v Commission*, in which a single parent company held 100% of its subsidiary, for the purpose of establishing the presumption that that parent company actually exerted a decisive influence over its subsidiary's conduct.

(335) The factual situation in each case may vary and it is not necessary for the particular facts to always be the same, because in any case they pertain to the structure that the joint venture's parents have decided to establish in each case. What is relevant is whether, on the basis of the facts particular to the case at hand, it is demonstrated that the joint venture's parents have exercised decisive influence over the joint venture's conduct, in particular, any management power over the joint venture. Therefore, in order to prove management power over a joint venture, it is necessary to consider

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[587] See judgment of 12 December 2007 in case T-112/05, *Akzo Nobel and Others v. Commission*, not yet reported.

[588] See case T-314/01 *Avebe v Commission* [2006] ECR II-3085, paragraph 135. See also Joined Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P et C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR, I-5425, paragraph 117, and Case C-294/98 P *Metsä-Serla Oyj and Others v Commission* [2000] ECR I-10065, paragraph 27.

[589] See case T-314/01 *Avebe v Commission* [2006] ECR II-3085, paragraph 136 and the following case-law referred therein: Joined Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P et C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR, I-5425, paragraphs 118 to 122; Case C-196/99 P *Aristrain v Commission* [2003] ECR I-11005, paragraphs 95 to 99; Case T-9/99 *HFB and Others v Commission* [2002] ECR II-1487, paragraph 527.

whether the facts in the case at hand demonstrate decisive influence, rather than compare the particular facts in one case against those in another.

(336) When an undertaking that has committed an infringement of Article 81 subsequently disposes of the assets which contributed to the infringement and withdraws from the market in question, it continues to be answerable for the infringement where it has not ceased to exist.[590] If the undertaking which has acquired the assets carries on the violation of Article 81, liability for the infringement should be apportioned between the seller and the acquirer of the infringing assets, each undertaking being responsible for the period of the infringement in which it participated through these assets in the cartel. However, if the legal person initially answerable for the infringement ceases to exist and loses its legal personality, being purely and simply absorbed by another legal entity, that latter entity must be held answerable for the whole period of the infringement and thus is liable for the activity of the entity that was absorbed.[591] The mere disappearance of the person responsible for the operation of the undertaking when the infringement was committed does not allow it to evade liability.[592] Liability for a fine may thus pass to a successor where the corporate entity which committed the violation has ceased to exist in law.

(337) Different conclusions may, however, be reached when a business is transferred from one company to another, in cases where transferor and transferee are linked by economic links, that is to say, when they belong to the same undertaking. In such cases, liability for past behaviour of the transferor may transfer to the transferee, notwithstanding the fact that the transferor remains in existence.[593]

(338) The foregoing considerations relate to the existence of a single economic entity based on parent-subsidiary relations. A single economic entity can also be deemed to arise on the basis of contractual relations freely entered into by legal entities which have no ownership relationship as set out below.

(339) In its judgment in case T-66/99 *Minoan Lines v Commission*, the Court of First Instance upheld the Commission's view that the acts of a true agent or commercial representative can be imputed to the principal where these companies acted as a single

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

591 See Case C-279/98P *Cascades* v *Commission* [2000] ECR I-9693, paragraphs 78 and 79: *"It falls, in principle, to the natural or legal person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the Decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking ... Moreover, those companies were not purely and simply absorbed by the appellant but continued their activities as its subsidiaries. They must, therefore, answer themselves for their unlawful activity prior to their acquisition by the appellant, which cannot be held responsible for it"*, and also Case T-259/02 to T-264/02 and T-271/02 *Lombard Club* Judgment of the Court of First Instance of 14 December 2006 (not yet published), paragraphs 319-336 (Case T-264/02).

592 See Court of First Instance in Case T-305/94 *PVC II* [1999] ECR II-931, paragraph 953. This point was confirmed by the Court of Justice in Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and others v Commission* (PVC II), [1999] ECR II-931.

593 See judgment in Joined Cases C-204/00 P (and other), *Aalborg Portland A/S a.o. v Commission* [2004] ECR I-267, paragraphs 354-360, as confirmed in Case T-43/02 *Jungbunzlauer AG v Commission*, [2006] ECR II-3435, paragraph 132-133.

entity in the market.[594] Where an agent works for the benefit of its principal, the agent may in principle be treated as an auxiliary organ forming an integral part of the principal's undertaking that must carry out his principal's instructions and thus, like a commercial employee, forms an economic unit within this undertaking.

(340) The Court also considered that in the case of companies having a vertical relationship, such as a principal and its agent or intermediary, two factors constitute the main parameters for determining whether there is a single economic unit: firstly, whether the intermediary takes on any economic risk and, secondly, whether the services provided by the intermediary are exclusive.[595]

6.2. Application

(341) In application of the above principles, the Commission addresses this Decision to those legal entities whose representatives committed the infringement as described in section 4 by, *inter alia*, attending Technical Meetings. In addition, this Decision is addressed to the parent companies of these legal entities. Together, these entities form part of the undertakings that committed the infringement of Article 81 of the Treaty.

6.2.1. The ENI group

(342) It has been established in section 4 that throughout the period of its involvement, ENI participated in the infringement via employees of AgipPetroli S.p.A. and ENI S.p.A. (see recital (10)).

(343) AgipPetroli S.p.A. was represented at a meeting on 30 and 31 October 1997 and from 21 and 22 February 2002 until 31 December 2002 (when it was merged into ENI S.p.A. and thus ceased to exist), and ENI S.p.A. participated as from 1 January 2003 (from this date onwards, ENI's refining & marketing division was in charge of the sales of paraffin waxes and slack wax) until 28 April 2005 (end date of the infringement).

(344) AgipPetroli S.p.A. has been taken over by ENI S.p.A. on 31 December 2002. Consequently ENI S.p.A., according to the principles laid down in recital (334), must be considered to have taken over the liability of AgipPetroli S.p.A.'s activities prior to 31 December 2002 (the date when AgipPetroli S.p.A. was merged into ENI S.p.A.).

(345) Thus, ENI S.p.A should be held liable, not only for its direct participation in the cartel after AgipPetroli S.p.A. was merged into ENI S.p.A. (31 December 2002), but also for the activities undertaken by AgipPetroli S.p.A. in the cartel prior to that date.

(346) In its reply to the Statement of Objections, ENI did not challenge the Commission's findings concerning liability.

(347) For the reasons stated above, ENI S.p.A. is liable for participation in a meeting on 30 and 31 October 1997 and from 21 and 22 February 2002 until 28 April 2005 (end date of the infringement).

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[594] See also Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *SuikerUnie and Others v Commission* [1975] ECR 1663, paragraph 480.

[595] See the judgment of the Court of First Instance in Case T-66/99 *Minoan Lines v Commission* paragraph 98-151 and Commission Notice-Guidelines on Vertical Restraints OJ C 291 13.10.2000, p. 1, paragraph 20.

6.2.2. The ExxonMobil group

(348) It has been established in section 4 that throughout the period of its involvement, ExxonMobil participated in the collusion via employees of Mobil Oil Française (and its legal successor) and Esso Deutschland GmbH (see recital (19)).

(349) Mobil Oil Française participated in the cartel via its own employees from the beginning of the infringement until it ceased to exist on 6 May 2003. Esso Deutschland GmbH participated via its own employees from at least 22 February 2001 onwards.[596] As a starting point, the Commission therefore intends to hold these companies liable for their direct participation in the cartel.

(350) Mobil Oil Française ceased to exist when it merged with Esso Société Anonyme Française on 6 May 2003. Consequently Mobil Oil Française can no longer be held liable for its participation in the cartel.

(351) Mobil Oil Française was taken over by Esso Société Anonyme Française. Consequently, Esso Société Anonyme Française, according to the principles laid down in recital (334), must be considered to have taken over the liability of Mobil Oil Française's activities committed prior to 6 May 2003 (the date when Mobil Oil Française merged with Esso Société Anonyme Française).

(352) Thus, Esso Société Anonyme Française should be held liable for the activities of Mobil Oil Française in the cartel prior to the date when the latter company was merged into Esso Société Anonyme Française.

(353) In addition, liability also arises for those companies which exercised decisive influence over Esso Deutschland GmbH and Esso Société Anonyme Française during the period they participated in the cartel. Before the merger of Exxon Corporation and Mobil Corporation (30 November 1999), Esso Deutschland GmbH was, via a chain of 100% subsidiaries, ultimately 100% owned by Exxon Corporation. Since the merger, Esso Deutschland GmbH was, via a chain of 100% subsidiaries, 75% owned by ExxonMobil Petroleum & Chemical B.V.B.A. (EMPC) while the other 25% were held by another legal entity within the ExxonMobil group. Esso Société Anonyme Française was, via a chain of subsidiaries, 82.89% owned by EMPC (the rest of the shares were publicly owned).

(354) Although EMPC held less than 100% of the shares of Esso Deutschland GmbH and of Esso Societé Anonyme Française, the Commission considers that the three entities acted as one undertaking. This consideration is based on the fact that the shares not held by EMPC (25% in the case of Esso Deutschland GmbH and 17.11% in the case of Esso Societé Anonyme Française) were not concentrated in the hands of a single (strategic) investor but were either widely dispersed (in the case of Esso Societé Anonyme Française) or even held by another entity within the ExxonMobil group under the ultimate control of Exxon Mobil Corporation (in the case of Esso Deutschland GmbH). In both cases, EMPC was an instrument of control exercised by the ultimate parent company and thus formed part of the economic entity participating in the infringement. As regards Esso Societé Anonyme Française, due to its dominant position in the shareholder's meeting and the dispersal of the other shareholdings, it must be

[596] […].

assumed that EMPC alone exercised decisive influence on the commercial policy of its subsidiary. The Commission further observes that ExxonMobil's leniency application was made on behalf of EMPC *"and its subsidiaries and affiliates"*[597]. Also, the e-mail referred to in recital (599) was sent by […], an employee of […]. Both indicates that ExxonMobil's economic activities, and likewise its participation in the infringement, was carried out through various group companies and including EMPC and its subsidiaries. Even if the shares in some of its subsidiaries were formally not 100% held by EMPC, they must therefore nevertheless be considered as part of the undertaking which participated in the infringement.

(355) For the time before the merger (before 30 November 1999), only Mobil Oil Française's legal successor is held liable for the infringement.

(356) ExxonMobil Petroleum & Chemical B.V.B.A. (EMPC), like all companies in the ExxonMobil group, constitutes a chain of subsidiaries ultimately wholly-owned (directly or indirectly) by Exxon Mobil Corporation.

(357) In case of a wholly-owned (or almost wholly-owned) subsidiary, it can be presumed that the parent exercised decisive influence over the conduct of such subsidiary and that the subsidiary necessarily followed the policy laid down by the parent company (see recitals (332)-(333)).

6.2.2.1. Arguments by the Party

(358) Within the ExxonMobil group, it is only the liability of the ultimate parent company – Exxon Mobil Corporation - that is contested.

(359) Exxon Mobil Corporation argues that 100% ownership does not, on its own, create any presumption and that any such presumption conflicts with fundamental principles of law (such as the principle that legal entities have distinct legal personality, the principle that liability for fines must be based on personal responsibility, the principle that the Commission bears the burden of proof for an infringement, principles of international jurisdiction and comity since Exxon Mobil Corporation is based outside the Community and the presumption of innocence as enshrined in the European Human Rights Convention). The Commission must demonstrate, according to ExxonMobil, additional factors to justify such liability and refers to case law, however no such additional factors have been identified[598].

(360) Even if Exxon Mobil Corporation does not accept that legal ownership creates a presumption of liability, it claims that it can, in any event, rebut such a presumption. Exxon Mobil Corporation did not manage, control or influence the commercial operations of the relevant affiliates which were free to conduct their commercial operations on an autonomous basis. In particular, day-to-day commercial decisions were taken at the level of local affiliate and were not subject to review or approval from Exxon Mobil Corporation. Within the ExxonMobil group there is a decentralised organisational structure and the affiliates have autonomous commercial policies as

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[597] […].

[598] In particular judgment of 26 April 2007 in joined cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, *Bolloré and others v Commission*, not yet reported, Case T-325/01, *DaimlerChrysler* v *Commission* [2005] ECR-II 3319 and Case T-259/02 to T-264/02 and T-271/02 *Lombard Club* Judgment of the Court of First Instance of 14 December 2006 (not yet published).

established in internal guidelines, which set out the levels of authority required for different types of decision making and delegate authority. The relevant affiliates were responsible and accountable for all day-to-day commercial decision relating to wax sales, in particular individual customer pricing, sales contracting, pricing policy and marketing strategy.

(361) Exxon Mobil Corporation's role was limited to that of a prudent shareholder protecting its financial ownership interests. Endorsement from Exxon Mobil Corporation was required only for a limited number of matters that were outside the scope of the day-to-day commercial operations- […]. Moreover, there are no overlaps between the directorship and management of Exxon Mobil Corporation and the EMPC affiliates or EMPC.

(362) Exxon Mobil Corporation further claims that it cannot be held liable for the conduct of a Mobil employee acting in violation of the ExxonMobil group's compliance policy.

(363) Exxon Mobil Corporation also claims that it cannot be held liable as a parent company for the infringement post-merger, as the illegal conduct is limited to one employee who ignored clear compliance rules. Exxon Mobil Corporation argues that parental liability requires a degree of institutionalization and Exxon Mobil Corporation had no direct or indirect involvement in the infringement and could thus not have known or prevented it.

(364) Finally Exxon Mobil Corporation argues that there is no practical or policy reason for addressing any Decision to Exxon Mobil Corporation and that the Commission has discretion to address a Decision to a parent company and refers to cases where the Commission has refrained from doing so.[599]

6.2.2.2. Assessment

(365) As explained above (see recitals (332)-(333)) and as recently confirmed by the Community Courts[600], it is established case law that the Commission can presume that parent companies exercise decisive influence on their wholly-owned subsidiary. Where such a presumption applies, as in this case for Exxon Mobil Corporation, it is for the parent company to rebut the presumption, by adducing evidence demonstrating that its subsidiary decided independently on its conduct on the market. Failure to provide sufficient evidence on the part of the parent company amounts to a confirmation of the presumption and provides a sufficient basis for the imputation of liability.

(366) Concerning the principle of personal liability, Article 81 of the Treaty is addressed to "undertakings" which may comprise several legal entities. In this context the principle of personal liability is not breached as long as different legal entities are held liable on the basis of circumstances which pertain to their own role and their conduct within the same undertaking. In the case of parent companies, liability is established on the basis of their exercise of effective control on the commercial policy of the subsidiaries which are materially implicated by the facts.

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599 […].

600 Court of First Instance in Case T-30/05 *Prym Consumer v Commission*, judgment of 12 September 2007, not yet reported, paragraphs 146-148 and judgment of 12 December 2007 in case T-112/05, *Akzo Nobel and Others v. Commission*, not yet reported.

(367) As to the arguments which Exxon Mobil Corporation has put forward in order to claim that its subsidiaries acted autonomously, it is observed that the exercise of decisive influence on the commercial policy of a subsidiary does not require day-to-day management of the subsidiary's operation. The subsidiary's management may well be entrusted with the subsidiary, but this does not rule out that the parent company imposes objectives and policies which affect the performance of the group and its coherence and to discipline any behaviour which may depart from those objectives and policies.[601] In fact, Exxon Mobil Corporation admits that it had an interest and role over its subsidiaries as a shareholder to protect its financial ownership interest. In addition, Exxon Mobil Corporation lists certain matters for which endorsement by Exxon Mobil Corporation was required. The absence of a management overlap cannot be taken, under the circumstances of this case, as being a significant, let alone decisive factor, in order to rebut the presumption.

(368) As regards Exxon Mobil Corporation's argument about the existence of an antitrust compliance programme, it is irrelevant in this context as it is not capable as such of distancing the parent company from the wrongdoings of its subsidiary. Exxon Mobil Corporation has, particularly with regard to the conduct of a former Mobil employee, not been able to show that its instructions proved effective. If anything, the introduction of a compliance programme shows an attempt by the mother company to exercise influence over its subsidiary's day-to-day conduct.

(369) The allegation that there is no indication of direct involvement of the parent company in the anti-competitive conduct and its alleged lack of awareness is irrelevant. That argument is based on the erroneous premise that a parent company can only be held liable for the infringements committed by its subsidiaries if it can be established that it was aware of the infringement or it was directly involved in its organisation and implementation. Contrary to that contention, attribution of liability to a parent company for the infringement committed by its subsidiary flows from the fact that the two entities constitute a single undertaking for the purposes of the Community rules on competition[602] and not from proof of the parent's participation in or awareness of the infringement (see recitals (329)-(333)).

(370) With regard to ExxonMobil's argument that there are no practical or policy reasons to address the Decision to Exxon Mobil Corporation and that the Commission has discretion to address a decision to a parent company and the fact that the Commission has refrained from doing so in other cases, it is must be said that the Commission decides on a case-by-case basis which entities of an undertaking it holds liable for an infringement in application of the principle described in recital (357). The fact that, in previous decisions, based on the facts in those particular cases, the Commission chose not to hold the parent companies liable does not mean that the Commission is prevented from holding the parent company liable in this case.

(371) Between August 1996 and November 2000, Mobil's wax business was contributed to a joint venture with BP.[603] […].[604] […].[605] […].[606] […].[607]

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[601] See judgment of 12 December 2007 in case T-112/05, *Akzo Nobel and Others v. Commission*, not yet reported, paragraph 83.

[602] See Cases T-71/03, T-74/03, T-87/03, and T-91/03 *Tokai Carbon v Commission*, [2005] ECR II-10, paragraph 54.

[603] See Case No IV/M.727 – *BP/Mobil*.

(372) […].[608] […].[609] […].[610] […].[611] […].[612] […].[613] […].[614]

(373) In 2000, the Mobil/BP joint venture had to be dissolved as a condition for obtaining clearance of the future Exxon/Mobil merger.[615] […].[616] […].[617] […].[618] […].[619] […].[620]

(374) Based on the above, the Commission concludes that Mobil exercised decisive influence over the lubricants business (including waxes) during the years of the Mobil/BP joint venture. […].[621] […].[622] […].[623] […].

(375) The Commission therefore concludes that the elements which Exxon Mobil Corporation has put forward are not capable of rebutting the presumption.

(376) The Commission observes that ExxonMobil has not put forward arguments as to why EMPC was not able to exercise decisive influence over its subsidiaries Esso Deutschland GmbH and Esso Société Anonyme Française.

(377) The Commission therefore finds that Exxon Mobil Corporation was, as of the date of the merger (30 November 1999),[624] able to exercise decisive influence and effective control over ExxonMobil Petroleum & Chemical B.V.B.A. (EMPC). The Commission also finds that EMPC exercised, as of that date, decisive influence and effective control over Esso Deutschland GmbH and Esso Société Anonyme Française. Consequently, ExxonMobil Petroleum & Chemical B.V.B.A. and Exxon Mobil Corporation together form part of the undertaking that committed the infringement.

(378) For these reasons, Exxon Mobil Corporation and ExxonMobil Petroleum & Chemical B.V.B.A. (EMPC) are jointly and severally liable with Esso Deutschland GmbH and Esso Société Anonyme Française, as they form part of the undertaking that committed the infringement in the period from 30 November 1999 onwards.

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615 See Case No COMP/M.1822 – *Mobil/JV Dissolution*.
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6.2.3. The Hansen & Rosenthal/Tudapetrol group

(379) It has been established in chapter 4 that throughout the period of the infringement H&R/Tudapetrol participated in the collusion via employees of SRS GmbH, Tudapetrol Mineralölerzeugnisse Nils Hansen KG, H&R Management & Service GmbH (renamed H&R ChemPharm GmbH as of 28 February 2002), H&R ChemPharm GmbH and/or H&R Wax Company Vertrieb GmbH (see recital (26)).

(380) Tudapetrol is an independent company with […] as general partners, and […] as limited partner (see recital (25)). Paraffin waxes were distributed by Tudapetrol until 1 May 2000, when the distribution was transferred to H&R Wax Company Vertrieb Komplementär GmbH & Co. KG. Since 1 January 2001, the distribution has been managed by H&R Wax Company Vertrieb GmbH, a 100% subsidiary of Hansen & Rosenthal KG.

(381) The Commission holds that Tudapetrol Mineralölerzeugnisse Nils Hansen KG (Tudapetrol) participated as of 24 March 1994 until 30 June 2002, SRS GmbH from 22 February 2001 until 1 July 2001, H&R ChemPharm GmbH (named H&R Management & Service GmbH until 28 February 2002) from 1 July 2001 until 28 April 2005 (end date of the infringement) and H&R Wax Company Vertrieb GmbH from 1 January 2001 until 28 April 2005 (end date of the infringement).[625] As a starting point, the Commission therefore holds Tudapetrol liable for its direct participation in the cartel during the period 24 March 1994 until 30 June 2002 and the companies of Hansen & Rosenthal which directly participated in the cartel liable for the period 1 January 2001 until 28 April 2005. During this period the participation varied among the respective Hansen & Rosenthal companies, however as all these companies directly belong to the same group (see recitals (384)-(386)), they are considered as one undertaking for the purpose of this Decision.

(382) With respect to SRS GmbH, the Commission considers that the economic activities of SRS GmbH were taken over by H&R Wax Company Vertrieb GmbH when the latter entity started to manage the distribution on 1 January 2001 (see also recital (25)). The Commission considers that, as of this date, the employees of SRS GmbH attended the Technical Meetings on behalf of the company that carried out the relevant economic activities, that is, H&R Wax Company Vertrieb GmbH. That the individuals continued to be employed by SRS GmbH for a transition period does not alter this finding. Consequently, H&R Wax Company Vertrieb GmbH is to be held liable from 1 January 2001.

(383) In addition, liability also arises for those companies which exercised decisive influence over H&R Wax Company Vertrieb GmbH and H&R ChemPharm GmbH during the period in which they participated in the cartel.

(384) H&R Wax Company Vertrieb GmbH is a 100% subsidiary of Hansen & Rosenthal KG (the ultimate parent company of Hansen & Rosenthal).

(385) H&R ChemPharm GmbH was a 100% subsidiary of H&R Wasag AG throughout the infringement. The main and largest individual shareholder of H&R Wasag AG was

[625] […].

H&R Beteiligung GmbH with 44,33%.[626] Although H&R Beteiligung GmbH only holds 44,33% of H&R Wasag AG, H&R Beteiligung GmbH has some special rights concerning H&R ChemPharm GmbH (a 100% subsidiary of H&R Wasag AG) […].[627] With respect to the relationship between H&R Beteiligung GmbH and H&R ChemPharm GmbH, the Commission considers that the two legal entities acted as part of the same undertaking. This consideration is based on the facts that H&R Beteiligung GmbH indirectly owned 44,33% of H&R ChemPharm GmbH while the other owners (insofar as they had more than just insubstantial shareholdings) also had ties with the H&R group and that H&R Beteiligung GmbH had special rights giving it a direct influence with respect to H&R ChemPharm GmbH's commercial policy. Therefore, the Commission considers that H&R Beteiligung GmbH through its position as the main and largest individual shareholder (of H&R Wasag AG which in turn owns 100% of the shares in H&R ChemPharm GmbH) as well as its special control rights directly with regard to H&R ChemPharm exercised decisive influence and effective control over the latter. H&R Beteiligung GmbH is in turn 100% owned by H&R Wax Company Vertrieb GmbH, a 100% subsidiary of Hansen & Rosenthal KG (the ultimate parent company of the H&R group).

(386) In case of a wholly-owned (or almost wholly-owned) subsidiary, it can be presumed that the parent exercised decisive influence over the conduct of such subsidiary and that the subsidiary necessarily followed the policy laid down by the parent company (see recitals (332)-(333)). The Commission therefore presumes that Hansen & Rosenthal KG exercised decisive influence and effective control over H&R Wax Company Vertrieb GmbH.

(387) In its reply to the Statement of Objections, H&R/Tudapetrol did not challenge the Commission's findings concerning liability, however it claimed that Tudapetrol's participation ended earlier and thus would be time barred. However, after further investigation, it is clear that even if Tudapetrol largely left the paraffin business on 1 May 2000, it continued to keep some paraffin customers.[628] Coupled with the fact that one employee of Tudapetrol, […], continued to be present at the Technical Meetings after 1 May 2000 and that […] was employed by Tudapetrol until 30 June 2002, makes Tudapetrol liable until 30 June 2002. The Commission also observes that there are no indications that Tudapetrol distanced itself publicly from the cartel, nor that H&R/Tudapetrol even claimed to distance itself.

(388) For these reasons, Hansen & Rosenthal KG is jointly and severally liable with H&R Wax Company Vertrieb GmbH from 1 January 2001 onwards and with H&R ChemPharm GmbH from 1 July 2001 onwards as they form part of the undertaking that committed the infringement. Tudapetrol is liable for the period 24 March 1994 until 30 June 2002.

6.2.4. The MOL group

(389) It has been established in chapter 4 that, throughout the period of the infringement, MOL participated in the collusion via employees of Mineralimpex Kft. (renamed

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626 […].
627 […].
628 […].

MOLTRADE-Mineralimpex Kft. in 1996), MOL-Chem Kft. and MOL Nyrt. (see recital (33)).

(390) Mineralimpex Kft. ("Mineralimpex") participated in the cartel from the beginning of the infringement (3 September 1992) until 31 December 1995. MOL-Chem Kft. participated in the cartel as of 1 January 1996 until 31 December 2001, and MOL Nyrt. participated in the cartel from 1 January 2002 onwards.[629]

(391) MOL Nyrt. is therefore found to be directly liable for the period from 1 January 2002 until 28 April 2005.

(392) The period of MOL's parental liability can be divided into two periods: 3 September 1992-31 December 1995 (the period of Mineralimpex Kft.) and 1 January 1996-31 December 2001 (the period of MOL-Chem Kft.).

(393) MOL generally claims that paraffin had a limited importance for it and that the Hungarian state should be held liable for the period from 3 September 1992 to 31 December 1995 because the Hungarian state held more than 50% of the shares in MOL until that latter date.

(394) With regard to MOL's argument on the limited importance of paraffins for MOL, this argument disregards the fact that MOL's subsidiaries' financial results are consolidated with those of the MOL group, implying that its profit or loss, albeit marginal as compared to the total result of the group, are reflected in the profit or loss of the whole group. More importantly, any benefits resulting from the cartel were reflected in the profit or loss of the whole MOL group. The fact that paraffin activities represent a small proportion of the group turnover does not in any way prove that the group granted complete autonomy to its subsidiaries in defining its conduct on the market.[630]

(395) With respect to MOL's claim that the Hungarian state should be held liable, the Commission observes that the Hungarian state is not an undertaking in the sense of Article 81 of the Treaty and that the Commission has discretion in deciding which legal entities are to be held liable for an infringement.

6.2.4.1. The Mineralimpex period (3 September 1992 until 31 December 1995)

(396) From 1991 until 31 December 1995, the export sale of paraffin waxes of MOL was carried out by Mineralimpex Kft, after which both export and domestic sales were taken over by MOL-Chem Kft and then by MOL Nyrt itself (see recital (32)). Mineralimpex was acquired by MOL on 30 May 1995. Prior to this date, Mineralimpex was an independent state-owned company (see recital (32)).

(397) Throughout Mineralimpex' period of participation in the cartel, the Commission considers that Mineralimpex acted as an agent, or commercial representative, for MOL. Therefore, MOL and Mineralimpex should be considered as one undertaking for the purpose of the application of Article 81.

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[629] […].

[630] Judgment of 26 April 2007 in Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, *Bolloré SA and Others v Commission*, paragraph 144.

(398) From information provided by MOL, it is clear that Mineralimpex participated in the Technical Meetings on the basis of an agency contract with MOL.[631] The contract between Mineralimpex and MOL, provided by MOL, explains that Mineralimpex concluded contracts with purchasers concerning the products produced by MOL.[632] These contracts were concluded by Mineralimpex in its own name and Mineralimpex received a commission fee for the products sold. However, the ownership and the risk for damages fell on MOL until the products were transferred to the purchasers. Consequently, the responsibility for the economic and commercial risks fell on MOL.

Arguments of the Party

(399) MOL contests the Commission's findings that MOL should be liable for the activities of Mineralimpex, on the basis that the latter acted as an agent or auxiliary organ of MOL.

(400) Concerning the agent argument, MOL cites the same references[633], the Commission is relying on (see recitals (338)-(340)). However, MOL stresses that the essential part of the test is whether the agent acts in the market on behalf of the principal and essentially carries out the principal's instructions, and states that the issue of "risk" is typically an important factor. MOL further refers to another judgment of the Community Courts where the court stressed that the question of risk must be analysed on a case by case basis.[634] MOL also points out that during the first half of the 1990's in Hungary, the market could not be described in terms of free market economic theory, especially not for semi-state controlled entities such as Mineralimpex. The factor of "risk" played little part and is a misplaced criterion to use in the economic circumstances of Hungary in the early and mid-1990's. MOL therefore claims that it is more appropriate to look at whether Mineralimpex received and carried out MOL's instructions.

(401) To substantiate its claim, MOL explains that Mineralimpex was an independent state-run company until 1995 and that it was a separate legal entity over which MOL had no control. MOL further explains the special situation in Hungary at the time and that the applicable laws and regulations for companies such as Mineralimpex (so-called foreign trade companies) meant that production companies, such as MOL, had no control over the former type of companies. Mineralimpex was, according to MOL, responsible for negotiating foreign trade contracts and had pricing authority and that the relationship between MOL and Mineralimpex was limited to information exchange. In particular, according to MOL, the prices for paraffin wax were set by a so-called Censorship Committee, whose members were representatives of various departments within Mineralimpex over which MOL had no influence.

(402) Moreover, MOL claims that it is also necessary to establish that MOL was aware of the alleged illegal conduct of Mineralimpex, which MOL was not. MOL finally states that paraffin wax is a product of limited importance ([<1%] of MOL's annual turnover) and consequently the price charged by Mineralimpex for paraffin wax was of little significance to MOL. Thus, MOL states that even if it had been able to supervise the

631 […].

632 […].

633 See judgment of the Court of First Instance in Case T-66/99 *Minoan Lines v Commission* paragraph 98-151 and Commission Notice-Guidelines on Vertical Restraints OJ C 291 13.10.2000, p. 1, paragraph 20.

634 Case C-217/05 *Confederacion Espanola de Empresarios de Estaciones de Servicio v Compania Espanol de Petróleos SA*, ECR [2006] I-11987.

pricing of Mineralimpex, it would have had little incentive to do so. For all the mentioned reasons, MOL concludes that Mineralimpex was a separate entity which acted independently on the market.

(403) MOL does not deny that Mineralimpex acted exclusively for MOL.

Assessment

(404) First, regarding MOL's liability for Mineralimpex, the Commission observes that MOL has not provided any evidence according to which it was not able to freely choose its economic partners or to freely choose its economic partners or to freely determine its contractual and commercial relations. The Commission therefore concludes that the relationship between MOL and Mineralimpex is governed by a series of contracts (see recital (405)), which establish a normal agent/principal relationship. Therefore, two factors have been taken to be the main parameters for determining whether there is a single economic unit: firstly, whether the intermediary takes on any economic risk and, secondly, whether the services provided by the intermediary are exclusive. The Commission has focused on the issue of "risk" in this case as there is no evidence or contestation by MOL that the second criterion, exclusivity, is not met. MOL does not as such deny that the issue of "risk" is an important factor, however, stresses that the essential part of the test is whether the agent acts in the market on behalf of the principal and as such receives and carries out the principal's instructions. The Commission considers that the issue of "risk" is the main criterion of determining the agent/principal relationship in this case and that MOL's argument that the Hungarian market during the first period of the 1990's was not a free market economy does not alter this conclusion in this specific case. In addition, MOL's argument that prices for paraffin wax were set by a Censorship Committee, is not confirmed by the contract submitted by MOL. Nor has MOL presented evidence which would support its assertions for example tending to demonstrate that the provisions of the contract did not reflect the reality of the commercial relations between MOL and Mineralimpex.[635]

(405) In particular, the information provided by MOL (see recital (397)) it can be concluded that the economic and commercial risks were with MOL until these were transferred to the purchasers. For example, the contract provided by MOL explicitly states that "ownership of the export goods and accidental damage to the goods/the risk of accidental wear and tear up to that point and place is the originator's until transfer to the foreign purchaser …" and "... where the commission agent exercised due diligence and the liability of the originator is established, the originator shall bear the material implications of these measures" and that the originator shall be responsible for "remedying weight deficiencies, complaints regarding quality and packaging defects …". This shows that, by the contract itself, MOL is considered to be the principal and Mineralimpex its agent.

(406) As to MOL's argument that it is more appropriate, at least in this case, to look at whether Mineralimpex received and carried out MOL's instructions, the Commission observes that in the present case it is sufficient to establish the existence of a single economic entity on the basis of the agency relationship.

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635 Case C-217/05 *Confederacion Espanola de Empresarios de Estaciones de Servicio v Compania Espanol de Petróleos SA*, ECR [2006] I-11987.

(407) The claim that it is necessary to establish that MOL was aware of the alleged illegal conduct by Mineralimpex, and MOL's alleged lack of such awareness, is irrelevant. That argument is based on the erroneous premise that a parent company can only be held liable for the infringements committed by its subsidiaries if it can be established that it was aware of the infringement or it was directly involved in its organisation and implementation. Contrary to that contention, attribution of liability to a parent company for the infringement committed by its subsidiary flows from the fact that the two entities constitute a single undertaking for the purposes of the Community rules on competition[636] and not from proof of the parent's participation in or awareness of the infringement (see recitals (329)-(333)).

(408) Thus, it can be concluded that the co-operation worked on the basis that MOL was the principal and Mineralimpex its agent. Moreover, the individuals representing Mineralimpex at the Technical Meetings were later on employed by MOL-Chem Kft. and/or MOL (see section 2.3.4).

(409) On the basis of the above, the Commission considers that Mineralimpex should be regarded as an auxiliary organ of MOL prior to the date it was acquired by MOL, and therefore in a position to engage fully the liability of MOL. MOL should therefore be considered responsible for the conduct of Mineralimpex.

6.2.4.2. The MOL-Chem period (1 January 1996 until 31 December 2001)

(410) MOL-Chem Kft. was 100% owned by MOL Nyrt. from 1992, but MOL-Chem Kft. was sold in 2003 and consequently it is not part of the MOL group today. MOL-Chem was sold in 2003 to a company called MCM Trading and Service Co Ltd, and MOL-Chem was then renamed Novochem Kft.

(411) In case of a wholly-owned (or almost wholly-owned) subsidiary, it can be presumed that the parent exercised decisive influence over the conduct of such subsidiary and that the subsidiary necessarily followed the policy laid down by the parent company (see recitals (332)-(333)).

Arguments of the Party

(412) MOL contests liability for the activities of Mol-Chem on the basis that Mol-Chem acted independently on the market.

(413) MOL claims that the European courts have held that further evidence than mere ownership is required to establish that the conduct of a subsidiary can automatically be attributed to its parents.

(414) MOL further explains the special situation in Hungary. Mol-Chem was a wholly-owned subsidiary of MOL from 1992. Mineralimpex was transferred to MOL through a resolution of the Hungarian Government, and thus not a normal market-driven acquisition but rather that Mineralimpex was imposed on MOL. Consequently the activities of Mineralimpex were incorporated into Mol-Chem. In 2003 Mol-Chem was

[636] See Cases T-71/03, T-74/03, T-87/03, and T-91/03 *Tokai Carbon v Commission* [2005] ECR II-10, paragraph 54.

sold to a company called MCM Trading and Service Co Ltd and renamed Novochem Kft.

(415) Moreover, MOL claims it did not influence Mol-Chem's day-to-day operations. Although MOL theoretically had the contractual right to set minimum prices, it did not do so. The relationship between MOL and Mol-Chem was characterised by the special economic situation in Hungary during the socialist era when the Government controlled market activities and production and trading activities were separated. The change in 1989 took several years to have a real effect on the market. Consequently, although MOL may have had the contractual right to act as the principal, in reality it never had the possibility to use its right. Mol-Chem acted independently on the market, the employees (such as […]) were carried over from Mineralimpex and conducted business as they had always done with no interference or control by MOL. Mol-Chem also effectively set its own prices and as paraffin wax is of very limited importance to MOL, MOL had little incentive to supervise the pricing policy of Mol-Chem.

(416) Thus, MOL claims that it should not be held liable for the activities of Mol-Chem as MOL never exercised any decisive influence over Mol-Chem, especially with regard to the historical relationship between the two companies.

Assessment

(417) Concerning MOL's liability over Mol-Chem, as explained above (see recitals (332)-(333)) and as recently confirmed by the Community Courts[637], it is established case law that the Commission can presume that parent companies exercise decisive influence on their wholly-owned subsidiary. Where such a presumption applies, as in this case for MOL, it is for the parent company to rebut the presumption by adducing evidence demonstrating that its subsidiary decided independently on its conduct on the market. Failure to provide sufficient evidence on the part of the parent company amounts to a confirmation of the presumption and provides a sufficient basis for the imputation of liability. The argument made by MOL that Mineralimpex, whose activities were transferred to Mol-Chem, was imposed on MOL by the Hungarian Government is irrelevant as the fact remains that Mol-Chem was a wholly-owned subsidiary of MOL throughout its period of participation in the infringement.

(418) The exercise of decisive influence on the commercial policy of a subsidiary does not require day-to-day management of the subsidiary's operation. The subsidiary's management may well be entrusted with the subsidiary, but this does not rule out that the parent company imposes objectives and policies which affect the performance of the group and its coherence and disciplines any behaviour which may depart from those objectives and policies. In fact, MOL admits that it had, at least theoretically, the contractual right to set minimum prices, which shows that it had the ability to influence the commercial policy of Mol-Chem, even if it allegedly chose not to. The special situation in Hungary, as argued by MOL, cannot change this, particularly not after Mol-Chem began its participation in the infringement on 1 January 1996, around seven years after the regime change in Hungary.

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[637] Court of First Instance in Case T-30/05 *Prym Consumer v Commission*, judgment of 12 September 2007, not yet reported, paragraphs 146-148.

(419) The argument that paraffin wax is of very limited importance to MOL and thus MOL had little incentive to supervise the pricing policy of Mineralimpex or Mol-Chem, is not conclusive with respect to the effective autonomy of a subsidiary. The fact that the parent company itself is not involved in the different businesses is not decisive as regards the question whether it should be considered to constitute a single economic entity with the operational units of the group. The division of tasks is a normal phenomenon within a group of companies. An economic unit by definition performs all of the main functions of an economic operator within the legal entities of which it is composed. Group companies and business units that are dependent on a corporate centre for the basic orientation of the commercial strategy and operations, for their investments and finances, for their legal affairs and for their leadership form a single economic unit and hence cannot be considered to constitute economic units in their own right. In addition, the fact that as of 1 January 2002 MOL itself took over the paraffin wax business proves that, by the restructuring of the paraffin business, the paraffin activities were to remain within the direct control of the parent company.

(420) Thus, what matters in this case is that the elements which MOL has put forward are neither capable of rebutting the presumption of liability for Mol-Chem nor its liability over Mineralimpex acting as an agent or auxiliary organ of MOL.

(421) The Commission, therefore, presumes that MOL Nyrt. exercised decisive influence and effective control over MOL-Chem Kft. (until it was sold in 2003) and therefore holds MOL Nyrt. liable, not only for its direct participation in the infringement, but also for MOL-Chem Kft's activities. In addition, the Commission considers that Mineralimpex should be regarded as an auxiliary organ of MOL (prior to the date it was acquired by MOL) and, therefore, in a position to fully engage the liability of MOL and thus Mineralimpex is considered to form an economic unit within MOL.

(422) For these reasons MOL Nyrt is liable not only for its direct participation in the infringement, but also for the activities of MOLTRADE-Mineralimpex Kft. (former Mineralimpex Kft.) and MOL-Chem Kft in the period from 3 September 1992 until 28 April 2005.

6.2.5. The Repsol group

(423) It has been established in chapter 4 that throughout the period of infringement Repsol participated in the collusion via employees of Repsol Derivados S.A. and Repsol YPF Lubricantes y Especialidades S.A. (Rylesa) (see recital (39)).

(424) Repsol Derivados S.A. participated from 24 June 1994 until 1 January 2002 (on which date Repsol Derivados S.A. was absorbed by Rylesa with the effect that from then on the production and sale of paraffin waxes and slack wax has been dealt with by Rylesa), and Rylesa participated from 2 January 2002 onwards. Repsol Derivados S.A. has ceased to exist and consequently it cannot be held liable for its participation in the cartel.

(425) Repsol Derivados S.A. was taken over by Rylesa on 1 January 2002, according to the principles laid down in recital (334). Consequently Rylesa must be considered to have taken over the liability of Repsol Derivados S.A's activities prior to 1 January 2002 (the date when Repsol Derivados S.A. was absorbed by Rylesa). As a starting point, the Commission therefore holds Rylesa liable not only for its direct participation in the

cartel, but also for the activities undertaken by Repsol Derivados S.A. prior to 1 January 2002.

(426) In addition, liability also arises for those companies which exercised decisive influence over Repsol Derivados S.A. and Rylesa during the period it participated in the cartel.

(427) Rylesa was 100% owned by Repsol Petróleo S.A from 1975 until 31 May 1995 and thereafter 99,99% owned by that company and with Repsol Comercial de Productos Petroliferos S.A. holding 0,01% of its shares.

(428) During the investigated period, Repsol YPF S.A. was the 99,97 % shareholder of Repsol Petróleo S.A. Repsol YPF S.A. is the ultimate parent company of the Repsol group.

(429) In case of a wholly-owned subsidiary, it can be presumed that the parent exercised decisive influence over the conduct of such subsidiary and that the subsidiary necessarily followed the policy laid down by the parent company (see recitals (332)-(333)).

(430) The presumption is strengthened in this case by evidence that during the whole time in question, Repsol Petróleo S.A., the direct owner of Rylesa, in fact exercised control over Rylesa by appointing its administrative boards and approving its annual accounts.[638] Repsol Petróleo S.A. was also the owner of Repsol Derivados S.A. (from 1975 until 24 October 2001) until Rylesa became its legal successor. A consequence of Repsol Petróleo S.A.'s ownership of Repsol Derivados S.A. was, according to Spanish law ("Ley de Sociedades Anónimas") that Repsol Petróleo S.A. exercised control over the business assets of its subsidiary (see also recital (441)).

6.2.5.1. Arguments of the Party

(431) In their replies to the Statement of Objections, Repsol YPF Lubricantes y Especialidades S.A. (Rylesa), Repsol Petróleo S.A. and Repsol YPF S.A. contest the attribution of liability to Repsol Petróleo S.A. and Repsol YPF S.A.

(432) Rylesa, Repsol Petróleo S.A. and Repsol YPF S.A. state that liability for Repsol Petróleo S.A. is based mainly on ownership of practically all the shares of Rylesa (and of Repsol Derivados S.A. prior to its absorption by Rylesa) and with regard to Repsol YPF S.A., for ownership of practically all the capital of Repsol Petróleo S.A. and that mere ownership of practically all the shares does not in itself constitute evidence of parent company's liability but, referring to case law,[639] a presumption which is open to rebuttal. They further state that there is no evidence of direct or indirect involvement of Repsol Petróleo S.A. and Repsol YPF S.A. in the infringement described in the Statement of Objections and that ownership of practically all the shares in Rylesa and Repsol Petróleo S.A. should not lead to attribution of liability regarding behaviour of which it knew nothing and thus could not have prevented. Repsol YPF S.A. further claims that there is no direct shareholding link between itself and Rylesa.

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638 […].

639 See for example, Case 107/82 *AEG v Commission* [1983] ECR 3151, Case T-325/01, *DaimlerChrysler* v *Commission* [2005] ECR-II 3319, Case 48/69, *Imperial Chemical Industries Ltd v. Commission*, [1972] ECR 619, and Case T-354/94 *Stora Kopparbergs Bergslags AB* v *Commission*, [1998] ECR II-2111.

(433) To rebut the presumption that Repsol Petróleo S.A. and Repsol YPF S.A. exercised decisive influence over Rylesa, Rylesa, Repsol Petróleo S.A. and Repsol YPF S.A. argue that neither of the latter two exerted decisive influence on the commercial behaviour/activity of Rylesa. Rylesa, Repsol Petróleo S.A. and Repsol YPF S.A. claim that Rylesa has full managerial autonomy, especially in the commercial area of paraffin waxes and that Rylesa's representatives have specific power of attorney to act in their respective area of responsibility and in exercising those powers it was not necessary for them to seek prior approval from Repsol Petróleo S.A or Repsol YPF.

(434) To substantiate its claims, Rylesa refers to various documents and contracts showing examples of purchase of raw material from third parties signed by Repsol Derivados S.A. and Rylesa and contacts maintained directly by Repsol Derivados S.A./Rylesa with customers within the context of daily commercial activity. Moreover, Rylesa stated that it is the proprietor of the assets it uses for conversion and blending of the products it acquires and makes decisions regarding the level of investment necessary for that purpose and that Rylesa's directors have full autonomy to operate on the market without receiving any instruction or supervision from their parent undertaking.

(435) Repsol Petróleo S.A. also disagrees with the Commission's conclusion that the Spanish legislation on limited-liability companies confers upon it the ability to exercise decisive influence over Rylesa. The reason being, according to Repsol, that none of the powers conferred by the aforementioned legislation give the parent company the ability to control the market activity of the subsidiary. For example, according to Repsol Petróleo S.A, the ability by a parent company to increase or reduce the capital of a subsidiary does not mean that the parent company controls the commercial decisions of the subsidiary, similarly decisions concerning merger or division of the company, approval of the annual accounts and application of the result (decisions on profits or losses) are not connected with the management of the undertaking's commercial policy but are of a purely structural and financial nature, and the power to appoint administrators does not convert the parent company into the subsidiary's parallel administrator.

(436) The administrators and various directors of Repsol Derivados S.A./Rylesa and Repsol Petróleo S.A. have autonomous management powers and delegation of powers in their by-laws especially relating to the company's commercial activity (such as purchase of raw materials, machinery etc., relationships with customers, suppliers, distributors) in the area of business for which they are responsible, to ensure a smooth running or the undertakings' daily management.

(437) In addition, Repsol Petróleo S.A. argues that the parent company has to respect the jurisdiction of the administrators to manage the undertaking's commercial activities on a daily bases and thus the limited-liability act even prevents the parent company, represented at the meeting of the shareholders, from encroaching upon the jurisdiction of the administrators. Thus, none of the rights invoked by the Commission confer the power on a shareholder to influence the commercial behaviour of its subsidiary. Repsol Petróleo S.A. also claims that only invoking the rights in the Spanish legislation cannot be sufficient to substantiate a presumption of liability as it would transform the presumption into a rule which is impossible to nullify as the application of the limited-liability act is mandatory for all Spanish limited-liability companies. Repsol Petróleo S.A. claims that there is no evidence that Repsol Petróleo S.A. influenced the strategic decisions adopted by Rylesa.

6.2.5.2. Assessment

(438) As explained in recitals (332)-(333)) and as recently confirmed by the Community Courts[640], it is established case law that the Commission can presume that parent companies exercise decisive influence on their wholly-owned subsidiary. Where such a presumption applies, as in this case for Repsol Petróleo S.A. and Repsol YPF S.A., it is for the parent companies to rebut the presumption by adducing evidence demonstrating that its subsidiary decided independently on its conduct on the market. Failure to provide sufficient evidence on the part of the parent company amounts to a confirmation of the presumption and provides a sufficient basis for the imputation of liability.

(439) The allegation that there is no indication of direct involvement of the parent companies in the anti-competitive conduct and their alleged lack of awareness is irrelevant. That argument is based on the erroneous premise that a parent company can only be held liable for the infringements committed by its subsidiaries if it can be established that it was aware of the infringement or it was directly involved in its organisation and implementation. Contrary to that contention, attribution of liability to a parent company for the infringement committed by its subsidiary flows from the fact that the two entities constitute a single undertaking for the purposes of the Community rules on competition[641] and not from proof of the parent's participation in or awareness of the infringement (see recitals (329)-(333)). Repsol YPF SA's argument that there is no direct shareholding link between itself and Rylesa is irrelevant as it is a indirect affiliate via Repsol Petróleo SA, and the above-mentioned presumption extends to indirect shareholdings.[642]

(440) As to the arguments which have been put forward in order to claim that Rylesa acted autonomously, it is observed that most of the arguments regarding the independence of Repsol YPF Lubricantes y Especialidades S.A. (Rylesa) focus on Rylesa's ability to act autonomously within the day-to-day management of its commercial activity. The exercise of decisive influence on the commercial policy of a subsidiary does not require day-to-day management of the subsidiary's operation. The subsidiary's management may well be entrusted with the subsidiary, but this does not rule out that the parent company imposes objectives and policies which affect the performance of the group and its coherence and disciplines any behaviour which may depart from those objectives and policies[643]

(441) In addition, according to Spanish legislation ("Ley de Sociedades Anónimas"), Repsol Petróleo S.A., as the owner of Rylesa, exercised control over the business assets of its subsidiary through a number of powers, including the approval of annual accounts and application of the results, increase or reduction of capital, transformation, merger or

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640 Court of First Instance in Case T-30/05 *Prym Consumer v Commission*, judgment of 12 September 2007, not yet reported, paragraphs 146-148 and judgment of 12 December 2007 in case T-112/05, *Akzo Nobel and Others v. Commission*, not yet reported.

641 See Cases T-71/03, T-74/03, T-87/03, and T-91/03 *Tokai Carbon v Commission,* [2005] ECR II-10, paragraph 54.

642 Case T-203/01, *Manufacture française des pneumatiques Michelin v Commission* [2003] ECR II-4071, paragraph 290; Judgment of 27 September 2006, Case T-330/01 *Akzo Nobel NV* v *Commission.,* paragraphs 78, 83 to 85.

643 See judgment of 12 December 2007 in case T-112/05, *Akzo Nobel and Others v. Commission*, not yet reported, paragraph 83.

division and modification of the company's by-laws, and appointment of administrators of the company.[644] The Commission considers that the Spanish legislation also applies to Repsol YPF S.A. as the owner of its almost wholly-owned subsidiary Repsol Petróleo S.A., and therefore that the control powers are equally granted to Repsol YPF S.A. and Repsol Petróleo S.A. over their respective subsidiaries. Firstly, it is a fact that members of the board of Repsol Petróleo are appointed by Repsol YPF S.A.. Secondly, the fact that the exercise of such powers derives from the application of the national law is irrelevant. What is important is the existence of organizational links between the companies, irrespective of the reasons why such links exist. In addition, the Commission cannot agree with the purely formal view put forward by Repsol YPF S.A. that the relationship between the legal entities is merely a natural consequence of corporate requirements governing the company established in accordance with the law. The board of directors and its chairman have a general duty to direct the affairs of the company, or at least to supervise the running of its affairs where it is delegated to others. To accept that the officers of the company may be appointed only in order to satisfy formal requirements of no legal significance would be to deprive those requirements of any purpose, and to negate the very principles of the representativeness and responsibility of the governing bodies of companies. The Commission would point out that in most cases, the persons who sit on the board of directors of a company receive fees for their attendance. In fact, the terms of the law merely confirm control by a parent company over its subsidiary by creating certain rights for the parent company (such as appointing key people, reporting obligations) in order to enable it to effectively exercise such control. Contrary to Repsol's claims such rights cannot be viewed as being redundant with the notion of ownership but are to be seen as tools granted by the law to effectively exercise parental responsibility.

(442) The Commission observes that Repsol does in fact admit that the aforementioned Spanish legislation is of a structural and financial nature. From this it can be concluded that Repsol Petróleo S.A. and Repsol YPF S.A. had a strategic and financial interest and role over its subsidiary Rylesa as a shareholder to protect its financial ownership interest. It is thus established that Repsol Petróleo S.A. and Repsol YPF S.A. had the ability to influence the strategic decisions of Rylesa, regardless of whether this ability was exercised or not.

(443) As to the argument that only invoking the rights in the Spanish legislation cannot be sufficient to substantiate a presumption of liability as it would transform the presumption into a rule which is impossible to rebut, it is enough to say that by definition, when the law creates a presumption, it is because when the premise of fact justifying the presumption is established, the fact that is presumed is generally true and only rarely false. This is what justifies reversing the burden of proof, and it is the essence of a presumption. It is in relation to rare cases where subsidiaries are controlled by their parent company, but nevertheless remain entirely "autonomous" that the law creates a presumption.

(444) Finally, Repsol YPF Lubricantes y Especialidades S.A. (Rylesa), Repsol Petróleo S.A. and Repsol YPF S.A. state that paraffin waxes are a very marginal activity within both the Repsol group (Rylesas's sales of paraffin waxes did […] represent [<1%] of the total business figure for the Repsol group) and within Rylesa (within Rylesa the paraffin

644 […].

wax sales represented [<10%] of the undertaking's total income) and thus of minor interest to Repsol Petróleo S.A. and Repsol YPF S.A.. Rylesa explains that the annual accounts for the Repsol group do not even mention paraffin waxes as such but that this activity is incorporated under the heading "others".

(445) The argument that paraffin wax is a very marginal activity both within the Repsol group and within Rylesa and thus of minor interest is not conclusive with respect to the effective autonomy of a subsidiary. The fact that the parent company itself is not involved in the different businesses is not decisive as regards the question whether it should be considered as a single economic unit with the operational units of the group. The division of tasks is a normal phenomenon within a group of companies. An economic unit, by definition, performs all of the main functions of an economic operator within the legal entities of which it is composed. Group companies and business units that are dependent on a corporate centre for the basic orientation of the commercial strategy and operations, for their investments and finances, for their legal affairs and for their leadership form a single economic unit and hence cannot be considered to constitute economic units in their own right. The contention that Rylesa's activities were marginal within the Repsol group disregards the fact that Rylesa's financial results are consolidated with those of the Repsol group, implying that its profit or loss, albeit marginal as compared to the total result of the group, are reflected in the profit or loss of the whole group. More importantly, any benefits resulting from the cartel were reflected in the profit or loss of the whole Repsol group. The fact that paraffin activities represent a small proportion of the group turnover does not in any way prove that the group allowed Rylesa complete autonomy in defining its conduct on the market.[645]

(446) In the light of the above, the Commission concludes that the elements which Repsol YPF Lubricantes y Especialidades S.A. (Rylesa), Repsol Petróleo S.A. and Repsol YPF S.A. have put forward are not capable of rebutting the presumption.

(447) The Commission therefore finds that Repsol Petróleo S.A. and Repsol YPF S.A. exercised decisive influence and effective control over Repsol YPF Lubricantes y Especialidades S.A. (Rylesa). Consequently, Repsol Petróleo S.A and Repsol YPF S.A. together form a part of the undertaking that committed the infringement.

(448) For these reasons, Repsol Petróleo S.A. and Repsol YPF S.A. are jointly and severally liable with Repsol YPF Lubricantes y Especialidades S.A. (Rylesa) as they form part of the undertaking that committed the infringement in the period from 24 June 1994 onwards.

6.2.6. The Sasol Group

(449) In chapter 4, it has been established that the individuals listed in recital (44) attended the Technical Meetings. These individuals were employed by and represented from the beginning of the infringement (3 September 1992) until 30 April 1995 Hans-Otto Schümann GmbH & Co KG (“HOS”); from 1 May 1995 until 31 December 2002 Schümann Sasol GmbH (before 2000 named Schümann Sasol GmbH & Co KG) and from 1 January 2003 onwards Sasol Wax GmbH.

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645 Judgment of 26 April 2007 in Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, *Bolloré SA and Others v Commission*, paragraph 144.

(450) HOS was formed on 31 January 1992 as a result of a merger between TerHell Paraffin Vertriebsgesellschaft Hans-Otto Schümann GmbH & Co. KG ("TerHell"), Erste Deutsche Virginia-Vaseline-Fabrik Carl Hellfrisch GmbH & Co. KG ("Hellfrisch") and Vaselinwerk Hans-Otto Schümann KG. Between 1992 and 1995, Hans-Otto Schümann owned all shares of HOS. For the period until 30 April 1995, Vara Holding GmbH & Co KG ("Vara") was the only Kommandist (limited partner) of HOS, and was in turn controlled by Mr Hans-Otto Schümann.

(451) On 1 May 1995, Sasol Limited (through its 100 % owned transaction vehicle SOCORRO zweiunddreissigste Verwaltungsgesellschaft mbH and Schümann Sasol International AG) acquired two-thirds of HOS. It acquired the remaining one-third on 30 June 2002.[646] HOS has first been renamed Schümann Sasol GmbH & Co KG and then changed its legal form and name to Schümann Sasol GmbH which was in turn renamed Sasol Wax GmbH. As the change of name or legal form of a company does not free it from liability for anti-competitive behaviour[647], the entity that is today called Sasol Wax GmbH is liable for the behaviour of HOS, Schümann Sasol GmbH & Co KG and Schümann Sasol GmbH. The Commission therefore finds Sasol Wax GmbH liable for its direct participation in the cartel including the activity of the entities that it has succeeded for the period between 3 September 1992 and 28 April 2005.

(452) As a starting point, the Commission therefore finds Sasol Wax GmbH liable for its direct participation in the cartel including the activities of the entities that have been absorbed by it for the period between 3 September 1992 and 28 April 2005.

(453) In addition, liability also arises for those companies which exercised decisive influence over Sasol Wax GmbH during the period it participated in the cartel. Between 1 May 1995 and 30 October 2002, Sasol Wax GmbH (previously Schümann Sasol GmbH and Schümann Sasol GmbH & Co. KG) was 99,9% owned by Schümann Sasol International AG, which as of 31 October 2002 became its 100% owner. On 1 January 2003, Schümann Sasol International AG was renamed Sasol Wax International AG.

(454) Although Sasol's statements on its corporate structure are not entirely consistent, the Commission understands the development to have occurred as follows: the corporate history can be divided in three periods: The Schümann period (from 3 September 1992 [the beginning of the infringement] until 30 April 1995); the joint venture period (from 1 May 1995 until 30 June 2002) and the Sasol period (from 1 July 2002 onwards).

6.2.6.1. The Schümann Period: from 3 September 1992 until 30 April 1995

(455) Between 1992 and 1995, Hans-Otto Schümann owned all shares of HOS. For the period until 30 April 1995, Vara Holding GmbH & Co KG ("Vara") was the only Kommanditist (limited partner) of HOS, and was in turn controlled by Mr Hans-Otto Schümann.

(456) Sasol states that during this period it had neither any interest (shareholding) nor corporate relationship with HOS, nor can it be held liable following the rules of

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646 […].

647 Cases 29/83 and 30/83 *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH* v *Commission*, ECR [1984] 1679, paragraph 9; Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 59.

succession for this time period. According to Sasol, it later acquired part of the European wax business from Mr Schümann who was the sole shareholder. Thus, Sasol claims it had no influence at all in this period and the sole responsibility for any infringement during this period rests with Vara and Mr Schümann personally.

(457) The Commission acknowledges that during this period, HOS, the company directly involved in the infringement, was ultimately controlled by Mr. Hans-Otto Schümann personally and that responsibility for the infringement committed in this period rests ultimately with Mr Schümann.

6.2.6.2. The Joint Venture Period: from 1 May 1995 until 30 June 2002

(458) On 1 May 1995, Sasol Limited (through its 100 % owned transaction vehicle SOCORRO zweiunddreissigste Verwaltungsgesellschaft mbH and Schümann Sasol International AG) acquired two-thirds of HOS.[648] The remaining one-third were held by Vara. Vara was privately held by Mr. Hans-Otto Schümann. The acting company in the wax business (representatives of which committed the infringement) was called after 1 May 1995 Schümann Sasol GmbH & Co. KG, a 100% subsidiary of Schümann Sasol International AG.

(459) On 30 June 2002, the legal successor of SOCORRO, Sasol Holding in Germany GmbH acquired from Vara the remaining 33,3% of the shares in Schümann Sasol International AG and thus became its 100% parent company (Schümann Sasol International AG was renamed Sasol Wax International AG as of 1 January 2003).

Arguments of the Party

(460) Sasol claims that despite its majority shareholding in the joint venture, the joint venture was controlled by Vara due to various rules governing the joint venture which in turn established the compositions of the management board, the supervisory board and the shareholders' assembly.

(461) According to Sasol, throughout the joint venture period, Schüman Sasol International AG/Schümann Sasol GmbH & Co. KG, was still controlled by Vara and its employees despite Sasol's majority share holding in the joint venture (2/3). Sasol claims that the articles of associations, the by-laws of the companies concerned, the composition of the management board and the supervisory board of the joint venture and the shareholder and voting rights agreement entered into by Sasol and Vara, put Vara in a position of control of Schümann Sasol International AG, which is contrary to the Commission's assumption in the Statement of Objections.

(462) […].

(463) […].

(464) […].

(465) […].

(466) […].

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[648] […].

(467) […].

(468) […].[649] […].

(469) […].

(470) […].[650] […].[651] […].

Assessment

(471) The Commission considers that Sasol, via its 100%-subsidiary Sasol Holding in Germany GmbH, exercised decisive influence over Schümann Sasol International AG.

(472) […].[652] […].

(473) […].

(474) […].

(475) […].

(476) […].

(477) […][653] […].

(478) With respect to Sasol Ltd's decisive influence over Sasol Holding in Germany GmbH, as explained above (see recitals (332)-(333)) and as recently confirmed by the Community Courts[654], it is established case law that the Commission can presume that parent companies exercise decisive influence on their wholly-owned subsidiary. Where such a presumption applies, as in this case for Sasol Ltd. and Sasol Holding in Germany GmbH, it is for the parent company to rebut the presumption by adducing evidence demonstrating that its subsidiary decided independently on its conduct on the market. Failure to provide sufficient evidence on the part of the parent company amounts to a confirmation of the presumption and provides a sufficient basis for the imputation of liability. For these reasons, Sasol's claim and the elements put forward are not capable of rebutting the presumption.

(479) […].

(480) The attribution of an infringement by a subsidiary to the parent company does not require proof that the parent company influences its subsidiary's policy in the specific area in which the infringement occurred. On the other hand, the economic and legal organisation links between the parent company and its subsidiary may provide sufficient

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649 […].
650 […].
651 […].
652 […].
653 […].
654 Court of First Instance in Case T-30/05 *Prym Consumer v Commission*, judgment of 12 September 2007, not yet reported, paragraphs 146-148 and judgment of 12 December 2007 in case T-112/05, *Akzo Nobel and Others v Commission*, not yet reported.

evidence that the parent exercises influence over the subsidiary's strategy and therefore they can be viewed as a single economic entity.[655]

(481) For the reasons stated above, the Commission holds not only the acting company Schümann Sasol GmbH & Co. KG, but also its parent companies Sasol International AG, Sasol Ltd and Sasol Holding in Germany GmbH liable for the joint venture period since it has been established that Sasol was in control of the joint venture. Moreover, the legal principle that is explained in recital (340) also applies to joint ventures. As set out in recitals (329)-(333), different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Article 81 of the Treaty if the companies concerned do not determine independently their own conduct on the market. In the case of a joint venture, it is possible to find that the joint venture and parents together form an economic unit for the purposes of the application of Article 81 of the Treaty if the joint venture has not decided independently upon its own conduct on the market. Whether or not the joint venture is to be regarded as a full-function joint venture in the sense of Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)[656] is irrelevant in this context as there is, as shown above, factual evidence demonstrating decisive influence. The fact that the parents of a joint venture can be held liable is in line with the practice of the Commission on this specific issue, following the general legal principles explained in recital (340) set by the Community Courts.[657] The fact that in another case, the Decision was not addressed to parent companies of a joint venture does not mean under these circumstances that Sasol International AG, Sasol Ltd. and Sasol Holding in Germany GmbH, as the parent companies within the Sasol group, cannot be held liable for activities of its subsidiary, since the Commission enjoys a margin of discretion in deciding which entities of an undertaking it holds liable for an infringement and its assessment is done on a case-by-case basis.

6.2.6.3. The Sasol Period: from 1 July 2002 onwards

(482) As explained in recital (459), Sasol Wax International AG (Schümann Sasol International AG) was owned by Vara and SOCORRO (a transaction vehicle within the Sasol group, the legal successor of SOCORRO being Sasol Holding in Germany GmbH) from 1 May 1995 until 30 June 2002. Since 1 July 2002, Sasol Wax International AG is 100% owned by Sasol Holding in Germany GmbH. All companies in the Sasol group are today via a chain of subsidiaries ultimately owned by Sasol Limited the ultimate parent company of the Sasol group.

(483) In the case of a wholly-owned (or almost wholly-owned) subsidiary, it can be presumed that the parent exercised decisive influence over the conduct of such subsidiary and that the subsidiary necessarily followed the policy laid down by the parent company (see recitals (332)-(333)).

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655 See judgment of 12 December 2007 in case T-112/05, *Akzo Nobel and Others v Commission*, not yet reported, paragraph 83.

656 OJ L 24, 29.1.2004, p. 1-22.

657 See Commission decision Case COMP/38.899 – Gas insulated switchgear of 24 January 2007, in particular in paragraphs 404-407, 427-435 and 385-403. Non-confidential version published at the Commission web-site: http://ec.europa.eu/comm/competition/cartels/cases/.

Arguments of the Party

(484) […].[658] […].[659] […].[660]

(485) […].

(486) […].

(487) […].

(488) […].

(489) […].

(490) […].

(491) […].

(492) […].

(493) For all the reasons mentioned, Sasol claims that it has rebutted the presumption of decisive influence as a condition for liability.

Assessment

(494) As explained above (see recitals (332)-(333)) and as recently confirmed by the Community Courts[661], it is established case law that the Commission can presume that parent companies exercise decisive influence on their wholly-owned subsidiary. Where such a presumption applies, as in this case for Sasol Wax International AG, Sasol Holding in Germany GmbH and Sasol Ltd, it is for the parent companies to rebut the presumption by adducing evidence demonstrating that its subsidiary decided independently on its conduct on the market. Failure to provide sufficient evidence on the part of the parent companies amounts to a further indicium that what is presumed corresponds to reality and provides a sufficient basis for the imputation of liability. […].

(495) As to the arguments which Sasol has put forward in order to claim that its subsidiary acted autonomously, it is observed that the exercise of decisive influence on the commercial policy of a subsidiary does not require day-to-day management of the subsidiary's operation. The subsidiary's management may well be entrusted with the subsidiary, but this does not rule out that the parent company imposes objectives and policies which affect the performance of the group and its coherence and disciplines any behaviour which may depart from those objectives and policies.[662]

(496) […].

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658 […].

659 […].

660 […].

661 Court of First Instance in Case T-30/05 *Prym Consumer v Commission*, judgment of 12 September 2007, not yet reported, paragraphs 146-148 and judgment of 12 December 2007 in case T-112/05, *Akzo Nobel and Others v Commission*, not yet reported.

662 See judgment of 12 December 2007 in case T-112/05, *Akzo Nobel and Others v Commission*, not yet reported, paragraph 83.

(497) […].

(498) […].

(499) […].

(500) […].

(501) The argument of Sasol Ltd that it regarded the wax business in Europe as immaterial from an economic point of view is not conclusive with respect to the effective autonomy of a subsidiary. The fact that the parent company itself is not involved, or interested in, as it is claimed in this case, the different businesses is not decisive as regards the question whether it should be considered to constitute a single economic unit with the operational units of the group. The division of tasks is a normal phenomenon within a group of companies. An economic unit by definition performs all of the main functions of an economic operator within the legal entities of which it is composed. Group companies and business units that are dependent on a corporate centre for the basic orientation of the commercial strategy and operations, for their investments and finances, for their legal affairs and for their leadership form a single economic unit and hence cannot be considered to constitute economic units in their own right.

(502) In the light of the above, the Commission considers that the elements which Sasol Wax International AG, Sasol Holding in Germany GmbH or Sasol Ltd have put forward are not capable of rebutting the presumption.

(503) The Commission therefore concludes that Sasol Wax International AG, Sasol Holding in Germany GmbH and Sasol Ltd, South Africa exercised decisive influence and effective control over Sasol Wax GmbH, from 1 May 1995 onwards. Consequently, Sasol Wax International AG, Sasol Holding in Germany GmbH and Sasol Ltd, South Africa together form part of the undertaking that committed the infringement, from 1 May 1995 onwards.

(504) For these reasons Sasol Wax International AG, Sasol Holding in Germany GmbH and Sasol Limited are jointly and severally liable with Sasol Wax GmbH as they form part of the undertaking that committed the infringement from 1 May 1995 onwards.

6.2.7. The Shell group

(505) It has been established in chapter 4 that throughout the period of infringement, Shell participated in the collusion via employees of Dea Mineralöl AG, Shell Deutschland Oil GmbH (formerly named Shell & Dea Oil GmbH) and Shell Deutschland Schmierstoff GmbH (see recital (54)).

(506) Shell Deutschland Oil GmbH participated as from 2 January 2002 until 31 March 2004 (when the wax business was transferred to its 100% owned subsidiary Shell Deutschland Schmierstoff GmbH) and Shell Deutschland Schmierstoff GmbH from 1 April 2004 until 17 March 2005 (end date of the infringement for Shell).

(507) As a starting point, Shell Deutschland Oil GmbH (former Shell & Dea Oil GmbH) and Shell Deutschland Schmierstoff GmbH should be held liable for their participation in the cartel.

(508) Shell Deutschland Oil GmbH (formerly named Shell & Dea Oil GmbH until 30 December 2003) was the result of the joint venture between Deutsche Shell GmbH and RWE AG, which combined the two companies' respective oil and petrochemicals business.

(509) Before the creation of the joint venture between Deutsche Shell GmbH and RWE AG, Dea Mineralöl AG (which was changed to Dea Mineralöl GmbH on 27 December 2001) was the company within the RWE group that participated in the cartel from the beginning of the infringement on 3 September 1992 until the creation of the joint venture on 2 January 2002.

(510) When Shell and RWE/Dea created their joint venture in January 2002, the existing Dea Mineralöl GmbH (in preparation of the joint venture, the legal form of Dea Mineralöl AG was changed into Dea Mineralöl GmbH) was used as the joint venture vehicle[663] which was renamed as of 2 January 2002 to Shell & Dea Oil GmbH, and simultaneously became a 50/50 subsidiary under joint control of Deutsche Shell GmbH and RWE-Dea AG für Mineralöl und Chemie.[664] The joint venture was set up with the intention that after an interim period, starting with the creation of the joint venture and ending at the latest on 1 July 2004, Shell would acquire sole control of the combined businesses.[665] During the interim period, the members of the management board which were in charge of the joint venture's day-to-day operation would be equally appointed by each shareholder, however the chairman of the management board would have a casting vote and would be a nominee of Shell. Moreover, both parties had certain veto rights safeguarding their decisive influence of the joint venture, and thus during the interim period, Shell and RWE had joint control over the joint venture.[666]

(511) From its creation on 2 January 2002 until 30 June 2002, Shell Deutschland Oil GmbH (Shell & Dea Oil GmbH) was 50/50 owned by Deutsche Shell GmbH and RWE-Dea AG für Mineralöl und Chemie (which was renamed RWE-Dea AG on 13 June 2002). RWE-Dea AG für Mineralöl und Chemie was [>99%] owned by RWE AG, the ultimate parent company within the RWE group. On 1 July 2002, RWE/Dea's shares of Shell Deutschland Oil GmbH (Shell & Dea Oil GmbH) were transferred to Deutsche Shell GmbH and Shell Petroleum N.V., conferring upon them a shareholding of […]% and […]%, respectively, of Shell Deutschland Oil GmbH. Subsequently, Shell Deutschland Oil GmbH (former Shell & Dea Oil GmbH) was directly owned by Deutsche Shell GmbH ([…]%) and Shell Petroleum N.V. ([…]%) until the end of the infringement.

(512) Shell Deutschland Oil GmbH (Shell & Dea Oil GmbH) must be considered to have succeeded in the liability of Dea Mineralöl AG/GmbH (which changed its name when coming under joint ownership) including the period prior to the creation of the joint venture (see recital (52)). Thus, Shell Deutschland Oil GmbH (Shell & Dea Oil GmbH) is to be held answerable from the beginning of the infringement (3 September 1992), that is to say, including the activity of Dea Mineralöl AG/GmbH prior to the joint venture with Shell.

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663 For a full description of this transaction, see Case No COMP/M.2389-*Shell/Dea*.
664 […].
665 See Case No COMP/M.2389 – *Shell/Dea*.
666 See Case No COMP/M.2389 – *Shell/Dea*.

(513) In addition, liability also arises for those companies which exercised decisive influence over Shell Deutschland Oil GmbH (former Shell & Dea Oil GmbH) and Shell Deutschland Schmierstoff GmbH during the period the subsidiaries participated in the cartel. Shell Deutschland Schmierstoff GmbH has from its creation on 1 April 2004 (when it also took over the wax business of Shell Deutschland Oil GmbH) until the end of the infringement been 100% owned by Shell Deutschland Oil GmbH.

(514) Shell Deutschland Oil GmbH (former Shell & Dea Oil GmbH) has from 1 July 2002 until the end of the infringement been directly owned by Deutsche Shell GmbH ([…]%) and Shell Petroleum N.V. ([…]%) (see recital (511)). Deutsche Shell GmbH was, throughout the infringement period, via a chain of subsidiaries, ultimately owned by the Royal Dutch Petroleum Company N.V. (Netherlands) with 60% and the Shell Transport and Trading Company plc (UK) with 40%. Shell Petroleum N.V. was from 1 July 2002 until the end of the infringement directly owned by the Royal Dutch Petroleum Company N.V. (Netherlands) with 60% and the Shell Transport and Trading Company plc (UK) with 40%.

(515) For the joint venture period, that is to say, 2 January 2002 until 30 June 2002, Shell Deutschland Oil GmbH (Shell & Dea Oil GmbH) was 50/50 owned by Deutsche Shell GmbH and RWE-Dea AG für Mineralöl und Chemie. Consequently, the RWE group and the Shell group are jointly and severally liable for the activities of the joint venture during this period as they together exercised decisive influence and effective control over the joint venture. Throughout the joint venture period, Deutsche Shell GmbH was, via a chain of subsidiaries, ultimately owned by the Royal Dutch Petroleum Company N.V. (Netherlands) with 60% and the Shell Transport and Trading Company plc (UK) with 40% (see recital (513)). Following the dissolution of the joint venture on 1 July 2002, RWE/Dea's shares of Shell Deutschland Oil GmbH (Shell & Dea Oil GmbH) were transferred to Deutsche Shell GmbH ([…]%) and Shell Petroleum N.V. ([…]%).

(516) Although Shell International Petroleum Company Limited (SIPC) was not directly involved in the production or sales of wax, it still performed a head office function […]; however no sales were made by SIPC. […].

(517) […].[667] Shell International Petroleum Company Limited (SIPC) was 100% owned by the Shell Petroleum Company Limited (SPCO) throughout the infringement, which in turn was owned by the Royal Dutch Petroleum Company N.V. (Netherlands) with 60% and the Shell Transport and Trading Company plc (UK) with 40%.

(518) In the case of a wholly-owned (or almost wholly-owned) subsidiary, it can be presumed that the parent exercised decisive influence over the conduct of such subsidiary and that the subsidiary necessarily followed the policy laid down by the parent company (see recitals (332)-(333)). Shell chose to apply a company structure where two legal entities jointly hold 100% of the group's subsidiaries. The Commission considers that the relevant entities in this case nevertheless form one undertaking and acted as such because the group was under the joint management of the two parent companies. Given that both parents (indirectly) held the entirety of shares in the subsidiaries to which this decision is addressed, and their joint management power, there is a presumption that they in fact exercised decisive influence over their subsidiaries' commercial policy.

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667 […].

(519) As regards Shell Deutschland Schmierstoff GmbH, the presumption of decisive influence by Shell Deutschland Oil GmbH over its subsidiary is strengthened in this case by the fact that Shell Deutschland Schmierstoff GmbH was not only wholly-owned by Shell Deutschland Oil GmbH but also had a direct control agreement in place with the latter. Both means that Shell Deutschland Oil GmbH directly controlled Shell Deutschland Schmierstoff GmbH and assumed all profits and losses.[668] Shell Deutschland Oil GmbH was majority ([…]%) owned by Deutsche Shell GmbH and a direct control agreement existed between those two companies as well, thereby providing Deutsche Shell GmbH with decisive influence over Shell Deutschland Oil GmbH. Deutsche Shell GmbH was throughout the infringement period, via a chain of subsidiaries, ultimately owned by the Royal Dutch Petroleum Company N.V. (Netherlands) with 60% and the Shell Transport and Trading Company plc (UK) with 40%.

(520) While SIPC had no direct or indirect shareholding in Shell Deutschland Oil GmbH or Shell Deutschland Schmierstoff GmbH, the Shell Petroleum Company Limited (SPCO) could exercise control rights over the latter two companies by way of its indirect shareholding over Deutsche Shell GmbH throughout the infringement […].[669] […]. In any case, Shell International Petroleum Company Limited (SIPC) was 100% owned by the Shell Petroleum Company Limited (SPCO) throughout the infringement, which in turn was owned by the Royal Dutch Petroleum Company N.V. (Netherlands) with 60% and the Shell Transport and Trading Company plc (UK) with 40%.

(521) Since the restructuring of 20 July 2005 within the Shell group, the ultimate parent company of the group is the Royal Dutch Shell plc. Of the two previous parent companies, the Royal Dutch Petroleum Company N.V. ceased to exist when it merged with Shell Petroleum N.V. (effective as of 21 December 2005), and the Shell Transport and Trading Company plc was transformed into the Shell Transport and Trading Company Limited, becoming a 100% owned subsidiary of Shell Petroleum N.V. and, ultimately, the Royal Dutch Shell plc.[670] As the restructuring took place after the end of the infringement, the Commission does not address this decision to the Royal Dutch Shell plc.

(522) In relation to the restructuring of the ultimate mother companies of the Shell group, the Commission considers that Shell Petroleum N.V. took over the liability of the Royal Dutch Shell Petroleum Company N.V. (which ceased to exist) according to recital (334), and that the Shell Transport and Trading Company Limited (previously the Shell Transport and Trading Company plc) is liable for the activities of Shell Transport and Trading Company plc since it was the same company that merely changed its name. Since 20 July 2005, the Shell Transport and Trading Company Limited is 100% owned by Shell Petroleum N.V., and Shell Petroleum N.V is in turn 100% owned by the Royal Dutch Shell plc.

6.2.7.1. Arguments of the Party

(523) Shell disagrees with the Commission's findings of liability for Shell Petroleum Company Limited (SPCO), Shell Petroleum N.V. and the Shell Transport and Trading Company

668 […].
669 […].
670 […].

Limited based on the presumption of decisive influence. Shell is stating that in organisations such as Shell's, the ultimate parents acting as holding companies are often far removed from the subsidiaries and cannot be held to exercise any decisive influence or control over them. In this case, Shell believes that only Deutsche Shell GmbH and Shell International Petroleum Company Limited (SIPC) can be said to have exercised some influence over Shell Deutschland Oil GmbH and Shell Deutschland Schmierstoff GmbH. However, Shell does not put forward any further substantive arguments to rebut the presumption for the other Shell entities held liable as parent companies as Shell is the immunity applicant in this case and has received conditional immunity.

(524) Shell argues that during the period in which Dea Mineralöl was part of the RWE undertaking (i.e. from the beginning of the infringement 3 September 1992 until 30 June 2002), RWE must also benefit from Shell's conditional immunity.

(525) Shell further states that it cannot and should not be held jointly and severally liable together with RWE for the period from 2 January to 30 January 2002 if the Commission decides to impose a fine on RWE. In such case, Shell and RWE should be held separately accountable.

6.2.7.2. Assessment

(526) First, the presumption of liability cannot be rebutted by a general statement that the parent companies in organisations such as Shell's act as holding companies and are often far removed from the subsidiaries. As Shell does not put forward any further substantive arguments to rebut the presumption that Shell Petroleum Company Limited (SPCO), Shell Petroleum N.V. and the Shell Transport and Trading Company Limited should be held liable as parent companies. As explained in recitals (332)-(333), recently confirmed by the Community Courts[671], it is established case law that the Commission can presume that parent companies exercise decisive influence on their wholly-owned subsidiary (in the case of joint management by two parent companies holding all shares, both parents are presumed to exercise such influence[672]). Where such a presumption applies, as in this case for Shell Petroleum Company Limited (SPCO), Shell Petroleum N.V. and the Shell Transport and Trading Company Limited, it is for the parent company to rebut the presumption by adducing evidence demonstrating that its subsidiary decided independently on its conduct on the market. Failure to provide sufficient evidence on the part of the parent company amounts to a confirmation of the presumption and provides a sufficient basis for the imputation of liability.

(527) The Commission stresses that Shell has not been able to further substantiate why RWE should benefit from Shell's immunity application. The Commission cannot, under these circumstances, accept a general statement as a reason to include RWE as a beneficiary of Shell's conditional immunity. Article 81 of the EC Treaty concerns anti-competitive conduct on the market at a given time period while the Leniency Notice concerns applications for cooperation during an administrative procedure. For the latter, the Commission must therefore assess what was the undertaking to which the applicant belonged to at the time of the application. At the time of Shell's immunity application,

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671 Court of First Instance in Case T-30/05 *Prym Consumer v Commission*, judgment of 12 September 2007, not yet reported, paragraphs 146-148 and judgment of 12 December 2007 in case T-112/05, *Akzo Nobel and Others . Commission*, not yet reported.

672 […].

Shell and RWE did not belong to the same undertaking. Shell is therefore the only undertaking which meets the requirements under the 2002 Leniency Notice and can therefore benefit from immunity..

(528) The Commission concludes that Shell has not been capable of rebutting the presumption of liability for Shell Petroleum Company Limited (SPCO), Shell Petroleum N.V. and the Shell Transport and Trading Company Limited. In addition, Shell's claim that RWE should benefit from Shell's conditional immunity cannot be upheld.

(529) The Commission therefore finds that Deutsche Shell GmbH, Shell International Petroleum Company Limited (SIPC), the Shell Petroleum Company Limited (SPCO), Shell Petroleum N.V. (from 1 July 2002 onwards) and the Shell Transport and Trading Company Limited exercised decisive influence and effective control over Shell Deutschland Oil GmbH (Shell & Dea Oil GmbH) and Shell Deutschland Schmierstoff GmbH. In addition, the Commission finds that Shell Deutschland Oil GmbH (for the period 1 April 2004 until 17 March 2005 (end date of the infringement for Shell)) exercised decisive influence and effective control over Shell Deutschland Schmierstoff GmbH. Consequently, Deutsche Shell GmbH, Shell International Petroleum Company Limited (SIPC), the Shell Petroleum Company Limited (SPCO), the Shell Transport and Trading Company Limited and Shell Deutschland Oil GmbH together form a part of the undertaking that committed the infringement from 1 April 2004 onwards. Shell Petroleum N.V. formed part of that undertaking as of 1 July 2002.

(530) For these reasons, Deutsche Shell GmbH, Shell International Petroleum Company Limited (SIPC), the Shell Petroleum Company Limited (SPCO) and the Shell Transport and Trading Company Limited are jointly and severally liable with Shell Deutschland Oil GmbH from 2 January 2002 onwards and with Shell Deutschland Schmierstoff GmbH from 1 April 2004 onwards. From 2 January 2002 until 30 June 2002, Shell is also jointly and severally liable with the RWE group as for this period they both form part of the undertaking that committed the infringement. Shell Petroleum N.V. is jointly and severally liable with the other Shell group companies to which this decision is addressed as from 1 July 2002.

6.2.8. The RWE group

(531) RWE/Dea and Shell created a joint venture on 2 January 2002. For the creation of the joint venture, the existing Dea Mineralöl GmbH (in preparation of the joint venture, the legal form of Dea Mineralöl AG was changed into Dea Mineralöl GmbH) was used as the joint venture vehicle[673] which was renamed as of 2 January 2002 to Shell & Dea Oil GmbH, and simultaneously becoming a 50/50 subsidiary under joint control of Deutsche Shell GmbH and RWE-Dea AG für Mineralöl und Chemie.[674]

(532) The joint venture was set up with the intention that after an interim period, starting with the creation of the joint venture and ending at the latest on 1 July 2004, Shell would acquire sole control of the combined businesses.[675] During the interim period, the members of the management board being in charge of the joint venture's day-to day operation would be equally appointed by each shareholder; however, the chairman of

673 For a full description of this transaction, see Case No COMP/M.2389 – *Shell/Dea*.
674 […].
675 See Case No COMP/M.2389 – *Shell/Dea*.

the management board would have a casting vote and would be a nominee of Shell. Moreover, both parties had certain veto rights safeguarding their decisive influence of the joint venture, and thus during the interim period, Shell and RWE had joint control over the joint venture.[676]

(533) From its creation on 2 January 2002 until 30 June 2002, Shell Deutschland Oil GmbH (Shell & Dea Oil GmbH) was 50/50 owned by Deutsche Shell GmbH and RWE-Dea AG für Mineralöl und Chemie (which was renamed RWE-Dea AG on 13 June 2002). RWE-Dea AG für Mineralöl und Chemie was [>99%] owned by RWE AG, the ultimate parent company within the RWE group. On 1 July 2002 RWE/Dea's shares of Shell Deutschland Oil GmbH (Shell & Dea Oil GmbH) were transferred to Deutsche Shell GmbH and Shell Petroleum N.V. thereby conferring upon them shareholdings of […]% and […]% respectively of Shell Deutschland GmbH.

(534) Prior to the creation of the joint venture, it was Dea Mineralöl AG/GmbH within the RWE group that participated in the cartel. However, since Shell Deutschland Oil GmbH (Shell & Dea Oil GmbH) is the legal and economic successor of Dea Mineralöl AG/GmbH, all shares of which were transferred to Shell (Deutsche Shell GmbH and Shell Petroleum N.V.), the latter must be considered to have taken over the liability of Dea Mineralöl AG/GmbH including the period prior to the creation of the joint venture as explained above in section (6.2.7.) Thus, Shell Deutschland Oil GmbH (Shell & Dea Oil GmbH) is to be held answerable from the beginning of the infringement (3 September 1992), including the activities of Dea Mineralöl AG/GmbH prior to the joint venture with Shell.

(535) However, liability also arises for those companies which exercised decisive influence over Dea Mineralöl AG and Shell Deutschland Oil GmbH (former Shell & Dea Oil GmbH) during the period in which they participated in the cartel.

(536) With regard to the period prior to the creation of the joint venture (from 3 September 1992 until 1 January 2002), the RWE group is still liable for the infringement committed by Dea Mineralöl AG. Since the creation of the joint venture on 2 January 2002, which was under joint control of RWE and Shell, until 30 June 2002 – the end of the joint venture period (as explained in recitals (510)-(511)), the RWE group is jointly and severally liable together with the Shell group for the activities of Dea Mineralöl/Shell Deutschland Oil GmbH/Shell & Dea Oil GmbH.

(537) Within the RWE group, the undertakings liable are RWE-Dea AG (previously named RWE-Dea AG für Mineralöl und Chemie until 13 June 2002) and its [>99%] owner RWE AG, the ultimate parent company within the RWE group. RWE-Dea AG für Mineralöl und Chemie (RWE-Dea AG) was the RWE company involved in the joint venture with Shell and was also the 100% owner of Dea Mineralöl throughout the period of its participation in the infringement (3 September 1992-30 June 2002).

(538) In the case of a wholly-owned (or almost wholly-owned) subsidiary, it can be presumed that the parent exercised decisive influence over the conduct of such subsidiary and that the subsidiary necessarily followed the policy laid down by the parent company (see recitals (332)-(333)).

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[676] See Case No COMP/M.2389 – *Shell/Dea*.

6.2.8.1. Arguments of the Party

(539) In its reply to the Statement of Objections, RWE AG and RWE-Dea AG (collectively also referred to as RWE) distinguish between two periods, the first period running from 3 September 1992 until 1 January 2002 when Dea Mineralöl (the company active in the paraffin business) was a wholly-owned subsidiary of RWE-Dea AG, which in turn was a wholly-owned subsidiary of RWE AG, and the second period running from 2 January 2002 until 30 June 2002 when the paraffin business was operated through a joint venture with Shell. RWE AG and RWE-Dea AG contest liability for both periods.

(540) During the first period (3 September 1992 until 1 January 2002), RWE claims that Dea Mineralöl AG operated the paraffin business independently and without influence from either RWE AG or RWE-Dea AG, and that neither RWE AG nor RWE-Dea AG exercised decisive influence on the paraffin business of Dea Mineralöl AG. RWE further explains that the paraffin business is of minor importance for the RWE group.

(541) RWE also states that […]. RWE AG concentrated […]The operational responsibility and performance was carried out by […]. Thus, neither RWE AG nor RWE-Dea AG had any influence on the operational business of Dea Mineralöl AG.

(542) During the second period (2 January 2002 until 30 June 2002), RWE AG and RWE-Dea AG claim that they are not responsible for the activities of Shell & Dea Oil GmbH (the joint venture company operating the paraffin wax business of RWE and Shell). To substantiate its claim, RWE states that it had no influence on the […] of Shell & Dea Oil GmbH. The […] and the operational management of the business of Shell & Dea Oil GmbH were, from the creation of the joint venture, decided and controlled by Shell. The management of the joint venture, as well as the decision and reporting structure, was integrated into the Shell Group's structure from the beginning. This is evident in the Rules of procedure for the management of the joint venture. RWE also points out that the joint venture agreement explicitly foresaw that RWE should exit the business after a short transitional period and that Shell should then take full control of the business. When RWE left the business, all the employees and business records were transferred to Shell. Thus, Shell had, from the creation of the joint venture, the operative control of Shell & Dea Oil AG and accordingly, RWE and RWE-Dea cannot be held responsible.

(543) RWE also states that the Commission cannot assume that both RWE AG and RWE-Dea AG on the one hand, and Shell on the other hand, exercised decisive influence over Shell & Dea Oil AG, but that such influence must be proven. The Commission cannot rely on the 50/50% ownership by RWE and Shell of the joint venture together with the equal appointment to the management board and veto rights conferred to the parent companies to establish that both RWE and Shell had decisive influence. The Statement of Objections even states that the chairperson of the management board (a representative of Shell) had a casting vote, which limited RWE's influence. RWE also distinguishes this case from the case law cited by the Commission. In any case, the assumption that RWE has exercised decisive influence is not correct and therefore RWE AG and RWE-Dea AG cannot be held liable for any activities of Shell & Dea Oil AG.

6.2.8.2. Assessment

(544) Concerning the first period (3 September 1992 until 1 January 2002), RWE has claimed that its subsidiaries (both RWE-Dea AG and Dea Mineralöl acted autonomously.

(545) The Commission observes that the exercise of decisive influence on the commercial policy of a subsidiary does not require day-to-day management of the subsidiary's operation. The subsidiary's management may well be entrusted with the subsidiary, but this does not rule out that the parent company imposes objectives and policies which affect the performance of the group and its coherence and disciplines any behaviour which may depart from those objectives and policies.[677] […] (see above). These statements do in fact show that both RWE AG, as the ultimate parent company within the group, and RWE-Dea AG, the direct owner of Dea Mineralöl, had an interest and the ability to exercise control over […], and that they in fact exercised (some) control on certain strategic issues as well as […].

(546) The arguments that paraffin wax is of very limited importance to RWE and that […], is not conclusive with respect to the effective autonomy of a subsidiary. The fact that the parent company itself is not involved in the different businesses is not decisive as regards the question whether it should be considered to constitute a single economic unit with the operational units of the group. The division of tasks is a normal phenomenon within a group of companies. An economic unit by definition performs all of the main functions of an economic operator within the legal entities of which it is composed. Group companies and business units that are dependent on a corporate centre for the basic orientation of the commercial strategy and operations, for their investments and finances, for their legal affairs and for their leadership form a single economic unit and hence cannot be considered to constitute economic units in their own right.

(547) The Commission concludes that the elements which RWE AG and RWE-Dea AG put forward are not capable of rebutting the presumption of liability for Dea Mineralöl for the period 3 September 1992 until 1 January 2002.

(548) With regard to the second period (2 January 2002 until 30 June 2002), the Commission would first like to clarify that, as the Court of Justice pointed out in *Avebe* (see also recital (340)), it is settled case-law that the anti-competitive conduct of a company can be attributed to another company where it has not decided independently upon its own conduct on the market but carried out, in all material respects, the instructions given to it by that other company, having regard in particular to the economic and legal links between them.[678] The Court also found in *Avebe*, on the basis of established case-law, that it is, in principle, for the Commission to demonstrate such decisive influence on the basis of factual evidence, including, in particular, any management power one of the companies may have over the other.[679] In *Avebe* the Court found that the joint venture

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[677] See judgment of 12 December 2007 in case T-112/05, *Akzo Nobel and Others v Commission*, not yet reported, paragraph 83.

[678] See case T-314/01 *Avebe v Commission* [2006] ECR II-3085, paragraph 135. See also Joined Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P et C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR, I-5425, paragraph 117, and Case C-294/98 P *Metsä-Serla Oyj and Others v Commission* [2000] ECR I-10065, paragraph 27.

[679] See case T-314/01 *Avebe v Commission* [2006] ECR II-3085, paragraph 136 and the following case-law referred therein: Joined Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P et C-213/02 P *Dansk*

agreement established joint management power over the joint venture. Given the joint management power and the fact that the parent companies each held a 50% stake in the joint venture and, therefore, controlled all of its shares jointly, the Court found that the situation in that case was analogous to that in Case T-354/94 *Stora Kopparbergs Bergslags v Commission*, in which a single parent company held 100% of its subsidiary, for the purpose of establishing the presumption that that parent company actually exerted a decisive influence over its subsidiary's conduct.

(549) It follows that the management power one company has over another can constitute the factual evidence that demonstrates decisive influence over another undertaking. In this case, the joint management power of Shell and RWE in the management board with respect to the management of the joint venture has been demonstrated (see recital (510)) on the basis of the agreement setting up the joint venture. The members of the management board, which was in charge of the joint venture's day-to-day operations, were equally appointed by each shareholder. Resolutions in the shareholder's meeting were to be taken by simple majority (as each party held 50% of the voting rights, decisions could be blocked by either party). During the relevant period certain decisions were to be taken by a Joint Venture Committee composed of six members, three nominated by each shareholder and decisions required unanimity. The Joint Venture Committee had the sole discretion and authority for a number of strategic decisions such as the business plan, the annual operating budget, structural changes in the joint venture, investments above a certain threshold and the appointment of members of the management board (the so-called veto rights mentioned in recital (510)). Therefore, in the light of these veto rights of both parties safeguarding their decisive influence in the joint venture, the Commission concludes that during the relevant joint venture period, Shell and RWE had joint control over the joint venture company.[680]

(550) Under these circumstances the fact that the chairperson of the management board who was a Shell nominee had a casting vote cannot be considered a significant, let alone the decisive, factor that would put into doubt the joint liability of Shell and RWE over the relevant joint venture period (see recital (510)) because this does not affect the veto rights. Given the management structure for the joint venture, RWE's argument that the […] of the joint venture was decided and controlled by Shell only and that the management of the joint venture was integrated into Shell's structure can not be followed. Similarly the fact that it was foreseen from the creation of the joint venture that Shell would take full control of the business after the transitional period does not change the fact that during the transitional period, the joint venture was for the reasons stated above in recitals (510) and (549) under joint control by Shell and RWE.

(551) Thus, given that joint management power (including in particular the Joint Venture Committee) and the fact that Shell and RWE jointly controlled all the shares in the joint venture company, each holding a 50% share, the finding of liability of both parent companies in this case is in line with the judgment in *Avebe*[681].

Rørindustri and Others v Commission [2005] ECR, I-5425, paragraphs 118 to 122; Case C-196/99 P *Aristrain v Commission* [2003] ECR I-11005, paragraphs 95 to 99; Case T-9/99 *HFB and Others v Commission* [2002] ECR II-1487, paragraph 527.

680 See also Case No COMP/M.2389 – Shell/Dea.

681 See the judgment in case *Avebe v Commission*, in paragraphs 138-139.

(552) In the light of the above, both of the parent companies, Shell and RWE, should be held jointly and severally liable for the behaviour of the joint venture.

(553) The Commission therefore concludes that RWE AG and RWE-Dea AG exercised decisive influence and effective control over Dea Mineralöl AG/GmbH from 3 September 1992 until 1 January 2002. In addition, RWE AG and RWE-Dea AG exercised decisive influence and effective control over Shell Deutschland Oil GmbH/Shell & Dea Oil GmbH (the joint venture) from 2 January 2002 until 30 June 2002 (together with the Shell group). Consequently, RWE AG and RWE-Dea AG are to be held jointly and severally liable with the Shell group for Shell Deutschland Oil GmbH/Shell & Dea Oil GmbH's conduct between 2 January 2002 and 30 June 2002. For both periods, RWE AG and RWE-Dea AG form part of the undertaking that committed the infringement.

(554) For these reasons, RWE AG and RWE-Dea AG are liable for the infringement committed by Dea Mineralöl AG/GmbH from 3 September 1992 until 1 January 2002. RWE AG and RWE-Dea AG are also jointly and severally liable with the Shell group for the infringement committed by Shell Deutschland Oil GmbH (former Shell & Dea Oil GmbH) – the joint venture company – for the period 2 January 2002 until 30 June 2002.

6.2.9. The Total group

(555) It has been established in chapter 4 that throughout the period of infringement Total participated in the collusion via employees of the entity today known as Total France S.A. (see recital (64)).

(556) Total France S.A. participated as from the beginning of the infringement (3 September 1992) until 28 April 2005 (end date of the infringement). As a starting point, the Commission therefore intends to hold Total France S.A. liable for its participation in the cartel.

(557) In addition, liability also arises for those companies which exercised decisive influence over Total France S.A. during the period it participated in the cartel.

(558) The legal entity today known as Total France S.A. was from 1990 until the end of the infringement, more than 98% directly or indirectly owned by the legal entity today known as Total S.A..[682]

(559) In case of a wholly-owned (or almost wholly-owned) subsidiary, it can be presumed that the parent exercised decisive influence over the conduct of such subsidiary and that the subsidiary necessarily followed the policy laid down by the parent company (see recitals (332)-(333)).

(560) The presumption is strengthened in this case by the fact that members of the board of Total France S.A. are, in accordance with the French law, nominated at the shareholders' meeting, the majority shareholder being Total S.A..[683]

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682 […].
683 […].

6.2.9.1. Arguments of the Parties

(561) Total France S.A. and Total S.A. both claim that the alleged conduct of Total France S.A. cannot be attributed to Total S.A..

(562) Total S.A. initially states that the Commission should suspend the present proceeding against Total S.A., and that pursuing this proceeding, while awaiting the outcome of four pending cases[684] before the European Court if First Instance is against the principle of good administration and legal certainty. The question of responsibility for Total S.A. is the same in those cases as in this one, and Total S.A. claims that there was a radical change in the Commission's practice in 2004 regarding parental liability which has not been explained or justified.

(563) To further substantiate their claims of not imputing liability to Total S.A. for the alleged activities of Total France S.A., both Total S.A. and Total France S.A. advance a number of arguments.

(564) Firstly, Total France S.A. and Total S.A. consider that the Commission has wrongly interpreted the jurisprudence of the Courts regarding parental liability and more precisely, the presumption decisive influence. They both claim that the simple fact that Total S.A. owns the majority of the shares (more than 98% directly or indirectly) is not sufficient to impute liability to Total S.A.. Total France S.A. and Total S.A. refer in this regard to the recent *Bolloré* judgement[685] and state that additional elements are always necessary to validate the presumption and that the additional element claimed by the Commission (the fact that members of the board of Total France S.A., according to French law, are nominated at the shareholders' meeting, the majority shareholder being Total S.A.) cannot be considered as such an element which reinforces the presumption. Such a fact is insufficient as it does not show the specific relationship between the two entities; it is merely in accordance and an application of the French law and it is claimed that such a fact cannot reverse or confirm a possible interference in the management of the subsidiary and thus is not enough to show that Total France S.A. did not act autonomously in the market. Therefore the reasoning of the Commission violates the principle of autonomy of legal persons and personal liability.

(565) Total France S.A. and Total S.A. also put forward arguments to show that Total France S.A. indeed has acted autonomously on the market.

(566) Total France S.A. states that selling strategies and the fixing of prices were decided by the relevant directors in Total France S.A. and that these strategies were put in place by employees of Total France S.A.. Total France S.A. had, during the relevant period, all the relevant means to conduct an autonomous policy for the commercialisation of its products, in particular paraffin waxes. The reporting to Total S.A. was limited to general financial information, and Total France S.A. never received any instructions from Total S.A. concerning the policy it should follow for the commercialisation of paraffin waxes and that Total France S.A. did not receive any authorisation from Total S.A. concerning its investments.

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[684] These cases are COMP/E-1/37.773 – *MCAA*, COMP/F/38620 – *Hydrogene Peroxide*, COMP/F/38645 – *Methacrylates* and COMP/F/38.456 – *Bitumen Netherlands*.

[685] Judgment of the Court of First Instance 26 April 2007 in Joined Cases T-109/02, *Bollore*, not yet reported.

(567) Total S.A. elaborates the arguments further and explains that the group is decentralised with diverse activities. Total S.A.'s role is limited to a few general tasks of the group, such as human resources policy, keeping consolidated accounts, and determination of the fiscal policy for the group, and some other horizontal operational tasks, including industrial security, environment, ethics treasury, financing etc. However, Total S.A. explains that it has the power to approve, or disapprove, the most important investments or major changes of activities within the group. According to Total S.A., these powers do no confer upon it a decisive influence on the commercial policy of its subsidiaries and in particular Total France S.A.. Furthermore, during the relevant period, Total S.A. and Total France S.A. had completely distinct organs and there are no officers occupying posts in both entities (with the exception of one individual who was officer in both entities between 1992 and 1994).

(568) Total S.A. further states that Total France S.A. determined its commercial strategy autonomously and that it had the organisational, legal and financial instruments necessary to do so. Total S.A. had no means to exercise supervision, coordination of the manufacturing or commercialisation of the Total France S.A.'s downstream petroleum products, including paraffin waxes. In addition, during the relevant period, the financial control by Total S.A. over Total France S.A. was very general and did not concern the paraffin activities and thus Total France S.A. enjoyed full financial autonomy.

(569) Total S.A. also claims that Total France S.A. has not informed Total S.A. of its activities on the market and has not reported to Total S.A. more than what is legally required, that is to say, reported only in very general terms and never about the commercial policy of any products.

(570) Total S.A. did not know the commercial policy of the paraffin business and has in no case contributed to the implementation of the infringement. The employees mentioned in the Statement of Objections reported only to their Directors of the relevant departments which were in turn under the authority of the "Directeur Spécialités" of Total France S.A.. All people allegedly involved in the infringement were employed by Total France S.A. and had no relation with Total S.A.. This explains why the Commission has not been able to prove that Total S.A. had any knowledge of the practices taken by its subsidiary, or that Total S.A. had been able to envisage or encourage such practices. Total S.A. was never informed of the Technical Meetings and has never had any role in the organisation of these meetings. Total S.A. learnt about the existence of the practices mentioned in the Statement of Objections only after the relevant infringement period. Total S.A. was informed on 28 April 2005, first day of inspection, about the inspections.

(571) For the above reasons, Total S.A. claims it should be concluded that activities of Total France S.A. on the market were not conditional upon instructions from Total S.A., that Total France S.A. was effectively an autonomous undertaking which had no need to rely on its parent company to define or approve its commercial strategy on the relevant markets, in particular the paraffin business and that Total S.A. never intervened or gave any instructions concerning the management of the paraffin activities (e.g. production, pricing and marketing of the products) and that Total France S.A. also had the benefit to define its sales objectives and its gross margins. Total S.A. was not present on the market operated by its subsidiary and in particular the paraffin market, and Total France S.A. acted in the market of paraffin waxes in its own name and for its own

account and not for Total S.A.. The role of Total S.A. and the organisation of the group did not allow Total S.A. to interfere in the management of its subsidiaries, in particular Total France S.A.. The role of Total S.A. was limited to a role of institutional coordination and control of strategic orientations and the most important investments. For all the above reasons it is claimed that Total France S.A. had full authority to manage fully autonomously its commercial policy and thus enjoyed full autonomy in the market.

(572) In addition, Total S.A. lists a number of principles it claims having been violated: violation of the principle of rights of defence (Total S.A. was left out of the investigation prior to the issuing of the Statement of Objections, it was neither inspected nor received any requests for information), violation of the presumption of innocence, violation of the principle of personal responsibility and of personal nature of fines, the principle of legality and of equality of arms (which all relate to the imputation of liability for Total S.A.).

(573) It is also mentioned that the paraffin business is of minor importance to both Total France S.A. and Total S.A..

6.2.9.2. Assessment

(574) Concerning Total S.A.'s initial claim that the present proceedings should be suspended due to pending court cases involving the same or similar issues, at least with regard to parental liability for Total S.A., it must be said that pending cases before the courts do not suspend the Commission's proceedings in other cases regardless of whether the issues are the same or similar. Even if there had been a further development of the Commission's policy in 2004 regarding parental liability, the Commission would like to stress that it enjoys a margin of discretion in deciding which entities of an undertaking it holds liable for an infringement and its assessment is done on a case-by-case basis. The Court has also acknowledged that the Commission may change its fining policy if it is required to ensure an effective enforcement of competition policy.[686]

(575) As explained in recitals (332)-(333) and recently confirmed by the Community Courts[687], it is established case law that the Commission can presume that parent companies exercise decisive influence on their wholly-owned (or almost wholly-owned) subsidiary. Where such a presumption applies, as in this case for Total S.A., it is for the parent company to rebut the presumption by adducing evidence demonstrating that its subsidiary decided independently on its conduct on the market. Failure to provide sufficient evidence on the part of the parent company amounts to a confirmation of the presumption and provides a sufficient basis for the imputation of liability. With regard to the argument that the fact that members of the board of Total France S.A., according to French law, are nominated at the shareholders' meeting, and that the majority shareholder being Total S.A. is only an application of the French law and thus not sufficient to either reverse or confirm the independence of Total France S.A., it must be rebutted that firstly, it is a fact that the members of the board of Total France S.A. are appointed by Total S.A.. Secondly, the fact that exercise of such powers

686 Case C-189/02 P *Dansk Rørindustri and others v Commission* [2005] ECR I-5425, para. 228-232.

687 Court of First Instance in Case T-30/05 *Prym Consumer v Commission*, judgment of 12 September 2007, not yet reported, paragraphs 146-148 and judgment of 12 December 2007 in case T-112/05, *Akzo Nobel and Others v. Commission*, not yet reported.

derives from the application of the national law is irrelevant. What is important is the existence of organisational links between the companies, irrespective of the reasons why such links exist. By definition, when the law creates a presumption it is because, when the premise of fact justifying the presumption is established, the fact that is presumed is generally true and only rarely false. This is what justifies reversing the burden of proof, and it is the essence of a presumption. It is relation to rare cases where subsidiaries are controlled by their parent company, but nevertheless remain entirely "autonomous", that the law creates a presumption. In addition, the Commission cannot agree with the purely formal view put forward by Total S.A. that the relationship between the legal entities is merely an natural consequence of corporate requirements governing the company established in accordance with the law. The board of directors and its chairman have a general duty to direct the affairs of the company, or at least to supervise the running of its affairs where that is delegated to others. To accept that the officers of the company may be appointed only in order to satisfy formal requirements of no legal significance would be to deprive those requirements of any purpose, and to negate the very principles of the representativeness and responsibility of the governing bodies of companies. The Commission would point out that in most cases the persons who sit on the board of directors of a company receive fees for their attendance. In fact, the terms of the law merely confirm that a situation of control by a mother company of a subsidiary creates certain rights for the mother company (such as appointing key people, reporting obligations) in order to enable it to effectively exercise such control. Contrary to Total's claims, such rights cannot be viewed as being redundant but are to be seen as tools granted by the law to effectively exercise the parental responsibility.

(576) Concerning the principle of personal liability, Article 81 of the Treaty is addressed to "undertakings" which may comprise several legal entities. In this context the principle of personal liability is not breached as long as different legal entities are held liable on the basis of circumstances which pertain to their own role and their conduct within the same undertaking. In the case of parent companies, liability is established on the basis of their exercise of effective control on the commercial policy of the subsidiaries which are materially implicated by the facts. Liability for acts of a subsidiary over which a company has full control cannot be said to infringe the principle of personal liability. The fact that acts of a subsidiary are attributable to the parent, even if there is no indication of any direct involvement by the parent company in the infringement itself, is not contrary to the principle of personal liability.[688]

(577) As to the arguments which Total France S.A. and Total S.A. have put forward in order to claim that its subsidiaries acted autonomously, it is observed that most of the arguments regarding the independence of Total France S.A. focus on Total France S.A.'s ability to act autonomously within its day-to-day management of its commercial activity.

(578) The exercise of decisive influence on the commercial policy of a subsidiary does not require day-to-day management of the subsidiary's operation. The subsidiary's management may well be entrusted with the subsidiary, but this does not rule out the ability for the parent company to impose objectives and policies which affect the performance of the group and its coherence and to discipline any behaviour which may

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[688] Case C-294/98 P *Metsä-Serla and Others* v *Commission* [2000] ECR I-10065, paragraph 28.

depart from those objectives and policies.[689] In fact, Total S.A. admits that it has a role of institutional coordination and control of strategic orientations, and that it has the power to approve, or disapprove, the most important investments or major changes of activities within the group. This shows that Total S.A., as a parent company, has an interest and role over its subsidiaries as a shareholder to protect its financial ownership and commercial strategy interests. Total S.A. also lists certain other matters such as human resources policy, keeping consolidated accounts, and determination of the fiscal policy for the group, and some other horizontal operational tasks, including industrial security, environment, ethics treasury, financing etc. which are in the hands of Total S.A. for the whole group.

(579) The absence of a management overlap, or very limited overlap, cannot be taken into account, under the circumstances of this case, as being a significant, let alone decisive, factor, in order to rebut the presumption.

(580) With regard to the argument that Total France S.A. never received any instructions from Total S.A. concerning the policy to take for the commercialisation of paraffin waxes, it must be observed that the attribution of an infringement by a subsidiary to the parent company does not require proof that the parent company influences its subsidiary's policy in the specific area in which the infringement occurred. On the other hand, the economic and legal organisation links between the parent company and its subsidiary may establish that the parent exercises influence over the subsidiary's strategy and therefore they can be viewed as a single economic entity.[690]

(581) The claim that Total France S.A. did not inform Total S.A. of its activities on the relevant market, did not report more than generally required by law to Total S.A. of its activities and financial situation, that Total S.A. had no means to exercise supervision of Total France S.A.'s business activities and the arguments that Total S.A. did not know the commercial policy of the paraffin business and has in any case not contributed to the implementation of the infringement or encouraged it, are all irrelevant. These arguments are based on the erroneous premise that a parent company can only be held liable for the infringements committed by its subsidiaries if it can be established that it was aware of the infringement or it was directly involved in its organisation and implementation. Contrary to that contention, attribution of liability to a parent company for the infringement committed by its subsidiary flows from the fact that the two entities constitute a single undertaking for the purposes of the Community rules on competition[691] and not from proof of the parent's participation in or awareness of the infringement (see recitals (329)-(333)).

(582) The argument that paraffin wax is of very limited importance to both Total France S.A. and Total S.A. is not conclusive with respect to the effective autonomy of a subsidiary. The fact that the parent company itself is not involved in the different businesses it holds is not decisive as regards the question whether it should be considered to constitute a single economic unit with the operational units of the group. The division

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689 See judgment of 12 December 2007 in case T-112/05, *Akzo Nobel and Others v Commission*, not yet reported, paragraph 83.

690 See judgment of 12 December 2007 in case T-112/05, *Akzo Nobel and Others v Commission*, not yet reported, paragraph 83.

691 See Cases T-71/03, T-74/03, T-87/03, and T-91/03 *Tokai Carbon v Commission,* [2005] ECR II-10, paragraph 54.

of tasks is a normal phenomenon within a group of companies. An economic unit by definition performs all of the main functions of an economic operator within the legal entities of which it is composed. Group companies and business units that are dependent on a corporate centre for the basic orientation of the commercial strategy and operations, for their investments and finances, for their legal affairs and for their leadership form a single economic unit and hence cannot be considered to constitute separate economic units in their own right. Therefore, the arguments that Total S.A. was not present on the market operated by Total France S.A. and that Total France S.A. acted on the market for paraffin waxes in its own name and for its own account, are irrelevant.

(583) Total France S.A. also claims that the principle of right of defence has not been respected arguing that Total S.A. was left out of the investigation prior to the issuing of the Statement of Objections and was neither inspected nor received any requests for information. The Commission has no obligation to inform companies prior to issuing a Statement of Objections whether it is under investigation.[692] In addition Total S.A. admitted at the oral hearing that it was informed by Total France S.A. on 28 April 2005, the first day of inspection, about the inspections and received a copy of the inspection decision.

(584) In addition Total S.A. has claimed that a number of principles have been violated, in relation to the imputation of liability for Total S.A.: the presumption of innocence, the principle of personal responsibility and of personal nature of fines, the principle of legality and of equality of arms. The Commission considers that these claims are to a large extent similar in substance to those already considered in the preceding recitals. In substance, most of these arguments come down to contesting the very idea that a company could be held liable even if its employees had not been materially involved in the cartel.

(585) The Commission concludes that the elements which Total S.A. has put forward are not capable of rebutting the presumption.

(586) The Commission, therefore, finds that Total S.A. exercised decisive influence and effective control over Total France S.A.. Consequently, Total S.A. forms a part of the undertaking that committed the infringement.

(587) For these reasons, Total S.A. is jointly and severally liable with Total France S.A. as both form part of the undertaking that committed the infringement from 3 September 1992 onwards.

6.3. Conclusion on Addressees

(588) Based on the foregoing, it has been established that the following companies are liable for the infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement, or bear liability thereof and should be addressees of this Decision:

– ENI S.p.A.;

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[692] See judgement of 8 July 2008 in case T-99/04, *AC Treuhand v Commission*, not yet reported, paragraphs 47-49.

– Esso Deutschland GmbH, Esso Société Anonyme Française, ExxonMobil Petroleum and Chemical B.V.B.A. and Exxon Mobil Corporation;

– H&R ChemPharm GmbH, H&R Wax Company Vertrieb GmbH and Hansen & Rosenthal KG;

– Tudapetrol Mineralölerzeugnisse Nils Hansen KG;

– MOL Nyrt.;

– Repsol YPF Lubricantes y Especialidades S.A. (Rylesa), Repsol Petróleo S.A. and Repsol YPF S.A.;

– Sasol Wax GmbH, Sasol Wax International AG, Sasol Holding in Germany GmbH and Sasol Limited;

– Shell Deutschland Oil GmbH, Shell Deutschland Schmierstoff GmbH, Deutsche Shell GmbH, Shell International Petroleum Company Limited (SIPC), the Shell Petroleum Company Limited (SPCO), Shell Petroleum N.V. and the Shell Transport and Trading Company Limited;

– RWE-Dea AG and RWE AG; and

– Total France S.A. and Total S.A.

7. DURATION OF THE INFRINGEMENT AND LIMITATION PERIODS

7.1. Starting Date for Each Undertaking

(589) […] the Commission will, for the purposes of this Decision, limit its assessment under Article 81 of the Treaty and Article 53 of the EEA Agreement and the application of any fines to the period beginning on 3 September 1992, as this is the first anti-competitive meeting of which the Commission has corroborating evidence. This Technical Meeting was attended by representatives of at least ExxonMobil, MOL, Sasol, Dea (today Shell) and Total.

(590) The Commission will thus take 3 September 1992 as the relevant starting date for ExxonMobil, MOL, RWE, Sasol, Shell and Total.

(591) For Shell, the starting date varies for different legal entities within the Shell group depending on liability for each of these entities (see section 6.2.7). For Shell Deutschland Oil GmbH the starting date is 3 September 1992; however, for the other entities in the Shell group of companies (Deutsche Shell GmbH, Shell International Petroleum Company Limited (SIPC), the Shell Petroleum Company Limited (SPCO) and the Shell Transport and Trading Company Limited), the starting date is set as 2 January 2002 (the date of the creation of the joint venture). For Shell Deutschland Schmierstoff GmbH the starting date is set as 1 April 2004 (the date when it was created and started taking part in the infringement). For Shell Petroleum N.V, the starting date is set as 1 July 2002 (the date when it acquired […]% ownership in Shell & Dea Oil GmbH).

(592) For ExxonMobil, the starting date for Exxon Mobil Corporation, and ExxonMobil Petroleum & Chemical B.V.B.A. (EMPC) is set as 30 November 1999, the date as of which these two entities became liable. As Esso Société Anonyme Française is held liable for the activities of Mobil Oil Française, the starting date for Esso Société Anonyme Française is set as 3 September 1992. The starting date for Esso Deutschland GmbH is set as 22 February 2001.

(593) For Sasol Wax International AG, Sasol Holding in Germany GmbH and Sasol Limited the starting date is set as 1 May 1995, the date when these three entities became liable. The starting date for Sasol Wax GmbH is set as 3 September 1992.

(594) For Tudapetrol, the starting date is set as 24 March 1994 (H&R/Tudapetrol's entry into the paraffin wax business with the acquisition of a refinery […] - see section 2.3.3 and recital (379)). Prior to 24 March 1994, […] participated in Technical Meetings, the representative being […], who also continued to participate on behalf of his new employer H&R/Tudapetrol.[693] Consequently, H&R/Tudapetrol was in a position to take advantage of the information/discussions at the Technical Meetings directly from its acquisition of the refinery which included the employment of […]. Therefore, the starting date for Tudapetrol is set as 24 March 1994, for H&R ChemPharm the starting date is set as 1 July 2001 and for the other Hansen & Rosenthal companies the starting date is set as 1 January 2001 (further explained in section 6.2.3).

(595) For Repsol, the first Technical Meeting at which Repsol's presence is demonstrated is the meeting of 24 June 1994. Consequently, 24 June 1994 is set as the starting date for Repsol.

(596) ENI participated in one Technical Meeting on 30 and 31 October 1997 and from 21 February 2002 onwards.

7.2. End Date for Each Undertaking

(597) The last Technical Meeting the Commission is aware of was organised on 23 and 24 February 2005 in Hamburg. It was at least attended by representatives of ENI, H&R/Tudapetrol, MOL, Sasol and Shell (see recital (177)).

(598) Another Technical Meeting had been planned for the end of May 2005[694], however, inspections were carried out at the premises of Sasol, H&R/Tudapetrol, Total, Esso/ ExxonMobil, Repsol, MOL and ENI on 28 and 29 April 2005. There is no evidence that the planned meeting took place.

(599) ExxonMobil, Total and Repsol claim that their participation ended before the first day of the inspections, that is to say, for Repsol, after the meeting in September 2003, for ExxonMobil, after the February 2003 meeting and for Total, after the meeting in May 2004.

(600) […].[695] […].[696] […].[697]

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693 […].
694 […].
695 […].
696 […].

(601) It cannot, however, be accepted that ExxonMobil's participation in the infringement ended after the Technical Meeting on 27 and 28 February 2003. It is not sufficient to abstain from attending meetings for an involvement to be ended. The public distancing as required by the case law only occurred with […] of 20 November 2003. […].

(602) Total states that it did not participate in any Technical Meetings after the meeting on […] and that its representative cancelled his journey for the meeting of […], internally communicating that he did so because of advice from his superior.[698] The Commission notes that there is no evidence of any withdrawal from the cartel. In cases of complex infringements, the fact that an undertaking is not present in a meeting, or does not agree what is discussed in a meeting, does not mean that the undertaking has stopped its participation in an on-going infringement. In order to terminate the infringement, the undertaking must clearly distance itself from the cartel. The Court has already ruled, in *Union Pigments*[699], that in the absence of such explicit withdrawal the Commission may still consider that the infringement has not yet been terminated. In *Westfalen Gassen*[700] the Court has followed the same approach. In *Archer Daniels Midland*[701] the Court has referred to the requirement *"to distance itself openly from the cartel objectives and the methods to be used for implementing those objectives"*, in the absence of which the undertaking can be said not to have withdrawn from the cartel. Total has not put forward clear evidence that it adopted a fully autonomous and unilateral strategy on the market nor that it clearly and openly distanced itself from the activities of the cartel. On the contrary, evidence in the Commission's possession shows that Total received formal invitations to all three of the subsequent Technical Meetings (namely, the last three Technical Meetings before the inspections were carried out)[702]. The Commission observes that Total's representative confirmed that he would attend the meeting of 3/4 November 2004[703] although he appears to have cancelled his journey later.[704] […][705] […].[706] […]. The Commission also observes that the discussions in the meetings were not fundamentally different from the previous meetings but that the participants continued to discuss price increases without mentioning any move by Total to leave the cartel (see recitals (175), (176) and (177)) and that it was not unusual during the cartel that companies did not attend some meetings. Both of these factors show that Total was not perceived as having dropped out of the cartel after the meeting of May 2004. The internal communication of Total's representative as to his reasons for not attending a meeting cannot, in any event, be seen as public distancing. As there is also nothing else to suggest that Total distanced itself from the cartel, the Commission considers that Total's involvement in the cartel did not end prior to the inspections.

(603) Total France S.A. claims that it interrupted its participation between 2000 and 2001 and that the fact that its representative left the meeting in anger was a sign of

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697 […].
698 […].
699 Case T-62/02 *Union Pigments AS* v *Commission*, [2005] ECR II-5057, paragraph 94.
700 Judgment of 5 December 2006 in Case T-303/02 *Westfalen Gassen Nederland* v *Commission*, not yet reported paragraphs 138-139.
701 Judgment of 27 September 2006 in Case T-329/01 *Archer Daniels Midland* v *Commission*, not yet reported, paragraph 247.
702 […].
703 […].
704 […].
705 […].
706 […].

distancing.[707] The Commission observes, as is demonstrated in section 4.2 that Total participated in the Technical Meeting of 18 and 19 September 2000 and again in the meeting of 26 and 27 June 2001, thus missing three meetings during nine months. The Commission also observes that there is nothing to suggest that Total has publicly distanced itself from the cartel. That […] left the meeting does not, as such, constitute a public distancing considering that even Total does not argue that […] announced an intention to stop Total's participation in the cartel. Rather, […] anger shows that he was not satisfied with the agreement reached. Total's reappearance after less than a year confirms that it had no intention to stop its involvement. The Commission does not, therefore, consider Total's short temporary absence as constituting an interruption of its involvement in the cartel.

(604) Repsol declares that the last meeting it participated in was the meeting on 24 and 25 September 2003 in Vienna, and that the objective of attending this meeting was to announce that it would be the last meeting in which Repsol would participate.[708] Repsol has not submitted evidence supporting this declaration nor has it declared that it indeed made the said announcement. Repsol, however, admits that it did receive invitations to later meetings, but claims that it did not attend them.[709] The Commission's evidence also shows that Repsol indeed received invitations to the Technical Meetings taking place after September 2003 until the inspections were carried out. These were the meetings of 14 and 15 January 2004 and 11 and 12 May 2004.[710] […].[711] The Commission observes that in 2004, the person who had represented Repsol at the Technical Meetings changed positions and that his successor was supposed to attend the meetings on behalf of Repsol.[712] The Commission does not consider that Repsol publicly distanced itself from the cartel.[713] […]. The Commission also observes that the discussions in the meetings on 14 and 15 January 2004, on 11 and 12 May 2004 and on 3 and 4 August 2004 were not fundamentally different from the previous meetings but that the participants continued to discuss price increases without mentioning any move by Repsol to leave the cartel (see recitals (173), (174) and (175)) and that it was not unusual during the cartel that companies did not attend some meetings. The motivation for Repsol's absence from the meeting on 3 and 4 August 2004 was the holiday period, that is to say, that Repsol's representative was simply not available. Afterwards, Repsol declined to attend the meetings and did not receive formal invitations. […].[714] […].

(605) For the RWE group (RWE-Dea AG and RWE AG), the end date for its liability is 30 June 2002 when the Shell group of companies took over all the shares of the previously 50/50% held joint venture between RWE/Dea and Shell.

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707 […].
708 […].
709 […].
710 […].
711 […].
712 […].
713 See Joined Case T-25/95 and others, *Cement*, ECR [2000] II-491, paragraph 1353.
714 […].

(606) For Tudapetrol, the end date for its liability is 30 June 2002, when the employment of its representatives at the Technical Meetings with Tudapetrol ended.[715]

(607) For Shell, the end date for its liability is 17 March 2005, the date of Shell's immunity application as there are no indications that Shell continued the infringement after this date.

(608) There are no other indications that the collusive contacts ended or the cartel ceased to produce its effects prior to the inspections.

(609) The Commission will thus take 28 April 2005 (the first day of the inspections) as the relevant end date with regard to Sasol, Hansen & Rosenthal (except for Tudapetrol where the end date is 30 June 2002), Total, MOL and ENI; 20 November 2003 as the end date for ExxonMobil; 30 June 2002 as the end date for RWE, 4 August 2004 as the end date for Repsol and 17 March 2005 as the end date for Shell.

7.3. Conclusion on the Duration of the Infringement Relating to Paraffin Waxes

(610) In view of sections 7.1 and 7.2, the Commission considers that the periods of participation in the cartel of each undertaking are the following:

	Period of involvement	Number of years and months
ENI	on 30/31 October 1997 from 21 February 2002 to 28 April 2005	 3 years and 2 months
Exxon Mobil Corporation and ExxonMobilPetroleum and Chemical B.V.B.A	from 30 November 1999 to 20 November 2003	3 years and 11 months
Esso Société Anonyme Française	from 3 September 1992 to 20 November 2003	11 years and 2 months
Esso Deutschland GmbH	from 22 February 2001 to 20 November 2003	2 years and 8 months
Tudapetrol	from 24 March 1994 to 30 June 2002	8 years and 3 months
Hansen & Rosenthal KG and H&R Wax Company Vertrieb GmbH	from 1 January 2001 to 28 April 2005	4 years and 3 months
H&R ChemPharm GmbH	from 1 July 2001 to 28 April 2005	3 years and 9 months
MOL	from 3 September 1992 to 28 April 2005	12 years and 7 months
Repsol	from 24 June 1994 to 4 August 2004	10 years and 1 month
Sasol Wax GmbH	from 3 September 1992 to 28 April 2005	12 years and 7 months

[715] For the period 1 January 2002 until 30 June 2002, the employees representing H&R/Tudapetrol were employed by both Tudapetrol and an entity directly in the Hansen & Rosenthal group, however from 30 June 2002, these employees were no longer employed by Tudapetrol.

	Period of involvement	Number of years and months
Sasol Wax International AG, Sasol Holding in Germany GmbH, Sasol Limited	1 May 1995 to 28 April 2005	9 years and 11 months
Shell Deutschland Oil GmbH	from 3 September 1992 to 31 March 2004	11 years and 6 months
Shell Deutschland Schmierstoff GmbH	from 1 April 2004 to 17 March 2005	11 months
Deutsche Shell GmbH; Shell International Petroleum Company Limited (SIPC); the Shell Petroleum Company Limited (SPCO); and the Shell Transport and Trading Company Limited	from 2 January 2002 to 17 March 2005	3 years and 2 months
Shell Petroleum N.V.	1 July 2002 to 17 March 2005	2 years and 8 months
RWE	from 3 September 1992 to 30 June 2002	9 years and 9 months
Total	from 3 September 1992 to 28 April 2005	12 years and 7 months

7.4. Conclusion on the Duration of the Infringement Relating to Slack Wax

(611) The infringement committed by Sasol and Total as far as it relates to slack wax sold to end-customers on the German market lasted from 30 October 1997 (first day of the first meeting on slack wax) to 12 May 2004 (last day of the last meeting on slack wax), that is to say, 6 years and 6 months. For Shell Deutschland Oil GmbH, the infringement, insofar as it relates to slack wax sold to end customers on the German market, lasted from 30 October 1997 to 12 May 2004 (6 years and 6 months), for Shell Deutschland Schmierstoff GmbH, it lasted from 1 April 2004 to 12 May 2004 (1 month), for Shell Petroleum N.V., it lasted from 1 July 2002 to 12 May 2004 (1 year and 10 months) and for Deutsche Shell GmbH, Shell International Petroleum Company Limited (SIPC), the Shell Petroleum Company Limited (SPCO), and the Shell Transport and Trading Company Limited, it lasted from 2 January 2002 to 12 May 2004 (2 years and 4 months). For RWE, the infringement, insofar as it relates to slack wax sold to end-customers on the German market, lasted from 30 October 1997 to 30 June 2002. (4 years and 8 months). Between 30 October 1997 and 12 May 2004, the presence of ExxonMobil at meetings where slack wax was discussed could be established for the meetings between 8 and 9 March 1999 (see recital (152)) and 17 and 18 December 2002 (see recital (168)). For Esso Société Anonyme Française, therefore, the infringement, insofar as it relates to slack wax sold to end-customers on the German market, lasted from 8 March 1999 to 18 December 2002 (3 years and 9 months), for Esso Deutschland GmbH, it lasted from 22 February 2001 to 18 December 2002 (1 year and 9 months) and for Exxon Mobil Corporation and ExxonMobil Petroleum and Chemicals B.V.B.A., it lasted from 20 November 1999 to 18 December 2002 (3 years and almost 1 month). This finding is consistent with ExxonMobil's acknowledgement

that there were anti-competitive discussions regarding slack wax in the German-speaking part of Europe in 1999-2001 (see recital (288)).[716]

7.5. Application of Limitation Periods

(612) Pursuant to Article 25(1)(b) of Regulation (EC) No 1/2003, the power of the Commission to impose fines or penalties for infringements of the substantive rules relating to competition is subject to a limitation period of five years. Any action taken by the Commission for the purpose of the preliminary investigation or proceedings in respect of an infringement interrupts the limitation period and each interruption starts time running afresh.[717]

(613) In this case, the Commission investigation started with the surprise inspections pursuant to Article 20(4) of Regulation (EC) No 1/2003 on 28-29 April 2005. Hence, regarding illegal conduct which ceased prior to 28 April 2000, no fines may be imposed unless infringements started before that date and were continuing or repeated with the same object.

(614) None of the addressees of this Decision ended its involvement in the infringement before 28 April 2000.

(615) In its reply to the Statement of Objections, […] claimed that […] participation ended earlier and thus would be time barred because, […] claims, […] left the market on […].[718]

(616) However, after further investigation, it is clear that even if […] largely left the paraffin business on […], it continued to keep some paraffin customers.[719] This together with the fact that one employee of […], continued to be present at the Technical Meetings after […] was employed by […], means that […] is liable until […]. Finally, even […] claims that […] left the market on […], the day when prescription would start to have effect. […] argument that the last Technical Meeting before […] and that prescription should therefore start at the […] cannot be accepted. The cartel is a single and continuous infringement which was not interrupted between the Technical Meetings and therefore continued after the meeting of […].

(617) With regard to ENI's participation at the Technical Meeting on 30 and 31 October 1997, the Commission considers that ENI's participation at this meeting may be time barred. The Commission does not, therefore, impose a fine for this part of the infringement committed by ENI and does not take it into consideration for the purposes of determining ENI's recidivism. The Commission however finds that ENI's participation at the meeting is an infringement of Article 81 of the Treaty and of Article 53 of the EEA-Agreement and considers it necessary to express this finding in this Decision because it completes and clarifies ENI's role in the infringement as a whole and thus completes the finding of its participation therein.

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716 […].
717 Article 25(3) to (5) of Regulation (EC) No 1/2003.
718 […].
719 […].

8. REMEDIES

8.1. Article 7 of Regulation (EC) No 1/2003

(618) Where the Commission finds that there is an infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement it may by decision require the undertakings concerned to bring such infringement to an end in accordance with Article 7 of Regulation (EC) No 1/2003.

(619) 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, in particular because, as Sasol reported, some of the projects that were discussed in the first parts of the Technical Meetings related to health issues and wax purity are continuing. It is therefore necessary for the Commission to require the undertakings to which the present Decision is addressed to bring the infringement to an end (if they have not already done so) and henceforth to refrain from any agreement, concerted practice or decision of an association which might have the same or a similar object or effect.

(620) The prohibition applies to all secret meetings and multilateral or bilateral contacts between competitors in view of restricting competition between them or enabling them to concert their market behaviour.

8.2. Article 23(2) of Regulation (EC) No 1/2003

(621) Under Article 23(2) of Regulation (EC) No 1/2003[720], the Commission may by decision impose upon undertakings fines where, either intentionally or negligently, they infringe Article 81 of the Treaty and/or Article 53 of the EEA Agreement. Under Article 15(2) of Council Regulation No 17 of 6 February 1962, First Regulation implementation Articles 85 and 86 of the Treaty[721], which was applicable during parts of the infringement, the fine for each undertaking participating in the infringement could not exceed 10% of its total turnover in the preceding business year. The same limitation results from Article 23(2) of Regulation (EC) No 1/2003.

(622) Pursuant to Article 23(3) of Regulation (EC) No 1/2003 and Council Regulation No 17, 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 Regulation (EC) No 1/2003.

(623) 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. In setting the fines to be imposed, the Commission will refer to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of

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[720] Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements of implementing the Agreement on the European Economic Area "*the Community rules giving effect to the principles set out in Articles 85 and 86 [now Articles 81 and 82] of the Treaty […] shall apply* mutatis mutandis." (OJ L 305/6 of 30 November 1994).

[721] OJ 13, 21.2.1962, p. 204/62.

Regulation (EC) No 1/2003[722] (hereafter, "the 2006 Guidelines on Fines"). Finally, the Commission will apply, as appropriate, the provisions of the 2002 Leniency Notice.

8.3. The Guidelines on Fines

(624) In response to the Statement of Objections […] claimed that any fine imposed on them should be determined according to the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty[723] (hereafter the "1998 Fining Guidelines") and not the 2006 Guidelines on fines as the infringement ended in 2005, that is to say, before the 2006 Guidelines on fines were published. […] rely in this respect on the principle of non-retroactivity and on the principle that the more lenient provision must apply. […] in addition maintains that, when it applied for leniency in […], it expected the 1998 Guidelines to apply.

(625) The Commission disagrees with those arguments. It is settled case law that in determining the amount of the fines, the Commission has a wide discretion. It is also settled case law that the fact that the Commission imposed fines of a certain level for certain types of infringement does not mean that it is prevented from raising that level to ensure the implementation of Community competition policy.[724] The European Court of Justice previously established that undertakings involved in an administrative procedure in which fines may be imposed cannot acquire a legitimate expectation of the fact that the Commission will not exceed the level of fines previously imposed, so that a legitimate expectation cannot be based on a method of calculating fines. This was also found to be the case for undertakings which had decided to co-operate with the Commission under the 1996 Leniency Notice before a new method of calculating fines was adopted, a method which was subsequently applied to calculate the fines imposed on the said undertakings.[725] The Court also held in the same circumstances that the Commission had not breached the principle of non-retroactivity.[726] Lastly, the Commission notes that at recital (364) of the Statement of Objections, it already anticipated the application of the 2006 Guidelines on Fines to the case concerned by this Decision. As to […] argument, the Commission observes in addition that […] leniency application was made under the 2002 Leniency Notice which is not connected to any version of the Guidelines on fines.

8.4. The Basic Amount of the Fines

8.4.1. Methodology

(626) The basic amount of the fine to be imposed on the undertakings concerned is to be set by reference to the value of sales.

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722 OJ C 210, 01.09.2006, p. 2.

723 OJ C 9, 14.1.1998, p.3.

724 Joined cases 100/80 to 103/80 *Musique Diffusion française and Others v Commission* [1983] ECR 1825, paragraph 109 and Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and others v Commission* [2005] ECR I-5428, paragraphs 169 and 172.

725 Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri and others v Commission*, cited above, in particular paragraphs 159, 162, 163 and 173.

726 Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri and others v Commission*, cited above, in particular paragraphs 213 to 232.

(627) According to the Guidelines on fines, the basic amount of the fine 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, and an additional amount of between 15% and 25% of the value of a company's sales, irrespective of duration.

(628) The Commission has used the figures provided by the undertakings for the calculations. As RWE has not been able to provide the value of sales specified according to products for 2001,[727] the Commission has used in this regard the information submitted by Shell which appears to be consistent with the total sales figures which RWE was able to submit. Shell has confirmed that, in 2001, it sold neither paraffin waxes nor slack waxes to end customers.[728]

8.4.2. The Value of Sales

(629) In determining the basic amount of the fine to be imposed, the Commission starts from the value of the undertaking's sales of the goods or services to which the infringement relates in the relevant geographic area within the EEA. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement.

(630) The goods to which the infringement relates in the present case are fully-refined paraffin waxes, semi-refined paraffin waxes, wax blends, specialties, hydro-finished wax and hard paraffin waxes for ENI, ExxonMobil, H&R/Tudapetrol, MOL, Repsol, Sasol, Shell and Total (see section 5.4.2). For ExxonMobil, RWE, Sasol, Shell and Total, the infringement also relates to slack wax that was sold to end-customers on the German market.

(631) In accordance with the findings on the duration of the involvement in the infringement (see section 7), the last full business year is:

- For Tudapetrol and RWE: 2001
- For ExxonMobil: 2002; as far as slack wax is concerned: 2001
- For Repsol: 2003
- For ENI, Hansen & Rosenthal, MOL, Sasol, Shell and Total: 2004; for Sasol, Shell and Total as far as slack wax is concerned: 2003.

(632) […] suggests that the infringement should be split into several periods reflecting the enlargement of the Community in 2004. The Commission sees no reason to take into account other years than those mentioned in recital (631) and therefore does not consider it necessary to splits years, except for the year 2004 (see recital (634)).

(633) […] argues that its sales in the 2004 accession countries should not be taken into account for the calculation of the value of sales because the infringement was almost entirely before the accession of these countries to the Community.

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[727] […].
[728] […].

(634) The Commission acknowledges that the year 2004 was, due to the enlargement of the European Union in May, an exceptional year. The Commission considers it appropriate not to use the value of sales in the year 2004 as the only basis for the calculation of the fine but to use the value of sales of the last three business years of the entity's involvement in the infringement. […] calls on the Commission to split […] period of involvement into a pre-merger and a post-merger period and to only take […] sales for the pre-merger period into account to reflect the fact that […] was not involved in the infringement.

(635) […] argues that instead of the year 2002, the Commission should take into account that, between 1992 and 2000, […] was not involved in the infringement.[729] The Commission does not share this view. The 2006 Guidelines on fines stipulate that normally the last full business year of the participation in the infringement should be taken as a reference year, which, in […], is 2002. […] does not put forward any argument as to why this should not be the case. Given that […] the Commission sees no reason not to take […] value of sales of the year 2002 into account. As demonstrated in section 6.2.2, the responsibility for […] involvement lies with […] and it is this company upon which the fine is imposed and, consequently, […] value of sales must be taken into account.

(636) […] argues that 2004 should not be used as reference year in its case because the figures for 2004 include turnover of the […]. This acquisition led to […] which is, according to […], not representative for the duration of the infringement. Moreover, […] claims that the production facilities of […] are partially not active in producing the products affected by the infringement.

(637) These claims cannot be accepted. An increase in turnover in a given year does not, as such, exclude that this year is used as a basis for the calculation of the fine. The fact that parts of […] are not active in the products to which the infringement relates is properly reflected by the basic amount of the fines which does not take the value of sales in these products into account. As stated in recital (634), the Commission will, for other reasons, use the average of the value of sales of the years 2002, 2003 and 2004 as a basis for the calculation of the fine with regard to […].

(638) […] appears to suggest that sales that were made within legitimate cross-supply relationships between the undertakings involved should be deducted from the value of sales.[730] The Commission cannot accept this suggestion. The 2006 Guidelines on fines do not provide for a further specification of sales for the purpose of calculation of the basic amount because the infringement related to all sales of the products in question. […] has not put forward any evidence showing that the cartel did not relate to such sales.

(639) […] argues that in its case, the business year […] should not be taken into account because it was an exceptional year due to the […].[731] This claim cannot be accepted. An increase or decrease of turnover in a given year does not, as such, exclude that this year is used as a basis for the calculation of the fine to be imposed upon the joint venture.

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729 […].
730 […].
731 […].

(640) The value of sales of the products to which the infringement related was as follows:

– The ENI group	EUR [10-30 million]
– The ExxonMobil group	EUR [10-30 million] (of which EUR [<5 million] for slack wax)
– Hansen & Rosenthal	EUR [20-40 million]
– Tudapetrol	EUR [<10 million]
– The MOL group	EUR[<10 million]
– The Repsol group	EUR [5-15 million]
– The Sasol group	EUR [160-180 million] (of which EUR [5-10 million] for slack wax).
– The Shell group	EUR [10-30 million] (of which EUR [<5 million] for slack wax).
– The RWE group	EUR [10-30 million] (of which EUR [<5 million] for slack wax).
– The Total group	EUR [20-40 million] (of which EUR [<5 million] for slack wax).

8.4.3. Gravity

(641) As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30%. In order to decide whether the proportion of the value of sales should be at the lower or at the higher end of the scale, the Commission will 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.

(642) […] repeatedly argues that it merits a lenient fine because the infringement was committed by one or several […] which […] could not effectively control despite its […].

(643) The Commission observes that one or several employees of […] attended the Technical Meetings on behalf and at the expenses of […]. The Commission considers that […] had plenty of time, opportunity and reason to become suspicious of the Technical Meetings which were not held within an industry association. The Commission also observes that, although […] later became obviously doubtful as regards the legality of the Technical Meetings as is demonstrated by […] which was prompted by an advice of […] legal department, these doubts have not lead to further investigations or an application for immunity with the Commission. The Commission also observes that, as is apparent from the aforementioned development, more than just one employee of […] knew or could and ought to have known about the nature of the Technical Meetings.

8.4.3.1. Nature

(644) Horizontal price coordination and – for some undertakings market and/or customer allocation – is, by its very nature, among the most harmful restrictions of competition, as it distorts competition on the main parameter of competition in a market of homogenous products. The addressees of this Decision participated in a single, complex and continuous infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement, with the common objective to distort competition in the market for fully-refined paraffin waxes, semi-refined paraffin waxes, wax blends, specialties, hydro-finished wax and hard paraffin waxes and – for those undertakings identified in recital (1) – slack wax that is sold to wax end-customers in Gemany (see also sections 5.3 and 5.4).

(645) […] argues that a modest percentage of the value of sales should be applied in order to reflect the low economic importance of the affected area, the lack of implementation and institutional encouragement by […], the high share of supply which remained unaffected by the infringement and its unawareness of bilateral arrangements between the other undertakings.[732]

(646) The Commission observes that, according to point 23 of the 2006 Guidelines on fines, cartels will be, as a matter of policy, highly fined. The economic importance of the sector is reflected by the basic amount which is based on the value of sales and does not require further adjustment of the fine. The alleged absence of encouragement by senior management does not alter the seriousness of the infringement. Moreover, the Commission observes that the undertaking had obviously created a climate where, even if it did not encourage the participation in infringements, it at least made them possible and was not able to prevent them. The Commission observes that […] does not contest that the participants to the cartel hold a combined market share of up to 75% of the EEA market. The Commission does not consider this share to be insignificant. With respect to […] alleged ignorance of bilateral arrangements between the other undertakings, the Commission observes that the present calculation of the basic amount of the fines does not take such arrangements into account. The issue of implementation is dealt with in section 8.4.3.4.

(647) […] argue that the paraffin and slack wax business only constitute a minor part of their commercial activities. Some of the undertakings appear to suggest that this alleged minor importance should diminish their respective responsibility and fine. The Commission observes that the importance of a business translates into the value of sales realised in that business and that, therefore, the 2006 Guidelines on fines take this figure as a starting point. The Commission does not, however, consider that the alleged minor importance of a business should have any effect on the assessment of the gravity or other factors determining the fine. The Commission also observes that the undertakings have not given up their activities in the wax sector, suggesting that it is profitable for them and that the undertakings cannot, as a consequence, escape from the responsibility for the conduct of the organisation in charge of the business.

(648) […] that the Commission should have attributed more weight to the bilateral contacts which took place, between some of the other companies, according to […], which would prompt an assessment of […] participation as less grave because the anti-

[732] […].

competitive practices were also operated in these bilateral contacts. […] views this as a potential source of discriminatory treatment.[733] […] also complained at the Oral Hearing that the Commission was mistaken in excluding bilateral contacts from the investigation which consequently lead to erroneous results. The Commission has chosen not to investigate the bilateral contacts between competitors. There is no discrimination against […] given that the Commission also assessed the intensity of […] involvement in the multilateral contacts in relation to the other companies' involvement in the same type of contact.

(649) […] further claims that a distinction should be made between the different kinds of undertakings involved, especially with regard to Sasol and, Sasol being a slack wax purchaser, to Sasol's relationship with other involved undertakings.[734] The Commission considers that such differences are properly reflected by the value of sales in the products to which the infringement relates and which forms the basis of the calculation of the fine. […] argues that the gravity of the infringement relating to slack wax was inferior to the one relating to paraffin waxes. It has been demonstrated that the infringement relating to slack wax was, for those undertakings identified in recital (1), part of a single and continuous infringement (see section 5.4). The Commission will determine the applicable percentage as regards slack wax, taking into account any major differences in gravity.

8.4.3.2. Combined Market Share

(650) The combined market share of the undertakings for which the infringement could be established is estimated to be around 75%, as explained in recital (67).

8.4.3.3. Geographic Scope

(651) As regards the geographic scope, the infringement covered the entire EEA as the undertakings involved sold fully-refined paraffin waxes, semi-refined paraffin waxes, wax blends, specialties, hydro-finished wax and hard paraffin waxes in all countries of the EEA.[735] As far as the infringement related for those undertakings identified in recital (1) to slack wax, this was limited to Germany.

8.4.3.4. Implementation

(652) As regards the implementation of the arrangements, as explained in section 5.5, although not always completely successful, the arrangements were indeed implemented.

8.4.3.5. Conclusion on Gravity

(653) Given the specific circumstances of this case, taking into account the criteria discussed above relating to the nature of the infringement and the geographic scope, the proportion of the value of sales to be taken into account for ENI and H&R/Tudapetrol should be 17%. It has been established that for ExxonMobil, MOL, Repsol, RWE, Sasol, Shell and Total the single and continuous infringement in addition consisted of customer and/or market allocation. Market and customer allocation are by their very nature also among the most harmful restrictions of competition as these practices lead

[733] […].
[734] […].
[735] […].

to the reduction or elimination of competition in certain markets or for certain customers (see also sections 5.3 and 5.4). In view of this additional gravity, the proportion of the value of sales to be taken into account for ExxonMobil, MOL, Repsol, RWE, Sasol, Shell and Total should be 18%. As there is no evidence that the customer and/or market allocation also related to slack wax and as the geographic scope of the infringement related to slack wax was limited to Germany, the proportion of the value ExxonMobil's, Sasol's, Shell's, RWE's and Total's sales of slack wax should be 15%.

8.4.4. Duration

(654) Point 24 of the 2006 Guidelines on Fines provides that "*In order to take fully into account the duration of the participation of each undertaking in the infringement, the amount determined on the basis of the value of sales (see points 20 to 23 above) will be multiplied by the number of years of participation in the infringement. Periods of less than six months will be counted as half a year; periods longer than six months but shorter than one year will be counted as a full year.*"

(655) Recital (610) concluded on the duration of the infringement of the undertakings involved in the present case.

(656) The application of point 24 of the Guidelines on Fines leads to the following multipliers:

	Period of involvement	Number of years and months	Multiplier
ENI	from 21 February 2002 to 28 April 2005	3 years and 2 months	3,5
Exxon Mobil Corporation and ExxonMobil Petroleum and Chemical B.V.B.A	from 30 November 1999 to 20 November 2003	3 years and 11 months	4
Esso Société Anonyme Française	from 3 September 1992 to 20 November 2003	11 years and 2 months	11,5
Esso Deutschland GmbH	from 22 February 2001 to 20 November 2003	2 years and 8 months	3
Tudapetrol	from 24 March 1994 to 30 June 2002	8 years and 3 months	8,5
Hansen & Rosenthal KG and H&R Wax Company Vertrieb GmbH	from 1 January 2001 to 28 April 2005	4 years and 3 months	4,5
H&R ChemPharm GmbH	from 1 July 2001 to 28 April 2005	3 years and 9 months	4
MOL	from 3 September 1992 to 28 April 2005	12 years and 7 months	13
Repsol	from 24 June 1994 to 4 August 2004	10 years and 1 month	10,5
Sasol Wax GmbH	from 3 September 1992 to 28 April 2005	12 years and 7 months	13

	Period of involvement	Number of years and months	Multiplier
Sasol Wax International AG, Sasol Holding in Germany GmbH, Sasol Limited	1 May 1995 to 28 April 2005	9 years and 11 months	10
Shell Deutschland Oil GmbH	from 3 September 1992 to 31 March 2004	11 years and 6 months	12
Shell Deutschland Schmierstoff GmbH	from 1 April 2004 to 17 March 2005	11 months	1
Deutsche Shell GmbH; Shell International Petroleum Company Limited (SIPC); the Shell Petroleum Company Limited (SPCO); and the Shell Transport and Trading Company Limited	from 2 January 2002 to 17 March 2005	3 years and 2 months	3,5
Shell Petroleum N.V.	from 1 July 2002 to 17 March 2005	2 years and 8 months	3
RWE	from 3 September 1992 to 30 June 2002	9 years and 9 months	10
Total	from 3 September 1992 to 28 April 2005	12 years and 7 months	13

(657) As explained in recital (611), the infringement committed by Sasol and Total, insofar as it relates to slack wax sold to end-customers on the German market, lasted from 30 October 1997 (first day of the first meeting on slack wax) to 12 May 2004 (last day of the last meeting on slack wax), that is to say, 6 years and 6 months leading to a multiplier of 7. For Shell Deutschland Oil GmbH, the infringement, insofar as it relates to slack wax sold to end customers on the German market lasted from 30 October 1997 to 12 May 2004 (6 years and 6 months, leading to a multiplier of 7), for Shell Deutschland Schmierstoff GmbH, it lasted from 1 April 2004 to 12 May 2004 (1 month, leading to a multiplier of 0,5), for Shell Petroleum N.V., it lasted from 1 July 2002 to 12 May 2004 (1 year and 10 months, leading to a multiplier of 2) and for Deutsche Shell GmbH, Shell International Petroleum Company Limited (SIPC), the Shell Petroleum Company Limited (SPCO), and the Shell Transport and Trading Company Limited, it lasted from 2 January 2002 to 12 May 2004 (2 years and 4 months, leading to a multiplier of 2,5). In relation to RWE, the infringement, insofar as it relates to slack wax sold to end-customers on the German market, lasted from 30 October 1997 to 30 June 2002 (4 years and 8 months leading to a multiplier of 5). Between 30 October 1997 and 12 May 2004, the presence of ExxonMobil at meetings where slack wax was discussed could be established for the meetings between 8 and 9 March 1999 (see recital (152)) and 17 and 18 December 2002 (see recital (168)). For Esso Société Anonyme Française, therefore, the infringement, insofar as it relates to slack wax sold to end-customers on the German market, lasted from 8 March 1999 to 18 December 2002 (3 years and 9 months, leading to a multiplier of 4), for Esso Deutschland GmbH, it lasted from 22 February 2001 to 18 December 2002 (1 year and

9 months, leading to a multiplier of 2) and for Exxon Mobil Corporation and ExxonMobil Petroleum and Chemicals B.V.B.A, it lasted from 20 November 1999 to 18 December 2002 (3 years and almost 1 months, leading to a multiplier of 3,5).[736]

8.4.5. The Percentage to be Applied for the Additional Amount

(658) Point 25 of the 2006 Guidelines on fines provides that "*irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum of between 15% and 25% of the value of sales […] in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output limitation agreements*".

(659) […] states in this respect the same arguments as with respect to gravity (see (645)) which were rebutted in recital (646).

(660) Given the specific circumstances of this case, taking into account the criteria discussed above relating to the nature of the infringement and the geographic scope, the percentage to be applied for the additional amount for ENI and H&R/Tudapetrol should be 17%.

(661) It has been established that for ExxonMobil, MOL, Repsol, RWE, Sasol, Shell and Total, the single and continuous infringement also consisted of customer and/or market allocation. Market and customer allocation are by their very nature also among the most harmful restrictions of competition as these practices lead to the reduction or elimination of competition in certain markets or for certain customers (see also sections 5.3 and 5.4). In view of this additional gravity, the percentage to be applied for the additional amount for ExxonMobil, MOL, Repsol, RWE, Sasol, Shell and Total should be 18%. As there is no evidence that the customer and/or market allocation also related to slack wax and as the geographic scope of the infringement related to slack wax was limited to Germany, the proportion of the value ExxonMobil's, Sasol's, Shell's, RWE's and Total's sales of slack wax should be 15%.

8.4.6. Calculation and Conclusion on Basic Amounts

8.4.6.1. The ENI group

(662) The basic amount of the fine to be imposed on ENI is to be calculated as follows:

Total basic amount:	EUR	13 000 000

8.4.6.2. The ExxonMobil group

(663) The basic amount of the fine to be imposed on ExxonMobil is to be calculated as follows:

Total basic amount:	EUR	44 940 000

[736] […].

8.4.6.3. Hansen & Rosenthal

(664) The basic amount of the fine to be imposed on Hansen & Rosenthal is to be calculated as follows:

Total basic amount:	EUR	24 000 000

8.4.6.4. Tudapetrol

(665) The basic amount of the fine to be imposed on Tudapetrol is to be calculated as follows:

Total basic amount:	EUR	12 000 000

8.4.6.5. The MOL group

(666) The basic amount of the fine to be imposed on MOL is to be calculated as follows:

Total basic amount:	EUR	23 700 000

8.4.6.6. The Repsol group

(667) The basic amount of the fine to be imposed on Repsol is to be calculated as follows:

Total basic amount:	EUR	22 000 000

8.4.6.7. The Sasol group

(668) The basic amount of the fine to be imposed on Sasol is to be calculated as follows:

Total basic amount:	EUR	426 400 000

8.4.6.8. The Shell group

(669) The basic amount of the fine to be imposed on Shell is to be calculated as follows:

Total basic amount:	EUR	30 000 000

8.4.6.9. The RWE group

(670) The basic amount of the fine to be imposed on RWE is to be calculated as follows:

Total basic amount:	EUR	31 200 000

8.4.6.10. The Total group

(671) The basic amount of the fine to be imposed on Total is to be calculated as follows:

Total basic amount:	EUR	75 390 000

8.5. Adjustments to the Basic Amount

8.5.1. Aggravating Circumstances

8.5.1.1. Recidivism

(672) Point 28 of the 2006 Guidelines on fines provides that "*The basic amount may be increased where the Commission finds that there are aggravating circumstances, such as: where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 81 or 82: the basic amount will be increased by up to*

100% for a each such infringement established (…).” Recidivism shows that previously imposed sanctions were not sufficiently deterrent and therefore justifies an increase of the basic amount of the fine.[737]

(673) Prior or during the infringement which is the subject of the present Decision, at least ENI and Shell or their respective subsidiaries had already been addressees of previous Commission Decisions concerning cartel activities:[738]

(674) The Decision in *Polypropylene* of 23 April 1986 was addressed, *inter alia*, to Anic SpA and Shell International Chemicals Company Ltd respectively.

(675) The Decision in *PVC II* of 14 September 1994 was addressed, *inter alia*, to Enichem SpA and Shell International Chemicals Company Ltd respectively.

(676) These addressees were, at the time of the respective infringements, part of groups that subsequently developed into today’s ENI group and Shell group. As all these Decisions concerned infringements of Article 81, the Commission considers therefore that ENI and Shell had been addressees of Decisions before the present Decision.

(677) […] highlights in its reply to the Statement of Objections that the Decisions in the cases *Polypropylene* and *PVC II* were taken more than 20 years ago and argues that, were the Commission to take these Decisions into account, this would be disproportionate. […] claims that the Commission is obliged to take the same stance as in the *Flat Glass* case (COMP/39165) where one of the undertakings involved was not fined for recidivism because the most recent previous Decision was taken a long time before the cartel in the *Flat Glass* case was proved to have begun. […] further argues that the undertaking that was the addressee of the aforementioned Decisions is no longer the same as the addressee of the present Decision because it underwent important changes in its structure, activity and management.[739]

(678) The Commission does not share this view. The Decisions quoted in recital (673) were adopted against entities that were part of an undertaking at the time the infringement took place. The same undertakings are the addressees of the present Decision. There is no requirement that the legal entities within the undertaking, products and personnel should be the same in all Decisions.[740] Recidivism can also be adduced against a subsidiary within one group with reference to a past infringement by a different subsidiary within the same group even if the parent company was not an addressee of the earlier prohibition Decision.[741] In any event, internal reorganisations cannot have any effect on the assessment of the existence of this aggravating circumstance. The Commission also observes that it is not required to address a Decision to the ultimate mother company but has discretion in determining the addressee of a Decision.

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737 See Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, paragraph 293.

738 See, in particular, Commission decision 86/398/EEC of 23 April 1986 *(Polypropylene)*, OJ L 230, 18.8.1986, p.1, where Anic S.p.A., a subsidiary of the ENI Group and Shell International Chemicals Company Ltd was found to have participated in the cartel; Commission decision 94/599/EC of 27 July 1994 (*PVC II)*, OJ L 239, 14.9.1994, p. 14 where Enichem S.p.A and Shell International Chemicals Company Ltd was found to have participated in the cartel.

739 […].

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

741 Case T-203/01 *Michelin v Commission* [2003] ECT-II 4071, paragraph 290.

(679) With respect to […] arguments, the Commission observes that the Decision in *PVC II* was taken in 1994, that is to say during the present infringement and only three years before […] is found to have participated in it (by attending the Technical Meeting of 30/31 October 1997), and that the *Polypropylene* Decision was taken in 1986, that is to say, six years before the present infringement began and eleven years before […] first participated in a Technical Meeting. That one of the previous Decisions was taken when the cartel at issue in the present Decision had already begun and the other six years before show that the present case is different from the *Flat Glass* case. It is finally irrelevant whether the new infringement is committed in a different business sector or in respect of a different product. It is sufficient that the same undertaking has already been found responsible for similar infringements.[742] The requirement that the infringements must be "similar" is satisfied by the fact that the previous Decisions cited, and this Decision, concern *inter alia* price fixing.

(680) In view of the above, the basic amount of the fines for ENI and Shell should be increased by 60% for ENI and by 60% for Shell.

8.5.1.2. Leading Role

(681) Point 28 of the 2006 Guidelines on fines provides that *"The basic amount may be increased where the Commission finds that there are aggravating circumstances, such as: (…) role of leader in, or instigator of, the infringement (…)".* In the Statement of Objections, the Commission has stated that it would *"also pay particular attention to the leading role that Sasol may have played, as it results from the facts described above."* […].

(682) Sasol's arguments cannot be accepted. The evidence described in Chapter 4 shows that:

(1) Sasol convened almost all Technical Meetings by sending invitations and proposing agendas and organised many of them by reserving hotel rooms, renting meeting rooms and arranging for dinners;

(2) Sasol chaired the Technical Meetings and initiated[743] and organised the discussions on prices;

(3) Sasol followed-up the Technical Meetings by bilateral contacts, at least on several occasions; and

(4) Sasol represented one of the other undertakings involved at least once (see recital (129)).

(683) […].[744] […][745] […].

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[742] Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, paragraph 284. See also Case T-38/02 *Groupe Danone v Commission*, judgment of 25 October 2005, paragraphs 353 to 355.

[743] […].

[744] […].

[745] Paragraph 374 of *BASF* judgment (Case T-15/02, *Basf* v *Commission*, [2006] ECR II-497): *"the fact that an undertaking exerts pressure and even dictates the behaviour of the other members of the cartel is not a precondition for that undertaking to be described as a leader in the cartel."* See also paragraph 587 of judgment of 26 April 2007 in joined cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, *Bolloré and others v Commission*, not yet reported.

(684) As Sasol's leading role cannot be demonstrated as far as slack wax is concerned, the Commission concludes that the aggravating circumstance of having played a leading role can only be applied to the other products to which the infringement related.

(685) Insofar as Sasol suggests that other undertakings played a leading role with respect to certain periods or aspects of the infringement, the Commission observes that these allegations are not based on evidence and cannot, therefore, be taken into consideration.

(686) In view of the above, the basic amount of the fine for Sasol should be increased by 50% of the part of the basic amount that is based on Sasol's sales in fully-refined paraffin waxes, semi-refined paraffin waxes, wax blends, specialties, hydro-finished wax and hard paraffin waxes.

8.5.2. Mitigating Circumstances

8.5.2.1. Passive and/or Minor Role

(687) Almost all undertakings involved claim that the business of slack wax and/or paraffin waxes is of minor importance for their group. The Commission generally considers that this cannot be the basis for a finding of a passive or minor role which only takes into account what kind of role an undertaking played in a cartel but not the undertaking's position on the market or the importance of the business in the group. The Commission also observes that despite the minor importance of the business all of the undertakings involved considered the slack wax and/or paraffin wax business as important enough to maintain it, presumably for reasons of profitability. The Commission finally observes that the relative importance of the business is sufficiently reflected in the calculation of the basic amount and does not need to be taken into account a second time.

(688) […] argues that it played only a limited role in the infringement.[746] Given that […] attended and contributed to […] Technical Meetings and also organised at least the […] meetings that took place in […], the Commission sees no reason to consider that […] played a limited role in the cartel.

(689) […] claims that it played a minor role because it never organised any of the Technical Meetings, was barely involved in bilateral contacts, was not informed of the results of Technical Meetings when it was not represented, did not participate in the sending of pricing letters and participated in […] Technical Meetings. […] also claims that it played a passive role in the cartel given that it started to participate in the Technical Meetings only at a later stage, was not involved in the formation of the cartel and did not participate in bilateral contacts outside the Technical Meetings. […] also argues that the products dealt with at the Technical Meetings were not of a great economic importance for it. […] claims that its role was particularly minor when compared to […] which is, according to […], also reflected in that it was not contacted by Sasol when it was absent from a Technical Meeting.[747] […] also claims it played only a passive role because it did not participate in all anti-competitive practices and did not send pricing letters and received only four such letters.[748]

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[746] […].
[747] […].
[748] […].

(690) The Commission observes that for the period in which […] participated in the cartel, its conduct was not different from the one of the other members.

(691) The Commission cannot accept […] arguments. […] was, during its time of involvement, a most regular participant in the Technical Meetings. The Commission has not established which undertakings originally founded the cartel and has therefore not attributed any – aggravating or attenuating – consequences to such conduct. The same consideration applies to bilateral contacts (see also recital (648)). The economic importance of the business to which the infringement related cannot justify a passive or minor role because this factor is sufficiently taken into account when the value of sales is determined. When compared to […], the Commission does not consider […] to be less active than these two other undertakings. Whether or not Sasol viewed […] as a less important participant at the Technical Meetings is in this respect, irrelevant. The Commission observes finally that […] has not based its claim on any documentary evidence. That […] is not found to have participated in the infringement as far as slack wax is concerned, is reflected by the starting amount. […] argument regarding pricing letters has been dealt with in section 5.5.

(692) […] also claims that it played a passive role because it allegedly used the meetings to improve its own position on the market, reporting one incident of cheating.[749] The Commission does not consider this to be sufficient evidence of a generally passive role for […]. A single incident of cheating rather shows that […] conduct was triggered by the arrangements in the cartel.

8.5.2.2. Non-Implementation

(693) Point 29 of the 2006 Guidelines on Fines stipulates: *"The basic amount may be reduced where the Commission finds that mitigating circumstances exist, such as: (…) where the undertaking provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market (…)."*

(694) […] argues that the agreements reached in the Technical Meetings did not have a significant effect on the market, that consumers did not suffer any damage from the agreements because prices had to be increased due to increases in raw material prices and that the agreements in any event were not respected by the participants.[750] […] also states that it adopted a competitive conduct on the market and that the alleged cartel had, if at all, only a limited effect on the market.[751] […] argues that it did not implement the price increases but in fact decreased its prices during some periods between 2002 and 2005. […] further argues that it sent only one of the pricing letters analysed by the Commission and received only two such communications from […] which were sent within an innocent cross-supply relationship.[752] […] also argues that it has not implemented the agreements and that it has not sent pricing letters.

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749 […].
750 […].
751 […].
752 […].

(695) Entitlement to a reduction for lack of implementation requires that the circumstances show that, during the period in which an undertaking was party to the offending agreements, it actually avoided implementing them by adopting competitive conduct on the market or, at the very least, that it clearly and substantially breached the obligations relating to the implementation of the cartel to the point of disrupting its very operation.[753] The Commission does not, firstly, share […] view that the agreements were not implemented. There were attempts, and occasional successes, in the implementation of the results of the Technical Meetings (see recital (113)). The Commission also observes that […] has not provided evidence showing that its involvement in the cartel was substantially limited and has also not demonstrated that it indeed avoided applying the agreements by adopting competitive conduct or by disrupting its very operation. As to […] argument, the Commission observes that […] only relies on statements by the other parties to the cartel without, however, submitting any evidence showing its alleged competitive conduct on the market. The statements quoted by […] show that […] occasionally may have cheated the other participants but do not demonstrate any competitive conduct or that its behaviour disrupted the operation of the agreement. The same holds true for […] allegation that the cartel had only a limited effect on the market. As to […] arguments, the Commission observes that it is apparent from the data […] submitted in its reply to the Statement of Objections that it indeed increased its prices five times between 2002 and 2005. The Commission also observes that attempts to increase prices did often not succeed because higher prices were not accepted by customers but not because of the behaviour of the undertaking claiming the benefit of an attenuating circumstance. The Commission therefore does not view […] arguments as showing that implementation of the agreed price increases was not realised or even attempted. With respect to the pricing letters, the Commission has previously explained that these letters were not the only means of implementation. It is therefore not possible to conclude from that fact that the Commission may not have been able to provide evidence that such letters were always sent and received that implementation did not occur. The Commission also considers in this context that information on price increases may have been communicated by other means between the participants of the Technical Meetings.

(696) A number of undertakings claim that they have not implemented the arrangements and point to the limited amount of pricing letters they sent or received. Several undertakings claim that their conduct on the market was not influenced by the arrangements. The Commission does not, firstly, consider such mere assertions to be sufficient evidence for non-implementation in the sense of the 2006 Guidelines on Fines. The Commission, secondly, observes that the sending or receiving of pricing letters was not the only means of implementation but that implementation mainly occurred through the regular (attempts of) price increases all undertakings communicated to the market, sometimes documented in the evidence of the Technical Meetings.

8.5.2.3. Compliance Programme

(697) […] claims that the existence of its compliance programme should be accepted as an attenuating circumstance. […] explains that this programme comprises of regular trainings, written information and constantly available support and requires its

[753] T-26/02, *Daiichi v Commission*, para 113 [2006] ECR II – 497.

employees to yearly accept the compliance rules. […] further explains that it applies a zero-tolerance policy to violators of its compliance policy and that it has terminated three employees that were found to be involved in the infringement subject of the present Decision. Moreover, […] states that, as soon as it became aware of the infringement (following the Commission's inspections at its premises), it conducted an own investigation, reminded all its European employees in the lubricants and specialties business of the compliance policy and conducted a six-hour workshop for these employees. Sasol also emphasises that it operates a compliance and ethics policy.[754] […] also highlight their compliance programmes.

(698) While the Commission indeed welcomes the existence of compliance programmes and policies, it considers compliance with the law as a natural obligation of each company and does not consider such compliance, or a programme ensuring such compliance, as going beyond what is already expected. The existence of a compliance programme cannot, therefore, be accepted as an attenuating circumstance. Moreover, this case shows that despite the existence of the programme, the companies (see for […] also recital (642)) were involved in anti-competitive practices. Also, the actions taken by the companies after the infringement was discovered do not go beyond what they were expected to do (in particular […]), that is to say, end their involvement in the anti-competitive practices and to co-operate with the Commission, in particular taking into account the timing of the applications.

8.5.2.4. Early Termination of the Infringement

(699) […] argues that its exit from the cartel before the Commission investigation started should be considered as a mitigating circumstance.[755]

(700) The Commission does not share this view. […] early termination was not accompanied by further internal investigation within […] and an application for immunity to the Commission although legal concerns were apparent. Had Shell not applied for immunity, the infringement may have never been investigated. Moreover, the Commission does not consider the adherence or re-adherence to the law as conduct which merits any reward. It is rather the normal obligation of undertakings.

8.5.2.5. Cooperation Outside the 2002 Leniency Notice

(701) Point 29 of the 2006 Guidelines on Fines provides that : "*The basic amount may be reduced where the Commission finds that mitigating circumstances* exist, *such as: (…) where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so.*"

(702) […] claims that it deserves a reduction of the fine of 10% because it did not contest the facts in its reply to the Statement of Objections and observes that the Commission has accepted such non-contestation as an attenuating circumstance in prior decisions.[756]

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754 […].
755 […].
756 […].

(703) The Commission observes firstly that it is not bound by its earlier practice[757] and that the reward for non-contestation of facts which was provided for in the 1996 Leniency Notice[758] has subsequently been abandoned. Secondly, the Commission has assessed the value of evidence concerning the infringement provided on a voluntary basis by different undertakings under the 2002 Leniency Notice, irrespective of whether it was supplied by means of a formal leniency application or in the form of voluntary self-incriminating information provided in reply to a request for information. To the extent that such co-operation merited a reduction, this has been granted under the 2002 Leniency Notice.[759] The Commission considers that there are no exceptional circumstances present in this case that could justify granting a reduction for effective co-operation falling outside the scope of the 2002 Leniency Notice.

(704) […] submits that its submissions created […] and that this should be taken into account as an attenuating circumstance.[760]

(705) As explained below, the Commission considers that […] has provided significant added value in the sense of the 2002 Leniency Notice and therefore qualifies for a reduction of the fine. The Commission observes that […] has thus co-operated within the scope of the 2002 Leniency Notice and has indeed always emphasised that it does so. The Commission therefore considers that Point 29 of the 2006 Guidelines on Fines is not applicable and that […] treatment under the 2002 Leniency Notice sufficiently rewards […] co-operation.

(706) […] submits that it intensively co-operated with the Commission by replying extensively to the Commission's requests for information which qualifies as an attenuating circumstance.[761] The Commission observes that […] has not co-operated with the Commission beyond its legal obligation to do so.

8.5.2.6. Negligence

(707) […] argues that it has not intentionally committed any breach of law. The Commission observes that […] has extensively participated in the Technical Meetings and that […] has not adduced any evidence showing that […] did this without intention. […] argument cannot, therefore, be accepted.

(708) […] also claims that it had no intention of committing an infringement as its representative reluctantly attended the meeting on […] and, after […], attended the meetings without any intention of infringing competition rules .[762] At the Oral Hearing, […] stated that its representative was of the opinion that he attended legitimate meetings of the […] when he in fact attended the Technical Meetings. The Commission observes that […] statements are not based on any evidence. The Commission does not deem it likely that […] representatives attend meetings without the intention of doing so. With respect to […] belief that he attended meetings of the […], the Commission does not comprehend how such a misunderstanding could have occurred given that

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757 Case T-347/94 *Mayr-Melnhof Kartongesellschaft v Commission*, [1998] ECR II-1751, para. 368; Case T-23/99 *LR AF 1998 v Commission* [2002] ECR II-1705, paragraph 337.

758 OJ C 207, 18.7.1996, p. 4.

759 [....]. See also Case T-15/02, *Basf* v *Commission*, [2006] ECR II-497, at paragraph 586.

760 […].

761 […].

762 […].

neither the invitation nor the set-up of the meetings showed any connection with the […].

8.5.3. Deterrence

(709) Point 30 of the 2006 Guidelines on fines provides that "*The Commission will pay particular attention to the need to ensure* that *fines have a sufficiently deterrent effect; to that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates"*.

(710) […] argues that it would not be appropriate to increase the fine imposed upon it for reasons of deterrence given that it underwent major changes in the course of […]. […] argue that the anti-competitive activities were not conceived, directed and encouraged within their undertakings.[763] The Commission does not consider the historic evolution of undertakings as decisive for the application of an increase of the fine for deterrence. The fine must have a deterrent effect on the undertaking as it is at the time of the present Decision in order to prompt the undertaking to take effective steps to prevent future infringements. The Commission observes that […] do not substantiate their claims that the anti-competitive activities were not conceived, directed and encouraged within their undertakings.

(711) […] argues that the application of a deterrence multiplier to it would not be appropriate because it has not realised unlawful gains as a result of the infringement and because there is no need to ensure specific or general deterrence as […] operates a […] and that […] would not have been in a position to control its employees beyond what it did.[764] […] claims that a deterrence component should not be applied against it because it has no strong presence on the relevant market and that deterrence is therefore not necessary in its case.[765] The Commission does not share this view. The fine imposed on […] and on […] must ensure that the group as a whole takes the necessary steps to ensure compliance with competition rules. […] position on the market is sufficiently reflected by the value of sales taken as a basis for the calculation of the fine.

(712) The Commission observes

- that the turnover of ExxonMobil and Shell exceed EUR 250 000 000 000, the turnover of Total exceeds EUR 150 000 000 000, the turnover of ENI exceeds EUR 85 000 000 000 and the turnover of Repsol, and RWE exceed EUR 40 000 000 000 (see section 2.3).

- that the value of sales in the relevant products represent less than 0,01% of the total turnover of Shell and ExxonMobil, less than 0,03% of the total turnover of ENI, Repsol and Total and less than 0,05% of the total turnover of RWE.

[763] […].
[764] […].
[765] […].

(713) In view of this, the Commission applies to the basic amount of ExxonMobil and Shell a multiplier of 2, of Total a multiplier of 1,7, of ENI a multiplier of 1,4 and of Repsol and RWE of 1,2 for the purposes of deterrence.

8.5.4. Conclusions on the Adjusted Basic Amounts

8.5.4.1. The ENI group

(714) The adjusted basic amount of the fine to be imposed on ENI should be as follows:

Total adjusted basic amount: EUR 29 120 000

8.5.4.2. The ExxonMobil group

(715) The adjusted basic amount of the fine to be imposed on ExxonMobil should be as follows:

Total adjusted basic amount: EUR 89 880 000

8.5.4.3. Hansen & Rosenthal

(716) The adjusted basic amount of the fine to be imposed on Hansen & Rosenthal should be as follows:

Total adjusted basic amount: EUR 24 000 000

8.5.4.4. Tudapetrol

(717) The adjusted basic amount of the fine to be imposed on Tudapetrol should be as follows:

Total adjusted basic amount: EUR 12 000 000

8.5.4.5. The MOL group

(718) The adjusted basic amount of the fine to be imposed on MOL should be as follows:

Total adjusted basic amount: EUR 23 700 000

8.5.4.6. The Repsol group

(719) The adjusted basic amount of the fine to be imposed on Repsol should be as follows:

Total adjusted basic amount: EUR 26 400 000

8.5.4.7. The Sasol group

(720) The adjusted basic amount of the fine to be imposed on Sasol should be as follows:

Total adjusted basic amount: EUR 636 400 000

8.5.4.8. The Shell group

(721) The adjusted basic amount of the fine to be imposed on Shell should be as follows:

Total adjusted basic amount: EUR 96 000 000

8.5.4.9. The RWE group

(722) The adjusted basic amount of the fine to be imposed on RWE should be as follows:

Total adjusted basic amount: EUR 37 440 000

8.5.4.10. The Total group

(723) Total S.A. claims that an alleged violation of its rights of defence should lead to a lower fine.[766] As such a violation of rights of defence has not occurred (see recital (583)), no reduction of the fine should be applied. The Commission also observes that Total S.A. has not claimed that the outcome of the investigation would have been different if its rights of defence were indeed violated.

(724) The adjusted basic amount of the fine to be imposed on Total should be as follows:

Total adjusted basic amount: EUR 128 163 000

8.6. Application of the 10% Turnover Limit

(725) Article 23(2) of Regulation (EC) No 1/2003 provides that *"For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year."*

(726) […] argues that 2004 should not be used as reference year in its case because the figures for 2004 include turnover of […]. This acquisition led to […] which is thus not representative for the duration of the infringement. Moreover, […] claims that the production facilities of […] are not active in producing the products affected by the infringement.

(727) These claims cannot be accepted. For the calculation of the upper limit of the fine, the Commission takes into account the turnover of the last full business year that precedes the Decision, which is 2007 in this case.

(728) For none of the addressees does the fine exceed 10% of its total turnover in 2007.

8.7. Application of the 2002 Leniency Notice

(729) Shell, Sasol, Repsol, ExxonMobil and RWE submitted applications under the 2002 Leniency Notice.

(730) The Commission considers that point 23 last subparagraph of the 2002 Leniency Notice is not applicable in this case because the evidence the Commission uses to establish the facts that were at the basis of the assessment regarding gravity and duration of the infringement (namely, the […] notes and the […] debriefing notes) were found during the inspections and were contained in Shell's application for immunity.

8.7.1. Shell

(731) Under point 8(a) of the applicable 2002 Leniency Notice, the Commission will grant immunity from fines if *"the undertaking is the first to submit evidence which in the Commission's view may enable it to adopt a decision to carry out an investigation in the sense of Article 14(3) of Regulation No 17 [now Article 20(4) of Regulation No 1/2003]"*. Pursuant to point 15 of the Notice, once the Commission has received the evidence submitted by the undertaking under point 13(a) and has verified that the evidence meets the conditions set out in point 8(a), it will grant the undertaking conditional immunity from fines in writing.

[766] […].

(732) The Commission has verified that no other application for immunity had previously been filed for the sector of fully-refined paraffin waxes, semi-refined paraffin waxes, wax blends, specialties, hydro-finished wax and hard paraffin waxes and slack wax and that no Commission investigation was pending in this sector. Shell was therefore the first undertaking to submit evidence on the infringement subject to the present Decision. The submitted evidence enabled the Commission to adopt a decision to carry out an investigation with regard to the alleged infringement in this sector.

(733) There is no evidence that Shell has not terminated its involvement in the suspected infringement at the time when it applied for immunity.

(734) […] suggests in its response to the Statement of Objections that Shell may not have complied with the requirements of the 2002 Leniency Notice. […] and observes that Sasol may have been aware of Shell's immunity application.

(735) Any allegation in this respect must be based on undeniable evidence. The Commission does not consider the document […] is referring to as evidence of such a quality. It reports from a meeting the author of the note had with the Sasol-internal team that was entrusted with the planning of a joint venture. In the course of the investigation, Sasol has provided further information on the document […] is referring to.[767] Sasol explains that the rumours about Shell's internal investigation were contradictory and unclear. The Commission does therefore not consider that Sasol was aware of the investigation or Shell's immunity application before the inspections of its premises by the Commission. […] only expresses assumptions in this respect without basing them on facts. In addition, had Sasol indeed learned about Shell's internal investigation or its application, it would presumably have submitted an application under the 2002 Leniency Notice much earlier. The Commission does therefore not consider that there is evidence that Shell has not fulfilled its obligation under the 2002 Leniency Notice.

(736) Shell therefore benefits from immunity from fines pursuant to Point 8 of the 2002 Leniency Notice. Consequently, Shell's fine is reduced by 100%. This reduction also applies to Shell's joint and several liability regarding the conduct of Shell Deutschland Oil GmbH/Shell & Dea Oil GmbH. Consequently, RWE is solely liable for part of the fine which results from this conduct.

8.7.2. Sasol

(737) Sasol Wax International AG and Sasol Wax GmbH submitted an application under the 2002 Leniency Notice on […], after the Commission had conducted its inspections.

(738) […]. […].

(739) […].

(740) Throughout the investigation, Sasol has answered the Commission's requests for information, although not exceeding its obligations under Article 18 and 23 of Regulation (EC) 1/2003.

[767] […].

(741) The evidence submitted by Sasol in […] constitutes significant added value in the sense of the Notice as it strengthens the Commission's ability to prove the facts pertaining to this cartel in respect of the following aspects, therefore giving rise to a reduction of the fine:

(1) […].

(2) […].

(3) […].

(4) […].

(5) […].

(6) […].

(7) […].

(742) In its response to the Statement of Objections, Sasol asks the Commission to consider the last subparagraph of point 26 of the 2006 Commission Notice on Immunity from fines and reduction of fines in cartel cases (hereafter "the 2006 Leniency Notice"[768] which reads: *"If the applicant for a reduction of a fine is the first to submit compelling evidence in the sense of point (25) which the Commission uses to establish additional facts increasing the gravity or the duration of the infringement, the Commission will not take such additional facts into account when setting any fine to be imposed on the undertaking which provided this evidence."*

(743) The Commission observes, first, that in this case the 2002 Leniency Notice is applicable (see point 37 of the 2006 Leniency Notice), point 23 of which reads: "*[I]f an undertaking provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel, the Commission will not take these elements into account when setting any fine to be imposed on the undertaking which provided this evidence."* The Commission secondly observes that the first evidence relating to facts previously unknown to the Commission which had a direct bearing on the duration of the cartel were not provided by Sasol but were found during the inspections, namely the […] notes and the […] debriefing notes and were contained in Shell's application for immunity.

(744) […].

(745) There is no evidence that Sasol has not terminated its involvement in the suspected infringement before or at the latest at the time at which it submitted the evidence (point 21 of the 2002 Leniency Notice).

(746) […] suggests in its response to the Statement of Objections that Sasol may not have complied with the requirements of the 2002 Leniency Notice. […] refers to a meeting between Sasol and officials of the Commission concerning a Joint Venture and to […] and suggests that Sasol may have been aware of Shell's immunity application.

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[768] OJ C 298, 8.12.2006, p.17.

(747) Any allegation in this respect must be based on undeniable evidence. The Commission does not consider the document […] is referring to as evidence of such a quality. It is reporting from a meeting the author of the note had with the Sasol-internal team that was entrusted with the planning of a joint venture. In the course of the investigation, Sasol has provided further information on the document […] is referring to.[769] Sasol explains that the rumours about Shell's internal investigation were contradictory and unclear. Should […] allege that Sasol may have learned about Shell's application in a meeting with Commission officials, the Commission observes that the meeting allegedly took place in […] while Shell's immunity application was received by the Commission in […]. In any event, a leak would be to Shell's detriment and not to Sasol's.

(748) The Commission does therefore not consider that Sasol was aware of the investigation or Shell's immunity application before the inspections of its premises by the Commission. […] only expresses assumptions in this respect without basing them on facts. In addition, had Sasol indeed learned about Shell's internal investigation or its application, it would presumably have submitted an application under the 2002 Leniency Notice much earlier. The Commission does therefore not consider that there is evidence that Sasol has not fulfilled its obligation under the 2002 Leniency Notice.

(749) Sasol is therefore the first undertaking to satisfy point 21 of the 2002 Leniency Notice. Considering the value of its contribution to this case, the early stage at which it provided this contribution and the extent of its cooperation following its submissions, Sasol's fine is reduced by 50%.

8.7.3. Repsol

(750) Repsol YPF Lubricantes y Especialidades (Rylesa) submitted an application under the 2002 Leniency notice on […].

(751) […].

(752) Throughout the investigation, Repsol has answered the Commission's requests for information, although not exceeding its obligations under Article 18 and 23 of Regulation (EC) 1/2003.

(1) The evidence submitted by Repsol on 19 May 2005 constitutes significant added value as it strengthens the Commission ability to prove the facts pertaining to this cartel in respect of the following aspects: (1) […].

(2) […].

(3) […].

(4) […].

(753) […] argues in its reply to the Statement of Objections that Repsol has not revealed the true extent of its involvement but does not base this claim on any evidence.[770]

(754) […].

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[769] […].
[770] […].

(755) As stated above, Repsol has terminated its involvement in the infringement on 2 November 2004, that is to say, before the time at which it submitted the evidence. The condition of point 21 of the 2002 Leniency Notice is therefore fulfilled.

(756) Therefore, Repsol is the second undertaking to satisfy point 21 of the 2002 Leniency Notice. Considering the value of its contribution to this case, the stage at which it provided this contribution and the extent of its cooperation following its submissions, its fine is reduced by 25%.

8.7.4. ExxonMobil

(757) ExxonMobil Petroleum and Chemical B.V.B.A. (EMPC) submitted an application under the 2002 Leniency Notice on […].

(758) […].

(759) […].

(760) Throughout the investigation, ExxonMobil has answered the Commission's requests for information, although not exceeding its obligations under Article 18 and 23 of Regulation (EC) 1/2003.

(761) The evidence provided by ExxonMobil on […] and throughout the investigation constitutes significant added value, as it strengthens the Commission ability to prove the facts pertaining to this cartel in respect of the following aspects:

(1) […].

(2) […].

(3) […].

(762) […] argues in its reply to the Statement of Objections that ExxonMobil has not revealed the true extent of its involvement but does not base this claim on any evidence.[771]

(763) […].

(764) As stated above, ExxonMobil has terminated its involvement in the infringement on 20 November 2003, i.e. before the time at which it submitted the evidence. The condition of point 21 of the2002 Leniency Notice is therefore fulfilled.

(765) Therefore, ExxonMobil is the third undertaking to meet point 21 of the 2002 Leniency Notice. Considering the value of its contribution to this case, the stage at which it provided this contribution and the extent of its cooperation following its submissions, its fine is reduced by 7%.

[771] […].

8.7.5. RWE

(766) Following its reply to the Commission Statement of Objections of […] the Commission received an application for immunity and leniency from RWE AG and RWE-Dea AG.

(767) RWE AG and RWE-Dea AG claim that they should benefit from the immunity granted to Shell since the documents and statements provided by Shell relate to RWE and its employees. Shell claims that the immunity from fines (if it is granted) should extend to RWE for the period from 3 September 1992 to 30 June 2002. Shell considers that not granting immunity to RWE could undermine the Commission's leniency policy.[772]

(768) The Commission does not consider that RWE can benefit from Shell's immunity application. This is based on the principle that when assessing leniency, it is the undertaking, as it exists at the time of application for immunity and which meets the requirements under the 2002 Leniency Notice, that can benefit from immunity. Had RWE based its claim for immunity on its previous relationship with Shell or its role as a parent, RWE would have been excluded from benefiting from Shell's immunity on the basis that at the time of Shell's immunity application, RWE and Shell were no longer part of the same undertaking. However, RWE does not base its claim on its previous relationship with Shell as part of a joint venture. The sole basis of RWE's application is its claim that it should benefit from the immunity granted to Shell, as the documents and statements that have been provided by Shell relate to RWE and its employees. Also, in the present situation, RWE cannot benefit from Shell's immunity. Immunity is granted to the first undertaking that submits evidence which fulfils the requirements of points 8-10 of the 2002 Leniency Notice. It does not matter for the purposes of the assessment under the 2002 Leniency Notice whether the evidence provided by Shell relates to RWE and its employees. It is not unusual for an immunity applicant to provide evidence that pertains to other participants in a cartel. In this case, the fact that Shell was able to provide information about RWE and its employees may have been facilitated by the fact that Shell and RWE had been part of the same undertaking for a period during the infringement in question. However, the previous relationship between the undertakings may be relevant to an allocation of liability for participation in the cartel but not for immunity. This is consistent with the policy underlying the leniency programme and indeed fulfils the objective of the 2002 Leniency Notice. The first undertaking that enables the Commission to detect the secret cartel by providing evidence which allows it to do so, benefits from immunity. Shell was the first such undertaking to do so. If RWE were to benefit from the immunity granted to Shell on this basis, immunity would be extended to an undertaking which did not provide *"at the time of submission, sufficient evidence to find an infringement of Article 81 (...) no [other] undertaking had been granted conditional immunity (...)"* (point 10 of the 2002 Notice). This would indeed undermine the leniency policy.

(769) The Commission does not see the alleged risk for the leniency policy. The Commission observes, in particular, that Shell entered the joint venture on 2 January 2002 and took complete control on 30 June 2002. It would be surprising if Shell or RWE did not conduct a due diligence at that time. Since that moment in time, Shell and RWE were in a position to know what was happening in the paraffin and slack wax business. Had Shell and/or RWE reported the cartel at that time, not only would the infringement

[772] […].

have stopped earlier with positive consequences on the business, but both companies could have been considered part of the same undertaking for at least the period of the joint venture. In addition, if particular agreements between RWE and Shell were concluded when the former divested the paraffin business, Shell was aware of them when it applied for immunity and therefore took this decision in full knowledge of facts. It is not for the Commission to intervene in these particular agreements.

(770) The Commission therefore considers that the fine that is to be imposed on RWE should not be reduced.

8.7.6. Conclusion on the Application of the 2002 Leniency Notice

(771) The fine to be imposed on Shell following the application of the 2002 Leniency Notice should be as follows:

Total adjusted basic amount:	EUR	96 000 000
Reduction:	%	100
Fine:	EUR	0

(772) The fine to be imposed on Sasol following the application of the 2002 Leniency Notice should be as follows:

Total adjusted basic amount:	EUR	636 400 000
Reduction:	%	50
Fine:	EUR	318 200 000

(773) The fine to be imposed on Repsol following the application of the 2002 Leniency Notice should be as follows:

Total adjusted basic amount:	EUR	26 400 000
Reduction:	%	25
Fine:	EUR	19 800 000

(774) The fine to be imposed on ExxonMobil following the application of the 2002 Leniency Notice should be as follows:

Total adjusted basic amount:	EUR	89 880 000
Reduction:	%	7
Fine:	EUR	83 588 400

8.8. The Amounts of the Fines to be Imposed in this Decision

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

8.8.1. The ENI group

(776) The total amount of the fine to be imposed on ENI should be as follows:

Total fine for ENI S.p.A.:	EUR	29 120 000

8.8.2. The ExxonMobil group

(777) The total amount of the fine to be imposed on ExxonMobil should be as follows:

Total fine for Esso Société Anonyme Française:	EUR	83 588 400
of which jointly and severally with ExxonMobil Petroleum and Chemical B.V.B.A. and Exxon Mobil Corporation:	EUR	34 670 400
of which jointly and severally with Esso Deutschland GmbH:	EUR	27 081 600

8.8.3. Hansen & Rosenthal

(778) The total amount of the fine to be imposed on Hansen & Rosenthal should be as follows:

Total fine for Hansen & Rosenthal KG jointly and severally with H&R Wax Company Vertrieb GmbH	EUR	24 000 000
of which jointly and severally with H&R ChemPharm GmbH	EUR	22 000 000

8.8.4. Tudapetrol

(779) The total amount of the fine to be imposed on Tudapetrol should be as follows:

Total fine for Tudapetrol Mineralölerzeugnisse Nils Hansen KG:	EUR	12 000 000

8.8.5. The MOL group

(780) The total amount of the fine to be imposed on MOL should be as follows:

Total fine for MOL Nyrt.:	EUR	23 700 000

8.8.6. The Repsol group

(781) The total amount of the fine to be imposed on Repsol should be as follows:

Total fine for Repsol YPF Lubricantes y Especialidades S.A. jointly and severally with Repsol Petróleo S.A. and Repsol YPF S.A.:	EUR	19 800 000

8.8.7. The Sasol group

(782) The total amount of the fine to be imposed on Sasol should be as follows:

Total fine for Sasol Wax GmbH:	EUR	318 200 000
of which jointly and severally with Sasol Wax International AG, Sasol Holding in Germany GmbH and Sasol Limited	EUR	250 700 000

8.8.8. The Shell group

(783) The total amount of the fine to be imposed on Shell should be as follows:

Total fine:	EUR	0

8.8.9. The RWE group

(784) The total amount of the fine to be imposed on RWE should be as follows:

Total fine for RWE-Dea AG jointly and severally with RWE AG:	EUR	37 440 000

8.8.10. The Total group

(785) The total amount of the fine to be imposed on Total should be as follows:

Total fine for Total France S.A. jointly and severally with Total S.A.:	EUR	128 163 000

8.9. Ability to Pay

(786) None of the addressees have argued that it is unable to pay the fine.

HAS ADOPTED THIS DECISION:

Article 1

The following undertakings have infringed Article 81(1) of the Treaty and – from 1 January 1994 – Article 53 of the EEA Agreement by participating, for the periods indicated, in a continuing agreement and/or concerted practice in the paraffin waxes sector in the common market and, as of 1 January 1994, within the EEA:

ENI S.p.A.: on 30/31 October 1997 and from 21 February 2002 to 28 April 2005;

Esso Deutschland GmbH: from 22 February 2001 to 20 November 2003;

Esso Société Anonyme Française: from 3 September 1992 to 20 November 2003;

ExxonMobil Petroleum and Chemical B.V.B.A.: from 30 November 1999 to 20 November 2003;

Exxon Mobil Corporation: from 30 November 1999 to 20 November 2003;

Tudapetrol Mineralölerzeugnisse Nils Hansen KG: from 24 March 1994 to 30 June 2002;

H&R Wax Company Vertrieb GmbH: from 1 January 2001 to 28 April 2005;

Hansen & Rosenthal KG: from 1 January 2001 to 28 April 2005;

H&R ChemPharm GmbH: from 1 July 2001 to 28 April 2005;

MOL Nyrt.: from 3 September 1992 to 28 April 2005;

Repsol YPF Lubricantes y Especialidades S.A.: from 24 June 1994 to 4 August [2004][773];

Repsol Petróleo S.A.: from 24 June 1994 to 4 August [2004][774];

Repsol YPF S.A.: from 24 June 1994 to 4 August [2004][775];

Sasol Wax GmbH: from 3 September 1992 to 28 April 2005;

Sasol Wax International AG: from 1 May 1995 to 28 April 2005;

Sasol Holding in Germany GmbH: from 1 May 1995 to 28 April 2005;

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[773] Correction to Commission Decision C(2008)5476 of 1 October 2008 in Case COMP/39181 – Candle Waxes.

[774] Correction to Commission Decision C(2008)5476 of 1 October 2008 in Case COMP/39181 – Candle Waxes.

[775] Correction to Commission Decision C(2008)5476 of 1 October 2008 in Case COMP/39181 – Candle Waxes.

Sasol Limited: from 1 May 1995 to 28 April 2005;

Shell Deutschland Oil GmbH: from 3 September 1992 to 31 March 2004;

Shell Deutschland Schmierstoff GmbH: from 1 April 2004 to 17 March 2005;

Deutsche Shell GmbH: from 2 January 2002 to 17 March 2005;

Shell International Petroleum Company Limited: from 2 January 2002 to 17 March 2005;

the Shell Petroleum Company Limited: from 2 January 2002 to 17 March 2005;

Shell Petroleum N.V.: from 1 July 2002 to 17 March 2005;

the Shell Transport and Trading Company Limited: from 2 January 2002 to 17 March 2005;

RWE-Dea AG: from 3 September 1992 to 30 June 2002;

RWE AG: from 3 September 1992 to 30 June 2002;

Total France S.A.: from 3 September 1992 to 28 April 2005 and

Total S.A.: from 3 September 1992 to 28 April 2005.

For the following undertakings, the infringement also includes slack wax sold to end-customers on the German market for the periods indicated:

Esso Deutschland GmbH: from 22 February 2001 to 18 December 2002;

Esso Société Anonyme Française: from 8 March 1999 to 18 December 2002;

ExxonMobil Petroleum and Chemical B.V.B.A.: from 20 November 1999 to 18 December 2002;

Exxon Mobil Corporation: from 20 November 1999 to 18 December 2002;

Sasol Wax GmbH: from 30 October 1997 to 12 May 2004;

Sasol Wax International AG: from 30 October 1997 to 12 May 2004;

Sasol Holding in Germany GmbH: from 30 October 1997 to 12 May 2004;

Sasol Limited: from 30 October 1997 to 12 May 2004;

Shell Deutschland Oil GmbH: from 30 October 1997 to 12 May 2004;

Shell Deutschland Schmierstoff GmbH: from 1 April 2004 to 12 May 2004;

Deutsche Shell GmbH: from 2 January 2002 to 12 May 2004;

Shell International Petroleum Company Limited: from 2 January 2002 to 12 May 2004;

the Shell Petroleum Company Limited: from 2 January 2002 to 12 May 2004;

Shell Petroleum N.V.: 1 July 2002 to 12 May 2004;

the Shell Transport and Trading Company Limited: from 2 January 2002 to 12 May 2004;

RWE-Dea AG: from 30 October 1997 to 30 June 2002;

RWE AG: from 30 October 1997 to 30 June 2002;

Total France S.A.: from 30 October 1997 to 12 May 2004 and

Total S.A.: from 30 October 1997 to 12 May 2004.

Article 2

For the infringement referred to in Article 1, the following fines are imposed:

ENI S.p.A.: EUR 29 120 000;

Esso Société Anonyme Française: EUR 83 588 400,
of which jointly and severally with

ExxonMobil Petroleum and Chemical B.V.B.A. and Exxon Mobil Corporation: for EUR 34 670 400, of which jointly and severally with Esso Deutschland GmbH for EUR 27 081 600;

Tudapetrol Mineralölerzeugnisse Nils Hansen KG: EUR 12 000 000;

Hansen & Rosenthal KG jointly and severally with H&R Wax Company Vertrieb GmbH: EUR 24 000 000,
of which jointly and severally with

H&R ChemPharm GmbH for EUR 22 000 000;

MOL Nyrt.: EUR 23 700 000;

Repsol YPF Lubricantes y Especialidades S.A. jointly and severally with Repsol Petróleo S.A. and Repsol YPF S.A. : EUR 19 800 000;

Sasol Wax GmbH: EUR 318 200 000,
of which jointly and severally with

Sasol Wax International AG, Sasol Holding in Germany GmbH and Sasol Limited for EUR 250 700 000;

Shell Deutschland Oil GmbH, Shell Deutschland Schmierstoff GmbH, Deutsche Shell GmbH, Shell International Petroleum Company Limited, the Shell Petroleum

Company Limited, Shell Petroleum N.V. and the Shell Transport and Trading Company Limited: EUR 0,;

RWE-Dea AG jointly and severally with RWE AG: EUR 37 440 000;

Total France S.A. jointly and severally with Total S.A.: EUR 128 163 000.

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

Account No: 0050915991
ING BANK NV
Financial Plaza
Bijlmerdreef 109,
NL – 1102 BW Amsterdam
Code IBAN: NL22INGB0050915991
Code SWIFT: INGBNL2AXXX

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3,5 percentage points.

Article 3

The undertakings listed in Article 1 shall immediately bring to an end the infringement referred to in that Article in so far as they have not already done so.

They shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or similar object or effect.

Article 4

This Decision is addressed to:

ENI S.p.A.
Piazzale Mattei, 1
I-00144 Roma

Esso Deutschland GmbH
Esso Haus
Kapstadtring 2
D-22297 Hamburg

Esso Société Anonyme Française
Tour Manhattan
5/6 Place de l'Iris
F-92400 Courbevoie

ExxonMobil Petroleum & Chemical B.V.B.A.
Hermeslaan 2
B-1831 Machelen

Exxon Mobil Corporation
3225 Gallows Road
Fairfax, VA 22037-0001
USA

H&R ChemPharm GmbH
Neuenkirchener Straße 8
D-48499 Salzbergen

H&R Wax Company Vertrieb GmbH
Neuenkirchener Straße 8
D-48499 Salzbergen

Hansen & Rosenthal KG
Neuenkirchener Straße 8
D-48499 Salzbergen

MOL Nyrt.
Benczúr utca 13
HU-1068 Budapest

Repsol Petróleo S.A.
Paseo de la Castellana, 278
E-28046 Madrid

Repsol YPF S.A.
Paseo de la Castellana 278
E-28046 Madrid

Repsol YPF Lubricantes y Especialidades S.A.
Edificio Tucumán, 2ª planta
Glorieta de Mar Caribe 1
E-28042 Madrid

RWE AG
Opernplatz 1
D-45128 Essen

RWE-Dea AG
Überseering 40
D-22297 Hamburg

Sasol Holding in Germany GmbH
Worthdamm 13-27
D-20457 Hamburg

Sasol Limited

1 Sturdee Avenue
Rosebank, 2196
Johannesburg
Republic of South Africa

Sasol Wax International AG
Worthdamm 13-27
D-20457 Hamburg

Sasol Wax GmbH
Worthdamm 13-27
D-20457 Hamburg

Shell International Petroleum Company Limited
Shell Centre
UK-London SE1 7NA

Shell Deutschland Oil GmbH
Suhrenkamp 71-77
D-22284 Hamburg

Shell Deutschland Schmierstoff GmbH
Suhrenkamp 71-77
D-22284 Hamburg

Deutsche Shell GmbH
Suhrenkamp 71-77
D-22284 Hamburg

the Shell Petroleum Company Limited
Shell Centre
UK-London SE1 7NA

Shell Petroleum N.V.
Carel van Bylandtlaan 30
NL-2596 HR Den Haag

the Shell Transport and Trading Company Limited
Shell Centre
UK-London SE1 7NA

Total France S.A.
24, Cours Michelet
Tour Michelet
F-92069 Paris La Défense Cedex

Total S.A.
2, place de La Coupole
La Défense 6
F-92078 Paris La Défense Cedex

Tudapetrol Mineralölerzeugnisse Nils Hansen KG
Am Sandtorkai 64
D-20457 Hamburg

This Decision shall be enforceable pursuant to Article 256 of the Treaty and Article 110 of the EEA Agreement.

Done at Brussels,

For the Commission
Neelie KROES
Member of the Commission

ANNEX

[…]