The synthetic rubber cartel cases

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The Nitrile Butadiene Rubber Case

On 23 January, the Commission adopted a prohibition decision and imposed fines totalling €34 million on the Bayer and Zeon groups for operating a cartel in the Nitrile Butadiene Rubber ('NBR') sector (2). The addressees of the decision participated in a single and continuous infringement of Article 81 of the EC Treaty from October 2000 to September 2002.

The product

NBR is a type of synthetic rubber and consists of a complex family of unsaturated copolymers of acrylonitrile and butadiene. The term NBR covers a wide variety of compositions depending on acrylonitrile content and polymerisation. Resistance to petroleum fluids, good physical properties and useful temperature range make NBR a widely used rubber. NBR is used mainly in the automotive industry for fuel and oil handling hoses, seals, o-rings and water handling applications. Other industrial uses are rolling covers, hydraulic hoses, conveyor belting, and seals for all kinds of plumbing. NBR can also be mixed with PVC for manufacturing NBR/PVC compounds. The estimated EEA market value of NBR in 2001 was approximately €145 million. At that time, the two undertakings involved in the infringement had an estimated market share of just over half of the European market.

The cartel

The anticompetitive practices consisted of price fixing, exchange of commercially sensitive information and monitoring and implementation of the illicit arrangements. In particular, the cartel started as a concerted practice in which the parties wanted to maximise their chances for successful price increases by reassuring both of them that they would effectively carry out the price increases they had already announced. Both parties considered the attitude of the other as a key factor for the success of a price increase. If one of the parties did not stick to its announced increases the increase would run a serious risk of failure. The arrangements culminated in an agreement on prices in the last period of the cartel. All in all, the undertakings involved organised a number of rounds of price increases which, although not always completely successful, were generally implemented and whose implementation was reviewed. The cartel covered the whole EEA territory.

Fines

Following the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (3) ('2006 Guidelines on fines'), the Commission, in fixing the amount of the fine, had regard to all relevant circumstances and particularly the gravity and duration of the infringement. On the basis of the principles laid down in the Guidelines, the basic amount of the fine was determined as a proportion of the value of the sales of the relevant product made by each undertaking in the relevant geographic area during the last full business year of the infringement, multiplied by the number of years of infringement, plus an additional amount, also calculated as a proportion of the value of sales, which is meant to enhance deterrence in respect of horizontal price-fixing agreements.

In determining the fine, the Commission also considered the fact that at the time of the infringement, Bayer had already been the addressee of a previous Commission decision concerning cartel activities. It concluded that this justified an increase in the basic amount imposed on Bayer for repeated infringement.

The Commission also took into account the need to ensure that fines have a sufficiently deterrent effect, and in consideration of the large size of Bayer's turnover beyond the sales of goods or services to which the infringement relates, the decision increased the fine to be imposed on this undertaking by 10%.

In its decision, the Commission granted a reduction in the fine of 30% for Bayer and 20% for Zeon under the Leniency Notice. These reductions took into account the extent to which the evidence submitted by each company represented added value, as well as the time at which this evidence was submitted. Furthermore, Zeon's application

(1) Directorate-General for Competition, unit G-3. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.
Cartels contained contemporaneous evidence relating to contacts between Zeon and Bayer that took place during the initial period of the cartel about which the Commission did not previously have sufficiently specific information. This evidence allowed the Commission to extend the duration of the infringement to the period 2000–2001 and to prove, to the requisite legal standard, the facts in question. Given that Zeon was the first to have disclosed the cartel period from October 2000 to April 2002, this period was not taken in consideration in the calculation of the fine for Zeon.

The earlier rubber chemicals cases
Since the NBR case is the fourth and most recent in a series of Commission decisions in the synthetic rubber sector, it provides an opportunity to give an overview of all the cases.

The Rubber Chemicals Case (4)
Rubber chemicals are synthetic or organic chemicals that act as productivity and quality enhancers in the manufacture of rubber. They are used by the rubber industry to make a wide range of rubber parts for use in many different applications. The automotive industry is the largest user of rubber parts, mainly in tyres but also in hoses, seals, belts, etc. On 21 December 2005, the Commission adopted a decision addressed to four groups of undertakings, which it found to have participated in the cartel at various periods between 1 January 1996 and 31 December 2001. The undertakings involved agreed to exchange information about prices and/or raise prices of certain rubber chemicals (antioxidants, antiozonants and primary accelerators) in the EEA and world-wide markets. Competitors usually had, or at least attempted to have, contacts before, during and after every price increase for rubber chemicals. While Fleksys enjoyed full immunity, Crompton was given a fine of €13.6 million (€12.75 million jointly and severally with Chemtura), Bayer was given a fine of €58.88 million and General Quimica was fined €3.38 million (jointly and severally with Repsol Quimica and Repsol YPF).

The Butadiene Rubber and Emulsion Styrene Butadiene Rubber Case (5)
Butadiene Rubber and Emulsion Styrene Butadiene Rubber (‘BR/ESBR’) are synthetic rubbers also used particularly in tyre production. The decision concluded that six groups of undertakings had participated in a cartel on ESBR, while four of the groups of undertakings had participated in a cartel on BR, at various periods between 20 May 1996 and 28 November 2002. The participants agreed prices and exchanged information on key customers and the amounts of synthetic rubber supplied to them; cartel agreements were made before or after the official meetings concerning BR and ESBR of the European Synthetic Rubber Association (ESRA). In terms of the size of the fines levied, BR/ESBR is the largest of the synthetic rubber cases. While Bayer enjoyed full immunity from fines, Enichem was given a fine of €272.25 million, Dow €64.575 million, Shell €160.875 million, Kaucuk €17.55 million and Stomil €3.8 million.

The Chloroprene Rubber Case (6)
Chloroprene rubber (‘CR’) is a synthetic rubber which is used in many different applications (cables, hoses, automotive industry, shoes, furniture, and diving equipment). On 5 December 2007, the Commission adopted a decision finding that five groups of undertakings had participated in a cartel at various periods between 13 May 1993 and 13 May 2002. The producers of CR agreed each other’s market shares and set prices and the companies further held regular meetings to discuss prices, exchange sensitive commercial information, discuss specific clients and follow up the implementation of their illegal agreements. Bayer again enjoyed full immunity from fines, DuPont was given a fine of €59.25 million (of which €48.675 million jointly and severally with Dow), Denka €47 million, ENI/Polimeri €132.16 million and Tosoh €4.8 million.

Altogether, four cartels in the synthetic rubber sector have been uncovered, resulting in fines of €872.35 million.

(4) Case COMP/38.443 Rubber chemicals.
(6) Case COMP/38.629 Chloroprene Rubber.