Recent cartel cases — Sodium Chlorate and Aluminium Fluoride

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In June 2008, the Commission adopted two prohibition decisions against infringements of Article 81 of the EC Treaty and Article 53 of the EEA Agreement and imposed fines totalling some €84 million. In both cases, the product concerned was a specific chemical compound used as a processing agent for the production of further commodities, such as paper pulp (the Sodium Chlorate case) and aluminium (the Aluminium Fluoride case).

The fines were set in accordance with the Guidelines on the method of setting fines pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (2) (‘Guidelines on fines’). In setting the amount of the fines, the Commission took account of all the circumstances and in particular the gravity and duration of the respective infringements.

The Sodium Chlorate case


The product

SC (chemical formula represented by NaClO₃) is a strong oxidising agent manufactured by the electrolysis of a sodium chloride water solution in a diaphragm-less cell. Hydrogen gas is the only by-product. The main raw materials are sodium chloride and water. The largest application (90%) of SC is for the manufacturing of chlorine dioxide, which is used in the pulp and paper industry for the bleaching of chemical pulp. Other applications include drinking water purification, textile bleaching, herbicides and uranium refining. The estimated EEA market value for SC in 1999 was over €200 million. At that time, the four undertakings involved in the infringement had an estimated market share of about 93%, i.e. between €185 and 195 million.

The cartel

The addressees of the decision pursued a strategy of stabilising the SC market with the ultimate aim of dividing SC sales volumes between themselves, coordinating pricing policy towards their customers and thereby maximising their margins. They further attempted to implement the illicit arrangements on the market by means of renegotiating SC prices with their respective customers. Compliance was monitored mostly in bilateral meetings and telephone conversations during which the parties exchanged commercially sensitive information on negotiations with customers, including contracted sales volumes and prices. The cartel covered a significant part of the EEA territory.

The participants usually discussed the total demand for SC in the EEA and made forecasts per country for the upcoming year. The parties tried to assess developments in the market in order to ensure the necessary stability for their planned price increases. Contacts among competitors usually intensified towards the end of each calendar year to reflect the annual negotiations of contracts between SC manufacturers and their customers. Negotiations with customers were often continued at the beginning of the following year.

Fines

In determining the fine, in accordance with Point 28 of the Guidelines on fines, the Commission also took account of the fact that, at the time of the infringement, Arkema France SA (‘Arkema’), a subsidiary of Elf Aquitaine, had already been the addressee of three previous Commission decisions concerning cartel activities. The Commission concluded that this justified an increase of 90% in the basic amount imposed on Arkema for repeated infringement.

The Commission further considered the need to ensure that fines have a sufficiently deterrent effect. In view of the size of Elf Aquitaine’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 70%.
In its decision, the Commission granted full immunity to Akzo Nobel and its subsidiary EKA Chemicals AB under the 2002 Notice on the non-imposition or reduction of fines in cartel cases (‘the 2002 Leniency Notice’). Finnish Chemicals was granted a 50% reduction of the fines that would have been otherwise imposed for its cooperation with the Commission under the 2002 Leniency Notice. This reduction took account of the added value provided by the evidence submitted by Finnish Chemicals, and of the time at which this evidence was submitted.

The Aluminium Fluoride Case
Another prohibition decision was adopted by the Commission on 25 June 2008. A number of aluminium fluoride producers, namely Boliden Odda S/A (Norway), Fluorsid S.p.A. (Italy), Minmet Financing Company S.A. (Switzerland), Société des Industries Chimiques du Fluor (Tunisia), Industrial Quimica de Mexico S.A. de C.V. and Q.B. Industrias S.A.B. de C.V. (both Mexico), were held liable for infringements of Article 81 of the EC Treaty and Article 53 of the EEA Agreement. During the second half of 2000, the addressees of the decision agreed worldwide target prices and market division. The Commission imposed fines of €4 970 000 (1).

The product
Aluminium fluoride (‘AlF’) is a chemical compound with the formula AlF₃. Adding AlF to the production process of aluminium lowers the consumption of electricity required in the smelting process and thereby considerably helps to reduce the production costs of aluminium. Energy is a major cost factor in aluminium production. AlF is not substitutable by other products in this respect. Aluminium producers (smelters) are the main users of AlF. The estimated total value of AlF sold on the open market in the EEA for 2000 was approximately €71 600 000.

The infringement
The Commission’s decision established that the cartel members organised a meeting in Milan in July 2000 where they agreed on a worldwide target price increase. They looked at various parts of the world, including Europe, to establish a general price level and, in some cases, a market division. The parties agreed that the overall aim was to obtain a higher price level and that they should discourage deep price discounting. They also exchanged commercially sensitive information. In the second half of 2000, the cartel members followed up with bilateral contacts with a view to monitor the implementation of the cartel arrangements agreed in Milan. In doing so, the parties adhered to a common plan, which limited or was likely to limit their individual commercial conduct by determining the lines of their mutual action on the market. They expressed their joint intention and reached a common understanding to operate on the market in a specific way, with the common objective of restricting competition. The agreement reached at the meeting in Milan and the follow-up contacts in the second part of 2000 enabled the cartel members to predict with at least a reasonable degree of certainty what the pricing policy pursued by their competitors would be. Such agreement was capable of distorting the normal formation of prices on the aluminium fluoride market. The infringement lasted from 12 July 2000 to 31 December 2000.

Fines
In setting the fines in accordance with the Guidelines on fines, the Commission also took account of the short duration of the infringement, and of the level of turnover in the aluminium fluoride market that was affected by the cartel.

In the Aluminium Fluoride case, the Commission applied Point 18 of the Guidelines on fines, providing a calculation method for cartels that are geographically wider than the EEA. This method has been applied by the Commission in its Decisions (and confirmed by the European Courts), but it was laid down for the first time in the Guidelines on fines in 2006. Point 18 provides for the relative shares of the cartel members’ sales in the geographic area covered by the cartel to be used as a basis to calculate the value of sales in the EEA for each cartel member. The purpose of this is to reflect the weight of each member in the cartel, which would not be taken sufficiently into account were the Commission to base itself only on the EEA turnover of the participants, since the geographic scope of the cartel was wider than the EEA.

Application of the 2002 Leniency Notice
The Commission’s investigation was triggered by an application for immunity lodged by Boliden Odda in March 2005. Boliden Odda was the first to inform the Commission of the existence of a cartel. The undertaking also applied to other competition authorities worldwide. In contrast to these other authorities, the Commission was able to uncover contemporaneous evidence in the EEA through its unannounced inspections. Boliden Odda continued to cooperate fully with the Commission throughout the administrative procedure, in accordance with Point 11 of the 2002 Leniency

(2) Case 39.180
Notice, and was eventually granted immunity from any fines that would otherwise have been imposed.

Fluorsid was the second undertaking to approach the Commission under the Leniency Notice. Its leniency application was submitted nearly two years after the beginning of the Commission’s investigation. The Commission found that the information and evidence provided by Fluorsid did not constitute significant added value within the meaning of Points 21 and 22 of the 2002 Leniency Notice. Accordingly, Fluorsid was not granted any reduction of fines under the Leniency Notice.

Conclusion
The Sodium Chlorate and the Aluminium Fluoride cases illustrate a number of key aspects of the new methodology of calculating fines under the 2006 Guidelines on fines (as opposed to the 1998 Guidelines (6)). In particular, it is worth noting that by increasing the fine substantially on grounds of repeated infringement in the case of Arkema, the Commission demonstrated its determination to pursue and punish repeat offenders. Similarly, the Aluminium Fluoride decision sends a clear signal that cartel members that achieve smaller sales and are involved in a cartel of short duration should not escape the Commission’s scrutiny. Commenting on the Aluminium Fluoride case Commissioner Neelie Kroes said: ‘This decision shows that the Commission takes all cartels seriously. Whatever the scope of the affected market, the duration of the cartel or the size of the companies involved, there is no safe haven for those who do not play by the rules.’

(6) OJ C 9, 14.1.1998, p.3