COMMISSION OF THE EUROPEAN COMMUNITIES

COMMISSION DECISION

of 23 January 2008

notified under document numberC(2008)282 final

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

Case COMP/38.628 - Nitrile Butadiene Rubber

(ONLY THE ENGLISH AND GERMAN TEXTS ARE AUTHENTIC)

(Text with EEA relevance)

TABLE OF CONTENTS

1. Introduction 6
1.1. Addressees 6
1.2. Summary of the infringement 6
2. The industry subject to the proceedings 6
2.1. The product involved 6
2.2. The market players 6
2.2.1. Undertakings addressed by the present proceedings 6
2.2.2. Other suppliers 7
2.3. Description of the industry 8
2.3.1. Market values and volumes 8
2.3.2. Geographic scope of the business 8
2.4. Trade between Member States 8
3. Procedure 9
3.1. The Commission's investigation 9
3.2. Statement of Objections and Oral Hearing 10
3.3. Investigations and proceedings in other jurisdictions 10
4. Description of events 10
4.1. Basic principles of the organisation of the cartel 10
4.1.2. The individual participants and their respective positions within the companies 10
4.2. The cartel history 11
5. Application of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement 11
5.1. Relationship between the Treaty and the EEA Agreement 11
5.2. Jurisdiction 11
5.3. Application of competition rules 11
5.3.1. Agreement and concerted practices: general principles 11

5.3.2. Application in this case 13
5.3.3. Single and continuous infringement 18
5.3.4. Restriction or distortion of competition 20
5.3.5. Effect upon trade between Member States and between Contracting Parties to the EEA Agreement 20
6. Addressees of this decision and duration of the infringement 21
6.1.1. Addressees 21
6.1.2. Duration of the infringement 23
7. Remedies 23
7.1. Article 7 of Regulation (EC) No 1/2003 23
7.2. Article 23(2) of Regulation (EC) No 1/2003 24
7.3. The basic amount of the fines 24
7.3.1 Methodology 24
7.3.2 The value of sales 24
7.3.3 Gravity 25
7.3.4 The percentage to be applied for the proportion of the value of sales 26
7.3.5 Duration 26
7.3.6 The percentage to be applied for the additional amount 26
7.3.7 Calculation and conclusion on basic amounts. 26
7.4. Adjustments to the basic amount 27
7.4.1 Aggravating circumstances 27
7.4.2 Attenuating circumstances 27
7.4.3 Deterrence 27
7.4.4 Conclusions on the adjusted basic amounts 28
7.5. Application of the 10% turnover limit 28
7.6. Application of the Leniency Notice 28
7.6.1 Bayer 28
7.6.2 Zeon 30

7.6.3 Conclusion on the application of the Leniency Notice 30
7.7. The amounts of the fines to be imposed in this Decision..... 31

COMMISSION DECISION

of 23 January 2008

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

Case COMP/38.628 - Nitrile Butadiene Rubber

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

Having regard to the Commission decision of 4 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[1],

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions[2],

Having regard to the final report of the Hearing Officer in this case[3],

Whereas:

[1] 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).

[2] OJ C 86, 15.4.2009, p. 3 and 4.

[3] OJ C 86, 15.4.2009, p. 5-6.

1. INTRODUCTION

1.1. Addressees

1. The Commission initiated proceedings for an infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement against the following companies:

   – Bayer AG

   – Zeon Europe GmbH

   – Zeon Chemicals Europe Ltd.

   – Zeon Corporation

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, with the common objective to distort competition in the market for Acrylonitrile butadiene rubber (hereafter "NBR") in the EEA, namely by reassuring each other on their intentions to apply price increases, coordinating a simultaneous price increase and exchanging information on pricing strategy, capacity levels and utilisation. The infringement to which this Decision relates started no later than on 9 October 2000 and lasted until 30 September 2002.

2. THE INDUSTRY SUBJECT TO THE PROCEEDINGS

2.1. The product involved

3. 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, Mooney values and polymerization. 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.

2.2. The market players

2.2.1. Undertakings addressed by the present proceedings

4. In the last year of the infringement described in this Decision, in 2002, the NBR market in the EEA was dominated by three undertakings: Bayer, Zeon and [another

competitor]. Two of these three undertakings, Bayer and Zeon, are the addressees of this Decision.

2.2.1.1. Bayer

5. *Bayer AG* (hereafter: Bayer) is a company active in the chemical sector, with its seat in Leverkusen, Germany. It produces a comprehensive range of chemicals, plastics, pharmaceuticals and other products. Until 31 December 2002, its business was divided into different areas ("*Arbeitsgebiete*"), which were sub-divided into divisions ("*Geschäftsbereiche*"), which were in turn split into sections ("*Geschäftsfelder"*). NBR belonged to the Polymers Area ("*Arbeitsgebiet Polymers*"), the Rubber Division ("*Geschäftsbereich Kautschuk*" – "*GB KA*") and the Solid Rubber Section ("*Geschäftsfeld Festkautschuk*").

6. NBR activities within Bayer were transferred to a new company called Lanxness Deutschland GmbH on 30 September 2004. Lanxness Deutschland GmbH was a 100 % subsidiary of Bayer until 28 January 2005 when it was floated on the stock exchange as Lanxness AG. Lanxness AG is not party to this procedure.

7. Bayer produces NBR in La Wantzenau, France and in Sarnia, Canada. The NBR production site in Leverkusen, Germany, was discontinued as from 2002.

8. The total world-wide turnover of the Bayer group in 2001 was EUR 30 275 million and EUR 28 956 million in 2006. Bayer achieved turnover of EUR 52.4 million in the EEA in respect of NBR in 2001.

9. Bayer markets its NBR under the trademarks Perbunan and Krynac.

2.2.1.2. Zeon

10. *Zeon Corporation*, based in Japan, operates in Europe through two principal subsidiaries, Zeon Europe GmbH based in Düsseldorf and Zeon Chemicals Europe Ltd. based in the United Kingdom (the three companies will be identified hereafter as Zeon). 100 % of the shares of Zeon Chemicals Europe Ltd are owned by Zeon Corporation. 18.5 % of the shares of Zeon Europe GmbH are owned by Zeon Chemicals Europe Ltd and the remaining 81.5 % directly by Zeon Corporation.

11. Zeon produces NBR in Barry, United Kingdom.

12. The total world-wide turnover of the Zeon group in 2001 was EUR 1 749 million and EUR 1 928 million in 2006**.** Zeon achieved turnover of EUR 27.993 million in the EEA in respect of NBR in 2001.

2.2.2. Other suppliers

13. In addition to the addressees of this Decision and to [another competitor] which are the major suppliers of NBR in the EEA, a number of other players supply limited

amounts of NBR to the EEA market. Those producers which are not concerned by the proceedings in this case are based in the United States, in South America or in Asia.

2.3. Description of the industry

2.3.1. Market values and volumes

14. Bayer estimates that in 2001 the world-wide NBR market amounted to 308 500 tonnes and that the European NBR market amounted to approximately 78 000 tonnes.

15. Based on the NBR turnovers of Bayer and Zeon in the EEA, as well as their estimates of their own and their competitors' market shares (which are confidential), the Commission estimates that in 2001 the total value of NBR sales in the EEA amounted to EUR 145.3 million. The Commission estimates the corresponding NBR market shares of Bayer, Zeon and their competitors in the EEA in 2001 to be as follows:

Bayer 36.06 %

Zeon 19.27 %

Others 44.67 %.

2.3.2. Geographic scope of the business

16. The scope of the NBR business is world wide. The major suppliers are present in each of the principal economic regions of the world and operate on a global basis.

2.4. Trade between Member States

17. The NBR production in Europe is concentrated in a small number of sites. In Europe, as already mentioned, Zeon produces NBR in the United Kingdom (Barry) and Bayer has production facilities in France (La Wantzenau).

18. Aside from imports from outside the EEA, the EEA market is supplied from these few production sites. In particular, customers in all fifteen Member States were supplied with NBR by Bayer in 2000 - 2002. Zeon's major customers were located in 8-9 Member States, however smaller volumes of NBR were supplied to 14 Member States. The NBR market during the period considered in this Decision was thus characterised by important trade flows between EU Member States. Both parties also sold NBR to Norway, i.e. a Contracting Party to the EEA Agreement.

19. Accordingly, there is a substantial volume of trade between EU Member States and the Contracting Parties to the EEA Agreement in the NBR market.

3. PROCEDURE

3.1. The Commission's investigation

20. (…)

21. On 30 January 2003, Bayer contacted the Commission and expressed its wish to co-operate with the Commission pursuant to the Leniency Notice. (…)

22. On 27 and 28 March 2003, the Commission conducted investigations under Article 14(3) of Council Regulation No 17 : First Regulation implementing Articles 85 and 86 of the Treaty[4] at the premises of Zeon Chemical Europe Ltd.

23. On 27 August 2003, legal representatives of Zeon Corporation (…) expressed Zeon Corporation's wish to co-operate with the Commission pursuant to the Leniency Notice. (…)

24. (…)

25. (…)

26. (…)

27. (…)

28. (…)

29. (…)

30. (…)

31. (…)

32. (…)

33. Regulation (EC) No 1/2003 entered into force on 1 May 2004, replacing Regulation (EC) No 17. The investigation was initiated under the old regime, but subsequent investigation was carried out under the new regime. In accordance with Article 34(2) of Regulation (EC) No 1/2003 procedural steps taken under Regulation No 17 continue to have effect for the purposes of applying Regulation No 1/2003.

34. On 29 March 2007, the Commission informed Bayer (…) that the Commission intended to grant Bayer a reduction of 30-50 % of the fine which would otherwise have been imposed on it, pursuant to the Leniency Notice. On the same date, 29 March 2007, Zeon was informed of the Commission's intention to grant it a reduction of 20-30 % of the fine that would otherwise have been imposed.

[4] OJ 13, 21.2.1962, p.204/62. Regulation repealed by Regulation (EC) No 1/2003.

3.2. Statement of Objections and Oral Hearing

35. On 3 May 2007 the Commission initiated proceedings in this case, and adopted the Statement of Objections which was notified to the addressees of this Decision on 4 May 2007.

36. The undertakings had access to the Commission's investigation file. (…)

37. Zeon and Bayer informed the Commission in writing of their views on the objections within the deadline imposed upon them. Comments on the Statement of Objections were submitted by Zeon on 8 June 2007 and by Bayer on 13 June 2007.

38. As regards the replies of the parties to the Statement of Objections, the facts, as described in the Statement of Objections, have remained uncontested, with a small number of factual clarifications provided by Zeon. (…)

39. In its reply to the Statement of Objections, Bayer declared that it would not request an oral Hearing unless a Hearing was requested by Zeon. Zeon subsequently withdrew its request for an oral Hearing. Hence, no oral hearing took place.

3.3. Investigations and proceedings in other jurisdictions

40. In the United States, an investigation into an NBR cartel was opened following an amnesty application. Plea bargaining agreements have been made with Bayer AG (2004) and with Zeon Chemicals L.P., a subsidiary of Zeon Corporation (2005). Cases have been filed against the companies resulting in fines of more than USD 15 million.

4. DESCRIPTION OF EVENTS

4.1. Basic principles of the organisation of the cartel

4.1.1.1. Organisation and objective

41. The purpose of the cartel was, on the one hand, to maximise the chances for successful price increases by reassuring both participants that they would effectively carry out the price increases they had already announced and, on the other hand, to agree on the level of prices in order to obtain a higher price for NBR than would otherwise have been the case. For the purpose of this Decision the infringement starts with the meeting between Bayer and Zeon of 9 October 2000 and ends in September 2002 with the implementation phase of the price agreement concluded in May 2002.

4.1.2. The individual participants and their respective positions within the companies

[Recitals (42) – (44) are deleted, including any cross references to these recitals and relevant footnotes]

4.2. The cartel history

[Recitals (45) – (94) are deleted, including any cross references to these recitals and relevant footnotes]

5. APPLICATION OF ARTICLE 81(1) OF THE TREATY AND ARTICLE 53(1) OF THE EEA AGREEMENT

5.1. Relationship between the Treaty and the EEA Agreement

95. The arrangements described in Section 4.2. applied to all or almost all the territory of the EEA, as the cartel members had sales in practically all the Member States and in the EFTA States party to the EEA Agreement.

96. Insofar as the arrangements affected competition in the common market and trade between Member States, Article 81 of the Treaty is applicable. As regards the operation of the cartel in EFTA States which are part of the EEA and its effect upon trade between the Community and Contracting Parties to the EEA Agreement or between Contracting Parties to the EEA Agreement, this falls under Article 53 of the EEA Agreement.

5.2. Jurisdiction

97. The Commission is the competent authority to apply both Article 81(1) of the Treaty and Article 53(1) of the EEA agreement on the basis of Article 56 of the EEA Agreement, since the cartel had an appreciable effect on trade between Member States (see recitals 17-19 and 145-149). In this case the turnover of the parties achieved in the territory of the EFTA States is less than 33% of their turnover in the EEA, and the primary effects of the arrangements in question are on trade between Member States and on competition in the Community.

5.3. Application of competition rules

5.3.1. Agreement and concerted practices: general principles

98. Article 81(1) 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 trade conditions, limit or control production and markets, or share markets or sources of supply.

99. Article 53(1) of the EEA Agreement (which is modelled on Article 81(1) of the Treaty) contains an identical prohibition on agreements and concerted practices. but substitutes the condition of affect on trade between Member States with “between

contracting parties" (in this context "contracting parties" means the European Community, its members and the individual (then) EFTA-States), and the condition of prevention, restriction or distortion of competition "within the common market" with "within the territory covered by the EEA Agreement".

100. An *agreement* can be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The fact of an agreement may be express or implicit in the behaviour of the parties.

101. Furthermore, it is not necessary, in order for there to be an infringement of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement, for the participants to have agreed in advance upon a comprehensive common plan. The concept of *agreement* in Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement would apply to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement.

102. In its judgement in Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and others v Commission* (*PVC II*)[5], the Court of First Instance of the European Communities stated that "it is well established in the case law that for there to be an agreement within the meaning of Article [81(1)] of the EC Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way"[6].

103. An agreement for the purposes of Article 81(1) of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract at civil law. Moreover, in the case of a complex cartel of long duration, the term "*agreement*" can properly be applied not only to any overall plan/scheme or to the terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose. As the Court of Justice, upholding the judgement of the Court of First Instance, has pointed out in Case C-49/92P *Commission v Anic Partecipazioni SpA*[7], it follows from the express terms of Article 81(1) of the Treaty that that agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.

104. Article 81(1) of the Treaty and Article 53 of the EEA Agreement draw a distinction between the concept of "*concerted practices*" and that of "*agreements between undertakings"* or of "*decisions by associations of undertakings"* in order to bring within the prohibition of those Articles any form of co-ordination between

---

5 Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and others v Commission (PVC II),* [1999] ECR II-931, at paragraph 715, confirmed on this point by judgment in joined cases C-238/99P et al, *Limburgse Vinyl Maatschappij N.V. and others v Commission (PVC II),* [2002] ECR I-08375.

6 See reference in footnote (…) above.

7 See [1999] ECR I - 4125, at paragraph 81.

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[8].

105. 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 determine independently the commercial policy which he intends to adopt in the common market.

106. Thus, conduct may fall under Article 81(1) of the Treaty as a *concerted practice* even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour[9]. While the 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 of which 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.[10]

107. The process of negotiation and preparation culminating effectively in the adoption of a common scheme to regulate the market may well also (depending on the circumstances) be correctly characterised as a concerted practice.

108. Although in terms of Article 81(1) of the Treaty the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period. Such a concerted practice is caught by Article 81(1) of the Treaty even in the absence of anti-competitive effects on the market[11].

5.3.2. Application in this case

109. In this case, Bayer and Zeon each appear to have had their own policy towards possible price increases in 2000 and 2001. However, there is documentary evidence in the file that both of them considered the attitude of the other as a key factor for the success of a price increase. In other words, each of them knew that the support of the other party would increase or maximise the success of a price increase to be imposed

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

9 See also judgment in Case T-7/89 *Hercules v Commission* [1991] II ECR 1711, at paragraph 258-261.

10 See judgment in Case C-199/92 *P Hüls v Commission*, [1999] ECR I-4287, at paragraph 160.

11 Ibidem, at paragraphs 158-166.

on customers. If one of the parties did not stick to its announced increases the increase would run a serious risk of failure. For example, Bayer considered in August 2000 that the success of the 2000 price increases had been limited. Bayer reiterated this view in January 2001: (…)

110. Zeon's attitude is similar. In August 2000, one of its officials stated that (…) (see recital (…)).

111. In connection with the meeting on 9 October 2000, evidence shows that Bayer and Zeon agreed that the prices charged at that time were too low and expressed their intentions to increase prices. Furthermore, the desired percentage of the price increase was specified (…). Although the competitors do not seem to have made any explicit commitments as to the exact amount of the increase or as to the precise timing, they shared their intentions to behave on the market in a certain way. The discussed price increase was carried out in January 2001.

112. The evidence in the Commission's possession further shows that on 13 February 2001 Bayer informed Zeon about a price increase planned for April 2001 and asked Zeon to increase its NBR prices accordingly. The subsequent internal communication within Zeon demonstrates efforts made by Zeon to prepare its internal position pertaining to Bayer's request. Apart from internal enquiries, those efforts encompassed a meeting between Mr. (…) and Mr. (…) on 1 or 2 March 2001. In the course of this meeting Bayer communicated its recent pricing policy and future pricing strategies to Zeon. The price increase as of 1 April 2001 was also discussed in the meeting. Despite the fact that Zeon eventually did not participate in the April 2001 price increase, its activities in February and March 2001 clearly demonstrate that it took account of the information received from Bayer and that it considered determining its own conduct on the market accordingly, that is to say, increasing the NBR price.

113. The objective of the concertation between Bayer and Zeon between October 2000 and April 2001 can be described using Bayer's words relating to the meeting of 13 February 2001 (…). In other words, the consumers would only accept the price increase if the suppliers acted consistently. The proof of this is given by the April 2001 price increase, which was not as successful as expected by Bayer because Zeon did not increase its prices.

114. Incidentally, in its reply to the Statement of Objections, concerning the meeting of 1 or 2 March 2001, Zeon submits (…) and that, consequently, any conclusions as to Zeon's alleged support of Bayer's price increases lack corroboration by documentary evidence.

115. However, the Commission, observing globally the sequence of events described (above), refers to the case *Industrial Gases*[12] where the Court of First Instance stated: "*It is apparent at least that the applicant did not express a clear view on the question*

[12] Case T-303/02 *Westfalen Gassen Nederland BV v Commission*, judgment of 5 December 2006, not yet reported.

of a price increase. Therefore, ***while it did not state expressly that it would increase its prices in 1995, it also did not say that there would be no price increase that year****. The applicant therefore did not express a view which would have left the other undertakings in no doubt that it was* ***distancing itself from the idea of such an increase****. Its conduct, which it describes as vague, is akin to tacit approval which effectively encourages the continuation of the infringement and compromises its discovery*." (emphasis added by the Commission)

116. Furthermore, the Court of Justice has explained the standard of proof applicable in cartel cases in *Cement*[13]. The Court of Justice first recalls that since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in third country, and for the associated documentation to be reduced to a minimum. Even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that **it is often necessary to reconstitute certain details by deduction**. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a **number of coincidences and indicia** which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (recitals (…)) (emphasis added by the Commission).

117. In addition, in *JFE*[14] the Court of First Instance stated: "*However, it is important to emphasise that it is not necessary 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 institution, viewed as a whole, meets that requirement (see, to that effect, PVC II, cited in paragraph 61 above, paragraphs 768 to 778, and in particular paragraph 777, confirmed on the relevant point by the Court of Justice, on appeal, in its judgment in Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P Limburgse Vinyl Maatschaapij and Others v Commission [2002] ECR I-8375, paragraphs 513 to 523)*".

118. Furthermore, the evidence in the Commission's possession suggests the existence of mutual expectations of Bayer and Zeon concerning NBR price increases following the March 2001 meeting. (…)It is the Commission's understanding that in cases where the expectations of one of the competitors were not met, contacts aimed at influencing the conduct on the market of the other competitor were initiated.

119. Based on these facts it is concluded that, even in the absence of contemporaneous documentary evidence, it is sufficiently established that Zeon did not reject Bayer's

---

13 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

14 Joined cases T-67/00, T-68/00, T-71/00 et T-78/00T-13/89 *JFE Engineering Corp. and Others v Commission* [2004] ECR II-02501, paragraphs 180, 220 and 323).

proposal. On the contrary, Bayer's subsequent complaints show at least that Zeon gave positive feedback to Bayer. In the absence of any other plausible explanation, the Commission therefore maintains its conclusions concerning the meeting on 1 or 2 March 2001, in particular Zeon's on-going support for price increases by Bayer.

120. It is also concluded that the addressees of this Decision reached a definitive agreement concerning the increase of NBR prices on the European market between 12 and 15 May 2002 in Naples. That definitive agreement was initiated and prepared in the course of exploratory contacts that began at the latest on 4 March 2002.

121. In the case of the meeting of 4 March 2002, the Commission interprets the reference to NBR in the internal Zeon email as confirmation of Mr. (…) statement that participants discussed NBR related issues, including pricing, despite Bayer's denial. The internal Zeon email is contemporaneous documentary evidence that clearly refutes Bayer's claim that it did not discuss NBR. (…)

122. (…) It can be established that Bayer informed Zeon of the fact that it intended to increase its prices and wanted to know whether Zeon would follow. Zeon supported the idea of the price increase but feared that market conditions would not make its implementation possible at the time. Both parties agreed to continue discussing the price increase. It is concluded that both parties reached a common understanding of the need to increase prices, only the exact timing was left open ((…)).

123. The discussions (of March and April 2002) represent preparatory steps in the bargaining process which then culminated in the agreement at the AGM of the IISRP between 12 and 15 May 2002 in Naples. In the course of their contacts in March and April 2002, both Bayer and Zeon declared their willingness to agree on an eventual price increase, the condition of the price increase being that the situation of the market better allowed it.

124. Hence, the contacts in March and April 2002 qualify as a "concerted practice" within the meaning of Article 81 in the Treaty, in the sense that the undertakings concerned participated in meetings during which information was exchanged about the prices they wished to see charged on the market, the prices they intended to charge, and the timing of the price increase. Through their participation in those meetings, they took part in concerted action the purpose of which was to influence their conduct on the market and to disclose to each other the course of conduct which each of the producers itself contemplated adopting on the market. Accordingly, not only did the undertakings pursue the aim of eliminating uncertainty about the future conduct of their competitors in advance but also, in determining the policy which they intended to follow on the market, they could not fail to take account, directly or indirectly, of the information obtained during the course of those meetings.

125. As regards the meetings of Bayer and Zeon on the occasion of the AGM of the IISRP between 12 and 15 May 2002 in Naples, (…) concerning their previous meetings in March and April 2002 demonstrate at least preparatory discussions and conditional

plans to increase prices. (…) . Thus, in line with the judgement in Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and others v Commission* (*PVC II*)[15], as referred to above in recital 102, it is concluded that in May 2002 Bayer and Zeon reached an agreement to increase prices of NBR.

126. (…)

127. (…)

128. (…)

129. Bayer and Zeon attempted to implement the agreed price increase and monitored its implementation in September 2002. Therefore, even if the conduct were not to be considered an actual agreement, it would still constitute an infringement of Article 81 as concerted practice, since the anticompetitive contacts between the competitors were clearly followed by the parties' conduct on the market through their attempts to implement the price increase.

130. For a concerted practice to be established there must be a causal link between the concertation and the subsequent conduct on the market. The concertation between Bayer and Zeon throughout the period covered by this Decision is clearly documented in this case. Given the concerns of both companies regarding the success or lack of success of price increases, it can be presumed, given that the parties have not put forward proof to the contrary during the administrative procedure, that both Bayer and Zeon took account of the information obtained during those contacts in order to decide whether or not to stick to the price increases of 1 January 2001 and 1 April 2001 which had already been announced. (…) may serve as an additional example of the concertation between Bayer and Zeon. Given the existence of documented anticompetitive meetings and the established common perception that price increases would be successful only if supported by other competitors, it must be concluded that the parties could not continue to operate on the market without using the knowledge and contents of the information exchanged.

131. The concepts of agreement and concerted practice are fluid and may overlap. Indeed, it may not even be possible realistically to make any such distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while considered in isolation some of its manifestations could accurately be described as one rather than the other. It would however be artificial analytically to sub-divide what is clearly a continuing common enterprise having one and the same overall objective into several discrete forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time.

---

[15] Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and others v Commission (PVC II)*, [1999] ECR II-931, at paragraph 715, confirmed on this point by judgement of the Court of Justice in Joined Cases C-238/99P et al, *Limburgse Vinyl Maatschappij N.V. and others v Commission (PVC II)*, [2002] ECR I-08375.

132. Although a cartel is a joint enterprise, 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(1) of the Treaty where there is a common objective. This also applies in this case where, in some instances, the participants acted contrary to the expectations of the other party and/or did not stick to what had been agreed. The fact that Zeon did not increase prices in April 2001, Bayer's complaints about prices charged by Zeon to a particular customer in September 2001 and in February or March 2002, or the inconsequent implementation of the Naples agreement, thus do not contradict the finding of an infringement.

133. On the basis of the abovementioned considerations, it is concluded that the complex of actions carried out by the addressees of this Decision between October 2000 and at least 30 September 2002 presents all the characteristics of an agreement and/or a concerted practice in the sense of Article 81 of the Treaty.

5.3.3. Single and continuous infringement

134. An infringement of Article 81(1) of the Treaty may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves and taken in isolation an infringement of that provision. When the different actions form part of an 'overall plan', because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole[16]. A complex cartel, such as the one which is the subject of this Decision, may thus properly be viewed as a single and continuous infringement for the time frame in which it existed. The cartel may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. Also, the agreements and concerted practices referred to in Article 81(1) of the Treaty necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged[17].

135. In this case, where the cartel was characterised by a loose structure, and where the contacts between undertakings only took place when they considered that there was a need for such contacts, the conduct of the addressees of this Decision in question constitutes a single and continuous infringement of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement for the following reasons: At least for the period from 9 October 2000 to 30 September 2002, the addressees of this Decision colluded,

---

16 See judgement of the Court of First Instance in 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*, …, at paragraph 258; recently confirmed in Case C-113/04 *Technische Unie BV v Commission*, judgment of 21 September 2006, not yet reported, at paragraph 178.

17 Case C-49/92.

by way of concerted practices and/or agreements, to align their action in the market, thus restricting their individual commercial conduct. These actions formed part of an overall plan as they were carried out in pursuit of a single and common anti-competitive object, namely to distort the normal movement of prices in the EEA market for NBR (see recitals (…)). In practical terms, Bayer and Zeon exchanged information on prices charged or to be charged and discussed their intentions to increase prices in order to ensure that the other player would actually implement its intended/announced price increases, with a view to maximising the success of the price initiative and therefore their profits. (…) The sequence of events shows that the parties progressively strengthened their concertation and moved towards/reached an agreement on a price increase in order to ensure its success. All these measures had the same objective.

136. The participants in these arrangements knew that they were part of a common plan in pursuit of an unlawful object. Some documents also contain the instruction to delete them after having taken knowledge of their contents.

137. The common plan, which was subscribed to by the addressees of this Decision, was developed and implemented over a period that lasted approximately two years, through a complex of collusive arrangements, specific agreements and/or concerted practices, pursuing the same common objective of eliminating competition between them. It would therefore be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was in reality a single infringement which manifested itself in a series of anti-competitive activities throughout the period of the operation of the cartel[18].

138. The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and the same anti-competitive effect. An entity which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. This is certainly the case where it is established that the entity 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[19]. Such a conclusion is not at odds with the principle that responsibility for such infringements is personal in nature, nor does it neglect, in disregard of the applicable rules of evidence, individual analysis of the evidence adduced, or infringe the rights of defence of the undertakings involved.

---

[18] Case T-13/89 *Imperial Chemical Idustries v Commission* [1992] ECR II-1021, paragraphs 259-260.

[19] See judgment in Case C-49/92 *Commission v Anic Partecipazioni* [1999] ECR I-4325 at paragraph 83.

5.3.4. Restriction or distortion of competition

139. The agreement and/or concerted practices in this case had the object of restricting and/or distorting competition in the common market and the rest of the EEA within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

140. Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement expressly include as restrictive of competition agreements and concerted practices which directly or indirectly fix selling prices or any other trading conditions.

141. These are the essential characteristics of the arrangements under consideration in this case. The purpose of the agreement and/or concerted practice was to increase prices in a co-ordinated fashion on the European market for NBR.

142. Price being the main instrument of competition, an agreement and or concerted practice directed at the co-ordination of price movements between competitors will by its very nature restrict and distort competition within the meaning of Article 81(1) of the Treaty and Article 53 (1) of the EEA Agreement.

143. In order to conclude that Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement apply there is no need to consider the actual effects upon competition of an agreement once it is established that the agreements had the object of restricting, preventing or distorting competition[20].

144. In this case, on the basis of the elements which are put forward in this Decision, the collusion culminating in the price increase of 1 January 2001 was successful as both parties managed to increase their prices (see recitals (…)), while the collusion agreed in May 2002 (Naples agreement) was implemented without being entirely successful.

5.3.5. Effect upon trade between Member States and between Contracting Parties to the EEA Agreement

145. According to the judgment of the Court of Justice in the *Bagnasco* case, "in order that an agreement 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 that it may have influence, direct and indirect, actual or potential, on the pattern of trade between Member States"[21]. In any event, Article 81(1) of the Treaty "does not require that agreements referred to in that provision have actually affected trade

[20] Judgment in Case Case T-25/95 et al., Ciment, ECR (2000), II-491, at paragraph 3927. See also judgment in cases T-374/94, T-375/94, T-384/94 and T-388/94, European Night Services, ECR (1998), II-3196, at paragraph 136, Case T-202/98, *Tate & Lyle and others v Commission*, at paragraphs 72-73, Case T-241/01, *Scandinavian Airlines System v Commission*, at paragraph 130 and in Case T-141/94, *Thyssen Stahl v Commission*, confirmed by the Court of Justice in Case C-194/99 P, at paragraph 635 f.

[21] See judgment in Joined Cases C-215/96 and C-216/96, Bagnasco, [1999] ECR I-135, at points 47 and 48.

between Member States, it does require that it be established that the agreements are capable of having that effect"[22].

146. As demonstrated in the section of this Decision entitled "Trade between Member States", the market for NBR is one which is characterised by an important volume of trade between Member States. There is also a considerable volume of trade between the Community and EFTA countries belonging to the EEA.

147. The application of Articles 81(1) of the Treaty and Article 53(1) of the EEA Agreement to a cartel is not, however, limited to that part of the members' sales which actually involve the transfer of goods from one State to another. Nor is it necessary, in order for those provisions to apply, to show that the individual conduct of each member, as opposed to the cartel as a whole, affected trade between Member States[23].

148. In this case, the cartel arrangements covered the whole Community and the EEA. Although Zeon claims that it sold NBR only in 8-9 Member States, the relevant element here is the territorial coverage of the cartel as a whole and not of one of its members. The existence of a price-fixing mechanism must have resulted, or was likely to result, in the automatic diversion of trade patterns from the course they would otherwise have followed[24]. NBR production in Europe is concentrated in a small number of sites and the EEA market is predominantly supplied from those production sites.

149. The parties have not presented any argument suggesting that the conditions of Article 81(3) of the Treaty or Article 53(3) of the EEA Agreement are satisfied and the Commission takes the view that they are not.

6. ADDRESSEES OF THIS DECISION AND DURATION OF THE INFRINGEMENT

6.1.1. Addressees

150. As a general consideration, the subject of Community and EEA competition rules is the "undertaking", a concept that is not identical with the notion of corporate legal personality in national commercial or fiscal law. The term "undertaking" is not defined in the Treaty. As it refers to any entity engaged in a commercial activity, it may be possible, according to the circumstances, to treat as the relevant "undertaking" for the purposes of Article 81 of the Treaty and Article 53 of the EEA Agreement a whole group of companies or individual subgroups thereof.

---

22 Judgment in Case C-306/96 *Javico*, ECR 1997, paragraphs 16 and 17; see also the Judgment in Case T-374/94, *European Night Services*, paragraph 136.

23 See the judgment in Case T-13/89 *Imperial Chemical Industries v Commission* [1992] ECR II-1021, at paragraph 304.

24 See judgment in Joined Cases 209 to 215 and 218/*78 Van Landewyck and others v Commission*, at paragraph 170.

151. As regards the undertaking Bayer (see section 2.2.1.1), its employees directly participated in and implemented the infringement.

152. As regards the undertaking Zeon (see section 2.2.1.2), the employees of Zeon Corporation, Zeon Europe GmbH and Zeon Chemicals Europe Ltd. actively participated in certain of the cartel meetings and arrangements, which are part of, and together constitute, the single and continuous infringement described in this Decision. Moreover, those companies formed part of a corporate group, with 100 % of the shares of both Zeon Europe GmbH and Zeon Chemicals Europe Ltd. directly or indirectly owned by Zeon Corporation during the whole period of the infringement.

153. According to the settled case-law of the Court of Justice and the Court of First Instance, the Commission can generally assume that at the time of the infringement, the parent company was able to exercise decisive influence on a wholly-owned subsidiary and actually did so without needing to check whether the parent company has in fact exercised that power.[25] However the parent company and/or subsidiary can rebut this presumption by producing sufficient evidence that the subsidiary "*decided independently on its own conduct on the market rather than carrying out the instructions given to it by its parent company and such that they fall outside the definition of an 'undertaking'*".[26] According to the Court of First Instance, such evidence must show that the subsidiary "defined its conduct on the market entirely independent from its parent" and thus had "complete autonomy"[27].

154. In this case, representatives of Zeon Corporation directly took part in anticompetitive meetings with Bayer. Furthermore, Zeon Corporation has organised its group's commercial activities into business units (for example, the Polymer Business Unit) and officials of the other two Zeon companies directly involved in the cartel reported, or at least had a reporting obligation, to (…) of Zeon Corporation. This fact, in addition to the 100 % ownership by Zeon Corporation of Zeon Europe GmbH and Zeon Chemicals Europe Ltd., demonstrates that Zeon Corporation was able to exercise decisive influence on the commercial policy of those two Zeon companies at the time of the infringement, and, it may be presumed, did in fact do so.

155. This Decision should therefore be addressed to Zeon Corporation, Zeon Europe GmbH and Zeon Chemicals Europe Ltd. Together these entities form the economic unit that is responsible for the sale and production of NBR in the EEA by Zeon and for the infringement covering that product. They should therefore be held jointly and severally responsible for the infringement.

---

25 Judgment in Joined cases T-71/03 etc. *Tokai Carbon and others v Commission*, paragraph 60; Case T-354/94 *Stora Kopparbergs Bergslags v Commission* [1998] ECR II-2111, paragraph 80, upheld by Court of Justice in Case C-286/98P *Stora Kopparbergs Bergslags v Commission* [2000] ECR I-9925, paragraphs 27, 28 and 29; and Court of Justice in Case 107/82 *AEG v Commission* [1983] ECR 3151, paragraph 50. Akzo Nobel, Avebe, Jungbunzlauer, Prym.

26 Judgment in Joined Cases T-71/03 etc. *Tokai Carbon and Others v Commission*,

27 T-109/02 Bolloré, paragraphs 142, 144.

156. On the basis of the above considerations, the following companies should bear responsibility for the infringement and be addressees of this Decision:

– Bayer AG,

– Zeon Europe GmbH,

– Zeon Chemicals Europe Ltd.,

– Zeon Corporation.

6.1.2. Duration of the infringement

157. The date of the first documented unlawful contact between employees of Zeon and Bayer is 9 October 2000. This contact, which subsequently evolved into the more explicit arrangement described (above, is thus considered as the starting point of the infringement of the competition rules in this case.

158. The evidence shows that Bayer and Zeon participated in the infringement at least until 30 September 2002. That date should therefore be considered to be the end date of the infringement.

159. The duration of the infringement by each addressee is therefore as follows:

– Bayer AG from 9 October 2000 to 30 September 2002;

– Zeon Europe GmbH from 9 October 2000 to 30 September 2002;

– Zeon Chemical Europe Ltd from 9 October 2000 to 30 September 2002;

– Zeon Corporation from 9 October 2000 to 30 September 2002.

7. REMEDIES

7.1. Article 7 of Regulation (EC) No 1/2003

160. Where the Commission finds that there is an infringement of Article 81(1) of the Treaty and Article 53 (1) of the EEA Agreement it may require the undertakings concerned to bring such infringement to an end in accordance with Article 7 of Regulation (EC) No 1/2003.

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

162. Such prohibition applies to all secret meetings and multilateral or bilateral contacts between competitors with the object and/or effect of restricting competition between them or enabling them to coordinate their market behaviour.

7.2. Article 23(2) of Regulation (EC) No 1/2003

163. Under Article 23(2)(a) of Regulation (EC) No 1/2003[28], the Commission may by decision impose fines upon undertakings where, either intentionally or negligently, they infringe Article 81 of the Treaty and/or Article 53 of the EEA Agreement. For each undertaking participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

164. Pursuant to Article 23(3) of Regulation (EC) No 1/2003 the Commission must, in fixing the amount of the fine, have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in that Regulation. In setting the fines to be imposed, the Commission will refer to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation (EC) No 1/2003[29] (hereafter "*the Guidelines on fines*"). Finally the Commission will apply as appropriate the provisions of the Leniency Notice.

7.3. The basic amount of the fines

7.3.1 Methodology

165. The basic amount of the fine to be imposed on the undertakings concerned should be set by reference to the value of sales.

166. 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.

7.3.2 The value of sales

167. 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.

---

[28] Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements of implementing the Agreement on the European Economic Area "the Community rules giving effect to the principles set out in Articles 85 and 86 [now Articles 81 and 82] of the EC Treaty […] shall apply *mutatis mutandis*". (OJ L 305, 30.11. 1994, p.6)

[29] OJ C 210, 1.9.2006, p.2

168. In this case the last full business year before the end of the infringement is 2001.

169. Bayer and Zeon's NBR sales in the EEA in 2001 were as follows:

Bayer	EUR 52.400 million
Zeon	EUR 27.993 million

7.3.3 Gravity

170. 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.

(a) Nature

171. Horizontal price coordination 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 NBR in the EEA, namely by reassuring each other on their intentions to apply price increases, by coordinating a simultaneous price increase and by exchanging information on pricing strategy, capacity levels and utilisation.

(b) Combined market share

172. The combined market share of the undertakings (…) is estimated to be around 55%, as explained in recital 15.

(c) Geographic scope

173. As regards the geographic scope, the infringement covered the entire Community and Norway. In its reply to the Statements of Objections, Zeon points out that its market coverage was significantly more restricted than Bayer's. While the fact that Bayer supplied all 15 then Member States is sufficient to establish that the infringement covered the whole territory of the EU, the Commission also notes that documents provided by Zeon unambiguously show that during the relevant period Zeon also supplied customers in 14 of the then Member States (Luxembourg being the only exception) and Norway. Therefore the geographic scope of the infringement was the EEA.

(d) Implementation

174. As regards the implementation of the arrangements, as explained in recital 144, although not always completely successful, the arrangements were indeed implemented.

7.3.4 The percentage to be applied for the proportion of the value of sales

175. 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 should be 16 %.

7.3.5 Duration

176. Point 24 of the 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 (…) 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".

177. The period to be taken into account for both undertakings is 9 October 2000 to 30 September 2002. Using the methodology outlined in the previous recital, this means that the multiplier applied in respect of duration would normally be 2 for both undertakings. (…) The period taken into account for Zeon will only be that between 12 May 2002 and the end of the cartel in September 2002. Therefore, for Zeon the multiplier to be applied to take account of the duration of the infringement should be 0,5.

7.3.6 The percentage to be applied for the additional amount

178. Point 25 of the 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".

179. Given the specific circumstances of the case, taking into account the criteria mentioned in recital 175 (which are also applicable to the additional amount), the percentage to be applied for the additional amount should be 16 % (see recitals 171 - 174).

7.3.7 Calculation and conclusion on basic amounts.

180. The basic amount of the fine to be imposed on Bayer can be calculated as follows.

Proportion of the value of sales:	=	EUR …16 768 000……
Additional amount:	=	EUR …8 384 000…..

Total basic amount: = EUR …25 000 000……

181. The basic amount of the fine to be imposed on Zeon can be calculated as follows.

Proportion of the value of sales: = EUR … 2 239 440…

Additional amount: = EUR … 4 478 880

Total basic amount = EUR … 6 700 000

7.4. Adjustments to the basic amount

7.4.1 Aggravating circumstances

7.4.1.1 Recidivism

182. At the time the infringement took place, Bayer (or rather a subsidiary of the Bayer Group) had already been the addressee of a previous Commission decision concerning cartel activities[30]. Given that the Commission's decision in the *Citric Acid* case was adopted almost a year before the end of the cartel to which this Decision relates which nevertheless continued and in fact intensified without any apparent breakdown in the arrangements prior to the Commission's investigation, Bayer's behaviour shows that the penalties previously imposed did not prompt any change in its conduct. This constitutes an aggravating circumstance. Considering that Bayer is a first time repeat offender this aggravating circumstance justifies an increase of 50 % in the basic amount of the fine to be imposed on Bayer.

7.4.2 Attenuating circumstances

183. No attenuating circumstances have been found nor claimed.

7.4.3 Deterrence

184. Point 30 of the 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".

185. The total world-wide turnover of the Zeon group was EUR 1 928 million in 2006. No multiplier should be applied to the fine to be imposed on Zeon.

186. The total world-wide turnover of Bayer was EUR 28 956 million in 2006. Bayer has a "particularly large turnover beyond the sales of goods or services to which the

[30] See Commission Decision 2002/742/EC of 5 December 2001 *(Citric Acid)* OJ L 239, 6.9.2002 p.18, where Harmann & Reimer Corporation, a wholly owned subsidiary of Bayer AG, was an addressee of the Commission Decision.

infringement relates". In order to ensure that the fine imposed on it has a sufficient deterrent effect, and given the circumstances of the case, a multiplier of 1.1 should be applied to the fine to be imposed on Bayer.

7.4.4 Conclusions on the adjusted basic amounts

187. The adjusted basic amount of the fine to be imposed on Bayer should be as follows:

Proportion of the value of sales:	=	EUR ….16 768 000
Additional amount:	=	EUR …. 8 384 000
Total adjusted basic amount	=	EUR …..41 250 000

188. The adjusted basic amount of the fine to be imposed on Zeon should the same as the basic amount.

7.5. Application of the 10% turnover limit

189. 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".*

190. The adjusted basic amounts of the fines to be imposed on Bayer and Zeon are less than 10 % of their total turnovers in 2001 (see chapters 7.3.2 and 7.4.4). It is consequently not necessary to reduce the amount of the fines in order to take into account the application of the 10% of turnover limit.

7.6. Application of the Leniency Notice

191. Bayer and Zeon both submitted applications under the Leniency Notice. They co-operated with the Commission at different stages of the investigation with a view to receiving the favourable treatment provided for in the Leniency Notice.

7.6.1 Bayer

192. (…), Bayer contacted the Commission on 30 January 2003 and expressed its wish to cooperate with the Commission pursuant to the Leniency Notice. (…)

193. (…)

194. (…), the information provided by Bayer added value to the Commission’s case (…)

195. On 29 March 2007 Bayer was informed of the Commission's intention to grant a reduction of 30-50 % of the fine which would otherwise have been imposed on it, pursuant to the Leniency Notice.

196. Bayer was the first undertaking to meet the conditions of point 21 of the Leniency Notice. (…) The Leniency Notice does not require a Leniency applicant to provide evidence for the whole infringement in order to receive a reduction of fines. However, the extent to which evidence fulfilling the condition in point 21 of the Leniency Notice represents added value depends, among others, on whether it relates to the whole infringement or merely certain (limited) parts thereof (see point 23 (b) of the Leniency Notice which refers to the "extent" of the added value). (…)

197. Taking these elements into consideration, Bayer should be granted a reduction of 30 % of the fine which would otherwise have been imposed.

198. (…)

199. (…)

200. (…)

201. (…)

202. (…)

203. (…)

204. (…)

205. (…)

206. (…)

207. (…) According to point 23, last recital, of the Leniency Notice, if an undertaking provides evidence "relating to facts previously unknown to the Commission" with a direct bearing on the duration of the suspected cartel, the Commission will not take these elements into account when setting the fine to be imposed on the undertaking which provided this evidence.

208. However (…), the evidence submitted by Bayer, alone, was so limited that it was not sufficient to establish the existence of an infringement, or certain facts thereof having a direct bearing on duration, as it required (…) corroboration (…).(…) It is only by the combination of the information provided (…) that the facts concerning the period (…) could be ascertained and therefore it is the combined information, not Bayer's submission in itself, which had a direct bearing on the duration of the suspected cartel.

209. (…)

210. (…)

7.6.2 Zeon

211. On 27 August 2003, that is to say, 5 months after the Commission's inspections at Zeon Chemicals Europe Ltd. had been carried out (on 27/28 March 2003) and following information from a third-party and Bayer's prior leniency submission, the legal representatives of Zeon Corporation contacted the Commission and expressed Zeon Corporation's wish to cooperate with the Commission pursuant to the Leniency Notice.(…).

212. (…)

213. (…) 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.

214. On 29 March 2007 Zeon was informed of the Commission's intention to grant it a reduction of 20-30 % of the fine which would otherwise have been imposed on it, pursuant to the Leniency Notice.

215. (…) It is therefore concluded that Zeon also brought significant added value in respect of the period before the Naples meeting.

216. Zeon was the second undertaking to meet the conditions of point 21 of the Leniency notice. (…)In its reply to the Statements of Objections Zeon argues that it should be granted a reduction of 30 % because of the quality of its information. (…)

217. On balance, and taking into account also the timing of its leniency submission and the fact that Zeon will be granted partial immunity for a significant period to which its submissions relate (see below), Zeon should therefore be granted a reduction of 20 % of the fine which would otherwise have been imposed.

218. In its reply to the Statements of Objections Zeon argues that it is entitled to (…) of the Leniency Notice as it provided the Commission with (…)

219. (…)

220. Taking this into account, Zeon (…)

221. The partial immunity awarded to Zeon results in a reduction of the fine in the proportion of the value of sales. The additional amount should, however, not be changed, as that part of the fine is not dependent on the duration of the infringement.

7.6.3 Conclusion on the application of the Leniency Notice

222. The fine to be imposed on Bayer following application of the Leniency Notice should be as follows:

Proportion of the value of sales:	=	EUR …16 768 000….
Additional amount:	=	EUR … 8 384 000
Total fine	=	EUR …28 870 000….

223. The fine to be imposed on Zeon following application of the Leniency Notice should be as follows:

Proportion of the value of sales:	=	EUR ……2 239 440
Additional amount:	=	EUR …… 4 478 880
Total fine	=	EUR …… 5 360 000

7.7. The amounts of the fines to be imposed in this Decision

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

- Bayer EUR …28 870 000
- Zeon EUR … 5 360 000
  - Zeon Corporation EUR … 5 360 000

  of which jointly and severally with:
  - Zeon Europe GmbH for EUR … 5 360 000
  - Zeon Chemicals Europe Ltd. for EUR ……5 360 000

HAS ADOPTED THIS DECISION:

Article 1

The following undertakings have infringed Article 81 of the Treaty and Article 53 of the EEA Agreement by participating in a single and continuous infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement covering the whole of the EEA, by which they agreed and coordinated price increases, reassured each other on their intentions to apply price increases and exchanged information on pricing strategy in the market for Acrylonitrile Butadiene Rubber (NBR) from 9 October 2000 to 30 September 2002 .

(a) Bayer AG;

(b) Zeon Corporation;

(c) Zeon Europe GmbH;

(d) Zeon Chemicals Europe Ltd.

Article 2

For the infringements referred to in Article 1, the following fines are imposed:

(a) Bayer AG: EUR 28 870 000;

(b) Zeon Corporation, Zeon Europe GmbH and Zeon Chemicals Europe Ltd., jointly and severally: EUR 5 360 000.

The fines shall be paid in Euros, within three months of the date of the notification of this Decision, to the following account:

Account No

0050915991 of the European Commission with:

ING BANK N.V.
Financial Plaza
Bijlmerdreef, 109
NL-1102 BW AMSTERDAM

(Code SWIFT: INGBNL2AXXX Code IBAN: NL22INGB0050915991)

After expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this decision is adopted, plus 3,5 percentage points.

Article 3

The undertakings listed in Article 1 shall immediately bring to an end the infringements referred to in that Article, insofar 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:

BAYER AG
Kaiser-Wilhelm-Allee
D-51368 Leverkusen
Deutschland

ZEON CORPORATION
1-6-2, Marunouchi
Chiyoda-ku, Tokyo
100-8246 Japan

ZEON CHEMICALS EUROPE LTD.
Sully, Vale of Glamorgan
CF64 5ZE
United Kingdom

ZEON EUROPE GMBH
Niederkasseler Lohweg 177
D-40547 D• sseldorf
Deutschland

This Decision shall be enforceable pursuant to Article 256 of the Treaty and Article 110 of the EEA Agreement.

Done at Brussels, 23 January 2008

For the Commission

Neelie KROES
Member of the Commission