Commission fines fourteen undertakings a total of € 266 million for participating in a cartel for road pavement bitumen in the Netherlands (1)

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On 13 September 2006 the Commission adopted a decision and imposed fines totalling € 266 717 000 on eight suppliers and six purchasers of road pavement bitumen in the Netherlands for having participated in a cartel between 1994 and 2002. The bitumen suppliers fined are Esha (Smid & Hollander), Klöckner Bitumen, Kuwait Petroleum, Nynäsh, Shell, Total and Wintershall. The bitumen purchasers fined are Ballast Nedam, BAM, Dura Vermeer, HBG (now part of BAM), Heijmans and KWS. Shell had its fine increased because it was found to be a repeat offender and because of its instigating/leading role in the cartel. The fine for KWS was also increased because of the instigating/leading role of this undertaking and because of its attempts to obstruct the Commission in carrying out its investigation. Another participant of the cartel, BP, avoided a fine of € 30 million by receiving full immunity under the Commission’s leniency regime for being the first to provide information about the cartel. The fine of Kuwait Petroleum was reduced because it also provided information with significant added value under the Commission’s leniency regime.

The product

Bitumen, a by-product of fuel production, is mainly used as an adhesive in the production of asphalt, binding the other materials together. It is also used in a variety of industrial applications such as roofing felts, paints and varnishes etc. The cartel covered all bitumen used for road construction in the Netherlands, a market valued around € 62 million in 2002.

The investigation

The investigation was prompted by an application for immunity of fines from BP in June 2002 under the 2002 Notice on immunity from fines and reduction of fines in cartel cases (“2002 Leniency Notice”) (2) that covered several Member States.

In October 2002 the Commission carried out inspections at the premises of several undertakings. When the Commission later continued its investigation by means of sending out requests for information in June 2003, several undertakings submitted leniency applications or provided the Commission with information on a voluntary basis in September/October 2003.

During the investigation it appeared that the cartel in the Netherlands, in which the large buyers were also involved, operated as a distinct cartel. It could not be established that this cartel formed part of any wider collusion covering other Member States and the Commission handled the investigation in the Netherlands in its own right, given that the facts in question constitute a separate infringement.

Proceedings were initiated and a Statement of Objections was issued in October 2004, addressed to 37 legal entities belonging to 15 undertakings. The oral Hearing was held in June 2005 and the final Decision was adopted on 13 September 2006 and addressed to 31 legal entities belonging to 14 undertakings.

The Commission investigation is separate from the investigations the Dutch Competition authority (NMa — Nederlandse Mededingingsautoriteit) has conducted in recent years in the construction sector. The Commission investigated price fixing for sales and purchases of bitumen in the Netherlands whereas the NMa investigated market sharing and bid rigging in downstream asphalt and road building markets in the Netherlands. The players involved are different in the sense that the bitumen cartel included the bitumen suppliers. The behaviour also relates to a different product and different cartel activities.

(1) The content of this Article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

The infringement

The addressees of the Decision participated in a single and continuous infringement of Article 81 of the EC Treaty from at least 1994 to 2002 with respect to road pavement bitumen.

In a series of meetings, called the “bitumen consultation” (“bitumenoverleg”), a delegation of the bitumen suppliers met with the six biggest road construction companies in the Netherlands. These meetings were usually preceded by preparatory meetings of the suppliers and separate preparatory meetings of the six biggest road construction companies (the latter being referred to as “WO5” or “WO6” (“wegenbouwoverleg”) (4).

In the joint meetings, the bitumen suppliers fixed with the large construction companies the price of bitumen (i.e. the gross price to be invoiced to the asphalt production plants that are owned by the road building companies in the Netherlands). It not only relates to the price of bitumen purchased (via their asphalt plants) by these large construction companies, but for all road pavement bitumen.

The large constructing companies owning these plants appeared not to be particularly concerned about the absolute level of the price of bitumen, as long as they directly received discounts that were higher than the rebates received by their smaller competitors. Therefore, they agreed in these meetings with the bitumen suppliers on two rebates (i.e. the rebates that are usually directly settled between the bitumen supplier and the road builder owning the asphalt production plant): a uniform minimum rebate for themselves and a smaller, maximum rebate for all other construction companies active in the Netherlands. In this manner, they not only limited competition for an important input among themselves, but they also deliberately and artificially disadvantaged smaller construction companies in the Netherlands.

Regular monitoring of the implementation of the agreements took place and sanctions (in the form of retroactive extra discounts) could be imposed on the suppliers if they were found to have granted too high rebates to smaller road builders.

The fixing of prices and rebates formed part of one overall anti-competitive scheme and the Commission considers such behaviour cartel behaviour. It does not accept claims that the behaviour of the large construction companies was a separate and less serious infringement.

Fines

The fines imposed by the Commission have been adopted in application of the 1998 Fining Guidelines (9).

The Commission took first into account the gravity of the infringement and in particular the fact that the practices uncovered are by nature a very serious infringement of the EU competition rules. The Commission also took into account the size of the market.

The Commission furthermore took into account the effective economic capacity of the undertakings involved to cause significant damage to competition in the cartelised industry: the undertakings were divided into different groups on the basis of their sales or purchases in the Netherlands of bituminous products for road building and similar applications in the most recent full year of the infringement in which they were active in the cartel.

In order to set the amount of the fine at a level which ensures that it had sufficient deterrent effect the Commission considered it appropriate in this proceeding to apply a multiplication factor, based on the worldwide turnovers in the financial year 2005, to the fines imposed for the undertakings with an annual turnover of more than € 10 000 million. Individual multiplying factors were also applied to all legal entities in function of the long duration of the infringement of each of them.

The Commission increased the fine by 50% for Shell because, at the time this infringement took place, it had already been subject to previous Commission decisions for its involvement in the polypropylene and PVC (II) cartels. The Commission also increased the fine by 50% for Shell and KWS because they were considered to have played an instigating and a leading role in the cartel. Finally, the Commission increased the fine by 10% for KWS for its attempts to obstruct the Commission investigation, in particular by refusing the inspectors access to its premises, forcing them to invoke the aid of the Dutch Competition Authority and the Dutch police.

Several undertakings claimed attenuating circumstances, such as a minor/passive role in implement-
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Application of the 2002 Leniency Notice

BP, Kuwait Petroleum and Shell submitted applications under the 2002 Leniency Notice. Other undertakings also claimed to have provided the Commission with information on a voluntary basis. None of the construction companies applied for leniency with the Commission.

BP disclosed the existence of the cartel in June 2002 and otherwise met the conditions of the Leniency Notice. It was therefore granted full immunity from paying a fine which was calculated at €30,780,000.

Kuwait Petroleum was the second undertaking to approach the Commission with information under the Leniency Notice, on 12 September 2003, and the first undertaking to meet the requirements of point 21 thereof. The Commission considered the evidence submitted by Kuwait Petroleum of significant added value and granted a reduction of its fine, within the bracket of 30%-50%, of 30% (= a reduction of €7 million). The reduction was not higher because it was only made almost one year after the Commission had conducted inspections. It was also taken into account that Kuwait Petroleum reformulated part of its statements after the Oral Hearing and that this contributed to the withdrawal of the accusations against one undertaking that was still addressed in the Statement of Objections.

Other undertakings voluntary submitted information shortly after Kuwait Petroleum. That time, the information provided did not or no longer constitute significant added value with respect to the evidence already in possession of the Commission and therefore failed to qualify for a reduction of the fines.