Final report of the Hearing Officer [1]

Case COMP/38.589 — Heat Stabilisers

(2010/C 307/04)

This competition case concerns a cartel agreement between producers of two categories of heat stabilisers used in the production of PVC products: tin stabilisers and ESBO/esters.

The draft decision gives rise to the following observations:

Statement of Objections

The Commission's investigation was initiated on the basis of an immunity application in November 2002. The Commission carried out on-site inspections. In addition to the immunity applicant, there were four leniency applicants in this case.

The Commission notified a Statement of Objections ('SO') on 18 March 2009 to 15 undertakings or groups of undertakings ('the Parties') [2].

In the SO, the Commission came to the preliminary conclusion that the Parties participated in a single and continuous infringement of Article 81(1) EC and Article 53(1) EEA relating to tin stabilisers for 13 years between 1987 and 2000 and ESBO/esters for 9 years between 1991 and 2000.

Time period to respond to the SO

The Parties were originally granted a deadline to reply to the SO until 14 May 2009. 13 Parties submitted reasoned requests for an extension. I prolonged the time limit for all of these. Three parties came back with justified reasons for a further extension which I granted. All Parties replied in due time except for one.

Access to file

The Parties were granted access to the file via a CD-ROM. The Parties also received access to oral and written leniency statements at the Commission's premises.

Baerlocher requested further access to the file. In my reply, I partially granted their request and allowed additional access to certain oral statements. This was to allow Baerlocher to verify potential discrepancies between various versions of documents. Another part of their request was rejected on the ground that the documents in question were subject to legal professional privilege ('LPP') claims then under adjudication by the Court of Justice. Several parties requested access to other parties' replies at various stages of the procedure. I rejected these request by referring to the Notice on Access to File and the applicable case law [3].

Oral Hearing

The Oral Hearing was held in June 2009. All Parties attended except for one.

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[1] Pursuant to Articles 15 and 16 of Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of Hearing Officers in certain competition proceedings (OJ L 162, 19.6.2001, p. 21).

[2] (i) Akzo Nobel Chemicals GmbH, Akzo Nobel Chemicals BV, Akzo Nobel Chemicals International BV and their parent company, Akzo Nobel N.V. ('Akzo'); (ii) Ackros Chemicals Ltd ('Ackros'); (iii) Elementis plc, Elementis Holdings Ltd, Elementis UK Ltd, Elementis Services Ltd ('Elementis'); (iv) Elf Aquitaine SA ('Elf'); (v) CECA SA and its parent company Arkema France SA ('Arkema'); (vi) Baerlocher GmbH, Baerlocher Italia SpA, Baerlocher UK Ltd and their parent company MRF Michael Rosenthal GmbH ('Baerlocher'); (vii) GEA Group AG ('GEA'); (viii) Chemson GmbH and Chemson Polymer-Additive AG ('Chemson'); (ix) Aachener Chemische Werke Gesellschaft für glastechnische Produkte und Verfahren mbH ('ACW'); (x) Addichem SA ('Addichem'); (xi) Chemtura Vinyl Additives GmbH and its parent company Chemtura Corporation ('Chemtura'); (xii) Ciba Lampertheim GmbH and its parent company Ciba Holding AG ('Ciba'); (xiii) Faci SpA ('Faci'); (xiv) Reagens SpA ('Reagens'); and (xv) AC Treuhand AG ('AC Treuhand').

[3] For example, cf. Case C-204/00 Aalborg Portland A/S [2004] ECR-I-123, paragraph 70: 'there is no general, abstract principle that a party must have in all instances the opportunity to receive copies of all the documents taken into account in the case of other persons.'

Main rights of defence issues raised by the Parties

A number of claims with regard to the rights of defence were raised by the Parties in their written and oral comments. Their claims mainly concerned the violation of the information obligation, the excessive duration of the proceeding and the failure to conduct a comprehensive investigation.

Addressees' rights to be informed of the investigation

AC Treuhand, Elementis, Chemson, GEA and Faci claimed that their rights of defence had been violated because they had not been informed of the investigation against them in good time. Following from this AC Treuhand and Elementis asked the Commission to close the proceedings against them, while Chemson and Gea demanded an investigation of ChemTrade Roth. Faci did not make any specific request.

(i) AC Treuhand

The first time that AC Treuhand was informed of its status as a potential addressee of a SO in the Heat Stabilisers case was in February 2009, i.e. a year and a half after the first request for information and six months after the judgment of the Court of First Instance ('CFI') setting the precedent for the information obligation of the Commission towards AC Treuhand in the Organic Peroxides case ([1]). This was despite the several requests to Competition DG by AC Treuhand, both before and after the CFI's judgment, for clarification of its role in the proceedings.

Measured against the standards set by the CFI, the Commission should have informed AC Treuhand of its status at the time of the first request for information of October 2007. The fact that such duty was spelt out by the court only in July 2008 is of no relevance since the obligation objectively already existed before the judgment. Further, as the SO had been sent to AC Treuhand in the Organic Peroxides case in March 2003, Competition DG should have been aware of AC Treuhand's status in the case at hand when it issued the first request for information to the consultancy. Accordingly, an irregularity has occurred.

It can be left open whether the information obligation could have occurred at an even earlier date ([2]) as AC Treuhand did not demonstrate that the belated information was capable of actually compromising its rights of defence in the proceeding in question.

According to the court, the mere fact that a legal entity is not provided with such information in time cannot lead to the annulment of the contested decision. Rather, it is also necessary to establish whether the irregularity committed by the Commission was capable of actually compromising the undertaking's rights of defence in the procedure in question ([3]).

AC Treuhand advanced three arguments in this regard: first, it pointed to the retirement of one employee-witness on 31 August 2002. Second, it referred to the fact that this individual's recollection of the facts had faded. Third, it underlined the expiry of the 10-year duty under Swiss law to store company documents (Aufbewahrungspflicht). The first argument can be rebutted since the employee's retirement had taken place even before the Commission received Chemtura's immunity application. The retirement would thus also have taken place, even if AC Treuhand had been duly informed about the investigation by the Commission. The second and third argument appear to be rather abstract and imprecise because AC Treuhand did not specify the nature and scope of the information or details necessary for its defence which the employee could have remembered or could have been retrieved in the AC Treuhand archives. It might also be relevant in this context to bear in mind that, after having been notified of the SO in the Organic Peroxides case in 2003, AC Treuhand was, or could reasonably have been aware of being subject to Commission scrutiny. I conclude therefore that AC Treuhand's rights of defence have not been breached.

([1]) Case T-99/04, *AC Treuhand* v *Commission*, paragraph 56. Cf. also Article 6(3)(a) ECHR and ECtHR, Application No 13972/88, *Imbrioscia* v *Switzerland*, judgment of 24 November 1993, paragraph 36.

([2]) AC Treuhand claimed that it should have been informed after the Commission concluded its evaluation of the leniency applications, i.e. approximately in mid-2003.

([3]) Case T-99/04, *AC Treuhand* v *Commission*, paragraph 58. See also Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland and Others* v *Commission* [2004] ECR I-123 and Case C-105/04 P, Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission [2006] ECR I-8725.

(ii) Elementis

The Commission duly informed Elementis about putative charges in its first request for information sent in May 2008. It can be left open whether it should already have been informed earlier, since Elementis' arguments to support a finding that its rights of defence have been compromised do not meet the requisite standard. Elementis noted that one witness died on 24 January 2008. It further argued that it had been impossible to locate and get in touch with several witnesses referred to in the SO or otherwise considered relevant. Lastly, it maintained that it had been difficult to locate documentary records and that the memory of available witnesses had faded.

Elementis' allegation that it could not have interviewed a number of witnesses is peculiar because at least two of the witnesses it lists had given testimony to another party to this case. Furthermore, Elementis described only in general terms the issues which the witnesses were to have provided additional insight on. It remained completely open, however, how their testimony would have helped Elementis' in its defence against the alleged infringement, as required by the jurisprudence.

(iii) Faci

The Commission also correctly informed Faci about its status when sending its first request for information in October 2007. Faci claimed that, if it had been informed in 2003 or at least before 2007, it would have been in a position to assess whether or not to submit a leniency application. After the relevant staff had left the company, it was no longer able to make such an assessment.

Faci's submission substantiated neither the violation of an information obligation nor its rights of defence and thus, has to be rejected.

Obligation to investigate

Both GEA and Chemson maintained that the Commission had been — and still is — under an obligation to investigate ChemTrade Roth. Both connected in their reply to the SO the right to be informed of their status with the duty of the Commission to conduct a comprehensive investigation.

GEA and Chemson withdrew from the relevant activities during the period of the alleged infringement. GEA had sold its ESBO business in May 2000. In addition, it had disposed of the former parent companies of the business directly involved in the alleged activities (Dynamit Nobel AG and Chemetall GmbH). Chemson had sold (via a management buy-out) all relevant assets and documents in relation to its ESBO business in 2002 to ChemTrade Roth. Chemson claimed that it had no access to documentary evidence and witnesses regarding the ESBO business ever since. As regards the information obligation of the Commission, it must be noted that it had made Chemson and GEA duly aware of putative charges in the request for information sent in October 2007 and July 2008 respectively. Chemson nevertheless pointed at a particularity of this case. It argued that it cannot be excluded and that it is perhaps even likely, that if Chemson's ESBO business had been sold by way of a share deal rather than a management buy-out, then ChemTrade Roth would have been subject to investigative measures by the Commission.

According to established case law, it is for the Commission to decide whether a particular item of information is necessary to enable it to bring to light an infringement of the competition rules [1]. In the case at hand, it does not seem to have been strictly necessary to investigate ChemTrade Roth in order to have enough incriminating evidence to prove the cartel.

With regard to exculpatory evidence, however, the situation is less clear. On the one hand, it could be argued that addressees of the SO are primarily obliged to adduce exculpatory pieces of evidence and GEA as well as Chemson have not provided any indication what useful piece of information an investigation of ChemTrade Roth could produce. Further, addressees can include clauses in their transfer agreements to secure continuing access to information and/or to shift internally liability for the payment of fines for cartel infringements. On the other hand, it is also true that the Commission is obliged to conduct an objective investigation which would normally have included ChemTrade Roth. Finally, Chemson and GEA might have been in a better situation, had the investigation not been suspended in 2003, or had the Commission informed these addressees about the investigation earlier.

[1] Case C-94/00, *Roquette Frères* v *Commission* [2002] ECR I-9011, paragraph 78.

In any event, the sending of a request for information to, or a dawn-raid of, ChemTrade Roth, i.e. after the oral hearing did not seem promising. These measures could not have realistically be expected to produce any results which would remedy the previous omission, since it is very likely that relevant documents (if any had existed) are no longer kept. Moreover, interviews of former representatives of the sold business would have only been possible with their consent.

Further, access to the documents had already been lost in 2002, i.e. before the case was opened. Any investigatory measure directed to ChemTrade Roth would therefore only be a substitute for the lost access to the former representative's memory (which could have been secured on a contractual basis).

Under these circumstances, I see no obligation of the Commission to investigate ChemTrade Roth as demanded by Chemson and GEA and certainly no violation of their rights of defence.

Duration of proceedings

A total of 9 out of 15 Parties claimed a violation of their rights of defence due to the duration of the proceedings ([1]). Indeed, the preliminary investigation lasted for more than six years. Taken in isolation, this might appear to be too long.

The courts have held that action must be taken within a reasonable period in administrative proceedings ([2]). This principle fully applies to the investigation ([3]).

However, during that period, the case was put on hold for more than four years due to the Akzo/Ackros proceedings. During the inspection at Ackros, the company's representatives claimed that certain documents were covered by LPP. In April 2003, Akzo and Ackros initiated court proceedings to have their LPP claims confirmed. For the time period of the court proceedings, the Commission's investigation was suspended. Four years later in September 2007, the CFI dismissed the applicants' actions as being partly inadmissible, partly unfounded ([4]).

Competition DG had to await the judgment of the CFI in order to be able to assess the added value of the leniency applications ([5]). This assessment hinged on whether or not a particular piece of evidence could be used as an inspection document. The document at issue is indeed an important piece of evidence on which the SO and the decision are based.

Therefore, the duration of the proceeding was not unreasonably long. The rights of defence of the 9 Parties have not been violated.

The draft decision

In the draft decision, the Commission essentially retains its objections; however, there are some changes in comparison to the SO:

— The Commission drops the objections against Akzo Nobel Chemicals International BV and Addichem SA.

— The Commission, although recognising that Arkema withdrew from the tin stabilisers cartel in the period from 1 April 1996 until 8 September 1997, holds Arkema liable for the first period of its participation (from 16 March 1994 until 31 March 1996) on the basis that later it rejoined the same cartel (from 9 September 1997 until 21 March 2000). However, exercising its discretion, the Commission does not impose a fine on Arkema for the first period of infringement. The Commission holds that the agreements with regard to tin stabilisers and ESBO/esters constitute two separate infringements.

([1]) AC Treuhand, ACW, Akzo subsidiaries, Arkema, Baerlocher, Chemson, Elementis, GEA, Reagens.
([2]) Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-250/99 P to C-252/99 P and C-254/99 P, Limburgse Vinyl Maatschappij et al. v Commission [2000] ECR I-8375, paragraph 179; see also Case C-167/04 P, JCB Service v Commission [2006] ECR I-8935, paragraph 60.
([3]) Case C-113/04 P, Technische Unie BV v Commission, [2006] ECR I-8831, paragraph 54 et seq.
([4]) Case T 112/05, Akzo Nobel and Others v Commission, [2007] ECR II-05049.
([5]) Point 26 of the 2002 Leniency Notice.

— The Commission concludes that it cannot be held responsible for any procedural irregularities, in particular for not informing the potential addressees of the SO that there was an investigation and that it had been suspended. With regard to AC Treuhand, the Commission finds that under the specific circumstances of the case, AC Treuhand could have concluded that it was a possible target of the investigation. The Commission concluded that it acted diligently and reasonably throughout the procedure.

— When setting the fine for Arkema, the Commission takes three previous decisions relevant for recidivism into account (instead of two previous decisions mentioned in the SO). The Commission sent a Letter of Facts to Arkema on 20 October 2009 informing it about this omission in the SO and gave Arkema the opportunity to submit comments thereon.

— The Commission concludes that the proceedings have lasted for a considerable length of time, and this justifies a reduction of the fine. The reduction, however, does not apply to Akcros and the Akzo group of companies since their action for annulment to the CFI in connection with LPP claims was central to the delay in the present case.

In my view the draft decision deals only with objections in respect of which the Parties have been afforded the opportunity of making known their views.

Conclusion

In view of the above observations I consider that the right to be heard has been respected with regard to all Parties to the proceedings in this case.

Brussels, 5 November 2009.

Michael ALBERS