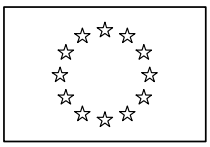
COMP/F/38.638



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 29 XI 2006
COM (2007) 5007 def.

COMMISSION DECISION

of 29/11/2006

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

(Case COMP/F/38.638 – Butadiene Rubber and Emulsion Styrene Butadiene Rubber

(ONLY THE ENGLISH, GERMAN, ITALIAN AND POLISH TEXTS ARE AUTHENTIC)

(Text with EEA relevance)

COMMISSION DECISION

of 29/XI(/2006

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

(Case COMP/F/38.638 – Butadiene Rubber and Emulsion Styrene 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[1] and, in particular, Articles 7(1) and 23(2) thereof,

Having regard to the Commission Decision of 12 April 2005 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 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[2],

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions[3],

Having regard to the final report of the Hearing Officer in this case[4],

Whereas:

A. INTRODUCTION

[1] OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).
[2] OJ L123, 27.4.2004, p. 18. .
[3] OJ […], […], p.[…].
[4] OJ […], […], p.[…].

1. Introductory remarks

(248) This Decision is addressed to

- Bayer AG
- The Dow Chemical Company
- Dow Deutschland Inc.
- Dow Deutschland Anlagengesellschaft mbH
- Dow Europe GmbH
- Eni S.p.A.
- Polimeri Europa S.p.A.
- Shell Petroleum N.V.
- Shell Nederland B.V.
- Shell Nederland Chemie B.V.
- Kaucuk a.s.
- Unipetrol a.s.
- Trade-Stomil Ltd.

(249) During the period beginning from at least 20 May 1996 and continuing until at least 28 November 2002 the addressees of this Decision, producers of Butadiene Rubber (BR) and/or Emulsion Styrene Butadiene Rubber (ESBR), committed a complex single and continuous infringement contrary to Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement covering the EC and the EEA, by which they agreed on price targets for the products, shared customers by non-aggression agreements and exchanged sensitive commercial information relating to prices, competitors and customers.

B. FACTS

2. The industry subject to the proceedings

2.1. The Products

(250) Butadiene Rubber (BR) is a synthetic rubber primarily used in tyre production. There is one major grade of BR (Buna cis 132), which is exclusively used in the tyre industry. A number of specialized grades exist. Some of these are also used in non-tyre applications. The characteristics of BR strongly depend on the type of catalyst (neocis, cobalt etc.) used in the production process.

(251) BR has a high elasticity and a good abrasion resistance. Due to its specific performance characteristics, BR is substitutable with certain synthetic rubbers only. In certain circumstances, for example in tyre production, there is some flexibility with respect to the BR content as compared to the Styrene Butadiene Rubber content. According to the parties, BR is fully substitutable with natural rubber, as regards its intended use.

(252) Emulsion Styrene Butadiene Rubber (ESBR) is a synthetic rubber primarily used in tyre production. ESBR is produced in a number of different grades (1500, 1502, 1700, 1712, 1721 and others). The processes for manufacturing each grade are different. The two main grades are 1500/1502 and 1712.

(253) In certain circumstances, there is substitutability with other synthetic rubbers. For example, in tyre production there is some flexibility with respect to the ESBR content as compared to the BR and SSBR (Solution Styrene Butadiene Rubber) content. According to the parties, ESBR is fully substitutable with natural rubber, as regards its intended use.

(254) A distinction can be made between cold and hot polymerised ESBR. The latter is polymerised at a higher temperature than the former, which leads to a different molecular weight structure as well as to different process abilities and properties.

(255) ESBR is part of the SBR (Styrene Butadiene Rubber) group. SBR is a generic term covering several types of synthetic rubbers, of which ESBR is by far the most important. The only other rubber type in the SBR group, produced in any significant quantity is SSBR .

(256) Both BR and ESBR are products which have been on the market for a considerable time. The classification of ESBR types was made by the US government in 1939-40. Several European companies started production of BR and ESBR in the 1960's.

2.2. The undertakings involved in these proceedings

2.2.1. Bayer group

(257) Bayer AG is the ultimate parent company of the Bayer group of companies active in 150 countries. It is headquartered in Leverkusen, Germany.

(258) The total turnover of the group was EUR 27 383 million in 2005[5].

(259) BR and ESBR activities within Bayer were transferred to a new company (Lanxess AG) on 30 September 2004. Lanxess AG was a 100 % subsidiary of Bayer AG until 28 January 2005, when it was floated on the stock exchange. Lanxess AG is not a party to this procedure.

(260) BR is produced in three Bayer factories in Germany, France and the U.S.

(261) The main ESBR types (1500, 1712 and 1721) are produced in one factory in France.

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[5] Bayer Geschäftsbericht 2005 included In Bayer fax to the Commission of 14 August 2005

(262) For reasons of clarity, the name "Bayer" will be used in this decision to refer to any company owned by Bayer AG.

2.2.2. The Dow group (The Dow Chemical Company, Dow Deutschland Inc., Dow Deutschland GmbH & Co. OHG – now Dow Deutschland Anlagengesellschaft mbH -, Dow Europe GmbH and Buna Sow Leuna Olefinverbund).

(263) The Dow group is an international company headquartered in Delaware, USA. The Dow Chemical Company is the ultimate parent company.

(264) The turnover of The Dow Chemical Company was EUR 37 221 million in 2005.

(265) BR and ESBR activities within the Dow group are or were carried out by the companies described below, among others.

(266) Dow Deutschland Inc. is a fully owned subsidiary of The Dow Chemical Company. It had a turnover of EUR [between 5 and 10 million] in 2005. In 1996, Dow Deutschland Inc, became responsible for the marketing of BR/ESBR produced by Buna Sow Leuna Olefinverbund (BSL), a company created in August 1995, following a merger of a number of smaller Eastern German synthetic rubber producers. The marketing agreement was implemented for BR and ESBR on 1 July 1996. Dow acquired 80 % of the shares in BSL on 1 September 1997 and purchased the remaining 20 % of BSL from the German government on 1 June 2000. [deleted], was made available to Dow Deutschland Inc. with effect from the implementation of the marketing agreement. [deleted] became an employee of Dow Deutschland Inc. on 1 October 1997. Since 1 September 1997, BSL has continued to exist as a subsidiary within the Dow organisation; it is however no longer involved with sales or marketing of BR or ESBR. In 2003, BSL changed its name to Dow Olefinverbund GmbH.

(267) Dow Deutschland Anlagengesellschaft mbH was acting until 15 March 2001 under the name of Dow Deutschland Anlagen GmbH and, until November 2005, as Dow Deutschland GmbH & Co. OHG. It is also fully owned by the The Dow Chemical Company through a number of subsidiaries. It had a turnover of EUR [between 3 000 and 4 000 million] in 2005.

(268) Dow Europe GmbH, is a company situated in Switzerland, indirectly fully owned by The Dow Chemical Company, who acted until 29 November 2001 under the name of Dow Europe S.A. It had a turnover of EUR [between 4 000 and 8 000 million] in 2005.

(269) BR is produced at the former Buna plant in Schkopau, Germany.

(270) ESBR is produced at Schkopau, Germany, and in another plant in Pernis, Netherlands.

(271) Dow increased its activities in BR and ESBR with the purchase of the South African Company Sentrachem (Karbochem) in 1997, and the purchase of the synthetic rubber business of Shell on 1 June 1999.

(272) For reasons of clarity, the name "Dow" will be used in this decision to refer to any company owned by The Dow Chemical Company.

2.2.3. The Eni group (Eni S.p.A., Polimeri Europa S.p.A.).

(273) Eni S.p.A. is the ultimate parent company of the Eni Group.

(274) Within the ENI group, the BR/ESBR business was originally (as from 1991) entrusted to EniChem Elastomeri S.r.l., a company which ENI S.p.A. indirectly fully controlled through EniChem S.p.A. (EniChem Elastomeri S.r.l's 100% parent company). With effect from 1 November 1997, EniChem Elastomeri S.r.l. was merged into EniChem S.p.A.

(275) From 13 April 1995 to 31 December 1997, Eni S.p.A. owned 99.97 % of EniChem S.p.A., 59.74 % of this indirectly through its subsidiaries Agip S.p.A. and Snam S.p.A..

(276) On 31 December 1997, Eni S.p.A. and Agip S.p.A. merged. While Eni S.p.A. still controlled 99.97 % of EniChem S.p.A, the share indirectly owned (through its subsidiary Snam) decreased to 29.87 %.

(277) On 1 January 2002, EniChem S.p.A. transferred the "Strategic Chemical Activity" business (including BR and ESBR) together with other businesses to its 100 % subsidiary Polimeri Europa S.p.A.

(278) On 21 October 2002, Eni S.p.A. acquired direct full ownership of Polimeri Europa.

(279) On 30 April 2003, EniChem S.p.A. changed its name into Syndial. Syndial's activities are currently limited to "managing non-strategic shareholdings in view of their sale to third parties or their liquidation; sale of any active plant to third parties or closure and safeguarding thereof; dismantling of closed plants and reclamation of contaminated land; managing of services and utilities in shared plants with a view to their conversion into third-party services or the establishment of consortia; managing pending litigation".

(280) ENI S.p.A.'s turnover amounted to EUR 73 738 million in 2005.

(281) The turnover of EniChem S.p.A was EUR 4 762 million in 2001. In 2002, its turnover was EUR 1 007 million. Syndial's turnover in 2003 was EUR 671 million. In 2004, it was EUR 739 million. In 2005, it was EUR 860 million. Over the last financial year Syndial's operating losses have increased by EUR 111 867 up to EUR 384 287. Net losses amounted to EUR 883 410.

(282) Polimeri Europa S.p.A's turnover was EUR 1 457 million in 2001, EUR 4 516 million in 2002, EUR 4 489 million in 2003, EUR 5 417 million in 2004 and EUR 6 257 million in 2005. Net profits amounted to EUR 164 million.

(283) The name "EniChem" will be used in this decision to refer to any company owned by Eni S.p.A..

(284) BR and ESBR are produced at plants in Ravenna, Italy, and Hythe, United Kingdom.

2.2.4. The Shell group (Shell Petroleum N.V., Shell Nederland B.V., Shell Nederland Chemie B.V.)

(285) The Shell Group is a global group of energy and petrochemical companies. Since 20 July 2005, the Group has been owned by a single parent company, Royal Dutch Shell

plc, with headquarters in The Hague, the Netherlands. Under the new structure, Shell Petroleum N.V. is a 100% subsidiary of Royal Dutch Shell plc and serves as a holding company for the rest of the group. Shell has confirmed that the turnover of Shell Petroleum N.V. is equal to that of Royal Dutch Shell plc. Prior to the restructuring, Shell Petroleum N.V. was one of the main holding companies of the Shell group and was the addressee of the two Statements of Objections.

(286) Up until the sale of its synthetic rubber activities to Dow on 1 June 1999, Shell was a producer and seller of ESBR and BR.

(287) Shell Nederland Chemie B.V. marketed BR and ESBR. It was and is a wholly owned subsidiary of Shell Nederland BV, which itself is wholly owned by Shell Petroleum NV.

(288) Shell Nederland Chemie B.V. had a total net turnover of EUR [under 2 million]in 2005.

(289) Shell Nederland BV had a turnover of EUR 28 827 million in 2005.

(290) The turnover of Shell Petroleum NV was EUR 246 549 million in 2005.

(291) For reasons of clarity, the name "Shell" will be used in this decision to refer to any company owned by Royal Dutch Shell plc.

2.2.5. Kaucuk a.s. and its parent company Unipetrol a.s.

(292) Kaucuk a.s. (hereinafter Kaucuk) is a Czech producer of ESBR situated in Prague and was created in 1997 following a merger between Kaucuk Group a.s. and Chemopetrol Group a.s. It does not produce BR.

(293) On 21 July 1997, Unipetrol a.s. (hereinafter "Unipetrol") acquired all assets, rights and obligations of the merged companies. Unipetrol owns 100 % of the shares in Kaucuk.

(294) The turnover of Kaucuk was EUR 343.721 million in 2005.

(295) The turnover of Unipetrol was EUR 2 718 million in 2005.

(296) Tavorex s.r.o. (hereinafter "Tavorex") was a Czech agency which developed from the monopoly foreign trade organisation Chemapol. [deleted] The Commission opened proceedings against Tavorex on 7 June 2005. As Tavorex went into voluntary liquidation in October 2004, the Commission has closed its procedure against it.

(297) The name "Kaucuk" will be used in this decision to refer to any company owned by Unipetrol and their agents.

2.2.6. Trade-Stomil Ltd.

(298) Trade-Stomil Ltd. (formerly Ciech-Stomil Ltd.) is a Polish agency which developed from the state monopoly for export. The company is situated in Lodz. It represented the Polish ESBR producer Chemical Company Dwory S.A. (Dwory) in export activities for about 30 years, until at least 2001, in accordance with various agency

agreements (see recitals (432) - (441)). Trade-Stomil Ltd. represented Dwory in the European Synthetic Rubber Association (ESRA) from 1997 to 2000.

(299) The turnover of Trade-Stomil Ltd. was EUR 38.0189 million in 2005.

(300) For reasons of clarity, the name "Stomil" will be used in this decision to refer to Trade-Stomil Ltd. and Ciech-Stomil Ltd.

2.3. Other market players

(301) In addition to the addressees of this Decision, which are the major producers and suppliers of BR and/or ESBR in the EEA or their agents, a number of other players sell limited amounts of BR and ESBR in the EEA. Most of these players are Asian (Japan, Korea, Thailand) or Eastern European. Furthermore, a considerable amount of BR is produced in-house by major tyre producers for use in their own plants. These producers are not concerned by the proceedings in this case.

2.4. Description of the BR sector

2.4.1. Supply

(302) The Commission has received the following figures from the addressees of this Decision on their respective BR turnover in the EEA.

Table 1: The size of BR sales by addressees of this Decision (in EUR millions) [6]

	EEA 1998	EEA 2000	EEA 2001
Bayer	94.4	111.6	118.9
Dow	17.928	33.944	36.565
EniChem	87.992	91.270	95.241
Shell	31.859	0.006	0

2.4.2. Demand

(303) The majority of the customers for BR are tyre producers, Continental, Goodyear, Michelin, Pirelli and Bridgestone/Firestone being the largest ones. Other customers for BR are producers of various consumer goods, such as golf balls.

2.4.3. Inter-state Trade

[6] Figures provided by addressees of the present Decision.

(304) The European BR production is concentrated in a relatively small number of sites. Bayer produces BR in Germany (Dormagen and Marl) and France (Port Jerome), Dow produces BR in Germany (Schkopau) and France (Berre), and EniChem produces BR in Italy (Ravenna) and the United Kingdom (Hythe). From these production sites the three undertakings supply the EEA. Cross-border supplies include, quite significantly, supplies to the major tyre producers, which generally purchase from more than one supplier.

(305) In view of the above, and considering that BR was also being sold to Norway, the BR sector was characterised by important trade flows between Member States as well as between the Contracting Parties to the EEA Agreement during the period considered in this Decision.

(306) Accordingly, there is a substantial volume of trade between Member States and the Contracting Parties to the EEA Agreement in the BR sector.

2.5. Description of the ESBR sector

2.5.1. Supply

(307) The Commission has received the following figures from the addressees of this Decision on their respective ESBR turnover in the EEA.

Table 2: The size of ESBR sales by addressees of this Decision (in EUR millions)[7]

	EEA 1998	EEA 2000	EEA 2001
Bayer	30.6	32.3	29.9
EniChem	92.040	87.976	69.661
Dow	53.498	69.101	90.371
Shell	54.803	0.003	1.172
Trade Stomil	28.262 for 1999 16.422	13.963	
Kaucuk	26.183	35.315	40.810

Demand

[7] Figures provided by addressees.

(308) The majority of customers for ESBR are tyre producers, Continental, Goodyear, Michelin, Pirelli and Bridgestone/Firestone being the largest ones. Other customers for ESBR are producers of various consumer goods such as shoe soles and floorings.

2.5.2. Inter-state trade

(309) The European ESBR production is concentrated in a relatively small number of sites. Bayer produces ESBR in France (La Wantzenau), Dow produces ESBR in Germany (Schkopau) and The Netherlands (Pernis), EniChem produces ESBR in Italy (Ravenna) and UK (Hythe), Kaucuk produces ESBR in Kralupy near Prague and the ESBR sold by Stomil is produced by the company Dwory in Oswiecim. From these production sites, the five undertakings supply the EEA market.

(310) In view of the above, and considering that ESBR was also sold to Norway, the ESBR sector was characterised by important trade flows between Member States, as well as between the Contracting Parties to the EEA Agreement, during the period considered in this Decision.

(311) Accordingly, there is a substantial volume of trade between Member States and the Contracting Parties to the EEA Agreement in the ESBR sector.

2.6. The combined sector for BR and ESBR

(312) Based on the figures set out in recitals (302) and (307), the combined value of the sales of BR and ESBR of the addressees of this Decision within the EEA is calculated as follows.

Table 3: The size of BR and ESBR sales by addressees of this Decision (in EUR million)

	EEA 1998	EEA 2000	EEA 2001
Bayer	125.0	143.9	148.8
EniChem	180.032	179.246	164.902
Dow	71.426	103.045	126.936
Shell	86.662	0.009	1.172
Trade Stomil	28.262 For 1999 16.422	13.963	
Kaucuk	26.183	35.315	40.810

(313) In addition to the addressees of this Decision, the Commission estimates that total sales of BR and ESBR in 2001 by other producers account for at least around EUR 70 million. On this basis, the Commission estimates that the combined value of BR and ESBR sales in 2001 accounts for at least EUR 550 million.

3. PROCEDURE

(314) **[Recitals 67-73 has been deleted, including any cross references to these recitals and relevant footnotes]. The Recitals are summarised as follows.** Following Bayer's application for immunity pursuant to the Commission notice on immunity from fines and reduction of fines in cartel cases[8] (hereinafter, "the Leniency Notice"),On 27 March 2003, the Commission undertook an inspection pursuant to Article 14(3) of Council Regulation No 17[9] at the premises of Dow Deutschland GmbH & Co. OHG in Schwalbach, Germany. Later representatives of Dow Deutschland Inc. and Dow Deutschland GmbH & Co. OHG visited the Commission, and offered to co-operate pursuant to the provisions of the Leniency Notice.

(74) On 7 June 2005 the Commission initiated proceedings in this case, and adopted a first Statement of Objections (the "First Statement of Objections" or "First SO") which was notified to the addressees of this Decision (with the exception of Unipetrol) as well as Dwory. The First Statement of Objections was also adopted against Tavorex, but never notified to it, following the liquidation of that company. The procedure against Tavorex has since been closed.

(75) **[Recitals 75-83 has been deleted, including any cross references to these recitals and relevant footnotes.]**

(84) On 6 April 2006 the Commission adopted a second Statement of Objections (the "Second Statement of Objections" or "Second SO"), which was addressed to the same companies as this Decision with the exception of Dwory. The Second Statement of Objections replaced the First Statement of Objections. The Oral Hearing took place on 22 June 2006 and was attended by all undertakings to which the second statement of Objections had been addressed with the exception of Stomil.

(85) **[Recitals 85-87 has been deleted, including any cross references to these recitals and relevant footnotes.]**

(88) Having given the undertakings concerned the opportunity to make their views known on the objections raised against them, the Commission decided to close the proceedings against Dwory, since it did not have sufficient evidence of their participation in the conduct which is the subject matter of this Decision.

(89) For the reasons set out in recitals (367) - (374), the Commission has also decided to close the proceedings against Syndial.

(90) **[Recitals 90-91 has been deleted, including any cross references to these recitals and relevant footnotes.]**

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[8] OJ C45, 19.2.2002, p. 3

[9] OJ 13, 21.2.1962, p. 204/62 repealed by Regulation (EC) No 1/2003 as from 1 May 2004.

4. THE FACTS

4.1. Sources of the documentary evidence.

(92) The Commission's objections which are set out below are based on the oral statements and documentary evidence provided [deleted]. Other sources of documentary evidence are the documents found during the investigation at the premises of Dow, the replies of the parties to the Commission's requests for information and the replies of the addressees to the Commission's two Statements of Objections.

4.2. General description of the cartel

(93) The cartel existed from at least 20 May 1996 until 28 November 2002. The aim pursued was the elimination of competition in the European market for BR and ESBR. This was to be achieved by fixing price targets for the products, sharing customers by non-aggression agreements and exchanging sensitive commercial information relating to price, competitors and customers.

(94) Company officials responsible for the marketing of BR and ESBR met within the framework of the European Synthetic Rubber Association (ESRA) subcommittees for BR and SBR (the product family to which ESBR belongs). Each of the subcommittees normally met four times each year. During the period of the cartel, the subcommittees for BR and SBR were usually arranged to take place on the same dates and in the same venues, and the participants in the two committees were the same for EniChem, Dow and Shell. Only Bayer had different officials in charge of BR and ESBR. On a few occasions, however, meetings of the BR and SBR subcommittees did not take place at the same dates and in the same venues.

(95) The cartel discussions took place on the fringes of the ESRA committee meetings, in an informal setting before or after the official committee meetings, without the presence of the ESRA general secretary.

(96) Usually, during these informal meetings, target prices for BR and ESBR for the upcoming period were agreed. These agreements were not always on price increases for BR and ESBR. In much of the lifetime of the cartel, the main objective was not to increase the price of the products, but to stabilise the price of the products to minimise the effects of weakening demand.

(97) During the cartel meetings sensitive commercial information about BR and ESBR was exchanged. This included information about prices charged to particular customers, commercial relationships between competitors and potential customers, the prices of raw materials and the production capacity of competitors.

(98) Occasionally market sharing agreements were also made on the fringes of the meetings, and bilaterally between meetings. These normally took the form of agreements not to try to win the major customers of the competitors, thereby preserving the status quo in the market (non-aggression agreements).

(99) **[Recitals 99-100 has been deleted, including any cross references to these recitals and relevant footnotes.]**

4.2.1. Background and initial contacts

(101) ESRA was founded in 1971. It is a sector group recognised by and affiliated to the European Chemical Industry Council (CEFIC). The purpose of ESRA is to represent the interests of the synthetic rubber industry in Member States and in other European countries, in which the industry is organised. The official meetings of the ESRA committees for BR and SBR were conducted by a general secretary appointed by ESRA. [deleted]

(102) **[Recitals 102-104 has been deleted, including any cross references to these recitals and relevant footnotes.]**

4.2.2. Price agreements

(105) **[Recitals 105-112 have been deleted, including any cross references to these recitals and relevant footnotes.]**

(113) The Commission notes that the statement above fits in well with the fact that in the inspection of March 2003, the Commission copied several notes of cartel meetings drawn up by [deleted] in the period 1996-1999, but none from 2000-2001.

(114) **[Recitals 114-122 have been deleted, including any cross references to these recitals and relevant footnotes.]**

(123) The declarations from [deleted] quoted above in this Section and the information given for some specific cartel meetings in Section 4.3 allow the Commission to come to the following conclusions with respect to price agreements:

- in the margins of some but not all of the ESRA meetings, typically during dinner, at the bar, on the way to the dinner, in the hotel room of one of the participants or at a specifically hired conference room, and hence outside the official ESRA meeting and in the absence of the ESRA Secretary General, the companies concerned concluded price agreements for BR and ESBR;

- the discussions leading to the price agreements could take the form of actual cartel meetings or a series of side meetings between two or three producers;

- the discussions started typically with a discussion of prices for key raw materials and often led to a decision to increase or stabilise prices, typically by setting a target price for the next quarter or to agree a roll-over price, that is to say, that the same price as in the previous quarter would apply for the next;

- price agreements were concluded in the period 20 May 1996 to 28 November 2002. 20 May 1996 is the date of the first cartel meeting for which documentary evidence is available and 28 November 2002 is the date that the parties ended the cartel;

- the companies concerned for both BR and ESBR were Bayer, Dow, EniChem and Shell. In addition ESBR agreements involved Kaucuk (represented by Tavorex) and Stomil.

4.2.3. Market sharing agreements

(124) **[Recitals 124-129 has been deleted, including any cross references to these recitals and relevant footnotes.]**

(130) The declarations from [deleted] quoted above in this Section and the information given in respect of some specific cartel meetings in Section 4.3 allow the Commission to come to the following conclusions with respect to market sharing agreements:

- both outside and in the context of some (but not all) of the ESRA meetings, for instance in the hotel room of one of the participants, the companies concerned concluded market sharing agreements for BR and ESBR;

- the discussions leading to the market sharing agreements could take the form of actual cartel meetings or side meetings between two producers;

- the market sharing agreements typically took the form of "non-aggression agreements" or "status quo agreements" whereby the competitors agreed not to make aggressive competition for the main clients of the other players as, if this happened, they could expect an attack on their main clients. The market sharing agreements could also take the form of assurances concerning specific clients;

- market sharing agreements were concluded throughout the period 20 May 1996 to 28 November 2002. 20 May 1996 is the date of the first cartel meeting for which documentary evidence is available and 28 November 2002 is the date that the parties ended the cartel;

- the companies concerned for both BR and ESBR were Bayer, Dow, EniChem and Shell. In addition ESBR agreements involved Kaucuk a.s (represented by Tavorex) and Stomil.

4.2.4. Exchange of sensitive commercial information

(131) Cartel meetings also involved the exchange of sensitive commercial information. Well documented examples of this practice are the exchange of information which took place on the occasion of the cartel meeting in Milan on 20 May 1996 and the exchange of information about which producer was likely to supply how much ESBR to each customer, which took place in the meeting on the night of 16 November 1999 in Frankfurt. More detailed information can be found under the detailed description of each of these two meetings, in the following chapter.

(132) **[Recitals 132-133 has been deleted, including any cross references to these recitals and relevant footnotes.]**

4.2.5. Follow-up

(134) An important element in some cartel meetings were discussions to assure that cartel agreements were complied with. Companies which had not stuck to the agreements were criticised.

(135) **[Recital 135 has been deleted, including any cross references to this recital and relevant footnotes.]**

(136) Bilateral telephone contacts between the competitors between cartel meetings played an important role in assuring the efficient running of the cartel. They were particularly important in assuring that cartel agreements were being complied with.

(137) **[Recitals 137-141 have been deleted, including any cross references to these recitals and relevant footnotes.]**

(142) As regards the first statement, in its reply to the Second Statement of Objections, Kaucuk stated that [deleted] did not deny that he might have touched upon the business with [customer] in some discussion with [deleted] and Mr [deleted] but that he denied that the result of such a conversation was to agree upon prices or to share markets.

(143) **[Recitals 143-148 has been deleted, including any cross references to these recitals and relevant footnotes.]**

4.2.6. Involvement in the cartel

(149) The purpose of this Section is to indicate the different degrees of involvement of the respective parties to the cartel in the set-up and organization of the cartel.

(150) **[Recitals 150-153 has been deleted, including any cross references to these recitals and relevant footnotes.]**

(154) In addition to Bayer, Dow, Shell and EniChem, Kaucuk and Stomil also participated in the ESBR part of the cartel. Kaucuk was represented by its agent Tavorex at the meetings, while Stomil participated in cartel meetings as the agent for the Polish producer Dwory until February 2000.

(155) **[Recitals 155-159 has been deleted, including any cross references to these recitals and relevant footnotes.]**

4.3. Cartel meetings

(160) ESRA meetings for which there is evidence of collusive discussions in the Commission's possession are described below. A few other meetings which are relevant for the understanding of the cartel are also specifically described.

4.3.1. ESRA BR/SBR meeting at EniChem's offices, Milan 20-21 May 1996

(161) **[Recital 161 has been deleted, including any cross references to this recital and relevant footnotes**]

(162) According to handwritten notes of [deleted], copied by the Commission at the investigation in March 2003, and [deleted], an unofficial meeting took place on 20 May 1996, the day before the official meeting. On this occasion the discussions focussed on SBR/ESBR.

(163) The following is [] notes of the meeting:

"20.5.1996 Milano ESRA

SBR

No overdelivery for tyres.

Bayer has problems with supply.

Overdelivery of non tyres.

For the third quarter 1996 waste in production through building, shoes etc.

Spotoffers in N[deleted]

– American products to GB and F[deleted]

– Slightly raising prices for But[deleted]. Styrol – at first prices were high, then they fell/at the moment 840 DM/t

1712 - Ø-price - 1,50-1,60 - Current level (ed: z.Z. Niveau)

1721 - 1,70-1,75

1500/M [15]02. - 1,70-1,75

– Bayer stops production in July

Bayer has three main customers for tyres

From 1. [deleted] will become leader of sales for chemical products Europe

[deleted]. The successor of [deleted] comes from H[deleted]N[deleted]B[deleted]R[deleted]. [deleted]replaces [deleted],

At the end of the year Eni will lay off personnel. Even knowledgeable staff will be included

Bayer for the moment maintain stocks for 14 days. 1 week is necessary for the material to cool off. It is necessary to maintain stocks for 4-6 weeks. Bayer - Michelin(F[deleted] + E[deleted]), Conti[deleted] (F[deleted]), Pirelli (D[deleted]+E[deleted])

1712 Shell 160-165

1712 - 1600.-.N[deleted]T [deleted] 1550

1721 - 1700

1500 – 1800 - N[deleted]T [deleted] - 1750

1502 - 1750

1509 - 1750"

(164) **[Recitals 164-165 has been deleted, including any cross references to these recitals and relevant footnotes.]**

4.3.2. ESRA BR/SBR Meeting 2-3 September 1996 Arabella Airport Hotel Düsseldorf

(166) **[Recitals 166-167 has been deleted, including any cross references to these recitals and relevant footnotes.]**

4.3.3. ESRA BR and SBR meetings 25-26 February 1997 Crowne Plaza Hotel Vienna

(168) **[Recitals 168-172 has been deleted, including any cross references to these recitals and relevant footnotes.]**

(173) The following is [deleted] notes of the unofficial meeting.

"Is E-mail in ESRA possible ?

next meeting 29/30 May 97 Prague

	T[deleted]	N[deleted]T[deleted]
SB 1500		
SB 1502	1,65	1,60 (1,55)
SB 1712	1,50	1,50
SB 1721	1,60	
SB 1509		1,65 (higher for UK)
SB 1778		1,65 HSR"

(174) [deleted]

(175) From the above the Commission concludes that a cartel meeting took place on 26 February 1996 in Vienna and that, on that occasion, a price agreement was made for various ESBR products.

4.3.4. ESRA BR and SBR meetings 4-5 September 1997 Memphis Hotel Amsterdam

(176) **[Recitals 176-181 has been deleted, including any cross references to these recitals and relevant footnotes.]**

(182) Based on [deleted], it is concluded that, on the occasion of this meeting, illegal price agreements were made pertaining to BR.

4.3.5. ESRA BR and ESBR Meetings 19-20 February 1998 CEFIC offices Brussels

(183) **[Recitals 183-187 has been deleted, including any cross references to these recitals and relevant footnotes.]**

(188) Based on [deleted], it is concluded that a price agreement pertaining to BR and ESBR was made at this meeting, and that the discussions were led by [deleted] of EniChem.

4.3.6. ESRA BR and ESBR meetings 23 February 1999 ESRA offices Richmond-on-Thames

(189) **[Recitals 189-192 has been deleted, including any cross references to these recitals and relevant footnotes.]**

(193) On the basis of [deleted] it is concluded that, on the occasion of this ESRA meeting, a cartel meeting on ESBR with price discussions took place.

4.3.7. ESRA BR and SBR Meetings 2-3 September 1999 Richmond-on-Thames

(194) **[Recitals 194-197 has been deleted, including any cross references to these recitals and relevant footnotes.]**

(198) On the basis of the above, it is concluded that, on the occasion of this ESRA meeting, prices were discussed for ESBR. [deleted]

4.3.8. ESRA SBR Meeting 15-16 November 1999 Meridien Hotel Frankfurt

(199) **[Recitals 199-200 has been deleted, including any cross references to these recitals and relevant footnotes.]**

(201) [deleted] notes of the unofficial meeting read as follows:

"ESBR

- Check if we can report stock figures per quarter

T – next meeting 6/7 March Leverkusen

- N[deleted]R[deleted] 427 £ Sept Preis, 535 £ Nov. Preis

1500 1,40 ex work

1712 1,20 ex work

(ed: BR erased) + 5(BAY)pfg, + 10 pfg(ENI)

min. + 10 pfg

2002 Bayer will finish N[deleted]B[deleted]R[deleted] in Leverkusen,

further production in La Wantzenau

HNBR in Leverkusen

<u>BR</u>

Neo-Karbo too cheap

Low cis (approximation sign)1,80 DM current level

Neo more than 1,80 DM

North America 70 % formula prices

Golf increase start 1.12.99 2-3 cts/pound

4-5 Eni Kunden for Neo in US

Price between 5,15-5,40 cts/pound

ESBR Potential

Kt

Michelin	60-70 (2000)	Europe 22 BAY, 10 ENI, 15 OS, 12
DOW		
0-70 (2000)	US	

ENI shipments to Europe only

Conti[deleted]	60	15 t OS, 20 t DOW, 10 t KRA[deleted], 10 (or 16) t BAY, 10 t ENI
GY	60	25 t OS, (?), 1 ENI, 25 DOW, 5 KRA, 7 GY
Pirelli	30	15 t ENI, 4 t DOW, 5 t BAY, 6 t Petroflex

BAY 45 kt utilisation

OS[deleted]	15 kt Mich, 15 t Conti, 25 t GY, 5 t TGA, 20 t domestic	
BFE	40 kt	6 KRA, 8-9 ENI, 12 DOW, 3 BAY, 6 Petroflex, 6 JSR
Dunlop	35 kt	1-2 BAY, 5 KRA, 9 ENI, 12 DOW, 3 Petroflex, 5 Japan
Vredestein	7 kt	3 BAY, 0 ENI, 1 DOW, 3 Kumho
Cooper Avon	7 kt	0,7 DOW, 1 KRA, 5 ENI”

[deleted]

(202) **[Recitals 202-208 has been deleted, including any cross references to these recitals and relevant footnotes.]**

(209) The above indicates firstly that a price agreement was made for ESBR: a price increase of 5 to 10 pfennig is referred to in the note and [deleted].

(210) Second, a price agreement or at least an attempt at a price agreement, was made for 2 BR types, neo and lowcis. The note indicates “Neo-Karbo too cheap”. [deleted]

(211) Third, an exchange of information took place to determine which companies supplied which amounts of ESBR to key customers ("ESBR potential").

(212) From the above it is concluded that (i) an unofficial meeting took place in the evening and night of 16 November 1999, (ii) that price agreements were made on this occasion pertaining to ESBR, (iii) that an least an attempt to reach an agreement on BR prices was also made; (iv) an information exchange took place on key customers of the participants and the amounts of ESBR supplied to them and (v) that Bayer, Dow, EniChem for BR and ESBR as well as Tavorex (on behalf of Kaucuk) and Stomil for ESBR participated to the meeting in which price agreements were made.

4.3.9. ESRA BR and ESBR meetings 21-22 February 2000, Grosse Leder, Wermelskirchen

(213) **[Recitals 213-215 has been deleted, including any cross references to these recitals and relevant footnotes.]**

4.3.10. BR and ESBR meetings 31 August-1 September 2000, Hotel U Pave, Prague

(216) **[Recitals 216-220 has been deleted, including any cross references to these recitals and relevant footnotes.]**

(221) [deleted], the Commission concludes that ESBR cartel discussions, either in the form of a meeting or a series of bilateral contacts, leading to a number of agreements took place in the context of this ESRA meeting and that the cartel discussions involved Bayer, Dow and Enichem.

4.3.11. ESRA BR and ESBR meeting 30 November-1 December 2000, Meridien Parkhotel, Frankfurt

(222) **[Recitals 222-224 has been deleted, including any cross references to these recitals and relevant footnotes.]**

(225) It is concluded that cartel agreements were made on the occasion of this meeting.

4.3.12. ESRA BR and SBR meeting 30-31 August 2001 Meridien Hotel Frankfurt

(226) **[Recitals 226-229 has been deleted, including any cross references to these recitals and relevant footnotes.]**

(230) It is concluded that on the occasion of this meeting, price agreements were made for both BR and ESBR. This is the last meeting in which BR price agreements are documented.

4.3.13. ESRA SBR meeting 26-27 November 2001 Madison Hotel Hamburg

(231) **[Recitals 231-237 has been deleted, including any cross references to these recitals and relevant footnotes.]**

4.3.14. ESRA BR and SBR meetings 2-3 September 2002 Hotel Pariz Prague

(238) **[Recitals 238-244 has been deleted, including any cross references to these recitals and relevant footnotes.]**

(245) On the basis of the above it is concluded that a cartel meeting on ESBR took place on 2 September 2002, during which a price agreement was made and that the companies represented at the meeting were Bayer, Dow, Polimeri and Tavorex s.r.o representing Kaucuk. [deleted]

4.3.15. ESRA SBR meeting 28-29 November 2002 Quality Inn Hotel London

(246) **[Recitals 246-248 has been deleted, including any cross references to these recitals and relevant footnotes.]**

(249) On the basis of [deleted] it is concluded that on the occasion of this meeting Bayer informed at least Dow that it wished to terminate cartel activities.

C. LEGAL ASSESSMENT

5. Application of Article 81 of the Treaty and Article 53 of the EEA Agreement

5.1. Relationship between the Treaty and the EEA Agreement

(250) The arrangements for BR and ESBR described in this Decision applied to the whole territory of the EEA, as the cartel members had sales of BR and ESBR worldwide as well as in all Member States. BR and ESBR were also sold to at least one of the EFTA States parties to the EEA Agreement, namely Norway.[10]

(251) The EEA Agreement, which contains provisions analogous to the Treaty, came into force on 1 January 1994. The infringement described in this Decision is deemed to have started at least on 20 May 1996. The relevant EEA rules (primarily Article 53 of the EEA Agreement) therefore apply to the arrangements to which objection is taken.

(252) In so far as the arrangements affected competition in the common market and trade between Member States, Article 81 of the Treaty is applicable. The operation of the cartel in EFTA States that are part of the EEA and its effect upon trade between the Community and Contracting Parties to the EEA or between Contracting Parties to the EEA fall under Article 53 of the EEA Agreement.

5.1.1. Jurisdiction

(253) In this case the Commission is the competent authority to apply both Article 81 of the Treaty and Article 53 of the EEA Agreement on the basis of Article 56 of the EEA Agreement, as the turnover of the parties achieved in the territory of the EFTA states is less than 33% of their turnover in the EEA.

(254) The fact that some of the undertakings concerned, at the time of the facts, were based outside the Community does not rule out the applicability of both Article 81 of the Treaty and Article 53 of the EEA Agreement to them, as for these provisions to be

[10] See recitals (304) and (310)

applicable it suffices that the anti-competitive conduction in question affects trade within the Community and the EEA[11].

5.2. Application of Competition rules

5.2.1. Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement

(255) Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement respectively prohibit as incompatible with the common market and with the functioning of the EEA Agreement, all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States/trade between the Contracting parties and which have as their object or effect the prevention, restriction or distortion of competition within the common market/the territory covered by the EEA Agreement and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production and markets, or share markets or sources of supply.

5.2.2. Agreements and concerted practices

5.2.2.1. Principles

(256) Article 81(1) of the Treaty and 53(1) of the EEA Agreement prohibit anticompetitive agreements and concerted practices between undertakings as well as decisions of associations of undertakings.

(257) An agreement, within the meaning of Article 81(1) of the Treaty, can be said to exist when the parties adhere to a common plan which limits or tends 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 agreement may be express or implicit in the behaviour of the parties. Furthermore it is not necessary, in order for there to be an infringement of Article 81(1) of the Treaty, for the participants to have agreed in advance upon a comprehensive common plan. The concept of agreement in Article 81(1) of the Treaty would apply to the inchoate understandings and partial and conditional agreements in the bargaining process which leads up to the definitive agreement[12].

(258) In its judgment in Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij NV and others v Commission* (PVC II)[13], 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 Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way*"[14].

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11 See Joined Cases 89/85, 104/85, 114/85, 116/85,117/85 and 125/85 to 129/85, *Åhlström and Others v Commission* [1988] ECR 5193.

12 Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraphs 196 and 207.

13 Joined Cases T-305/94 etc. *Limburgse Vinyl Maatscappij N.V. and others v Commission (PVC II),* [1999] ECR II-931, paragraph 715.

14 The case Law of the Court of Justice and the Court of First Instance in relation to the interpretation of Article 81 of the Treaty applies equally to Article 53 of the EEA Agreement. See recitals No 4 and 15

(259) Although Article 81 of the Treaty and Article 53 of the EEA Agreement draw a distinction between the concept of "concerted practices" and "agreements between undertakings", the object is to bring within the prohibition of these Articles a form of co-ordination between undertakings by which, without having reached the stage where an agreement properly so-called has been concluded, they knowingly substitute practical co-operation between them for the risks of competition[15].

(260) The criteria of co-ordination and co-operation laid down by the case law of the Court of First Instance and the Court of Justice of the European Communities, 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. Although that 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 whereof 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[16].

(261) Thus conduct may fall under Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement as a "concerted practice" even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopted or adhered to collusive devices which facilitate the coordination of their commercial behaviour.[17] Furthermore the process of negotiation and preparation culminating effectively in the adoption of an overall plan to regulate the market may well also (depending on the circumstances) be correctly characterised as a concerted practice.

(262) Although in terms of Article 81(1) of the Treaty the concept of "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 anticompetitive effects on the market[18].

(263) Moreover, it is established case law that the exchange, between undertakings, in pursuance of a cartel falling under Article 81(1) of the Treaty, of information

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as well Article 6 of the EEA Agreement, Article 3(2) of the EEA Surveillance and Court Agreement, as well as Case E-1/94 of 16 December 1994, recitals 32-35. References in this text to Article 81 therefore apply also to Article 53.

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

16 Joined Cases 40-48/73 etc. *Suiker Unie and others v Commission* [1975] ECR 1663, paragraph 174

17 See also judgment of the Court of First Instance in Case T-7/89 *Hercules v Commission* [1991], ECR II 1711, paragraph 242

18 See also judgment of the Court of Justice in Case C-199/92 *P Hüls v Commission*, [1999] ECR I-4287, paragraphs 158-166.

concerning their respective deliveries, which not only covers deliveries already made but is intended to facilitate constant monitoring of current deliveries in order to ensure that the cartel is sufficiently effective, constitutes a concerted practice within the meaning of that Article[19].

(264) However, in the case of a complex infringement of long duration, it is not necessary for the Commission to characterise the conduct as exclusively one or other of these forms of illegal behaviours. The concepts of "agreement" and "concerted practice" are fluid and may overlap. The anti-competitive behaviour may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. Indeed, it may not even be possible to make such a distinction, an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when 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 different forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time. Article 81 of the Treaty lays down no specific category for a complex infringement of the type involved in this case[20].

(265) In its PVC II judgement, the Court of First Instance confirmed that *"in the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [81] of the Treaty"*[21].

(266) 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 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 S.p.A.*[22]* it follows from the express terms of Article 81(1) of the Treaty that an agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.

(267) It is also well-settled case law that *"the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose is not such as to relieve it of full responsibility for the fact that it participated in the cartel, if it has*

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19 See in this sense, the judgments of the Court of First Instance in Cases T-147/89, T-148/89 and T-151/89, *Societe Metallurgique de Normandie v Commission, Trefilunion v Commission and Societe des treillis et panneaux soudes v Commission*, respectively, paragraph 72.

20 See judgment of the Court of First Instance in Case T-7/89 *Hercules v Commission*, paragraph 264.

21 . See Joined Cases T-305/94 etc. *Limburgse Vinyl Maatscappij N.V. and others v Commission (PVC II)*, [1999] ECR II-931, paragraph 696.

22 See Case C-49/92 *Commission v Anic Partecipazioni* [1999] ECR I -4125, paragraph 81

not publicly distanced itself from what was agreed in the meetings".[23] Such distancing should have taken the form of an announcement by the company, for instance, that it would take no further part in the meetings (and therefore did not wish to be invited to them).

5.2.2.2. Application to this case

(268) On the basis of the above considerations, the Commission considers that the facts described in this Decision amount to a complex of agreements and/or concerted practices in the sense of Article 81 of the Treaty.

(269) In this case, it can however be concluded that agreements were entered into with a view to increasing or stabilising prices for BR and ESBR (see recitals (105)-(123), (175), (182), (209), (210), (230) and (245)) in the EEA market.

(270) Discussions on prices in the context of cartel meetings did not necessarily lead to the conclusion of specific agreements (see, in particular, recitals (193) and (198)). Such discussions, however, can only be explained as an attempt by the participants to substitute co-operation between them for the risks of competition (see recital (259)).

(271) Non-aggression agreements were also concluded in respect of major customers of the cartel's participants (see recital (124)).

(272) Further co-ordination took place, mainly in the form of exchanges of information (see recitals (131)-(143), (198), (212), (221) and for which it is not always possible to establish a direct link with instances where specific agreements were reached. Although they may individually be qualified as concerted practices, the significance of these instances should not be underestimated as they occurred within the scope of an overall and unitary plan aimed at the elimination of normal competition in the market for BR and ESBR.

(273) Syndial, in its reply to the First and Second Statements of Objections and during the Oral Hearing, contended that the available economic evidence ran counter to the existence of a cartel concluding that there was no behaviour that could be qualified either as a concerted practice or as an agreement in breach of Article 81 of the Treaty.

(274) The Commission replies to these arguments as follows. Regarding the general argument that no agreement or concerted practice could have existed due to the fact that certain indicators (price and market shares fluctuations) were inconsistent with the existence of an infringement, it should be observed that the prohibition contained in Article 81(1) of the Treaty strictly precludes any direct or indirect contact between 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 are contemplating adopting on the market and that this is the case regardless of its actual effect on the market[24](see also recital (260) above). It is sufficient for the Commission to demonstate that

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[23] See, inter alia, Case T-141/89, *Tréfileurope Sales v Commission*, [1995] ECR II-791, at paragraph 85; Case T-7/89, *Hercules Chemicals* v *Commission*, [1991] ECR II-1711, at paragraph 232; and Case T-25/95, *Cimenteries CBR / Commission*, [2000] ECR II-491, at paragraph 1389.

[24] Joined cases 40-48/73, etc. *Suiker Unie and others v Commission*, [1975] ECR, p.1663.

conduct had as its object the fixation of prices and/or the sharing of markets. The fact that certain economic indicators may be interpreted as pointing to the absence of effects of the same conduct cannot have any bearing on the Commission's conclusions as regards the existence of an infringement.

(275) On the specific arguments made by Syndial, the Commission further observes the following:

(276) Tables annexed under Annex 3 and Annex 4 of Syndial's reply to the Statement of Objections (which are elaborated on the basis of variations in price applied by the different producers, as set out in the First Statement of Objections) indicate a high degree of correlation in prices variations implemented by market participants, both in terms of prices development and timing.

(277) As to Syndial's claim that those tables highlight significant differences in actual prices, the level of actual prices cannot be established on the basis of those tables (as the Commission figures on which they are based only refer to relative price variations). In fact, Syndial assumes that prices were identical for all participants in 1992 when the index was started. However this assumption is far from being proven and leads to obvious misconclusions as to the level of actual prices during the existence of the cartel.

(278) Syndial further contends that the cost of butadiene was the driving factor for price variations of final BR/ESBR products. According to Syndial, Butadiene represents 60% and 65% of the underlying costs for BR and ESBR respectively.

(279) In that respect, according to Syndial's same analysis, the ratio between relative prices and butadiene cost fluctuated significantly during the whole period (which means that the effect of the cost of butadiene was not the only factor determining prices for BR and ESBR during the period).

(280) In any event, even accepting that butadiene did account for the majority of underlying costs, a significant part of the costs was nonetheless made up by other elements.

5.2.3. Single and continuous infringement

5.2.3.1. Principles

(281) A complex cartel, of the type at issue in these proceedings, may properly be viewed as a single and continuous infringement for the time frame in which it existed. The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. The validity of this assessment is not affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute a violation of Article 81(1) of the Treaty.

(282) Although a cartel is a joint enterprise, each participant in the agreement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries, or even cheating may occur, but this will not prevent the arrangement from constituting an agreement/concerted practice for the purposes of

Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement where there is a single and common objective.

(283) 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 undertaking which takes part in a 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 undertaking 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[25].

(284) In fact, 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. Therefore, the mere fact that each undertaking takes part in the infringement in ways particular to it does not suffice to exclude its responsibility for the entire infringement, including conduct put into effect by other participating undertakings but sharing the same anti-competitive object or effect[26].

5.2.3.2. Application to this case

(285) The evidence referred to in section 4 of this Decision shows the existence of a complex, single and continuous collusion in pursuit of a single anti-competitive economic aim: the elimination of competition in the European market for BR and ESBR.

(286) The infringement found to exist forms part of an overall scheme which laid down the lines of the action of the addressees of this Decision in the market and restricted their individual commercial conduct with the aim of pursuing an identical anti-competitive object and a single economic aim, namely to distort the normal setting of prices in the EEA market for BR and ESBR. It would 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 a single infringement which progressively would manifest itself in both agreements and concerted practices.[27]

(287) The information contained in the requests for leniency [deleted] confirm that from May 1996 to November 2002 the addressees of this Decision took part in a cartel, the aim of which was the elimination of competition in the European BR and ESBR sectors.

(288) That plan found application in a series of specific instances which are further documented in this Decision.

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25 Case C-49/92 *Commission v Anic Partecipazioni*, ,[1999] ECR I-4125, paragraph 83.

26 Case C-49/92, *Commission v Anic Partecipazioni*, [1999] ECR I-4125, paragraphs 79-80 and 203

27 Case C-49/92, *Commission v Anic Partecipazioni*,[1999] ECR I-4125, paragraph 81.

(289) At times where demand was falling, cartel participants would generally attempt to agree on a price "roll-over" (that is to say, that prices remained unchanged for the period after the agreement was reached) (recitals (105), and 228)).

(290) Depending on market conditions, the cartel participants would also attempt to co-ordinate price increases (recitals (105),(107)-(108), (165), (175), (212) and (245)).

(291) Exchanges of sensitive information (on both prices and customers) also occurred with a view to implementing and monitoring the agreements which had been concluded. This applied, in particular, to information exchanged in the context of non-aggression agreements in respect of major customers of the cartel's participants (see recitals (124) and (210)). In the absence of specific agreements, information exchanges enabled competitors to adjust their conduct in the market on the basis of the knowledge so acquired (see recitals (131), (141)-(143), (182), (198), (221) and (237)).

(292) Bilateral and trilateral contacts also occurred on a regular basis, leading sometimes to the conclusion of bilateral agreements (see recitals (115), (124), (135) and (137).

(293) The following circumstances also indicate that there was a single and continuous infringement.

(294) First, the cartel followed a similar pattern throughout. ESRA provided the official forum for meetings between competitors. On the fringe of these official meetings, the cartel participants would meet, thereby entering into illegal discussions. These sometimes culminated in agreements and were sometimes limited to the exchange of sensitive commercial information (see recital (269) and (272)).

(295) Secondly, BR and ESBR are substitutable to a significant extent both from the demand and the supply side[28]. Cartel participants represented the biggest producers of both products and did not always distinguish strictly between ESBR and BR in their discussions (see recital (99)).

(296) Thirdly, within producing undertakings, BR and ESBR units are managed by the same company representatives. These managers were constantly behind the organisation of the cartel. In the case of Bayer it is noted that a second manager was appointed for ESBR. However, the manager responsible for BR would also attend both sub-committees meetings. Furthermore, BR and ESBR were discussed at the same ESBR meeting until February 1997.

(297) The fact that two of the undertakings concerned did not participate in all the constituent elements of the overall cartel cannot relieve them of responsibility for the infringement of Article 81 of the Treaty. In this case the fact that Stomil and Kaucuk were not active in the BR sector like the other participants of the anti-competitive arrangements does not change the nature and the object of the infringement which was to distort the normal movement of prices with regard to both BR and ESBR. From the facts described above in section 4 it is clear that all participants in the anticompetitive arrangements adhered and contributed, to the extent they could (that is to say, to the

[28] Although Natural Rubber is a valid alternative to BR and ESBR as for its use, the conditions of supply differ greatly from either BR or ESBR. This reflects in the way prices for NR fluctuate (see recitals (251) and (253)).

extent they were active in one or more of the products concerned by the arrangements) to the common anti-competitive plan. In fact, both BR and ESBR cartel discussions took place on the fringe of official ESRA BR and ESBR meetings which were usually held on the same day or over two consecutive days and at the same location. At the cartel meeting of the night between 15 and 16 November 1999, both BR and ESBR were discussed in the presence of Kaucuk and Stomil (see recital (201)). It should therefore be concluded that Kaucuk and Stomil were aware that the cartel extended to both BR and ESBR.

(298) It is therefore concluded that the conduct of the addressees of this Decision constitutes a single and continuous infringement of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

5.2.4. Restriction of competition

(299) The evidence referred to in section 4 shows that the addressees of this Decision have agreed on price targets for BR and ESBR and have shared customers and exchanged sensitive commercial information in order to ensure that the cartel was sufficiently effective and/or in the absence of specific agreements, to enable them to adjust their conduct in the market on the basis of the knowledge so acquired.

(300) 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[29]:

(a) directly or indirectly fix selling prices or any other trading conditions;

(b) share markets or sources of supply.

(301) These are the essential characteristics of the horizontal arrangements under consideration in this case. Price being the main instrument of competition, the various collusive agreements and/or concerted practices adopted by the addressees of this Decision were all ultimately aimed at inflating prices to their benefit or at least limiting the negative effects on price of falling demand. Furthermore, on several occasions, the parties shared customers at least as regards ESBR by way of non-aggression agreements and exchanged sensitive commercial information in order to assure that the cartel was sufficiently effective. Price fixing and customer allocation between competitors by their very nature restrict competition within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

(302) It is settled case-law that for the purpose of the application of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement there is no need to take into account the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved[30].

(303) There is evidence however that in some instances cartel participants communicated in order to check whether the agreed strategy was being respected and often complained

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29 The list is not exhaustive.

30 Case T-62/98 *Volkswagen AG vs Commission* [2000] ECR II-2707, paragraph 178.

about other participants' lack of compliance (see recital (126) and section 4.2.5). In some instances, threats of retaliation were even made (see recital (146))[31].

(304) 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.

5.2.5. Effect upon trade between the Member States and between the EEA contracting parties

(305) The infringement at issue in this Decision had an appreciable effect upon trade between Member States and between Contracting Parties to the EEA Agreement.

(306) Article 81 of the Treaty is aimed at agreements which might harm the attainment of a single market between the Member States, whether by partitioning national markets or by affecting the structure of competition within the common market. Similarly, Article 53(1) of the EEA Agreement is directed at agreements that undermine the achievement of a homogeneous European Economic Area.

(307) According to the Court of First Instance *"Article 8[1](1) of the Treaty does not require proof that such agreements or concerted practices have actually affected such trade, which would moreover be difficult in the majority of cases to establish for legal purposes, but merely requires that it be established that the agreement or concerted practice in question was capable of having that effect. The condition that trade between Member States must be affected is thus satisfied where it is possible to foresee with a sufficient degree of probability on the basis of a set of factors of law and of fact that the agreement or practice found to exist may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States"*[32]. In any event, Article 81 of the Treaty does not require that agreements referred to in that provision have actually affected trade between Member States, it does require that it is established that the agreements are capable of having that effect.[33]

(308) As explained in recitals (304) - (306) and (309) - (310), the markets for both BR and ESBR are characterised by substantial volumes of trade between Member States. There is also some trade between the Community and EFTA-countries belonging to the EEA[34].

(309) The application of Article 81 of the Treaty and Article 53 of the EEA Agreement to a cartel is not, however, limited to that part of the members' sales that actually involve the transfer of goods from one Member State to another. Nor is it necessary, in order

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31 Those threats are equally indicative of a cartel behaviour whether or not it can be proven that Dwory was actively taking part in the cartel at that time. In fact, while making them, Dow impliedly relied on the support of the other major players. Those threats would otherwise have hardly been meaningful, since Dow alone was not in a position to retaliate against Dwory.

32 Joined Cases T-25/95 and others, *Cimenteries CBR v Commission* [2000] ECR II-491, paragraph 4612.

33 C-306/96 *Javice*, judgment of 28 April 1998, ECR 1997, paragraphs 16 and 17; see also the Judgment of the Court of First Instance in Case T-374/94, *European Night Services*, paragraph 136.

34 See recitals (304) and (310).

for these provisions to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States[35].

(310) With regard to both BR and ESBR the arrangements focussed mainly on price-fixing. The existence of price-fixing mechanisms, as well as the non-aggression of major customers, must have resulted, or was likely to result, in the automatic diversion of trade patterns from the course they would otherwise have followed[36].

(311) The conditions described at paragraphs 53, 64 and 65 of the Commission Notice entitled Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty apply in this case[37].

5.3. Proof of the infringment

(312) The following undertakings have been involved in the infringement which is the subject-matter of these proceedings: Bayer, Dow, EniChem, Shell, Kaucuk and Stomil.

(313) During the administrative procedure Enichem, Kaucuk and Stomil have denied their involvement in the infringement and argued that the evidence of which the Commission is in possession would not be sufficient to establish their participation in the alleged cartel.

(314) The Commission observes that the overall participation of these undertakings in the cartel is established on the basis of the contemporaneous evidence gathered during the investigation and the statements [deleted]. The general thrust of these statements is explained in section 4.2 above.

(315) As to the credibility of such statements and whether they have an intrinsically self-serving nature, the Commission notes the following.

(316) With regards to Bayer, it came forward and applied for immunity at a time when the Commission possessed no evidence of the cartel.

(317) The credibility of the statements from [deleted] cannot be seriously questioned as such statements were given despite the concrete risk that they would be used to hold them liable and impose a fine on them. In fact, the only expectation that [deleted] could have had at the time it gave its statements was that the fine it would receive would be reduced under the Leniency Notice.

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35 Case T-13/89 *Imperial Chemical Industries v Commission* [1992] ECR II-1021, paragraph 304, and Case T-2/89 Petrofina [1991] ECR II-1087, paragraphs 226 and 227.

36 Joined cases 209 to 215 and 218/78 *Van Landewyck and others v Commission* [1980] ECR 3125, paragraph 170.

37 OJ C 101, 27.4.2004, p.81. Paragraph 53 stipulates that ”there is a rebuttable *positive* presumption that such effects on trade are appreciable when the turnover of the parties in the product covered by the agreement calculated as indicated in paragraphs 52 to 54 exceeds 40 million Euro”.
Paragraph 64 stipulates that “Cartel Agreements such as those involving price fixing and market sharing covering several Member States are by their very nature capable of affecting trade between Member States”.
Paragraph 65 stipulates that “The effect on trade produced by cross-border cartels is generally also by its very nature applicable due to the market position of the parties to the cartel”.

(318) As far as is concerned, only occurred following the notification of the First Statement of Objections to it, that is to say, when, by its own admission, no legitimate expectation could be acquired by making an application under the terms of the Leniency Notice.

(319) Finally, and more importantly, the statements corroborate each other to a large extent and are based on the direct testimony of people who were present when the relevant facts occurred.

(320) The same statements also corroborate the evidence used in section 4.3 in respect of specific cartel meetings, with regards to both their illicit object and the participation of specific undertakings.

(321) This Decision clarifies and eliminates certain factual inaccuracies which were contained in the statements received during the administrative procedure and which became apparent during the further stages of the administrative procedure. The fact that statements contained some factual inaccuracies cannot be taken as such as rendering the statements' testimony not credible. In fact, recollection of facts does not need to be perfect in order to be credible. Furthermore in this case, in any event, the facts retained in this Decision are accepted by three different parties.

(322) Concerning the proof of bilateral contacts (see in particular recitals (135) and following), it should be added that although, by their very nature, direct corroboration of one party's allegation could only occur through admission by the other party of the same contacts, [deleted]. On that basis it can be concluded that the existence of such patterns of communications is sufficiently established.

(323) The Commission recalls with regard to the applicable standard of proof 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 a non-member country, and for the associated documentation to be reduced to a minimum. Even if the Commission discovers evidence explicitly showing unlawful contact between traders, (…) 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*"[38].

(324) In practice, the Commission is often obliged to prove the existence of an infringement under conditions which are hardly conducive to that task, when several years may have elapsed since the time of the events constituting the infringement. Indeed, in *JFE Engineering*, the Court of First Instance ruled that while sufficiently precise and consistent evidence must be produced to support a firm conviction that the alleged infringement took place, "*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.*

[38] Judgment of the Court of Justice 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 A/S et al. v Commission*, [2004] ECR I-123, paragraphs 55-57.

It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement" [39].

(325) It is therefore concluded that the existence of the infringement, its duration and the participation of the addressees in the cartel is proven.

(326) The arguments put forward by Syndial/Polimeri, Stomil and Kaucuk in the replies to the Second Statement of Objections cannot affect such conclusion.

(327) First, their outright denials of participation (in the cartel or in specific instances) cannot, as such, outweigh the evidence in the Commission's possession.

(328) Second, certain discrepancies between information contained in contemporaneous notes and actual data (for example, prices, clients, plants utilisation ratio, quantities supplied to customers etc), do not detract from the fact that parties met and discussed in order to co-ordinate their commercial policies. The existence of such collusive meetings and their aim is sufficiently established[40].

(329) The illegal nature of such discussions was or should have been known to the parties involved. This is evidenced by the fact that official ESRA meetings never covered the matters which formed the object of the illegal discussions (future pricing, specific clients, etc). Even accepting that part of the information shared during those meetings was public, its exchange during the same meetings was clearly preordained to the conclusion of illicit agreements and should therefore be considered to constitute part of the infringement.

(330) Finally, the fact that, in some cases, actual behaviour in the market might have been inconsistent with what was agreed during cartel meetings, cannot exonerate parties from bearing liability for the infringement as the collusive nature of those meetings was or ought to have been known to all of them. Also, none of the participants ever distanced themselves from those discussions (see recital (267)).

(331) In their reply to the Second SO, Polimeri and Syndial have claimed that the Commission's investigation following the adoption of the First SO and the adoption of the Second SO constituted an abuse of procedure and led to the breach of its right of defence, as it was clearly biased towards strengthening the Commission's case against the addressees and mainly relied on new testimonies from co-operating undertakings.

(332) In reply to this claim, it is observed that the Commission choose to address certain factual issues raised by the addressees of the First SO in their replies, as well as to take into account new information that the parties brought forward. Even if Polimeri and Syndial consider that this resulted in a strengthening of the Commission case, the Commission also dismissed certain incriminating evidence used in the First SO which led, amongst other things, to a shortening of the duration of the infringement for certain addressees. As all addressees of the Second SO were given the opportunity to

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[39] Judgment of the Court of First Instance, *JFE Engineering Corp. et al. v Commission*. joined cases T-67/00, T-68/00, T-71/00 and T-78/00 (*Seamless Steel Tubes*), 2004 ECR II-02501, at paragraph 180.

[40] See, in the same sense, judgment in case *JFE Engineering Corp. et al. v Commission*. joined cases T-67/00, quoted above, paragraphs 203-204.

express themselves fully on the objections raised against them in the Second SO, the Commission's investigation did not lead to a breach of their rights of defence.

6. Addressees of these proceedings

6.1. General principles on liability

(333) The Commission considers that the addressees of this Decision should be held liable for the anti-competitive behaviour described in this Decision. As a general consideration, the subject of Community competition rules is the "undertaking", a concept that has an economic scope and that is not identical with the notion of corporate legal personality in national commercial or fiscal law. The "undertaking" that participated in the infringement is therefore not necessarily the same entity as the precise legal entity within a group of companies whose representatives actually took part in the cartel meetings. The term "undertaking" is not defined in the Treaty. However, in *Shell International Chemical Company v. Commission*, the Court of First Instance held that *"in prohibiting undertakings inter alia from entering into agreements or participating in concerted practices which may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the common market, Article 85(1) [now Article 81(1)] of the EEC Treaty is aimed at economic units which consist of a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision"*.[41]

(334) Despite the fact that Article 81 of the Treaty is applicable to undertakings and that the concept of undertaking has an economic scope, only entities with legal personality can be held liable for infringements. This Decision should therefore be addressed to legal entities.[42] For each undertaking that is to be held accountable for infringing Article 81 of the Treaty in this case it is therefore necessary to identify one or more legal entities which should bear legal liability for the infringement in this case. According to the case law, "*Community competition law recognises that different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Articles 81 EC and 82 EC if the companies concerned do not determine independently their own conduct on the market*".[43] If a subsidiary does not determine its own conduct on the market independently, the company which directed its market strategy forms a single economic entity with that subsidiary and may be held liable for an infringement on the ground that it forms part of the same undertaking.

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41 See Case T-11/89, [1992] ECR II-757, paragraph 311. See also case T-352/94 *Mo Och Domsjö AB v Commission*, [1998] ECR II-1989, paragraphs 87-96, case T-43/02 *Jungbunzlauer v. Commission*, judgment of 27 September 2006, not yet reported, paragraph 125; case T-314/01 *Avebe v Commission*, judgment of 27 September 2006, not yet reported, paragraph 136; case T-330/01, *Akzo Nobel v Commission*, judgment of 27 September 2006, not yet reported, paragraph 83

42 Although an 'undertaking' within the meaning of Article 81(1) is not necessarily the same as a company having legal personality, it is necessary for the purposes of applying and enforcing decisions to identify an entity possessing legal or natural personality to be the addressee of the measure. See Case T-305/94 *PVC*, [1999] ECR, II-0931, paragraph 978.

43 Court of Justice in Case 48/69 *Imperial Chemical Industries v. Commission*, [1972] ECR 619, paragraphs 132-133; Case 170/83 *Hydrotherm*, [1984] ECR 2999, paragraph 11 and Court of First Instance in Case T-102/92 *Viho v Commission*, [1995] ECR II-17, paragraph 50, cited in Case T-203/01 *Michelin* v *Commission*, [2003] ECR II-4071, paragraph 290.

(335) According to the settled case-law of the Court of Justice and the Court of First Instance, the Commission can generally assume that a wholly-owned subsidiary essentially follows the instructions given to it by its parent company without needing to check whether the parent company has in fact exercised that power. [44] However, the parent company and/or subsidiary can reverse 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*".[45]

(336) Where an infringement of Article 81 of the Treaty is found to have been committed, it is necessary to identify a natural or legal person who was responsible for the operation of the undertaking at the time when the infringement was committed so that it can answer for it.

(337) When an undertaking that has committed an infringement of Article 81 of the Treaty subsequently disposes of the assets which contributed to the infringement and withdraws from the market in question, it continues to be answerable for the infringement if it has not ceased to exist.[46] If the undertaking which has acquired the assets carries on the violation of Article 81 of the Treaty, liability for the infringement should be apportioned between the seller and the acquirer of the infringing assets, each undertaking being responsible for the period in which it participated through these assets in the cartel. However, if the legal person initially answerable for the infringement ceases to exist and loses its legal personality, being purely and simply absorbed by another legal entity, that latter entity must be held answerable for the whole period of the infringement and thus liable for the activity of the entity that was absorbed.[47] The mere disappearance of the person responsible for the operation of the undertaking when the infringement was committed does not allow it to evade liability.[48] Liability for a fine may thus pass to a successor where the corporate entity which committed the violation has ceased to exist in law.

(338) Different conclusions may, however, be reached when a business is transferred from one company to another, in cases where transferor and transferee are linked by economic links, that is to say, when they belong to the same undertaking. In such

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44 Court of First Instance in Joined Cases T-71/03 etc. *Tokai Carbon* and Others *v Commission*, 15 June 2005, paragraph 60, not yet published; 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 27-29; and Court of Justice in Case 107/82 *AEG v Commission*, [1983] ECR 3151, paragraph 50.

45 Court of First Instance in Joined Cases T-71/03 etc. *Tokai Carbon and Others v Commission*, 15 June 2005, paragraph 61.

46 Case T-6/89 *Enichem Anic v Commission (Polypropylene)*, [1991] ECR II-1623; Case C-49/92P *Commission v Anic Partecipazioni*, [1999] ECR I-3125, paragraphs 47-49.

47 See Case C-279/98 P *Cascades* v *Commission*, [2000] ECR I-9693, paragraphs 78-79: *"It falls, in principle, to the natural or legal person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the Decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking ... Moreover, those companies were not purely and simply absorbed by the appellant but continued their activities as its subsidiaries. They must, therefore, answer themselves for their unlawful activity prior to their acquisition by the appellant, which cannot be held responsible for it"*.

48 See Court of First Instance in Case T-305/94 *PVC II*, [1999] ECR II-931, paragraph 953.

cases, liability for past behaviour of the transferor may transfer to the transferee, notwithstanding the fact that the transferor remains in existence. [49]

6.2. Liability in this case

(a) Bayer

(339) The evidence described in section 4 of this Decision shows that Bayer AG directly participated in the cartel from 20 May 1996 until 28 November 2002.

(b) Dow

(340) The evidence described in section 4 of this Decision shows that Dow Deutschland Inc., from 1 July 1996 (date as from which it took over the responsibility for marketing and sales of BR and ESBR produced by BSL) to 27 November 2001, Dow Deutschland Anlagengesellschaft mbH, from 22 February 2001 to 28 February 2002, and Dow Europe GmbH, from 26 November 2001 to 28 November 2002 (until 29 November 2001 under the name of Dow Europe S.A. see recital 27), have participated in the cartel. The ESRA meeting of 20 May 1996 is the first one for which there is documentary evidence of participation of [deleted] in the cartel meetings (see recitals (161)). As from 1 July 1996, Dow took over the marketing of BR and ESBR from BSL (see recital (265)). Thus, [deleted], represented Dow Deutschland Inc. at the subsequent ESRA meetings, with effect from the meeting of 2-3 September 1996, (see recital (166)). The last ESRA meeting in which a representative of Dow Deutschland Inc. [deleted] participated, took place on 26-27 November 2001 (see recital (231)). The first meeting in which a representative of Dow Deutschland GmbH & Co. OHG [deleted] participated took place on 22-23 February 2001 (see recital (213)). The last ESRA meeting in which a representative of Dow Deutschland Anlagengesellschaft mbH [deleted] participated took place on 28 February 2002 (see recital (246)). The first ESRA meeting in which a representative of Dow Europe S.A. [deleted] participated took place on 26-27 November 2001 (see recital (231)). Dow Europe GmbH participated in the ESRA meeting of 28 November 2002 during which it was decided to abandon cartel activities (see recital (246)).

(341) In this case, during the period of the infringement, these companies were directly or indirectly wholly owned by The Dow Chemical Company. During the period from 1 July 1996 to 28 November 2002. The Dow Chemical Company fully controlled (either directly or indirectly) Dow Deutschland Inc, Dow Deutschland Anlagengesellschaft mbH and Dow Europe GmbH (see section 2.2.2).

(342) According to the principles set out in recitals (333) - (337) and the established case-law, when a parent company owns the totality (or almost the totality) of the shares of a subsidiary, at the time the latter commits an infringement of Article 81, it can be presumed that the parent exercised a decisive influence on the conduct of such

[49] See judgment in Joined Cases C-204/00 P (and other), *Aalborg Portland A/S a.o. v Commission* [2004] ECR I, 267, paragraphs 354-360, as confirmed in case T-43-02 *Jungbunzlauer AG v Commission*, quoted above, par. 132-133.

subsidiary and that the subsidiary necessarily follows the policy laid down by the parent company. [50]

(343) Given that The Dow Chemical Company directly or indirectly controlled all the companies mentioned in recital (341), the Commission presumes that The Dow Chemical Company excercised decisive influence over its subsidiaries' commercial policies.

(344) In addition to the above, the file contains further elements which confirm that The Dow Chemical Company was responsible for the conduct of its subsidiaries. In particular, this is shown by the reporting lines of the officials directly involved in cartel meetings. Such reporting lines would have resulted in The Dow Chemical Company having knowledge of its subsidiaries' commercial policy and would have allowed The Dow Chemical Company to exercise regular control and direction.

(345) In fact, throughout the whole duration of the cartel Dow's officials who were involved in the cartel [deleted] reported directly or indirectly (via the intermediary of [deleted]) to [deleted].

(346) As already indicated in recital (265), in 1996 BSL made a Marketing and Sales Agreement (MSA) with Dow Deutschland Inc., which required Dow to market BSL production. The agreement was implemented for BR and ESBR on 1 July 1996. [deleted]

(347) Dow states that "Since synthetic rubber was a new business for Dow, Dow had to put together a new team for this business. Initially it consisted of [deleted] and still had this function until recently at Dow Deutschland Anlagengesellschaft mbH, and [deleted] but was made available to Dow as of the implementation of the MSA on 1 July 1996."

(348) **[Recital 348 has been deleted, including any cross references to this recital and relevant footnotes.]**

(349) [deleted] was closely involved with the day to day running of the synthetic rubber business right from the start. Many decisions made at the cartel meetings were important from a marketing perspective and must have been implemented with [deleted] agreement. [deleted]

(350) During this period [deleted] or his superiors made no attempt to stop [deleted] from participating in the meetings. Instead, from 1998 onwards other Dow colleagues joined [deleted] at the illegal activities on the fringes of ESRA meetings. From the start of the MSA Dow must have been aware of the illegal cartel activities taking place in the margins of the ESRA meetings.

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50 Case 107/82 *AEG v Commission* [1983] ECR 3151, paragraph 50; Case C-310/93P, *BPB Industries & British Gypsum v. Commission* [1995] ECR I-865, at par. 11; Case T-354/94 *Stora Kopparbergs Bergslags AB v Commission*, [1998] ECR II-2111, paragraph. 80; Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/*94 LVM and others v. Commission* (PVC II), [1999] ECR II-931, paragraphs 961 and 984; Case T-203/01 *Michelin v Commission*, [2003] ECR II-4371 paragraph 290; Joined cases T-71, 74, 87 and 91/03 *Tokai Carbon Co. Ltd and others v Commission*, judgment of 15 June 2005 (not yet published) paragraphs 59-60).

(351) **[Recitals 351 has been deleted, including any cross references to this recital and relevant footnotes.]**

(352) [deleted] reported to The Dow Chemical Company's managers in charge of the emulsion polymers, chemicals, performance chemicals, synthetic elastomers and speciality chemicals sectors. They would further report to the The Dow Chemical Company's CEO.

(353) In its reply to the Statements of Objections, Dow has claimed, contrary to the Commission's contention, that the Commission's precedents and the judgments of the Court of First Instance and the Court of Justice indicate that full control is not sufficient to establish a presumption of exercise of decisive influence. The Commission disagrees with Dow's interpretation of the relevant precedents (see recitals (333) - (336)).

(354) As to arguments which Dow has put forward in order to argue that its subsidiary acted autonomously, it is observed that Dow simply challenges as a matter of principle that the existence of the reporting lines described in recitals (348) - (352) can prove Dow's actual control of the BR/ESBR business and denies that it could have become aware of the cartel.

(355) In this respect, this argument is based on the erroneous premise that a parent company can only be held liable for the infringements committed by its subsidiaries if it can be established that it was aware of the infringement or it was directly involved in its organisation and implementation. Contrary to this contention, attribution of liability to a parent company for the infringement committed by its subsidiary flows from the fact that these two entities constitute a single undertaking for the purposes of the Community rules on competition[51] and not from proof of its participation to or awareness of the infringement (see case law quoted in recitals (333) - (336).

(356) Also, in its reply to the First Statement of Objections, The Dow Chemical Company accepted that [deleted] reported to The Dow Chemical Company. It did not deny that reporting extended to all material aspects of the European subsidiaries' commercial policy. The Dow Chemical Company limits itself to claiming that it "did not interfere with the business decisions taken by [deleted] and its team due to the lack of familiarity with the synthethic rubber business".

(357) Such general denials cannot rebut the presumption established in the case-law quoted in recitals (333) - (336). It is not disputed that reporting lines within the Dow group covered all material aspects of the BR/ESBR business. The cartel at issue was certainly an essential factor of the commercial policy pursued by the Dow subsidiaries involved in the BR/ESBR sector and it cannot be accepted that their operations could be discussed without mentioning the existence of the cartel[52], especially in the context of a chemical group such as Dow, which is characterised by solid industrial and economic links between parent and subsidiaries.

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51 See cases T-71/03, T-74/03, T-87/03, and T-91/03 *Tokai Carbon v Commission*, judgment of 15 June 2005, not yet published, point 54.

52 See, to the same effect, judgment in Case T-314/01, *Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA v Commission* of 27 September 2006, not yet published, paragraphs 113-115.

(358) On the contrary, the reporting lines described in recitals (345) - (352) rightly illustrate how the decision-making process concerning the BR/ESBR business can be traced back to the ultimate parent company.

(359) The possibility of The Dow Chemical Company to reorganise the activities of its subsidiaries dealing with BR and ESBR and to expand them by the acquisition of new businesses (such as Shell's in 1999) further proves The Dow Chemical Company's decisive influence on the BR/ESBR activities as a whole.

(360) In this context, the existence of an antitrust compliance programme would also become irrelevant as it would not be capable as such of distancing the parent company from the wrongdoings of its subsidiaries. In any event, it proved ineffective.

(361) The Dow Chemical Company has also claimed that, as a matter of policy, the Commission is not obliged to address the Decision to it. It has pointed to the fact that by addressing the Decision to it, the Commission would expose The Dow Chemical Company to an unjustified harm (mainly stemming from the risk of facing litigation in the US) and would jeopardise the Commission leniency policy by creating a clear disincentive for companies to come forward and co-operate with the Commission. The Dow Chemical Company also points to the fact that in this case, not addressing the Decision to it would not result in any discriminatory treatment vis-à-vis other companies involved (as the same policy concerns would not be applicable to them), nor would it undermine the possibility of executing the payment of the fine, as the financial capacity of the Dow subsidiaries also involved in this case is not disputed.

(362) The Commission agrees that it has discretion to choose which companies, within the same undertaking, should be the addressees of a decision. In the case of ultimate parent companies, when addressing a decision to them, the Commission applies a general policy which is confirmed by settled case-law (see recitals ((333) - (336)), and from which it sees no compelling reasons to depart. The arguments of the The Dow Chemical Company (which have an eminently political nature) cannot, in any event, have any impact on the assessment that the Commission makes of its liability.

(363) In accordance with the above, this Decision should be addressed to Dow Deutschland Inc, Dow Deutschland Anlagengesellschaft mbH (legal successor of Dow Deutschland GmbH & Co. OHG), Dow Europe GmbH and to The Dow Chemical Company, in that it excercised decisive influence over its named subsidiaries.

(364) In consideration of its effective control over the subsidiaries listed above, The Dow Chemical Company should be held jointly and severally liable with them for the infringements committed by those subsidiaries in the period from 1 July 1996 until 28 November 2002.

(c) EniChem

(365) The evidence described in section 4 of this Decision shows that Enichem bears responsibility for the participation in the cartel from 20 May 1996 to 1 January 2002 under different names or legal/economic entities.

(366) On 1 November 1997 EniChem Elastomeri S.r.l. was merged into EniChem S.p.A.. Therefore EniChem S.p.A. takes over liability for the past actions of EniChem Elastomeri S.r.l. which ceased to exist as a separate legal entity.

(367) On 1 January 2002 EniChem S.p.A. transferred the "Strategic Chemical Activity" business (including BR & ESBR), to its 100 % subsidiary Polimeri Europa S.p.A., which therefore became the economic successor of EniChem S.p.A as far as those products are concerned. On 1 May 2003, EniChem S.p.A. changed its name to Syndial S.p.A.

(368) As explained above (see recital (338), where the relevant business (including its main human and material elements) is transferred within the same undertaking from one company to another, the acquiring company may be held liable for the past behaviour of the entity which has transferred the business. In such a case, the economic entity actually remains the same.[53]

(369) In this case, Polimeri Europa S.p.A. and Syndial S.p.A. belong to the same undertaking (see recital (273) and following). That Polimeri should be held liable for Syndial's past behaviour is also supported by the following factors.

(370) First, Polimeri acquired the majority of Enichem's active businesses (defined as "Strategic Chemical Business") with effect from 1 January 2002, including all the main assets and employees. Before and after this reorganisation, Enichem S.p.A. was Polimeri's only shareholder. The transfer did not lead to the payment of any consideration to Enichem S.p.A. but was instead achieved through an increase of Polimeri's share capital and the issuance of the corresponding shares to Enichem S.p.A.. The total nominal value of those shares was established on the basis of a report rendered by an expert who was appointed by the Italian courts. The purpose of the report was mainly to avoid an excessive evaluation of Polimeri Europa's S.p.A.'s share capital which might have harmed the expectations of Polimeri Europa S.p.A.'s creditors.

(371) Second, Enichem/Syndial's assets and associated turnover have since considerably decreased (see information set out in recitals (279) and (281)) and its current activity is limited to "managing non-strategic shareholdings in view of their sale to third parties or their liquidation; sale of any active plant to third parties or closure and securing thereof; dismantling closed plants and reclaiming contaminated land; managing services and utilities in shared plants with a view to their conversion into third-party services or to the establishment of consortia; managing pending litigation". It also appears that Enichem/Syndial has kept full responsibility for any sanitation of sites which become polluted as a consequence of the production of chemicals.

(372) There is therefore a serious risk that, by the time a decision imposing a fine in this case is addressed to and executed against it, Syndial will no longer possess sufficient assets for the payments of the fine.

(373) Finally, in this case, Polimeri Europa S.p.A. took over the involvement in the ESRA meetings, and the employee who had participated in the infringement as an employee

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[53] See judgment in Joined Cases C-204/00 P (and other), *Aalborg Portland A/S a.o. v Commission* [2004]ECR I, 267, paragraphs 354-360.

of EniChem S.p.A., continued to participate in the infringement as an employee of Polimeri Europa S.p.A.. Polimeri Europa S.p.A. should therefore be held liable for the entire period from 20 May 1996 to 28 November 2002.

(374) For these reasons, it is not necessary to address this decision to Syndial.

(375) Eni S.p.A. owned directly or indirectly almost 100 % of EniChem Elastomeri S.r.l., EniChem S.p.A., Syndial S.p.A. and Polimeri Europa S.p.A. at the time they participated directly in the infringement. Further elements confirm that it can be assumed that Eni S.p.A. exercised decisive influence on its subsidiaries mentioned above.

(376) The reporting lines between managers in the BR/ESBR business lead directly to the CEO of EniChem S.p.A. and Polimeri Europa S.p.A.

(377) **[Recitals 377-378 has been deleted, including any cross references to these recitals and relevant footnotes.]**

(379) The CEO's of both Syndial S.p.A and Polimeri Europa S.p.A.are responsible to their board of directors. The board of directors were appointed by the shareholders of the company. The board of directors of EniChem Elastomeri S.r.l. was appointed by EniChem S.p.A. Most, if not all, of the board of directors of EniChem S.p.A. (1995-2001) and Polimeri Europa S.p.A. (2002) were directly or indirectly appointed by Eni S.p.A..

(380) In its reply to the Second SO, ENI has claimed that, contrary to the Commission's contention, the Commission's precedents and the judgments of the Court of First Instance and the Court of Justice indicate that the full control is not sufficient to establish a presumption of exercise of decisive influence. According to ENI, other factors should also be present, such as management overlaps, direct involvement in the facts, lack of assets in the subsidiary, the parent's acquiescence during the procedure or the involvement of a number of subsidiaries in the infringement. The Commission disagrees with ENI's interpretation of the relevant precedents. As explained in recitals (333) - (337), the Commission is entitled to presume that parent companies exercise effective control on their wholly owned subsidiary and this presumption was not rebutted in this case. No additional factor has to be present in order to rely on such presumption.

(381) ENI has further pointed to the fact that during the administrative procedure it did not receive any act from the Commission (apart from the First SO and the Second SO). ENI seems to conclude from such circumstance that it would not be appropriate to hold them liable in the final decision. Apart from the fact that the Commission addressed a request for information to ENI on 16 November 2005 (that is to say, before the adoption of the Second SO), the grounds for holding ENI liable were clearly set out both in the First SO and in the Second SO, to which ENI replied extensively. By doing so, the Commission fulfilled all the procedural and substantive requirements which justify addressing this decision to ENI.

(382) As to the argument which ENI has put forward in order to claim that its subsidiary acted autonomously, the following is observed.

(383) The allegation that there is no indication of direct involvement of the parent company in the anti-competitive conduct and its alleged lack of awareness is irrelevant for the reasons already explained in recital (355) in relation to a similar argument raised by Dow.

(384) The exercise of decisive influence on the commercial policy of a subsidiary does not require day-to-day management of the subsidiary's operation. The subsidiary's management may well be entrusted with it; but this does not rule out the possibility for the parent company to impose objectives and policies which affect the performance of the group and its coherence and to discipline any behaviour which may depart from those objectives and policies.

(385) ENI has further claimed that chemical activities are not part of the core-business of the group. This would rather lie with the energy sector for which ENI has set up internal business divisions. It was decided to leave the chemical activities to the exclusive direction of separate subsidiaries (in particular Enichem/Syndial and Polimeri). The autonomous character of the chemical business is reflected in a document of corporate governance which limits the scope for intervention by the parent company to operations which may endanger the financial situation of the company, with no influence on Syndial's commercial policy.

(386) Concerning the alleged facts that; (i) ENI has always limited itself to the function of a "holding company" with respect to its chemical activities (contrary to what happened for the "Exploration & Production", "Gas & Power" and "refining and Marketing" divisions which have been absorbed within the same corporate structure), (ii) ENI's chemical activities fall outside its "core business", (iii) no management overlap occurred between ENI and Enichem/Syndial/Polimeri and (iv) the Commission file contains no evidence of direct communications between parent and subsidiary or of ENI's involvement in Enichem's commercial activities, the following observations should be made.

(387) First, the definition of core business and the qualification of the role of a parent group in terms of "holding company" are not conclusive arguments with respect to the effective autonomy of a subsidiary.

(388) Concerning the "corporate governance" document to which ENI refers in its reply to the Second SO, control in respect of the matters referred therein can, in fact, lead to control over significant aspects of the commercial policy of a company (as the parent company has an overriding right to consent to or oppose strategic financial and commercial decisions).

(389) Finally, the concentration of the chemical activities forming the "Strategic Chemical Activity" business first in Enichem and then in Polimeri indicates a clear intention of the group to keep a special focus on that business and to remain the master of its ultimate structure and conduction.

(390) It is, in any event, unlikely that Enichem and Polimeri could act independently in the market in a situation where the parent company was systematically reorganizing their business.

(391) If anything, the fact that, as from 21 October 2002, ENI has acquired direct full ownership over Polimeri proves that, by the restructuring of the chemical sector, the chemical activities forming the "Strategic Chemical Activity" business (being the ones which performed best), were to remain within the direct control of the parent company.

(392) In this context, the Commission does not have to prove the existence of an information flow to apply the presumption. On the other hand, a blanket denial of the existence of information from the subsidiary to the parent becomes implausible and certainly not sufficient to rebut the presumption.

(393) Similarly, the absence of a management overlap cannot be taken, under the circumstances of this case, as being a significant, let alone decisive, factor, in order to rebut the presumption.

(394) ENI has also pointed to the fact that during the duration of the infringement, a significant part of Enichem's shares were controlled through other group companies (Agip and Snam, see recital (274) and following) and this circumstance made the exercise of effective control even more difficult. This argument is not further substantiated and cannot be relevant, as the presumption of exercise of full control equally applies where a subsidiary is indirectly fully owned[54]. It should also be observed that ENI kept direct control over the majority of Enichem's shares at all times.

(395) According to ENI, the application of the presumption would also lead to the breach of fundamental principles of justice. On the one hand, it would lead to the breach of fundamental principle of personal liability, as parent companies would be made liable for conduct which they did not commit. On the other hand, it would create an impossible burden on parent companies (*probatio diabolica*) as the rebuttal of such presumption would become practically impossible.

(396) Concerning the principle of personal liability, Article 81 of the Treaty is addressed to "undertakings" which may comprise several legal entities. In this context the principle of personal liability is not breached as long as different legal entities are held liable on the basis of circumstances which pertain to their own role and their conduct within the same undertaking. In the case of parent companies, liability is established on the basis of their exercise of effective control on the commercial policy of the subsidiaries which are materially implicated by the facts. Under these circumstances, the principle of personal liability is not breached. References to different areas of law where the principle of autonomy of a subsidiary plays a different role (such as under corporate law) is not appropriate.

(397) As to whether the burden imposed on 100% parent companies amounts to "*probatio diabolica*", by definition, when the law creates a presumption it is because the conclusion is generally true and only rarely false. This is what justifies reversing the burden of proof, and it is the essence of a presumption. It is because a situation in

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[54] Cfr Case T-330/01 *Akzo Nobel NV v Commission*, judgment of 27 September 2006, not yet published, points 78, 81-90.

which subsidiaries are controlled by their parent company but nevertheless remain entirely "autonomous" is extremely rare, that the law creates a presumption.

(398) What matters in this case is that the elements which ENI has put forward are not capable of rebutting the presumption.

(399) Based on the above Eni S.p.A. should be held liable for the actions of EniChem Elastomeri S.r.l., EniChem S.p.A., Syndial S.p.A. and Polimeri Europa S.p.A. in the period from 20 May 1996 to 28 November 2002.

(400) For the reasons explained above, this Decision should therefore be addressed to Polimeri Europa S.p.A and Eni S.p.A..

(401) Eni S.p.A should be held jointly and severally liable with Polimeri Europa S.p.A. for the above referred periods.

(d) Shell

(402) The evidence described in section 4 of this Decision shows that Shell Nederland Chemie B.V. participated directly in the cartel from 20 May 1996 until 26 May 1999. Shell Nederland Chemie B.V. participated in the first cartel meeting on 20 May 1996 (see recital (161)). Shell Nederland Chemie B.V. participated in the ESRA meeting on 26 May 1999, which was the last ESRA meeting before the synthetic rubber division of Shell was sold to Dow (see recitals (194).

(403) Shell Nederlands Chemie B.V. should therefore be held liable for its direct participation in the cartel. In addition, liability also arises for those companies which exercised decisive influence over Shell Nederlands Chemie B.V. during the period it participated in the cartel.

(404) During the period of the infringement Shell Nederland Chemie B.V. was 100 % owned by Shell Nederland B.V., which was 100 % owned by Shell Petroleum N.V. Shell Petroleum N.V. is the group holding company for Royal Dutch Shell plc. During the period of the infringement which forms the subject matter of this Decision Shell Petroleum N.V. was jointly owned by Koninklijke Nederlandsche Petroleum Maatschappij N.V. and Shell Transport and Trading Company plc. Since 2005 the company has been 100 % owned by Royal Dutch Shell plc..

(405) In the case of a wholly owned subsidiary, it can be presumed that the parent exercised decisive influence over the conduct of such subsidiary and that the subsidiary necessarily followed the policy laid down by the parent company (see recitals (333) - (337)).

(406) This presumption is strengthened in this case by an analysis of the reporting lines connecting Shell Nederland Chemie B.V. (SNC) with its direct and indirect parent companies (Shell Nederland B.V and Shell Petroleum NV respectively). Until 1997 [deleted], who worked for Shell Nederland Chemie B.V. (SNC), reported to [deleted], who was also an SNC employee. [deleted] in turn reported within SNC to [deleted]. [deleted] reported in line to [deleted] of Shell Nederland B.V. until July 1997. [deleted] was formally accountable to the Supervisory Board of Shell Nederland B.V. and ultimately to Shell Petroleum N.V. (the holding company that owns all shares in

Shell Nederland B.V.). [deleted] retired in about 1997, when [deleted] succeeded to his position. [deleted] was succeeded in the position of [deleted] of Shell Nederland B.V. by [deleted], who held that office until September 1999.

(407) [deleted] succeeded to [deleted] position on 1 January 1997, and assumed the reporting relationships that had been in place for [deleted], i.e. the reporting relationship of [deleted]. In March 1998 [deleted] was succeeded by [deleted]. After the take over of Shell's synthetic rubber activities on 1 June 1999, [deleted].

(408) In its reply to the First Statement of Objections, to which the reply to the Second Statement of Objections refers, Shell has pointed out that because of the group's structure (where Shell Petroleum N.V. entities fully control hundreds of companies) and the business model (whereby operating subsidiaries are supported by service companies which were not addressees of the Statement of Objections, such as Shell Chemicals Europe Limited and Shell Chemicals Limited) the roles of Shell Nederland B.V's and Shell Petroleum N.V. as indirect shareholders were very limited.

(409) Shell has further pointed out that in the PVC II case[55], the Commission did not, in the case of Shell, address its decision to the ultimate parent companies but rather to a service company (Shell International Chemical Company Limited) in consideration of its "stimulating and coordinating role".

(410) Shell's contention as to SNC's autonomy remains fundamentally unsubstantiated. In particular, the fact that operational support was also directly provided by other subsidiaries confirms that the group as a whole was acting as a single undertaking, within which different functions were entrusted to different companies. In such a situation, to address the decision to the entities which have control by virtue of full ownership appears all the more appropriate.

(411) Shell refers to the Commission's *PVC* Decision, which did not impute liability at the Shell group level, but at the intermediate level of Shell International Chemical Company Ltd.[56] The Commission does not accept this argument. The fact that, in a previous case, an intermediary entity of a group and its subsidiary, which were found to form part of a single undertaking, were the addressees of a Decision, does not exclude that the group's ultimate parent company also forms part of the undertaking that committed the infringement and may be the addressee of a later Decision.[57] The Commission notes that following the reorganisation of 2005 the Shell Group is owned by a single parent company Royal Dutch Shell plc (see recital (285)) [58].

(412) Based on the above, this Decision should be addressed to Shell Nederland Chemie B.V., to Shell Petroleum N.V. and to Shell Nederland B.V., which should be held jointly and severally liable for the infringement.

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55 Commission Decision of 27 July 1994 in Case IV/31.865, OJ 1994, L 239, 14.9.1994, p. 14.

56 Commission Decision of 27 July 1994, in Case IV/31.865 *PVC*, OJ L 239 of 14 September 1994, p. 14.

57 See Joined Cases T-305/94 etc. *Limburgse Vinyl Maatscappij N.V. and others v Commission (PVC II)*, quoted above, paragraph 990, and Case T-203/01 *Michelin v. Commission* [2003] ECR 4071, paragraph 290.

58 See Joined Cases T-305/94 etc. *Limburgse Vinyl Maatscappij N.V. and others v Commission (PVC II)*, quoted above, paragraph 990.

(e) Kaucuk/ Unipetrol

(413) The evidence described in section 4 of this Decision shows that Tavorex participated in the cartel from 16 November 1999 until 28 November 2002 (see recitals (445) and (447)).

(414) Kaucuk participated in the cartel through its agent Tavorex. In fact, during the entire period of its participation in the cartel, Kaucuk was represented by its agent Tavorex in the cartel meetings. The Commission considers that Tavorex and Kaucuk should be considered as one undertaking for the purpose of the application of Article 81.[59]

(415) In its judgment in case T-66/99 Minoan Lines v Commission, the Court of First Instance upheld the Commission's view that the acts of a true agent or commercial representative can be imputed to the principal where these companies acted as a single entity in the market[60]. Where an agent works for the benefit of its principal, the agent may in principle be treated as an auxiliary organ forming an integral part of the principal's undertaking who must carry out his principal's instructions and thus, like a commercial employee, forms an economic unit within this undertaking.

(416) The Court also considered that in the case of companies having a vertical relationship, such as a principal and its agent or intermediary, two factors have been taken to be the main parameters for determining whether there is a single economic unit: first whether the intermediary takes on any economic risk and, secondly, whether the services provided by the intermediary are exclusive. [61] These criteria are illustrated in recital 15 of the Commission's Guidelines on Vertical restraints[62].

(417) Secondly from information provided by Kaucuk and Tavorex, it is clear that Tavorex participated in ESRA meetings on the basis of an agency contract with Kaucuk, that Kaucuk was kept informed of developments in ESRA, and that the final responsibility for price policy was with Kaucuk. Tavorex states "Cooperation worked on the basis that Kaucuk is principal and Tavorex is agent" and "Tavorex usually informed Kaucuk about market situation and out of it did proposals for volumes, prices and general strategy. Kaucuk usually pushed for bigger volumes and often for higher prices." And "Kaucuk decided that the commercial director of Kaucuk will attend official meetings as board meeting etc and [delete] from Tavorex was delegated to attend the meetings of statistical SBR subcommittee on behalf of Kaucuk." According to Tavorex the contract between Tavorex and Kaucuk included the following provisions "Tavorex is entitled to conclude in the name of Kaucuk individual sales contracts. Kaucuk shall determine in particular volume, fix the orientation, limit or average prices, payment as well as any other conditions it considers important." And "Tavorex shall keep Kaucuk informed about the situation on the market." Kaucuk does not contradict the above

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59 See the judgement of the Court of First Instance in Case T-66/99 Minoan Lines v Commission paragraph 121-130 and Commission Notice-Guidelines on Vertical Restraints OJ C 291, 13.10.2000, p.1, paragraph 20.

60 See also Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *SuikerUnie and Others v Commission* [1975] ECR 1663, paragraph 480.

61 See the judgment of the Court of First Instance in Case T-66/99 Minoan Lines v Commission paragraph 98-151 and Commission Notice-Guidelines on Vertical Restraints OJ C 291 13.10.2000, p. 1, paragraph 20.

62 OJ C 291 13.10.2000, p. 1.

information. It states that "Tavorex operate on behalf of Kaucuk and on Kaucuk's account" and "Kaucuk is contractually responsible for production capacity and sales volumes."

(418) In this case, it is clear that Tavorex acted in the market vis-à-vis third parties, customers, sub-agents and competitors of the Kaucuk as an organ of Kaucuk.

(419) It is demonstrated that Tavorex represented Kaucuk in not only the official meetings but also in the unofficial meetings (see for example recitals (154) – (158) and (199) - (210)).

(420) The same evidence (but see also recitals (124) shows that it was clear for the other participants in the cartel – it was their perception – that [deleted] was attending the meeting for Kaucuk. In fact he was identified as a Kaucuk or Kralupy representative to these meetings (Kralupy is the location were Kaucuk is situated).

(421) The Commission also notes that the contemporaneous notes of the meeting of 15-16 November 1999, where [deleted] was perceived as Kralupy by one of the participants, indicate that information on Kaucuk´s supplies to key customers was shared with other members of the cartel (see also recital (201)).

(422) In its replies to the First SO and the Second SO, Kaucuk has essentially acknowledged that the contractual relationship with Tavorex could be qualified as agency. It has, however, contested that it could be held liable for the actions of its agent in cases where it was not aware of Tavorex' participation in any illicit conduct. Kaucuk also claims that Tavorex was not acting for it on an exclusive basis but also acted for another customer on a similar basis (although not an ESBR producer). The Commission observes that (i) the second customer was not an ESBR producer; (ii) [deleted] (iii) following the end of the contract between Kaucuk and Tavorex on 1 March 2004, Tavorex went into voluntary liquidation in October 2004. On the basis of the above, the Commission considers that Tavorex should be regarded as an auxiliary organ of Kaucuk and, therefore, in a position to engage fully the liability of Kaucuk.

(423) As mentioned above Tavorex went into voluntary liquidation in October 2004, and should not be an addressee of this Decision.

(424) Unipetrol should also be held jointly and severally responsible for the infringement committed by its subsidiary in the period from 16 November 1999 until 28 November 2002.

(425) In case of a wholly owned subsidiary, it can be presumed that the parent exercised decisive influence over the conduct of such subsidiary and that the subsidiary necessarily follows the policy laid down by the parent company (see recitals (333) - (337)).

(426) During the duration of Kaucuk's infringement, Unipetrol held the totality of Kaucuk's shareholding.

(427) It also appears that the senior management of the parent and the subsidiary overlapped to a significant extent during the duration of the infringement, as both [deleted] and Mr [deleted] held senior executive positions on the boards of both Unipetrol and

Kaucuk. [deleted] was also a member of Unipetrol's Supervisory Board during the period January – April 1999 and acted as Unipetrol's Project Manager between June 2002 and June 2003. Unipetrol's and Kaucuk's registered offices were also located at the same address at least from 1999 until 2002.

(428) In its reply to the Second Statement of Objections, Unipetrol has claimed that the nature of its shareholding in Kaucuk was purely financial, as Unipetrol was set up for the sole purpose of facilitating the privatisation process of a range of companies.

(429) This claim must be rejected since the mere fact of being a holding company would not, as such, be sufficient to rebut the presumption concerning its effective control over Kaucuk.[63] The elements highlighted indicate, however, that the management of Kaucuk was far from being removed from the control of its parent company. Moreover, it appears that Unipetrol's mission encompassed the strategic management of the group of directly or indirectly controlled subsidiaries and that general matters concerning the medium and long term strategy issues were also discussed by commercial directors in the context of a Trade Committee. Finally, the Commission observes that, irrespective of the role that Unipetrol might have played in the context of the privatisation process of certain sectors, Unipetrol is still active on the market on a commercial basis and appears to be one of the biggest Czech industrial groups.

(430) Under such circumstances the Commission cannot accept that Unipetrol's interest in Kaucuk is purely financial. The presumption of effective control which derives from 100% ownership is therefore not rebutted in this case.

(431) In accordance with the above, this Decision should be addressed to Kaucuk, for participating in the infringement through its agent Tavorex, as well as to its parent company Unipetrol

(f) Stomil

(432) The evidence described in section 4 of this Decision shows that Stomil participated in the cartel from 16 November 1999 to 22 February 2000 (see recitals (445) and (446)).

(433) Stomil represented Chemical Company Dwory not only in the official ESRA meetings but also in the unofficial meetings. At these meetings, [deleted] within Ciech-Stomil Ltd, represented Dwory. Stomil states "at the invitation of ESRA council, Dwory officially joined the ESRA-ESBR/SBR committee at the meeting held in London on 5th February 1997. [deleted] in Ciech-Stomil and had been indicated by Dwory to represent them on ESRA-ESBR statistical meetings" and "Ciech-Stomil has never been a formal member of ESRA. We agreed to represent at ESRA meetings for some time" and "copies of documents received by [deleted], were always sent to Dwory".

(434) Stomil has claimed that Dwory was kept informed of developments in ESRA, and that the final responsibility for price policy was with Dwory. Stomil also stated that "Anyhow Dwory had always final decision about prices and quantities of exported synthetic rubber. For our services we were receiving commission."

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63 See in the same sense case T-330/01 *Akzo Nobel NV v Commission*, judgment of 27 September 2006, not yet published, points 81-90.

(435) On the other hand, Dwory has explained that Stomil was the exclusive actor in the export business until 1998. The 1993 agreement between Stomil and Dwory appears to give Stomil a prominent position and a significant degree of economic independence. This is reflected, in particular, in clause 6.4 of that agreement, according to which Stomil would pay Dwory for the supplied product within fourteen days from the day of the export invoice. This was the case, regardless of whether or not customers had paid or would still be able to pay. It therefore appears that Stomil would bear financial responsibility in the event of default of final customers. That Stomil bore financial liability also appears to be confirmed in a letter dated 29 October 1998 from Stomil to Dwory which refers to "significant securities and guarantees" which were established in the context of Stomil's business relationship with certain ESBR customers.

(436) In its reply to the Second Statement of Objections Stomil has not contested these circumstances. According to the same principles which were set out above (see recitals (415) - (416)), responsibility for bad debts could generate such an economic risk for the agent that it would no longer be possible to conclude that the agent forms part of the same undertaking as the principal.

(437) On 3 March 1999 a new agreement entered into force. As Dwory has explained, this agreement reflected the fact that "since 1998 the company has worked out and implemented its own independent trade policy, reducing over time the agency services provided so far by Ciech-Stomil Lodz with respect to export" and "in 1998, a substantial change in the Company's price policy took place when the company begun negotiating the prices with all the clients instead applying the prices according to the "pricelist".

(438) Under the terms of that contract Stomil would continue to be responsible for exports to a major customer and to sell to smaller buyers on its own account.

(439) It can therefore be concluded that, over the period during which it took part in ESRA meetings and the illegal discussions which occurred on those occasions, Stomil was acting as an independent undertaking.

(440) Hence, it is concluded that Dwory should not be held responsible for Stomil's action for the period from 16 November 1999 to 22 February 2000. At the same time the evidence in the Commission's possession does not prove to the required legal standard that Dwory participated in the cartel after it started participating in ESRA meetings under its own name from the meeting of 21-22 April 2000 onwards.

(441) This Decision should therefore be addressed to Trade Stomil Ltd. for its participation in the infringement from 16 November 1999 to 22 February 2000.

7. Duration of the infringement

7.1. Start and end of infringement

(442) The Commission has corroborated evidence that the parties involved in these proceedings designed and adhered to a common agreement with a view to restricting competition as from 20 May 1996 (see section 4.3.1).

(443) [deleted] . The agreement reached at that meeting was for the following quarter, and therefore intended to last at least until 31 December 2002. The discussion which took place during the meeting of 28 November 2002 seems to suggest that, on that date, the cartel members came to a common understanding to terminate the infringement (see section 4.3.15). Consequently, the Commission considers that the infringement ended on 28 November 2002.

(444) Although BSL participated in the first cartel meeting in May 1996, Dow cannot be held responsible for the behaviour of BSL prior to the entering into force of the marketing contract of 1 July 1996. After the conclusion of the marketing contract, Dow continued to participate in the cartel. In fact, in the cartel meeting of 2-3 September 1996, [deleted]. Therefore, the involvement of Dow in the infringement started at least on 1 July 1996.

(445) [deleted]. The Commission therefore considers it appropriate to take 16 November 1999 as the starting date for Stomil's and Kaucuk's responsibility for the infringement in this case.

(446) Although the price agreements reached at the meeting of 15-16 November 1999 were intended to have effect until the end of March 2000 (i.e. the quarter following that meeting, see recital - (123)), the meeting of 21-22 February 2000 was the last one at which Stomil participated. This was also the first meeting at which Dwory took part. This meeting should be considered as the end of Stomil's participation in the cartel.

(447) The involvement of Shell ended on 31 May 1999, when they sold their synthetic rubber activities to Dow. The involvement of all the other undertakings in the infringement ended on 28 November 2002.

(448) On the basis of the above considerations, it is concluded that the duration of the individual participation in the infringement of the various undertakings concerned was as follows:

(a) Bayer:

(449) From 20 May 1996 to 28 November 2002.

(b) Dow:

(450) The undertaking formed by The Dow Chemical Company (from 1 July 1996 to 28 November 2002), Dow Deutschland Inc. (from 1 July 1996 to 27 November 2001), Dow Deutschland GmbH & Co. OHG (now Dow Deutschland Anlagengesellschaft mbH) from 22 February 2001 to 28 February 2002) and Dow Europe GmbH (from 26 November 2001 to 28 November 2002).

(c) EniChem:

(451) The undertaking formed by Eni S.p.A. and Polimeri Europa S.p.A. (both from 20 May 1996 to 28 November 2002).

(d) Shell:

(452) The undertaking formed by Shell Petroleum N.V., Shell Nederland B.V. and Shell Nederland Chemie BV from 20 May 1996 to 31 May 1999.

(e) Kaucuk a.s.:

(453) The undertaking formed by Unipetrol a.s. and Kaucuk a.s. from 16 November 1999 to 28 November 2002.

(f) Stomil:

(454) From 16 November 1999 to 22 February 2000 .

8. Remedies

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

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

(456) While it appears from the facts that in all likelihood the infringement effectively ended in November 2002, it is necessary to ensure with absolute certainty that the infringement has ceased and, accordingly, 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 entering into any agreement, concerted practice or decision of an association which might have the same or a similar object or effect.

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

(457) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose fines on undertakings where either intentionally or negligently, they infringe Article 81 of the Treaty and/or Article 53 of the EEA Agreement. Under Article 15(2) of Council Regulation No 17[64] which was applicable at the time of the infringement, the fine for each undertaking participating in the infringement could not exceed 10 % of its total turnover in the preceding business year. The same limitation results from Article 23(2) of Regulation (EC) No 1/2003.

(458) Pursuant to both Article 15(2) of Regulation No 17 and Article 23(3) of Regulation (EC) 1/2003, the Commission must, in fixing the amount of the fine, have regard to both the gravity and duration of the infringement. In doing so, the Commission will set fines at a level sufficient to ensure deterrence. Moreover, the Commission will, having regard to all relevant circumstances, assess the role played by each undertaking participating in the infringement on an individual basis. In particular the Commission will ensure that the fines imposed reflect any aggravating or mitigating circumstances

[64] Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area (OJ L 305, 30.11.1994, p.6) "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 *mutadis mutandis*". (OJ L 305, 30.11.1994, p.6)

pertaining to each undertaking. Lastly it will apply where appropriate the Leniency Notice.

9. The basic amount of the fines

(459) The basic amount of the fine is determined according to the gravity and duration of the infringement.

9.1. Gravity

(460) In assessing the gravity of the infringement, the Commission takes account of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

9.1.1. Nature of the infringement

(461) The main features of the infringement which is the subject matter of this Decision extended to competitors' discussing and agreeing prices, implementing and monitoring price agreements either in the form of price increases or, at least, stabilisation of existing price levels and market sharing agreements, exchange of commercially important and confidential market and/or company relevant information and participating in regular meetings and other contacts to facilitate the infringement. The infringement lasted several years and covered the whole territory of the EEA. By their very nature, horizontal agreements and practices of this type are "very serious" infringements of Article 81 of the Treaty and Article 53 of the EEA Agreement within the meaning of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty[65] (hereinafter "the Guidelines") as the harm to consumers is always very likely and cannot be ignored. The case law has confirmed that agreements or concerted practices involving in particular, as in this case, horizontal price agreements, may warrant classification as "very serious" solely on the basis of their nature, without it being necessary for such conduct to cover a particular geographical area or have a particular impact in the market.[66]

9.1.2. The actual impact of the infringement

(462) In this proceeding, it is not possible to measure the actual impact on the EEA market of the complex of arrangements of which the infringement consists and therefore the Commission does not rely specifically on a particular impact, in line with the Guidelines according to which the actual impact should be taken into account when it can be measured. The Court of First Instance has held that the Commission is not required precisely to demonstrate the actual impact of the cartel on the market and to quantify it, but may confine itself to estimates of the probability of such an effect. What can be said, in this case, is that with regard to the EEA, the cartel arrangements were implemented by the European producers and that such implementation did have

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65 OJ C9, 14.1.1998, p. 3.

66 See judgment in Case T-49/02 to T-51/02 *Brasserie nationale a.o. v Commission*, , of 27 July 2005, not yet published paragraphs 178 and 179; T-38/02, *Groupe Danone v Commission*, 25 October 2005, in particular paragraphs 147, 148 and 152 and *SAS v Commission*, 18 July 2005, in particular paragraphs 84, 85, 130 and 131.

an impact on the market, even if its actual effect is difficult to measure[67]. Therefore, the Commission will not take into account the impact on the market in determining the applicable fines in this case.

9.1.3. The size of the relevant geographic market

(463) The infringement covered the whole of the EEA.

9.1.4. Conclusion on the gravity of the infringement

(464) In view of the nature of the infringement and the size of the relevant geographic market, the undertakings to which this Decision is addressed have committed a very serious infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement.

9.2. Differential treatment

(465) Within the category of very serious infringements, the scale of likely fines makes it possible to apply differential treatment to undertakings in order to take account of the effective economic capacity of the offenders, respectively, to cause significant damage to competition. This is appropriate where, as in this case, there are considerable disparities between the respective market shares of the undertakings participating in the infringement.

(466) In the circumstances of this case, which involves several undertakings, it is necessary, when setting the basic amount of the fines, to take account of the specific weight, and therefore the real impact on competition, of each undertaking's offending conduct. For this purpose the undertakings concerned can be divided into different categories according to their relative importance in the market concerned.

(467) It is appropriate in this case to use the combined BR and ESBR sales in the EEA of the undertakings participating in the infringement as a basis for comparison to determine their respective weight. The comparison is based on sales in the EEA of BR and ESBR in the last full calendar year of the infringement (2001). The total value of BR and ESBR sales within the EEA is estimated to have been at least claim in 2001 (see recital (313) above). For Shell, which sold its interests in BR and ESBR in 1999, the relevant year is 1998. For Stomil, which ended its infringement in 2000, the relevant year is 1999.

(468) Enichem, with combined sales of BR and ESBR of EUR, and Bayer, with combined sales of BR and ESBR of EUR 148.8 million in 2001, should be placed in the first category.

(469) Dow had combined BR and ESBR sales of EUR 126.936 million in 2001. Dow should be placed in a second category.

(470) Shell had combined sales of BR and ESBR of EUR 86.662 million in 1998. Shell should be placed in a third category.

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[67] See to the same effect judgments in case T-241/01 *SAS v Commission*, 18 July 2005 at paragraph 122, and in case T-38/02 *Danone v Commission*, 25 October 2005, at paragraph 148, both not yet published.

(471) Kaucuk had ESBR sales of EUR 40.810 million in 2001. Kaucuk should be placed in a fourth category.

(472) Stomil had ESBR sales of EUR 16.422 million in 1999. Stomil should be placed in a fifth category.

(473) On this basis, the appropriate starting amounts for those undertakings that will receive a fine are as follows:

- First Category (Enichem, Bayer) EUR 55 million
- Second Category(Dow) EUR 41 million
- Third Category (Shell) EUR 27.5 million
- Fourth Category (Kaucuk) EUR 13.5 million
- Fifth Category (Stomil) EUR 5.5 million

9.3. Sufficient Deterrence

(474) Within the category of very serious infringement, the scale of likely fines also makes it possible to set the fines at a level which ensures that they have sufficient deterrent effect, taking into account the size of each undertaking. In this respect the Commission notes that in 2005, the most recent financial year preceding this Decision, the world-wide turnover of Shell was EUR 246 549 million, that of Enichem EUR 73 738 million, that of Dow EUR 37 221 million, that of Bayer EUR 27 383 million, that of Kaucuk EUR 2 718 million, and that of Stomil EUR 38.0189 million. Given the considerable differences in turnover between the addressees of the Decision and, in particular, the fact that Bayer's turnover is ten times that of Kaucuk, and given the circumstances of the case, no multiplier should be applied to the fine to be imposed on Stomil and Kaucuk. As Bayer is a considerable larger undertaking with a turnover of more than EUR 27 000 million, 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 1.5 should be applied to the fine to be imposed on Bayer. The turnover of Dow is more than 35 % higher than that of Bayer. In order to ensure sufficient deterrence, and given the circumstances of the case, a multiplier of 1.75 should be applied to the fine to be imposed on Dow. Enichem have almost twice as high a turnover as Dow. In order to ensure sufficient deterrence in respect of Enichem, and given the circumstances of the case, a multiplier of 2 should be applied to the fine to be imposed on Enichem. Shell's turnover is several times higher than any of the other participants in the cartel. In order to ensure sufficient deterrence in respect of Shell, and given the circumstances of the case, a multiplier of 3 should be applied to the fine to be imposed on Shell.

(475) As a result, the starting amounts of the fines to be imposed on each undertaking become as follows:

- Bayer EUR 82.5 million
- Enichem EUR 110 million
- Dow EUR 71.75 million

– Shell EUR 82.5 million

– Kaucuk EUR 13.5 million

– Stomil EUR 5.5 million

9.4. Duration of the infringement

(476) The starting amount of the fines is generally increased by 10 % for each full year of infringement, and further increased by 5 % for any remaining period of 6 months or more but less than a year.

(477) As explained in section 6, Bayer participated in the infringement at least from 20 May 1996 to 28 November 2002, a period of 6 years and 6 months. This leads to an increase in the starting amount of the fine to be imposed on Bayer of 65 %.

(478) As for the ENI group, Polimeri and ENI should be held liable for the infringement in respect of the period from 20 May 1996 to 28 November 2002 (that is to say, more than 6 years and 6 months). This leads to an increase in the starting amount of the fine to be imposed on ENI and Polimeri of 65 %.

(479) As for the Dow group, The Dow Chemical Company should be held liable for the infringement in respect of the period from 1 July 1996 until 28 November 2002, a period of more than 6 years and 4 months. According to the criterion set out at recital (476), this would lead to an increase in the starting amount of the fine to be imposed on The Dow Chemical Company of 60 %. However, in consideration of the fact that Dow did not own Shell's BR and ESBR business during the first three years of the infringement and that Shell is also liable for the infringement in respect of that same period, the increase for duration to be imposed on The Dow Chemical Company is set at 50%.

(480) Dow Deutschland Inc. participated in the infringement from 1 July 1996 until 27 November 2001, a period of more than 5 years and 4 months. According to the criterion set out at recital (476) and having regard to the circumstances described at recital (479), the increase in the starting amount of the fine to be imposed on Dow Deutschland Inc. is set at 40%.

(481) Dow Deutschland GmbH & Co. OHG (now Dow Deutschland Anlagengesellschaft mbH) participated in the infringement from 22 February 2001 to 28 February 2002, a period of more than one year. This leads to an increase in the starting amount of the fine to be imposed on Dow Deutschland Anlagengesellschaft mbH of 10%.

(482) Dow Europe GmbH participated in the infringement from 26 November 2001 until 28 November 2002, a period of more than one year. This leads to an increase in the starting amount of the fine to be imposed on Dow Europe GmbH of 10%.

(483) Shell (Shell Petroleum N.V., Shell Nederland B.V. and Shell Nederland Chemie B.V) participated in the infringement from 20 May 1996 to 31 May 1999, a period of more than 3 years. This leads to an increase in the starting amount of the fine to be imposed on Shell of 30 %.

(484) Unipetrol and Kaucuk participated in the infringement from 16 November 1999 to 28 November 2002, a period of more than 3 years. This leads to an increase in the starting amount of the fine to be imposed on Unipetrol and Kaucuk of 30 %.

(485) Stomil participated in the infringement from 16 November 1999 to 22 February 2000, a period of more than 3 months. This leads to no increase in the starting amount of the fine to be imposed on Stomil.

9.5. Conclusion of the basic amounts

(486) The basic amounts of the fines to be imposed each undertaking are therefore as follows:

- Bayer EUR 136.125 million
- Enichem EUR 181.5 million
- Dow
  - The Dow Chemical Company EUR 107.625 million,

  of which jointly and severally with:
  - Dow Deutschland Inc., for EUR 100.45 million,
  - Dow Deutschland Anlagengesellschaft mbH, for EUR 78.925 million
  - Dow Europe GmbH, for EUR 78.925 million
- Shell EUR 107.25 million
- Kaucuk EUR 17.55 million
- Stomil EUR 5.5 million

10. Aggravating and attenuating circumstances

10.1. Aggravating circumstances

10.1.1. Recidivism

(487) At the time the infringement took place, Bayer, Enichem and Shell had already been the addressees of previous Commission decisions concerning cartel activities[68]. The fact that the undertakings have repeated the same type of conduct (and, in the case of

[68] See, in particular, Commission decision 86/398/EEC of 23 April 1986 (*Polypropylene)*, OJ L 230, 18.8.1986, p.1, where ENI and Shell were involved; Commission decision 94/599/EC of 27 July 1994 (*PVC II)*, OJ L 239, 14.9.1994, p. 14 where ENI and Shell were involved. Commission Decision 2002/742/EC of 5 December 2001 (*Citric Acid*) OJ L 239, 6.9.2002 p. 18, where Bayer was involved).

Bayer, continued the same conduct, considering that the Commission decision in the *Citric Acid* case was adopted less than one year before the end of the cartel which is the subject of this Decision) either in the same industry or in different sectors from that in which they had previously incurred penalties, shows that the first penalties did not prompt these undertakings to change their conduct. This constitutes an aggravating circumstance. This aggravating circumstance justifies an increase of 50 % in the basic amount of the fine to be imposed on the undertakings mentioned in this recital.

(488) In reply to the arguments put forward by Shell in its reply to the Second Statement of Objections, it is irrelevant whether the infringement is committed in a different business sector or in respect of a different product. It is sufficient that the same undertaking has already been penalised for similar infringements.[69] The requirement that the infringements must be "similar" is satisfied by the fact that the previous Decisions cited and this Decision concern collusion on prices. As for the requirement that the "person" must be the same, this requirement is satisfied when the same undertaking commits the infringements concerned. There is no requirement that the legal entities within the undertaking, products and personnel should be the same in all Decisions.[70] In any event, internal reorganisations cannot have any effect on the assessment of the existence of this aggravating circumstance.

(489) The argument that the previous Decisions are too old to constitute precedents for recidivism is not accepted either. The Commission's PVC-II Decision was taken in 1994, two years before Shell started participating in the cartel which is the object of this Decision. As for the 1986 Decision (*Polypropylene),* this was only ten years before the start of the current infringement in 1996. In *Danone v. Commission*, the Court of First Instance ruled that Article 15 of Regulation No 17 does not specify any maximum period for repeat offences.[71]

10.2. Attenuating circumstances

10.2.1. Effective co-operation outside the Leniency Notice

(490) According to the Guidelines, the Commission may reduce the basic amount of the fine on the basis of attenuating circumstances, among which effective cooperation of undertakings outside the scope of the Leniency Notice. Shell has argued that its effective co-operation during the procedure [deleted] should be regarded as an attenuating circumstance.

(491) Shell claims that, having sold its BR/ESBR business to Dow in 1999, it was extremely difficult for it to offer any meaningful co-operation to the Commission before the First Statement of Objections was issued. [deleted]

(492) In this case the Commission has assessed whether a reduction of fines is justified, in line with the case-law, on the grounds that the co-operation of any of the undertakings

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69 Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, paragraph 284. See also case T-38/02 *Groupe Danone v Commission*, judgment of 25 October 2005, paragraphs 353 to 355.

70 Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, paragraph 290.

71 Case T-38/02 *Groupe Danone v Commission,* judgment of 25 October 2005, paragraphs 353 to 355.

concerned enabled the Commission to establish the infringement more easily[72]. That assessement has been carried out in application of the Leniency Notice (see recitals (514) - (517) below), irrespective of whether it was supplied by means of a formal leniency application or in reply to the First Statement of Objections. To the extent that such co-operation merited a reduction, it should be granted under the Leniency Notice.

(493) The Commission considers, taking into account all the facts of the case, that no circumstances are present that would lead to a reduction of the fine outside the Leniency Notice, which, in secret cartel cases, could in any event only be of an exceptional nature[73].

(494) The circumstances highlighted by Shell do not have an exceptional character and cannot justify granting a reduction for effective cooperation outside the Leniency Notice.

10.2.2. Non implementation

(495) In its reply to the Second Statement of Objections, Kaucuk has pointed to the fact that, during the whole duration of the cartel it acted aggressively in the market, increased its market shares and also incurred a 21% anti-dumping duty in Poland. The Commission does not accept that such facts should have any specific mitigating effect on the fine which should be imposed on Kaucuk.

(496) First, it appears that cartel participants knew that Kaucuk and Stomil would sell at lower prices. This, however, did not prevent Kaucuk and Stomil from taking part in the overall cartel scheme and a number of meetings.

(497) Kaucuk and Stomil have failed to demonstrate that they systematically and explicitly refrained from applying the restrictive agreements[74].

(498) In particular, no mitigating effect can be attributed to the imposition of an anti-dumping duty to Kaucuk in Poland as, at the relevant time, Poland was not a Member State and consequently was not within of the geographic scope of the infringement.

11. Application of the 10 % turnover limit

(499) 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*".

(500) The world-wide turnover achieved by Stomil in 2005 was EUR 38.0189 million. The fine imposed on Stomil can therefore not exceed EUR 3.80189 million.

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72 Judgment of 6 December 2005 in Case T-48/02 *Brouwerij Haacht v Commission* (not yet published), point 104 and the case-law cited there.

73 See Commission decision of 20 October 2005 in case C. 38281 *Raw Tobacco Italy*, recital 385. See also Joined Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 *P Dansk Rørindustri and Others v Commission* [2005] ECR I-5425 paragraphs 380-382 and Case T-15/02 *BASF v Commission*, judgment of 15 May 2006, not yet reported, paragraphs 585-586.

74 See Case T-26/02, *Daiichi Pharmaceutical v. Commission*, judgment of 15 March 2006, not yet reported, paragraph 113 and T-38/02 *Groupe Danone v. Commission* judgment of 25 October 2005, not yet reported, paragraph 385.

12. Application of the Leniency Notice

(501) Bayer and Dow 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. Shell's request for favourable consideration of its effective co-operation during the procedure will also be dealt under this section (see recital (492))

(502) As regards Bayer and Dow, the leniency applications submitted by entities from these undertakings are considered, in the circumstances of this case, also to cover the other addressees within the same undertakings, given that they belong to the economic entity to be held liable for the infringement and that there are no reasons for refusing to extend the beneficial treatment to them.

12.1. Bayer

(503) [deleted]

(504) [deleted], the Commission was able to carry out an inspection pursuant to Article 14(3) of Regulation No 17 on 27 March 2003. Bayer has co-operated fully, on a continuous basis and expeditiously throughout the Commission's administrative procedure and provided the Commission with all evidence available to it related to the suspected infringement, giving details of meetings between competitors concerning both products and enabling the Commission to prove the existence of a cartel for both products. Bayer ended its involvement in the suspected infringement no later than the time at which it submitted evidence under point 8(a) of the Leniency Notice and did not take steps to coerce other undertakings to participate in the infringement. Bayer should therefore be granted full immunity from the fine that would otherwise have been imposed on it.

12.2. Dow

(505) Dow was the second undertaking to approach the Commission under the Leniency Notice, [deleted], and the first undertaking to meet the requirements of point 21 thereof, [deleted].

(506) Dow terminated its involvement in the infringement no later than the time at which it submitted the evidence and its involvement has remained terminated.

(507) [deleted]

(508) In the assessment of the level of reduction within the band of 30-50 %, the Commission takes into account the time at which the evidence of significant added value was submitted and the extent and continuity of any cooperation after the submission.

(509) Dow's application was made following the inspection which took place at its premises on 27 March 2003. During that inspection the Commission copied several sets of handwritten notes which are used in this Decision as evidence proving the existence of a cartel.

(510) **[recitals 510-512 has been deleted including any cross references to these recitals and relevant footnotes]**

(513) On the basis of the foregoing, Dow should be granted a 40% reduction of the fine that would otherwise have been imposed on it.

12.3. Shell

(514) Shell did not apply for leniency under the terms of the Leniency Notice. Nonetheless, as explained in recital (492), its co-operation should also be considered under the terms of the Leniency Notice.

(515) In its reply to the First Statement of Objections, Shell [deeleted]

(516) Shell claims that its voluntary cooperation should be rewarded. However, at the time it was supplied, the information provided by Shell did not constitute significant added value with respect to the evidence already in the Commission's possession, as the Commission was already able to prove the infringement in all of its main elements and the information voluntarily provided by Shell did not allow the Commission to prove any new significant elements of the infringement.

(517) In conclusion, the information provided by Shell does not constitute significant added value on the basis it should be granted a reduction of the fine in application of the Leniency Notice.

13. The amounts of the fines imposed in this proceeding

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

- Bayer EUR 0
- Enichem EUR 272.25 million
- Dow
  - The Dow Chemical Company EUR 64.575 million,

  of which jointly and severally with:
  - Dow Deutschland Inc. for EUR 60.27 million,
  - Dow Deutschland Anlagengesellschaft mbH for EUR 47.355 million
  - Dow Europe GmbH. for EUR 47.355 million
- Shell EUR 160.875 million
- Kaucuk EUR 17.55 million

– Stomil EUR 3.8 million

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, for the periods indicated, 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 on price targets for the products, shared customers by non-aggression agreements and exchanged sensitive commercial information relating to prices, competitors and customers in the Butadiene Rubber and Emulsion Styrene Butadiene Rubber sectors:

(a) Bayer AG, from 20 May 1996 to 28 November 2002;

(b) Dow: The Dow Chemical Company, from 1 July 1996 to 28 November 2002, Dow Deutschland Inc., from 1 July 1996 to 27 November 2001, Dow Deutschland Anlagengesellschaft mbH, from 22 February 2001 to 28 February 2002 and Dow Europe GmbH from, 26 November 2001 to 28 November 2002;

(c) Enichem: Eni S.p.A., from 20 May 1996 to 28 November 2002 and Polimeri Europa S.p.A., from 20 May 1996 to 28 November 2002;

(d) Shell: Shell Petroleum N.V., from 20 May 1996 to 31 May 1999, Shell Nederland B.V., from 20 May 1996 to 31 May 1999 and Shell Nederland Chemie B.V., from 20 May 1996 to 31 May 1999;

(e) Kaucuk: Unipetrol a.s., from 16 November 1999 to 28 November 2002 and Kaucuk a.s., from 16 November 1999 to 28 November 2002;

(f) Stomil: Trade-Stomil Ltd., from 16 November 1999 to 22 February 2000.

Article 2

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

(a) Bayer AG EUR 0;

(b) The Dow Chemical Company EUR 64.575 million, of which:

(i) jointly and severally with Dow Deutschland Inc, for EUR 60.27 million;

(ii) jointly and severally with Dow Deutschland Anlagengesellschaft mbH and Dow Europe GmbH, for EUR 47.355 million.

(c) Eni S.p.A. and Polimeri Europa S.p.A, jointly and severally, EUR 272.25 million;

(d) Shell Petroleum N.V., Shell Nederland B.V. and Shell Nederland Chemie B.V., jointly and severally, EUR 160.875 million;

(e) Unipetrol a.s. and Kaucuk a.s., jointly and severally, EUR 17.55 million;

(f) Trade-Stomil Ltd. EUR 3.8 million.

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

642-0029000-95 of the European Commission with:

Banco Bilbao Vizcaya Argentaria S.A., Avenue des Arts, 43

B-1040 Brussels

(CODE SWIFT BBVABEBB– Code IBAN BE76 6420 0290 0095)

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, namely 6.8%.

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

DE-51368 Leverkusen

THE DOW CHEMICAL COMPANY

2030 Dow Center,

USA – Midland MI 48674

DOW DEUTSCHLAND INC,

Am Kronberger Hang 4,

DE–65824 Schwalbach/TS

DOW DEUTSCHLAND ANLAGENGESELLSCHAFT mbH

Am Kronberger Hang 4,

DE-65824 Schwalbach/TS

DOW EUROPE GmbH

Bachtobelstrasse 3,

CH-8810 Horgen

ENI SpA

Piazzale Enrico Mattei 1,

I-00144 Roma

POLIMERI EUROPA SpA

Via Enrico Fermi 4,

I-72100 Brindisi

SHELL PETROLEUM NV

Carel van Bylandtlaan 30,

NL-2596 HR The Hague

SHELL NEDERLAND BV

Carel van Bylandtlaan 30,

NL-2596 HR The Hague

SHELL NEDERLAND CHEMIE BV

Vondelingenweg 601,

NL-3196 KK Rotterdam

UNIPETROL as

Klimentska 10,

Czech Republic - 110 05 Praha 1

KAUCUK as

O. Wichterleho 810,

Czech Republic - 27852 Kralupy nad Vltavou

TRADE-STOMIL LTD

74,6 Sierpnia, P.O.Box 118

Poland - 90-646 Lodz

This decision shall be enforceable pursuant to Article 256 of the Treaty.

Done at Brussels, 29 XI 2006

For the Commission
Neelie Kroes
Member of the Commission