PRICE FIXING (POLYVINYLCHLORIDE): THE LVM CASE

Subject: Price fixing
Quotas
Concerted practices
Fines
Procedure
Delays

Industry: Polyvinylchloride (PVC)
Some implications for most industries)

Parties: Limburgse Vinyl Maatschappij NV
Elf Atochem SA
BASF AG
Shell International Chemical Company Ltd
DSM NV and DSM Kunststoffen BV
Wacker-Chemie GmbH
Hoechst AG
Société Artésienne de Vinyle
Montedison SpA
Imperial Chemical Industries plc
Hüls AG
Enichem SpA
Commission of the European Communities

Source: Judgment of the Court of First Instance, dated 20 April 1999, in Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *(Limburgse Vinyl Maatschappij NV et al v Commission of the European Communities)*; press statement by the Court dated 20 April 1999

(Note. This application to the Court of First Instance for the annulment of the Commission's decision in the PVC cases resulted in the Court generally confirming the Commission decision fining the twelve PVC producers for participating in an illegal cartel. However, the Commission fines, which amounted in all to €19,250,000 were reduced in respect of three undertakings.

In October 1983, following investigations conducted in the polypropylene sector, the Commission of the European Communities opened a file concerning polyvinylchloride (PVC); and, in March 1988, the Commission initiated proceedings against 14 PVC producers which resulted in the adoption of a decision by the Commission on 21 December 1988 penalising those 14 producers for infringement of the Community prohibition on cartels. The Court of First Instance, in its judgment of 27 February 1992, and the Court of Justice, in its

judgment on appeal of 15 June 1994, found serious procedural errors in the adoption of the 1988 decision, which was therefore annulled. Following the judgment of the Court of Justice, the Commission adopted a fresh decision on 27 July 1994 against 12 of the producers concerned by the initial decision, correcting the procedural defects found by the Court of Justice. In its decision, the Commission found that those companies had infringed the Community prohibition on cartels by participating in an agreement and/or a concerted practice from August 1980, the producers having taken part in regular meetings in order to fix target prices and quotas, plan concerted initiatives to raise price levels and monitor the operation of those collusive arrangements. The table at the end of this report shows the amount of the Commission fines for each undertaking.

The 12 undertakings concerned brought new actions before the Court of First Instance for annulment of the 1994 decision. They made a total of nearly 80 pleas, set out in over 2 000 pages of pleadings and examined by the Court of First Instance in a judgment of over 220 pages. The parties raised a large number of procedural issues, especially whether the Commission was entitled to adopt a new decision in 1994 when the initial decision of 1988 had been annulled by the Court of Justice for formal defects. The Court of First Instance rejected all those procedural claims. On the merits, the Court has confirmed the existence of the infringement found by the Commission and the participation of the 12 undertakings in that infringement. As to the fines, the Court rejected in their entirety the pleas of nine of the applicants. The fines on those undertakings were therefore confirmed.

However, the Court accepted in part the arguments of three undertakings, whose fines were accordingly reduced. In the case of Societe Artesienne de Vinyle (SAV), the Court found that, contrary to the applicant's submissions, the documents produced by the Commission were sufficient to establish that the company participated in the infringement. For the purposes of determining the fine, however, it held that such participation should be taken into account only in respect of the period from August 1980 to June 1981, and not in respect of the period between August 1980 and April 1983. Therefore, the Court of First Instance reduced the fine imposed on SAV from €400,000 to €135,000.

In the case of Elf Atochem SA and Imperial Chemical Industries Plc (ICI), the Court held that, in determining the fine to be imposed on each producer, the Commission was entitled to take into account both the volume and the value of the goods which were the subject-matter of the infringement and the size and economic strength of the undertakings concerned. The Court's investigation of the case showed that, in fixing the amount of the fine, the Commission took account of each undertaking's market share to ensure a proportionate allocation of the total fine between the various undertakings. The Court's analysis of the average market shares of Elf Atochem SA and ICI for the period between 1980 and 1983 led it to conclude that the Commission had exaggerated their market share and accordingly imposed too high a share of the fine upon them. The Court of First Instance therefore reduced the fine on Elf Atochem SA

from €3,200,000 to €2,600,000, and reduced the fine on ICI from €2,500,000 to €1,550,000.

As the Court says, this was an unusually complex case; and many pleas were submitted. Not all of these were of great interest; but, considering the length of the proceedings, it was not perhaps surprising that the Court was called on to give an explanation, with particular reference to the recently decided SCK case. The passage in the Court's judgment in which this aspect is considered - paragraphs 120 to 127 - are therefore set out below. So, too, is Article 1 of the Commission's contested decision, since this shows the grounds on which the infringements were determined and the fines imposed.)

Facts

[Following the annulment of the original decision by the Commission:]

10 The Commission thereupon adopted a fresh decision on 27 July 1994 in relation to the producers who had been the subject of the original decision, with the exception, however, of Solvay and Norsk Hydro AS (Commission Decision of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/31.865 — PVC)

11 The Decision contains the following provisions: "*Article 1* BASF AG, DSM NV, Elf Atochem SA, Enichem SpA, Hoechst AG, Hüls AG, Imperial Chemical Industries plc, Limburgse Vinyl Maatschappij NV, Montedison SpA, Société Artésienne de Vinyle SA, Shell International Chemical [Company] Ltd and Wacker Chemie GmbH infringed Article 85 of the EC Treaty (together with Norsk Hydro ... and Solvay ...) by participating for the periods identified in this Decision in an agreement and/or concerted practice originating in about August 1980 by which the producers supplying PVC in the Community took part in regular meetings in order to fix target prices and target quotas, plan concerted initiatives to raise price levels and monitor the operation of the said collusive arrangements ..."

[The following paragraphs concern the delays in the whole procedure]

120 The Community judicature has consistently held that fundamental rights form an integral part of the general principles of Community law whose observance it ensures (see, in particular, Opinion 2/94, paragraph 33; Case C-299/95 *Kremzow* v *Austria*, paragraph 14). For that purpose, the Court of Justice and the Court of First Instance rely on the constitutional traditions common to the Member States and the guidelines supplied by international treaties and conventions on the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect (Case 222/84 *Johnston* v *Royal Ulster Constabulary*, paragraph 18; *Kremzow*, paragraph 14). Moreover, Article F.2 of the Treaty on European Union states that "[the Union shall respect fundamental rights, as

guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law".

121 It is therefore necessary to examine whether in the light of those considerations the Commission has infringed the general principle of Community law that decisions following administrative proceedings relating to competition policy must be adopted within a reasonable time (Joined Cases T-213/95 and T-18/96, *SCK and FNK* v *Commission*, paragraph 56).

122 Infringement of that principle, if established, would justify the annulment of the Decision however only in so far as it also constituted an infringement of the rights of defence of the undertakings concerned. Where it has not been established that the undue delay has adversely affected the ability of the undertakings concerned to defend themselves effectively, failure to comply with the principle that the Commission must act within a reasonable time cannot affect the validity of the administrative procedure and can therefore be regarded only as a cause of damage capable of being relied on before the Community judicature in the context of an action based on Article 178 and the second paragraph of Article 215 of the Treaty.

123 In this case, the administrative procedure before the Commission lasted for a total of some 62 months. The period during which the Community judicature examined the legality of the 1988 decision and the validity of the judgment of the Court of First Instance cannot be taken into account in determining the duration of the procedure before the Commission.

124 In order to determine whether the administrative procedure before the Commission was reasonable, a distinction must be made between the procedural stage opening with the November 1983 investigations in the PVC sector, based on Article 14 of Regulation No 17, and the procedural stage which started on the date of receipt of notification of the statement of objections by the undertakings concerned. Whether the time taken for each of those two stages was reasonable will be assessed separately.

125 The first period of 52 months elapsed between the first investigations carried out in November 1983 and the initiation of the procedure by the Commission in March 1988 on the basis of Article 9(3) of Regulation No 17, pursuant to Article 3 of that regulation.

126 Whether the time taken for a procedural stage is reasonable must be assessed in relation to the individual circumstances of each case, and in particular its context, the conduct of the parties during the procedure, what is at stake for the various undertakings concerned and its complexity.

127 In the light of all the information on the file, the Court considers that in the particular cases submitted to it for review the length of that inquiry procedure was reasonable ...

Applicant	Commission fine (ECUs)	Revised fine (€)
Limburgse Vinyl Maatschappij NV	750,000	Unchanged
Elf Atochem SA	3,200,000	2,600,000
BASF AG	1,500.000	Unchanged
Shell International Chemical Co,, Ltd	850,000	Unchanged
DSM NV	600,000	Unchanged
Wacker-Chemie GmbH	1,500,000	Unchanged
Hoechst AG	1,500,000	Unchanged
Société Artésienne de Vinyle SA	400,000	135,000
Montedison SpA	1,750,000	Unchanged
Imperial Chemical Industries plc	2,500,000	1,550,000
Hüls AG	2,200,000	Unchanged
Enichem SpA	2,500,000	Unchanged

Commission investigation into State aid to Fiat Auto

On the basis of new information, the Commission has decided to extend its investigations, begun in February this year, in three cases of state aid which Italy plans to grant to Fiat Auto, for its Mirafiori, Carrozzeria, Mirafiori Meccanica and Rivalta plants. The Commission is also giving Italy one month to provide all the information required for examination of the cases. As part of its examination of the proposed aid for the Fiat Mirafiori Carrozzeria, Fiat Mirafiori Meccanica and Fiat Rivalta plants, the Commission has ascertained new facts. It is now apparent that the investment decisions in the three cases were certainly taken by Fiat in 1993/94, at a time when the Mirafiori and Rivalta plants were not situated in an assisted region. The Commission therefore doubts that Fiat should have included regional aid in the financing of the projects. The relevant investment at Mirafiori and Rivalta should not therefore need aid. The Italian Government notified six state aid proposals for Fiat Auto SpA between October and December 1997, including the three projects covered by this decision. Since it had difficulty assessing the compatibility of the aid, the Commission decided in February 1999 to initiate a detailed investigation in each of the cases.

Source: Commission Statement IP/99/352, dated 26 May 1999