COMMISSION DECISION

of 25 June 2008

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

(COMP/39.180 – Aluminium fluoride C(2008) 3043 final)

(Only the English, French and Italian texts are authentic)

(Text with EEA relevance)

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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 Article 7 and Article 23(2) thereof,

Having regard to the Commission decision of 24 April 2007 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty[2],

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

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

Whereas:

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1 OJ L 1, 4.1.2003, p.1. Regulation as last amended by Regulation (EC) No 1419/2006 (OJ L 269, 28.9.2006, p. 1).

2 OJ L 123, 27.4.2004, p. 18. Regulation as amended by Regulation (EC) No 1792/2006 (OJ L 362, 20.12.2006, p. 1).

3 OJ […]

1. INTRODUCTION

(1) This Decision concerns an infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement in the aluminium fluoride industry, which was committed by the addressees of this Decision and involved agreement on a target price increase. They examined various regions world-wide, including Europe, to establish a general price level and in some cases a market division. They were also involved in the exchange of commercially sensitive information. The geographic scope of the infringement is world-wide. The infringement period lasted from 12 July 2000 to 31 December 2000.

2. THE INDUSTRY SUBJECT TO THE PROCEEDINGS

2.1. The product

(2) Aluminium fluoride is the chemical compound with the formula AlF_3. This formula is also used in the aluminium fluoride industry to denote the product, that is to say, as an alternative term for aluminium fluoride. It has the consistency of a white powder. Adding aluminium fluoride to the production process of primary aluminium lowers the consumption of electricity required in the smelting process and thereby considerably contributes to the reduction of production costs of aluminium. Energy is a major cost factor in aluminium production[4]. Aluminium fluoride is not substitutable by other products in this respect.

(3) Aluminium producers (smelters) are the main users of aluminium fluoride. For many years now the production of aluminium has been growing[5]. Every year more than 20 million tons of aluminium is produced world-wide, some 30% of which in Europe. Depending on the type and efficiency of the production process, around 20 kg of aluminium fluoride are used in producing one ton of aluminium.

(4) There are two main ways to produce aluminium fluoride. One production process is called the "dry process" in which aluminium fluoride is produced from fluorspar (CaF_2) and results in a quality referred to as "high density" aluminium fluoride. High density quality consists of 90-92% of aluminium fluoride. The other main production process is called the "wet process" in which aluminium fluoride is produced from a by-product of fertilizer plants and results in a quality called "low density" aluminium fluoride[6]. Low density quality consists of 97% of aluminium fluoride. All the producers that are addressees of this Decision produce and sell high density aluminium fluoride.

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4 It takes around 14.000 KWh to produce 1 tonne of primary aluminium.

5 From 1997 to 2005 reported total production grew from over 19,4 million to over 23,4 million tons.

6 *[…]*

(5) Aluminium fluoride is normally transported in bulk, in big bags or in smaller paper bags. While low transport costs or a logistic system for delivery are a competitive advantage in markets close to the production facility, the product is traded worldwide and shipped around the world.

2.2. Undertakings subject to the present proceedings

2.2.1. Noralf/Boliden Odda

(6) Boliden Odda A/S is a Norwegian company active in the production and sales of zinc and aluminium fluoride. During the period of the infringement, Boliden Odda A/S was called Norzink A/S.

(7) Boliden Odda A/S has two divisions: one zinc division and one aluminium fluoride division. The latter division has been called Noralf since 1997. This division is not, and was not during the period of infringement, a separate legal entity, but is an integral part of Boliden Odda A/S[7]. During the period of the infringement ***[…]*** was ***[…]*** of Noralf[8].

(8) After the period of infringement, in 2001, Outokumpu Oyj, a Finnish company, acquired 100% of the shares in Norzink A/S, which subsequently changed its name to Outokumpu Norzink A/S. In 2003, Boliden AB, a Swedish company, acquired 100% of the shares in Outokumpu Norzink A/S, which subsequently changed its name to Boliden Odda A/S. The company has remained the same legal entity. (Boliden Odda A/S and Boliden AB will hereinafter be referred to as "Boliden".)[9]

(9) In 2000, sales of aluminium fluoride of Boliden Odda A/S in the EEA amounted to EUR ***[…]*** and its total sales of aluminium fluoride in the geographic area covered by the infringement (world-wide) amounted to EUR ***[…]***. In 2007, its worldwide total turnover amounted to EUR ***[…]***[10].

2.2.2. Fluorsid / Minmet

(10) Fluorsid S.p.A. (hereinafter referred to as "Fluorsid") manufactures and sells (including through sales agents) derivatives of fluorine, including aluminium fluoride. Fluorsid has its registered office and production plant in Assemini, Cagliari, Italy, and has a commercial office in Milan, Italy.

(11) At the time of the infringement, Fluorsid was owned by the following three shareholders: (1) Minmet Financing Company S.A. (with 54,844% of the shares), (2) the Autonomous Region of Sardinia (with 40,711% of the

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7 *[…]*

8 *[…]*

9 *[…]*

10 Reply to request for information.

shares) and (3) Nuova Mineraria Silius SpA (with 4,445% of the shares). Since 1997 this shareholder structure has not changed[11].

(12) *[…]* held the post of *[…]*(1997-1999) and of *[…]* of Fluorsid (from 2000)[12].

(13) During the period of infringement, *[…]* was *[…]* and *[…]* and *[…]* were *[…]* of Fluorsid[13].

(14) From 1997 to 2001, *[…]* was *[…]* of Fluorsid for aluminium fluoride. In 2001, *[…]* took over this responsibility[14]. *[…]* was at the same time *[…]* (1997-2001). *[…]* became *[…]* in 2002[15].

(15) In 2000, Fluorsid had a turnover of EUR *[…]* in EEA-wide aluminium fluoride sales, almost all generated in Italy, and its total sales of aluminium fluoride in the geographic area covered by the infringement (world-wide) amounted to EUR *[…]*. In 2007, its worldwide total turnover amounted to EUR *[…]*[16].

(16) Minmet Financing Company S.A. (hereinafter referred to as "Minmet"), apart from being Fluorsid's main shareholder, acts as its exclusive sales agent for aluminium fluoride throughout the world with the exception of Italy. Minmet acts exclusively as Fluorsid's agent (it does not act as agent on behalf of other aluminium fluoride producers). Minmet is a non-publicly traded share company with its seat in Lausanne, Switzerland. Minmet states that "*[…]*[17] *[…]* another member of *[…]*, has been a *[…]* since 1992[18].

(17) In view of its majority shareholding in Fluorsid, the power to appoint more than half of the members of the board of directors lies with Minmet, even if such members have in fact been appointed unanimously by all shareholders since 1997[19].

(18) As a commercial agent, Minmet's core activity is to represent Fluorsid, to trade and to market non-ferrous metals and magnesium products. In

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11 Reply to request for information.

12 Reply to request for information.

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19 Reply to request for information.

addition, it develops photometric ore sorting equipment. Minmet does not itself produce aluminium fluoride[20].

(19) As its commercial agent, Minmet received instructions from Fluorsid concerning aluminium fluoride sales carried out on behalf of Fluorsid. The individuals in charge of aluminium fluoride sales at Minmet were Mr ***[…]*** (1997-31.7.2003) and Mr. ***[…]*** (since 1997). These individuals, in their capacity as ***[…]*** for Fluorsid received information enabling Minmet to carry out its activities on behalf of Fluorsid for transactions regarding aluminium fluoride. This information was provided by ***[…]*** of Fluorsid until 2001 and by ***[…]*** (in his functions at Fluorsid) thereafter[21].

(20) In 2000, Minmet had ***[…]***[22]. In 2007, its worldwide total turnover amounted to EUR ***[…]***.

(21) In Italy C.E. Giulini & C. S.r.l. has acted (since 1975) as Fluorsid's exclusive sales agent for aluminium fluoride[23]. C.E. Giulini & C. S.r.l. is a 90% family-owned limited-liability company registered in Milan. The individuals owning the company also hold positions of responsibility (***[…]***) in Fluorsid. The remaining 10% stake in the company is held by Minmet[24]. This company structure has not changed since 1997.

(22) C.E. Giulini & C. S.r.l.'s core business is the sale of chemical products, metals, sulphur, sulphuric acid, minerals and fertilizers. C.E. Giulini & C. S.r.l. does not produce aluminium fluoride itself[25]. With regard to aluminium fluoride sales it acted on behalf of Fluorsid and under its instructions[26].

2.2.3. Société des Industries Chimiques du Fluor

(23) Société des Industries Chimiques du Fluor (hereinafter referred to as "Industries Chimiques du Fluor", also commonly among the parties referred to as "ICF") is a public company which is established under Tunisian law and the shares of which are quoted on the Tunis stock exchange[27]. Industries Chimiques du Fluor is active in the production and sale of aluminium fluoride.

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[20] Reply to request for information.

[21] Reply to request for information.

[22] Reply to request for information.

[23] Reply to request for information.

[24] Reply to request for information.

[25] Reply to request for information.

[26] Reply to request for information.

[27] Reply to request for information.

(24) From 1997 to 2005 ***[…]*** was ***[…]*** of Industries Chimiques du Fluor[28].

(25) In 2000, Industries Chimiques du Fluor had a turnover of EUR ***[…]*** in EEA-wide aluminium fluoride sales and its total sales of aluminium fluoride in the geographic area covered by the infringement (world-wide) amounted to EUR ***[…]***. In 2007, its worldwide total turnover amounted to EUR ***[…]***[29].

2.2.4. Industrial Quimica de Mexico/QB Industrias

(26) Industrial Quimica de Mexico S.A. de C.V. (hereinafter referred to as “Industrial Quimica de Mexico”, also commonly referred to among the parties as "IQM") is a public limited company situated in San Luis Potosi, Mexico[30]. The company manufactures and sells chemicals, *inter alia* aluminium fluoride.

(27) Since 1999, Industrial Quimica de Mexico has been a 99,99% subsidiary of Q. B. Industrias, S.A.B. de C.V. (hereinafter referred to as “QB Industrias”), a Mexico-city based holding company[31].

(28) Throughout the period of infringement, ***[…]*** was the ***[…]*** of Industrial Quimica de Mexico. He was also the ***[…]*** of QB Industrias[32].

(29) In 2000, Industrial Quimica de Mexico's total sales of aluminium fluoride in the geographic area covered by the infringement (world-wide) amounted to EUR ***[…]***. In 2000, Industrial Quimica de Mexico had no sales of aluminium fluoride in the EEA. In 2007, its worldwide total turnover amounted to EUR ***[…]***[33].

(30) In 2000, QB Industrias had no sales of aluminium fluoride. In 2007, QB Industrias' worldwide turnover amounted to EUR ***[…]***[34].

2.3. The business concerned

2.3.1. Supply

(31) The main producers of aluminium fluoride in the EEA are located in Norway (Noralf), Sweden, Italy (Fluorsid) and Spain.

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28 Reply to request for information.

29 Reply to request for information. ***[…]***

30 Reply to Statement of Objections. ***[…]***

31 Reply to Statement of Objections.

32 Reply to Statement of Objections.

33 Reply to request for information.

34 Reply to request for information. ***[…]***

(32) Outside Europe, aluminium fluoride is produced in the United States, Canada, Brazil, India, Mexico (Industrial Quimica de Mexico), Tunisia (Industries Chimiques du Fluor) and Jordan, but also in Russia and China. Some of the big producers of aluminium and, thus, major users of aluminium fluoride, have a large "captive" production of aluminium fluoride, which means that they produce (mainly) for their own use, although in the period of the infringement they also bought from other aluminium fluoride producers.

(33) The estimated total market value of aluminium fluoride sold on the open market in the EEA for 2000 is approximately EUR 71 600 000[35]. The market value of aluminium fluoride sold on the open worldwide market concerned by the cartel[36] in 2000 is approximately EUR 340 000 000[37]. The parties' estimated joint market share on the open market in the EEA is ***[…]***% and on a world-wide basis ***[…]***%. If captive production of the vertically integrated aluminium producers is included in the value of the market, the value of the market would be higher, but the share of each individual participating undertaking would be lower.

2.3.2. Demand

(34) While there are some other uses for the product, nearly the entire production of aluminium fluoride goes into primary aluminium production. The main users are therefore aluminium smelters worldwide. They are able to, and in fact do, obtain their aluminium fluoride requirements from all over the world, if the quality is acceptable and the price offer is competitive. Some large aluminium producers produce most of the aluminium fluoride which they require themselves, while buying the remainder of their requirements of aluminium fluoride on the open market.

2.3.3. The geographic scope of the aluminium fluoride business

(35) Aluminium fluoride is traded on a world-wide basis. Sales have been made from the United States into the EEA and from the EEA to the United States, Africa, South America and Australia. Aluminium fluoride from Russia is increasingly sold into the EEA. Indian and Chinese producers have at least been interested in gaining a foothold in the EEA. Producers from all over the world bid for tenders in the Arab world.

(36) The Tunisian producer Industries Chimiques du Fluor sells considerable quantities in the EEA.

(37) The Mexican producer Industrial Quimica de Mexico has claimed that between 1997 and the end of the period of infringement it did not sell

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[35] This estimate is based on the sum of the individual figures provided by the parties in reply to request for information. ***[…]***.

[36] The geographic scope of the infringement is defined in recital (136).

[37] This estimate is based on the sum of the individual figures provided by the parties in reply to request for information.

aluminium fluoride in the EEA[38]. It did, however, make an offer to at least one aluminium fluoride user in the EEA in 1998.[39] In addition, Industrial Quimica de Mexico admitted that its products were shipped in 1999 to Germany for the purposes of a plant trial[40]. Since the end of the period of the infringement, Industrial Quimica de Mexico has made at least one sale in the EEA[41].

(38) Since 1997, the aluminium fluoride industry association IFPA (Inorganic Fluorine Producers Association) brought together producers from all around the world, including Europe, Latin America, Northern Africa and the Near and Middle East, as well as India.

2.3.4. The parties' arguments relating to the Statement of Objections as regards the description of the business concerned and the Commission's response

(39) Industrial Quimica de Mexico and QB Industrias have emphasised the important role that transport costs and logistics play in the sale of aluminium fluoride. They claim that while the product sells globally, where there is a local producer, the market becomes regional. Industrial Quimica de Mexico and QB Industrias have contended that producers’ location and logistics play a very important role at the delivery of the material. Aluminium fluoride is characterised by low economic density since the transport costs am,ount to around 10 per cent of the value of the material. In Europe there are four producers of aluminium fluoride. Industries Chimiques du Fluor is located in Tunisia. Moreover, the European region is a net exporter and the production capacity exceeds consumption. Furthermore, tenders are not public, but the aluminium producers invite producers of aluminium fluoride to submit tenders. Before being invited to submit a tender, the producer's product has to be approved. Invitations to tenders were not extended to Industrial Quimica de Mexico by any of the major European aluminium producers, with exception of the tender that led to a sale in 2005 (which is after the infringement period). Industrial Quimica de Mexico had no turnover in EEA-wide aluminium sales in 2001

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38 Reply to request for information. According to EUROSTAT a considerable amount of aluminium fluoride was imported from Mexico into the Community in July 1999. According to the best information available to the Commission, Industrial Quimica de Mexico was the only Mexican aluminium fluoride producer at the time.

39 [During] a conversation between ***[…]*** and Industrial Quimica de Mexico towards the end of 1998.***[…]*** of Industrial Quimica de Mexico informed ***[…]*** that Industrial Quimica de Mexico had made an offer to a customer in Europe "*in order to put pressure*" on ***[…]***, presumably for having touched customers outside Europe which Industrial Quimica de Mexico considered its own customers. An offer to the ***[…]*** plant in ***[…]***, a traditional client of ***[…]***, is expressly mentioned. There are also indications (Inspection document) suggesting that Industrial Quimica de Mexico faced no obstacles in approaching European customers and rather refrained from doing so in exchange for not being disturbed in other markets or with customers outside Europe.

40 Reply to Statement of Objections.

41 Reply to request for information.

or before. Industrial Quimica de Mexico and QB Industrias have further argued that although admittedly, Industrial Quimica de Mexico shipped 300 tonnes to *[…]* in 1999, this shipment was neither a considerable quantity (it represents 0,19% of an estimated 1999 European/North African production of 156 000 tons) nor a normal sale. According to Industrial Quimica de Mexico and QB Industrias, this transaction must be seen as a supply for the purpose of a trial supply for product approval. Finally, Industrial Quimica de Mexico and QB Industrias have stated that it took six years before this trial led to the sale in 2005. In fact, by purchase contract of 5 November 2004, the company *[…]*, Industrial Quimica de Mexico's agent, undertook to sell in 2005 and 2006 around 1 400 tons of aluminium fluoride annually to *[…]*. Already in March 2005 *[…]* had to ask for a renegotiation of terms as regards the changes in hydrate costs, something the customer refused. Because of increasing costs, *[…]* was forced finally to rescind the contract. The customer terminated the contract and claimed damages.

(40) Industries Chimiques du Fluor has objected that the relevant geographic market is not clearly defined in the Statement of Objections. Industries Chimiques du Fluor has claimed the market should be defined as world-wide and that captive production of aluminium fluoride by vertically integrated aluminium producers should be taken into account for the calculation of the value and volume of the market. As a consequence, the value and market shares attributed to Industries Chimiques du Fluor would be lower. The sales volume in the Western world attributed in the Statement of Objections to Industries Chimiques du Fluor is incorrect (too high).

(41) Fluorsid has argued that the correct definition of the market should include captive production of the vertically integrated producers, who were not only buying and reselling aluminium fluoride and as such competing on the market, but who were also capable of expanding production easily, for which reason competition from their side was potentially even greater.

(42) As to the geographic scope of the market, Fluorsid has objected that the Commission refers to an ill-defined "western free market", which does not take into consideration imports from China and Russia. These imports, according to Fluorsid, had a direct impact on the volumes available on the European market and prices. Russia, China and India were important producers as well and import and export aluminium fluoride in the "Western world". Fluorsid has argued that European aluminium fluoride producers are aware of this. The fact that the Commission could not find evidence of agreements on exports does not imply that Russia and China were not part of the geographic market. Producers in the United States sell aluminium fluoride in Europe. North America, China and Russia should be included in the definition of the aluminium fluoride market. Fluorsid has argued that Northern Europe is a separate, autonomous geographic market due to *[…]*.

(43) Fluorsid has also objected that the Commission's estimate of the total market value of aluminium fluoride in the Western world is inaccurate. Fluorsid has claimed that the market shares have to be re-calculated to include all producers.

(44) Minmet has argued that the Commission should have defined the market using the Commission Notice on the definition of the relevant market for the purposes of Community competition law[42]. Moreover, the Commission's selection of the 'Western world' is arbitrary. Russia and China should have been included and it should not have excluded so-called 'captive sales' by the companies ***[…]*** and ***[…]*** as in fact a large portion of these companies' production of aluminium fluoride is sold on the open market.

(45) The Commission responds to the arguments of the parties set out in recitals (39) to (44) as follows. Firstly, as to the parties' different arguments with respect to the definition of the market, for the establishment of the infringement, the Commission is not required to define the market but its duty is to establish the scope of the infringement. For this purpose it is not relevant whether the geographic scope of the aluminium fluoride market should correctly be defined as regional, world-wide, or as covering the 'Western world' (excluding Russia and/or China) or whether captive production by vertically integrated aluminium producers should rightly be included in the market. The geographic scope of the infringement is defined in recital (136), based on the facts set out in Section 4.

(46) Indeed, in the *Mannesmannröhren-Werke*[43] case, the Court of First Instance of the European Communities held that, assuming it is established that "*that the Commission defined the market affected by the infringement found in Article 1 of the contested decision insufficiently or incorrectly in the present case, that circumstance could not have an impact on the existence of that infringement*".

(47) In cartel cases, undertakings, by concluding anti-competitive agreements, de facto determine the parameters within which they compete with one another. As the Court of First Instance has held[44] "*...for the purposes of applying Article 81 EC, the reason for defining the relevant market, if at all, is to determine whether an agreement is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market [45]. Consequently, there is an obligation on the Commission to define the relevant market in a decision applying Article 81 EC only where it is impossible, without such a definition, to determine whether the agreement, decision by an association of undertakings or concerted practice at issue is liable to affect trade*

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42 OJ C 372, 9.12.1997, p. 5.

43 Case T-44/00, *Mannesmannröhren-Werke AG v Commission,* [2004] ECR II-2223, paragraphs 132-133; and Case T-61/99, *Adriatica di Navigazione Spa*, [2003] ECR II-5349, paragraph 29.

44 Case T-213/00 *CMA CGM a.o.* v *Commission (FETTCSA)* [2003] ECR II-913, paragraph 206.

45 Case T-29/92 *SPO a.o.* v *Commission* [1995] ECR II-289, paragraph 74; Joined Cases T-25/95 T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR a.o.* v *Commission* [2000] ECR II-491, paragraph 1093.

between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market".

(48) It follows that for the purpose of the establishment of an infringement, the definition of the market in a cartel case does not call for the degree of precision equal to that which is required when assessing infringements of Article 82 of the Treaty or in certain merger cases. By describing the product, the undertakings concerned, the supply and the demand as well as the geographic scope of the aluminium fluoride industry, the Commission has examined the market and placed the cartel conduct in its relevant context.

(49) If the actual object of a cartel arrangement is to restrict competition by agreeing on price-increases or prices, it is not necessary to define the geographic markets in question precisely, provided that actual or potential competition on the territories concerned was necessarily restricted, whether or not those territories constitute "markets" in the strict sense[46].

(50) However, according to Point 18 of the Commission's 2006 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003[47] (hereinafter "2006 Guidelines on fines"), where the geographic scope of an infringement extends beyond the EEA (e.g. worldwide cartels), the relevant sales of the undertakings within the EEA may not properly reflect the weight of each undertaking in the infringement. In such circumstances, in order to reflect both the aggregate size of the relevant sales within the EEA and the relative weight of each undertaking in the infringement, the Commission may assess the total value of the sales of goods and services to which the infringement relates in the relevant geographic area (wider than the EEA), may determine the share of the sales of each undertaking party to the infringement on that market and may apply this share to the aggregate sales within the EEA of the undertakings concerned. The result will be taken as the value of sales for the purpose of setting the basic amount of the fine.

(51) The Commission points out that according to the findings made in this Decision (recital (136)), the cartel had a worldwide scope. The discussion in the cartel meeting in Milan covered Australia, South America, North America, Europe, and "other markets" (including, for example, Turkey). To a varying degree the cartel members were present in these different regions. The very fact that the participants at the meeting on 12 July 2000 in Milan discussed prices and sometimes the allocation of volumes for these regions and also raised the question in what regions the different producers had an interest to supply, indicates that effective – or potential, with respect to those regions where there was no interest from certain companies, –

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[46] Case T-241/01 *SAS v Commission* [2005] ECR II-2917, paragraph 99; Case T-213/00 *CMA CGM (FETTCSA)*, cited above, paragraph 206; and Case T-348/94 *Enso Española v Commission*, [1998] ECR II-1875, paragraph 232.

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

competition existed between the cartel members in every region discussed. This finding alone is strong evidence that undertakings competed at worldwide level (excluding China, which was not discussed, and Russia, because the reference to the latter country does not bear out the existence of arrangements concerning it). Such a wide definition is supported by Industries Chimiques du Fluor and Fluorsid (although Fluorsid also claims that Northern Europe is a market of its own, while at the same time it has claimed that the market should be defined as world-wide, including Russia and China).

(52) As to Industries Chimiques du Fluor's and Fluorsid's arguments with regard to incorrectness of the value and volume of sales and the market shares attributed to the undertakings concerned by the Commission in the Statement of Objections, it is sufficient to state that the information as to the value and volume of its sales in this Decision have been supplied by Industries Chimiques du Fluor and Fluorsid, respectively. Moreover, this Decision, contrary to the Statement of Objections in this case, does not try to establish the absolute market shares of the undertakings concerned on the relevant product or geographic market. In this respect, it is noted that the relative shares of sales of the undertakings concerned in the geographic area covered by the cartel are examined in recital (229) for the purpose of the calculation of fines. Those relevant shares of sales do not take into account production by third parties, so that the question whether such production is captive or sold on the open market is immaterial. Nor do those relevant shares of sales take into account, for the purpose of calculating the fine, sales in the geographic area not covered by the cartel, so that these sales also would not affect the calculation of the fine imposed on the undertakings concerned by this Decision. However, that is a different issue from the one examined in the context of a definition of the market for aluminium fluoride and the undertakings' absolute share of that market. The latter is not needed here.

2.4. Trade between Member States

(53) Between 1999 and 2001, there was a considerable amount of trade flows in aluminium fluoride between the EU-15 Member States, as well as between the EU-15 Member States and Norway. Cross-border supplies include supplies to the major smelters in the EEA[48], which generally purchase from more than one aluminium fluoride supplier.

(54) In 2000, for example, 11 518 tons of aluminium fluoride were traded between EU-15 Member States, with the main quantities imported from France, Spain and Sweden. In the same year, nearly 3 703 tons were imported into the EU-15 Member States from Norway.[49]

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[48] The EEA at the time of the infringement included the Member States of the Community at 30 April 2004 ("EU-15"), as well as Norway, Iceland and Liechtenstein.

[49] Data according to Eurostat.

(55) European aluminium production, for which aluminium fluoride is an input, is concentrated in a relatively small number of sites. The customers of aluminium fluoride producers are located in a large number of EEA States. At the time of the infringement aluminium production took place in France, Germany, Greece, Iceland, Italy, Netherlands, Norway, Spain, Sweden and the United Kingdom[50]. There was accordingly a substantial volume of trade flows in aluminium fluoride between the Member States and between the Member States and the Contracting Parties to the EEA Agreement.

3. PROCEDURE

(56) On 23 March 2005, Boliden submitted an application for immunity under the Commission Notice on immunity from fines and reduction of fines in cartel cases (hereinafter "the Leniency Notice"). In April 2005, Boliden submitted further clarifications, additional information and oral statements. On 28 April 2005 the Commission granted Boliden conditional immunity pursuant to point 8(a) of the Leniency Notice.

(57) On 25 and 26 May 2005, the Commission carried out unannounced inspections pursuant to Article 20(4) of Regulation (EC) No 1/2003 at the premises of European producers or resellers of aluminium fluoride

(58) On 23 and 31 August 2006, the Commission interviewed, pursuant to Article 19 of Regulation (EC) No 1/2003, ***[…]***, a former employee of Boliden (holding the post ***[…]*** of Noralf at the time of the infringement).

(59) Between September 2006 and February 2007, the Commission sent, and received answers to, a number of requests for information under Article 18(2) of Regulation (EC) No 1/2003.

(60) On 29 March 2007, during a meeting with the Commission, Fluorsid voluntarily submitted certain written materials. On 22 April 2007, Fluorsid submitted an application under the Leniency Notice and on 27 May 2007, an addendum to its application. On 13 July 2007, the Commission adopted a decision informing Fluorsid that the Commission did not intend to grant Fluorsid any reduction of fines under the Leniency Notice.

(61) On 24 April 2007 the Commission initiated proceedings and adopted a Statement of Objections. The Statement of Objections was sent on 25 April 2007 and was notified to the addressees between 26 and 30 April 2007. At the same time the addressees were granted access to the file by means of a CD ROM with the accessible documents in the Commission's case file.

(62) All addressees but Boliden made known to the Commission in writing their views on the objections raised against them. The Hearing Officer granted extensions to the prescribed deadline to certain addressees.

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50 *[…]*.

(63) An Oral Hearing was held on 13 September 2007, in which all the addressees of the Statement of Objections took part. After the Oral Hearing, Industrial Quimica de Mexico and QB Industrias confirmed in writing their answers provided at the Oral Hearing.

(64) On 11 and 14 April 2008, requests for information were sent to addressees of the Statement of Objections asking them to provide information about their overall turnover and sales of aluminium fluoride as well as details about any forthcoming significant change to their businesses or owners.

The parties' observations in response to the Statement of Objections as regards the Procedure and the Commission's findings

(65) Industries Chimiques du Fluor has claimed that its rights of defence have been affected insofar as it has been informed late of the proceedings contrary to the other undertakings concerned who were informed of the Leniency Notice in connection with the unannounced inspections carried out by the Commission. Moreover, Fluorsid's application under the Leniency Notice is not mentioned in the Statement of Objections and the documents submitted together with it can not be used against Industries Chimiques du Fluor as inculpatory documents.

(66) In this respect, it should be noted at the outset that the Leniency Notice is a publicly available document that is accessible to any party regardless of whether such party is involved in antitrust proceedings before the Commission. Industries Chimiques du Fluor was given ample opportunity to be heard on all the matters to which the Commission has objected.

(67) Insofar as Industries Chimiques du Fluor claims that Fluorsid's application under the Leniency Notice was not mentioned in the Statement of Objections, the Commission points out that this leniency application was made available to the parties as it was included in the CD-ROM sent on 18 June 2007[51]. Accordingly, Industries Chimiques du Fluor received it well before the Oral Hearing and had the opportunity to make known its views.

(68) Industries Chimiques du Fluor has also submitted that the Commission, when issuing the Statement of Objections to it, violated the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part[52] (hereinafter the "Agreement"), because the Commission did not consult the Association Committee, something which it alleges is foreseen under the Agreement.

(69) The Agreement, which entered into force in 1998, contains, *inter alia*, provisions relating to competition and state aid. Article 36(1) thereof provides that all agreements between undertakings, decisions by

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51 See footnote 53.

52 Decision 98/238/EC, ECSC of the Council and the Commission, OJ L 97, 30.3.1998, p. 1.

associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition, insofar as they may affect trade between the Community and Tunisia, are incompatible with the Agreement.

(70) The Agreement provides that if the Community or Tunisia considers that a particular practice is incompatible with Article 36(1) thereof, and if such practice causes or threatens to cause serious prejudice to the interest of the other Party or material injury to its domestic industry, including its services industry, it may take appropriate measures after consultation within the Association Committee or after 30 working days following the referral to that Committee.

(71) Firstly, it is important to note that the Commission is not applying Article 36(1) of the Agreement, but Article 81 of the Treaty. Secondly, the Court of Justice of the European Communities has already ruled as regards similar provisions in other agreements that they do not prevent the application by the Commission of Articles 81 and 82 of the Treaty[53]. Thirdly, appropriate measures may be taken if the practice incompatible with Article 36(1) of the Agreement "causes or threatens to cause serious prejudice to the interest of the other Party or material injury to its domestic industry" (Article 36(1) of the Agreement). However, there is no obligation to take "appropriate measures", measures which would in any event concern the enforcement of Article 36(1) of the Agreement and not of Article 81 of the Treaty. The fact that a Tunisian company is concerned by an investigation of an infringement of Article 81 of the Treaty does not oblige the Commission to apply the Agreement and does not mean that the cartel practice causes or threatens to cause serious prejudice to the interest of the other Party or its domestic industry (in this case Tunisia).

(72) Although the geographic scope of the investigated cartel includes Tunisia, the Commission has no indication that the cartel practice seriously causes or threatens to cause serious prejudice to Tunisia's interests or its domestic industry. In any case, Industries Chimiques du Fluor did not raise any claim that Tunisia incurred any such prejudice. Therefore the Commission sees no scope for application of the Agreement in this case. Accordingly, there is no obligation to consult the Association Committee as foreseen by the Agreement.

4. DESCRIPTION OF THE EVENTS

4.1. Origins of the cartel

(73) There are indications[54] that to some extent collusive activities already took place in the aluminium fluoride industry in the period between the creation

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53 Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, *Ahlström Osakeyhtiö and Others v* Commission [1988] ECR 5193, paragraphs 30 and 31.

54 Inspection documents.

of the industry organisation IFPA in 1997 and the Milan agreement of 12 July 2000. Within IFPA, the members collaborated directly amongst each other to produce industry statistics that include, *inter alia*, data on sales, production capacities and aluminium fluoride consumption. Other, mostly bilateral contacts, took place between the addressees of this Decision but without there being conclusive evidence of reaching the stage of concrete anti-competitive agreements.

(74) Around 29 July 1999 aluminium fluoride producers met in Greece. During inspections at the premises of Fluorsid, the Commission found a seven-page document[55] with the title "PRODUCERS MEETING - GREECE" and the date "July 29, 1999". This document itself does not mention the name of the author or the names of the participants (individuals or companies) to this meeting nor the date of the meeting. Mr. ***[…]*** of Industrial Quimica de Mexico admitted at the Oral Hearing that he attended a dinner with other producers in Athens[56]. He was not able to confirm who else participated or what was discussed.

(75) Further indications of prior contacts between the competitors can be inferred from the document ***[…]***[57] which was circulated in the industry. It reads as follows:

"1. Improve/increase communications.
2. Minimum price range for 1 year contracts:

- *Basis **[…]** in bags or palletized.*
- *Payment **[…]**.*
- *Price increase $**[…]**.*
- ***[…]** $ **[…]** desirable per metric ton;*
- ***[…]**$**[…]** desirable per metric ton.*
- ***[…]**$**[…]**desirable per M:ton.*

3. Minimum prices for long term contracts based on LME:

- *LME 3 month quotation referred to **[…]**.*
- *Minimum price $**[…]** per metric ton.*
- *Price increase $**[…]**.*
- *MINIMUMPRICE OF **[…]**.*

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55 Inspection documents.

56 ***[…]*** Statement at the Oral Hearing. ***[…]***

57 ***[…]***

*4. Calculated price difference between **[…]**.*
5. Harmonize specifications and provide for swaps in all contracts.

*6. Guarantee every producer who follows guidelines **[…]**'*

(76) The document ***[…]*** includes the names of all the addressees of this Decision. However, it is not dated and it does not mention the name of the author. It cannot be inferred from the document itself whether it was eventually discussed or approved.

4.2. Operation of the cartel

4.2.1. The meeting on 12 July 2000 in Milan

(77) On 12 July 2000, a meeting between Fluorsid, Industries Chimiques du Fluor and Industrial Quimica de Mexico took place in Milan, Italy[58]. Noralf attended the meeting over the telephone[59]. Mr ***[…]*** of Fluorsid made a report of the meeting, according to which the meeting covered a number of issues concerning the aluminium fluoride market. Mr ***[…]***, representing Noralf, also took minutes of what was discussed[60].

(78) According to the ***[…]*** of Mr. ***[…]*** of Noralf, Mr. ***[…]*** called Mr.***[…]*** on the phone and Mr. ***[…]*** and Mr. ***[…]*** were present in the office with ***[…]***[61]. Mr. ***[…]*** confirmed the identity of the participants in his later statement to the Commission[62].

(79) The report drawn up by Mr ***[…]*** of Fluorsid is entitled "Meeting among Fluorsid, Industries Chimiques du Fluor, Industrial Quimica de Mexico". The report mentions the name of Mr.***[…]*** (***[…]***of Industries Chimiques du Fluor) at two occasions. ***[…]***.

(80) Industrial Quimica de Mexico and QB Industrias in their reply to the Statement of Objections confirmed that the case file clearly shows Industrial Quimica de Mexico's participation in the Milan meeting of 12 July 2000. Similarly, Industries Chimiques du Fluor in ***[…]*** confirmed its presence at the meeting[63].

(81) The first issue discussed in the meeting was the development of costs of production between June 1999 and June 2000. The participants calculated

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58 Inspection documents. ***[…]***

59 ***[…]***

60 ***[…]***

61 ***[…]***

62 ***[…]***

63 ***[…]***

an increase in total cost of 20% between those two points in time. The report states in this regard: ***[…]***

*"[…] as our price of ALF3 for sale in 2000 was determined in mid year 1999 and our costs at mid year 2000 are **[…]**% higher than 1999, our prices of ALF3 in 2001 should be **[…]**% higher than those of 2000. All three parties agreed this was reasonable from the producer standpoint. However will the market supply/demand permit such an increase".*[64]

(82) Secondly, the meeting participants exchanged information on sales volumes for the year 2000 and expected sales volumes for the year 2001. The report first lists total aluminium fluoride production and overall sales volumes for each producer for the year 2000. The report continues by providing for each undertaking that participated in the meeting sales volume forecasts for 2001 by client/area. ***[…]***

(83) That information is followed in the report by a detailed description of the expected specific market situation of each participant. This information included discussion of expected sales volumes and prices to specific clients/areas. The four producers discussed their sales targets and how these could be reached in the individual regions[65].

(84) The participants next discussed individual regions[66]. The report states:

[…][67].

(85) As regards Europe, the report of the meeting states: ***[…]***

"<u>Europe</u>

Sales today as follows:

*Fluorsid – 8,000 ton in **[…]** and **[…]***

*Industries Chimiques du Fluor – 9,000/12,000 T **[…]** 2,000 T **[…]**DDF – 7000 T **[…]** 2000 T **[…]***

*Noralf/Alufluor – **[…]***

[…]

[…]

- ***[…]***

[64] Inspection document.

[65] Inspection documents.

[66] Inspection document. The regions discussed were Australia, Europe, South America, North America, Turkey and Romania. As for Russia, there is only one reference stating that "Russia – no interest for ICF or IQM".

[67] Inspection document.

Total _________________________[…]T

Year 2000 prices

Industries Chimiques du Fluor to ***[…] […]*** *US$/T* ***[…]***
[…] *US$/T* ***[…]****Same price for bags and bulk.*

For year 2001 Industries Chimiques du Fluor wants to raise price to ***[…]****US$/T* ***[…]*** *And* ***[…]*** *US$/T* ***[…]****. European producer price therefore* ***[…]****US$/T* ***[…]****'*[68].

(86) As to ***[…]***, the report contains an overview of customers, their purchase of aluminium fluoride (by volume), their suppliers and the expected supply distribution for year 2001. With respect to price, the report states:

"*Price idea:* ***[…]****US$/T* ***[…]***
[…]

[…]*price in 2001 should be about* ***[…]****US$ / T* ***[…]****with imputed freight of* ***[…]****US$/T. But European level can be higher. Delivered price from* ***[…]****should be* ***[…]*** *US$/T.*"

[…][69]

(87) Regarding South America, the report states the following with respect to prices and sales volumes:

"***South America***

[…] Prices*: Year* ***[…]*** *–* ***[…]*** *US$ / MT* ***[…]***
Year ***[…]*** *–* ***[…]*** *US$/MT* ***[…][…]****US$/MT.*

[--]-

Quantity: 2001: ***[…]****tons*

*Divided****[…]*** *T ICF / Minimum 3,000 T lot size*
[…]*T Fluorsid*
[…]*T IQM*
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68 Inspection document.

69 Inspection document.

*Total **[…]** tons*

***[…]** All producers agree price has to be about **[…]**. This means at LME of **[…]** US$ the producer absorbs **[…]** US$/T of the **[…]** US$/T freight rate. Fluorsid indicated it would quote for business at **[…]** and**[…]**."*[70]

(88) Finally, Mr ***[…]*** report indicates that information on each participant's raw material costs – namely fluorspar, Al(OH3) and sulphur - was exchanged for the years 2000 and 2001[71].

(89) The ***[…]*** records that costs had increased by ***[…]***% and goes on to state:*"Conclusion prices must be raised **[…]**%"*. The reports also states: *"Prices should be USD **[…]**/MT = **[…]** % LME"*. The report ends by saying: *"[Representative for Industries Chimiques du Fluor] [sic] wants Moerdijk price of **[…]**% LME"*.

(90) In his statement to the Commission, Mr. ***[…]*** explained further the following concerning the ***[…]*** and the Milan meeting: ***[…]***

(91) During the meeting on 12 July 2000 in Milan, Fluorsid, Industries Chimiques du Fluor, Industrial Quimica de Mexico and Noralf agreed on a target price increase of ***[…]*** %. They examined various regions world-wide, including "Europe", to establish a general price level and in some cases a market division. They agreed that the overall aim was to obtain a higher price level and that they should discourage deep price discounting. They also exchanged commercially sensitive information.

(92) The Commission notes that prices discussed were defined as "FCA" or "FOB". (These Incoterms stand for "Free carrier" (FCA), which means that responsibility for the transport cost and the risk of the goods is transferred to the buyer on delivery of the goods to the carrier at the named place, and "Free on board" (FOB), which means that the risk and the transport cost are the buyer's responsibility as of when the goods pass the ship's rails.) That way, cartel members were able to transparently discuss and agree on end price levels despite different absolute transport costs from their production facilities.

4.2.2. Contacts following the meeting on 12 July 2000 in Milan

(93) Following the Milan meeting, the parties remained in contact with each other.

(94) On 25 October 2000 Mr. ***[…]*** of Noralf and Mr. ***[…]*** of Industrial Quimica de Mexico exchanged over the telephone information on their respective offers to an aluminium fluoride customer in ***[…]***.[72] The content of this

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70 Inspection document.

71 Inspection document.

72 *[…]*

telephone call has been recorded on a ***[…]*** by Mr ***[…]*** addressed to Mr ***[…]*** of Noralf. During the telephone call, Mr ***[…]*** provided information about the price level, contract period and volume offered to the ***[…]*** customer: ***[…]***. According to the notes of the telephone conversation, Mr. ***[…]*** inquired about ***[…]*** prices. Mr. ***[…]*** reports to Mr ***[…]*** that he replied as follows: "*Questioned about our prices I told him we during the spring had mentioned ca* ***[…]*** *USD to them but that we had not concluded any agreement with them yet*".(…). Mr ***[…]*** mentioned that he wanted ***[…]*** to "*keep in touch*". The price level offered by Industrial Quimica de Mexico and ***[…]*** in ***[…]*** was in line with what had been agreed at the meeting in Milan.

(95) On 8 November 2000, Mr. ***[…]*** of Minmet, Fluorsid's parent company and sales agent for sales outside of Italy, sent a note to Fluorsid describing a telephone conversation with Mr. ***[…]*** of Industries Chimiques du Fluor on the same day. In the note, Minmet states that Industries Chimiques du Fluor had *"complained about our low prices $***[…]*** in Egypt public tender and asked how we could now expect to raise the price* ***[…]*** *in* ***[…]*** *as the* ***[…]*** *certainly will have access to the results of the* ***[…]*** *tender"*. In the same telephone conversation, Industries Chimiques du Fluor *"reconfirmed that the prices in [Brazilian client] were above $***[…]*** "*, which is in line with the price agreed at the meeting in Milan. Finally, Minmet reports that *"the Tunisians and Mexicans…still communicate well together"* and that *"the Mexicans do not appear to be willing to make any concession regarding tonnage (minimum* ***[…]*** *tons)"*[73].

(96) On 9 November 2000, Minmet sent another report to Fluorsid, this time of a meeting with Industries Chimiques du Fluor in Lausanne, Switzerland, where Minmet is located. According to this report the meeting took place between Mr. ***[…]*** and Mr. ***[…]*** of Industries Chimiques du Fluor and Mr. ***[…]*** and Mr. ***[…]*** of Minmet. Clients in ***[…]*** were discussed, as well as the situation of Industrial Quimica de Mexico. With respect to the customer in Brazil, Industries Chimiques du Fluor informed Minmet that it had secured a contract for a price of *"$***[…]***"*[74]. Regarding ***[…]***, Industries Chimiques du Fluor *"clearly confirmed that they will not offer more than* ***[…]*** *MT"*. As such the statement is in line with the outcome of the cartel meeting in Milan where the parties had divided the market in ***[…]***, allocating ***[…]*** tonnes to Industries Chimiques du Fluor. Industries Chimiques du Fluor *"insisted that we (Industries Chimiques du Fluor, Industrial Quimica de Mexico and Fluorsid) should limit the quantities to raise the prices"*[75]. Minmet, from its side, *"insisted several times that prices* [in ***[…]***] *should be above $***[…]*** CFR (which they* [Industries Chimiques du Fluor] *did not comment or support except that they doubt that prices will be as high as $***[…]*** in* ***[…]***)

73 Inspection document.

74 Inspection document.

75 Inspection document.

to cover costs but we did not disclose quantities we will offer despite their repeated requests for this information"[76].

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

5.1. Relationship between the Treaty and the EEA Agreement

(97) The EEA Agreement, which contains provisions on competition analogous to the Treaty, entered into force on 1 January 1994. The infringement described in this Decision is deemed to have started thereafter. This Decision therefore includes the application as from that date of those rules (primarily Article 53(1) of the EEA Agreement) to the arrangements to which objection is taken.

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

(99) The arrangements described in this Decision covered, *inter alia*, those parts of the territory of the EEA in which a demand for aluminium fluoride existed and where the cartel members had sales, i.e. the Community and the EEA.

5.2. Jurisdiction

(100) 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, since the cartel had an appreciable effect on trade between Member States and between contracting parties of the EEA Agreement.

(101) The fact that some of the undertakings concerned were, at the time of the infringement, based outside the EEA 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 applicable it suffices that the anti-competitive conduct in question affects trade within the Community and the EEA. According to settled case-law[77] where producers established outside the EEA sell directly to purchasers established in the EEA and engage in price competition in order to win orders from those customers, that constitutes competition within the common market, so that concertation between those producers on the prices to be charged to their customers in the EEA has the

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[76] Inspection document.

[77] Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 *Åhlström v Commission* ("Wood Pulp I") [1988] ECR 5193, Case T-395/94 *Atlantic Container v Commission (TAA Agreement)* [2002] ECR II-875.

object and effect of restricting competition within the EEA. The producers in this case met within the EEA, in Milan, and agreed on a world-wide target price increase and examined various regions world-wide, including Europe, to establish a general price level and in some cases a market division. They also exchanged commercially sensitive information. The agreement or concerted practice they engaged in had as an object the restriction of competition in the EEA. The Commission accordingly has jurisdiction to apply Article 81 of the Treaty and Article 53 of the EEA Agreement also to those aluminium fluoride producers that are established outside the EEA.

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

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

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

(103) Article 53(1) of the EEA Agreement (which is modelled on Article 81(1) of the Treaty) contains a similar prohibition. However the reference in Article 81(1) of the Treaty to trade "between Member States" is replaced by a reference to trade "between contracting parties" and the reference to competition "within the common market" is replaced by a reference to competition "within the territory covered by the … [EEA] Agreement".

5.3.2. The nature of the infringement

5.3.2.1. Agreements and concerted practices

Principles

(104) Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement prohibit anti-competitive *agreements* between undertakings, *decisions by associations of undertakings* and *concerted practices*.

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

(106) In its judgment in the PVC II case[78], the Court of First Instance 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*"[79].

(107) Although Article 81(1) 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[80].

(108) The criteria of co-ordination and co-operation laid down by the case law of the Court, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the commercial policy which he intends to adopt in the common market. 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[81].

(109) It follows from the case law of the Court of Justice that any direct or indirect contact between economic operators of such a nature as to disclose to a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, constitutes a

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78 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-335/9 *Limburgse Vinyl Maatschappij N.V. a.o. v Commission* [1999] ECR II-931, paragraph 715.

79 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 as well as Article 6 of the EEA Agreement, Article 3(2) of the EEA Surveillance and Court Agreement, as well as Case E-1/94 of 16.12.1994, recitals 32-35. References in this text to Article 81 of the Treaty therefore apply also to Article 53.

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

81 Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73 *Suiker Unie a.o. v Commission* [1975] ECR 1663, paragraphs 173 and 174.

concerted practice prohibited by Article 81(1) of the Treaty.[82] In order to prove that there has been a concerted practice, it is not therefore necessary to show that the competitor in question has formally undertaken, in respect of one or several others, to adopt a particular course of conduct or that the competitors have colluded over their future conduct on the market. It is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct to expect of the other on the market.[83]

(110) Thus, conduct may fall under Article 81(1) of the Treaty as a *concerted practice* even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour[84]. 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.

(111) Although in terms of Article 81(1) of the Treaty the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period. Such a concerted practice is caught by Article 81(1) of the Treaty even in the absence of anti-competitive effects on the market[85].

(112) 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 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[86].

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[82] Joined Cases T-25/95 etc., *Cimenteries CBR and others v Commission,* [2000] ECR II-491 (*Cement* cases*)*, at paragraph 1852, Case C-49/92 P *Commission v Anic Partecipazioni SpA,* [1999] ECR I-4125, paragraph 117, and Case C-199/92 P *Hüls* v *Commission* [1999] ECR I- 4287, paragraph 160.

[83] Case T-4/89 *BASF* v *Commission* [1991] ECR II-1523, paragraph 242; and Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, paragraph 260.

[84] Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, paragraph 256.

[85] Case C-199/92 *P Hüls v Commission* [1999] ECR I-4287, paragraphs 158-166.

[86] Cases T-147/89, T-148/89 and T-151/89, *Société Métallurgique de Normandie v Commission, Trefilunion v Commission* and *Société des treillis et panneaux soudés v Commission,* respectively, [1995] ECR II-1057, paragraph 72.

(113) 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, as 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 present type[87].

(114) It is also 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 not publicly distanced itself from what was agreed in the meetings.[88]

Application in the present case

(115) As indicated in recital (106) 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.

(116) It is demonstrated by the facts described in Section 4 that Fluorsid, Industrial Quimica de Mexico and Industries Chimiques du Fluor met on 12 July 2000 in Milan. During the meeting, Fluorsid, Industries Chimiques du Fluor, Industrial Quimica de Mexico and Noralf agreed on a target price increase of ***[…]*** %. They examined various regions world-wide, including Europe, to establish a general price level and in some cases a market division. They agreed that the overall aim was to obtain a higher price level and that they should discourage deep price discounting. They also exchanged commercially sensitive information.

(117) In doing so, the parties adhered to a common plan which limited or was likely to limit their individual commercial conduct by determining the lines of their mutual action on the market. They clearly expressed their joint intention or reached a common understanding to conduct themselves on the market in a specific way, with a common objective to restrict competition. The agreement reached at the meeting in Milan enabled all the participants to predict with at least a reasonable degree of certainty what the pricing

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[87] Case T-7/89 *Hercules v Commission*, cited in footnote 84, paragraph 264.

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

policy pursued by their competitors would be. Such agreement was capable of distorting the normal formation of prices on the aluminium fluoride market.

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

(119) In this case, the parties were involved in exchange of information about the prices they wished to see charged on the market, the prices they intended to charge, their cost structure and profitability thresholds, production and sales volume forecasts, intended behaviour regarding the individual markets and customers. It follows from the evidence that the parties, through their participation in the meeting in Milan engaged in action whose obvious purpose was to influence their conduct on the market and to disclose to each other the course of behaviour which each of the aluminium fluoride producers itself contemplated adopting on the market. Not only did they pursue the aim of eliminating, or at least reducing, in advance uncertainty about the future conduct of their competitors, but also, in determining the policy which they intended to follow on the market, they could not fail to take account, either directly or indirectly, of the information obtained during the course of the meeting.

(120) On 12 July 2000, the parties also exchanged information with respect to sales volumes for 2000 and 2001 and sales price for 2000 for ***[…]***[89], as well as information regarding each participating producer's expected sales volumes to specific markets and customers in different regions. The comparisons of price and sales information reduced uncertainty about the parties' market strategies and enabled the parties to adjust their own behaviour and influence each others' conduct. In so far as the characterisation of certain behaviour as a concerted practice requires subsequent conduct on the market following the exchanges of information, it can be presumed that the undertakings which take part in such concerting and which remain active on the market take account of the information exchanged with competitors in determining their own conduct on the market. In the absence of any rebuttal by the parties to the effect that the exchange of information was not capable of affecting their conduct on the market, it is shown that the information exchange amounted to a concerted practice that facilitated the coordination of the parties' commercial behaviour on the market.

(121) In general, however, regardless of whether the different elements of behaviour qualify separately as agreements or concerted practices, it is not necessary for the Commission to characterise conduct as exclusively one or the other of these forms of illegal behaviour. The concepts of agreement and concerted practice are fluid and may overlap. Indeed, it may not even

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[89] See recital (85).

be possible to make such a distinction, as 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 indeed be artificial to analytically sub-divide into several different forms of infringement what is clearly a common enterprise having one and the same overall objective, which in this case was to increase prices and restrict competition in the market in question.

(122) It is concluded that all the characteristics of agreements and/or concerted practices within the meaning of Article 81 of the Treaty and Article 53 of the EEA Agreement are present in this case.

5.3.2.2. Single and continuous infringement

Principles

(123) An infringement of Article 81(1) of the Treaty and Article 53 of the EEA Agreement may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves and taken in isolation an infringement of that provision. The Court of Justice has stated that when different actions form part of an 'overall plan', because their identical object is to distort competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole[90]. A complex cartel may thus properly be viewed as a single and continuous infringement for the time frame in which it existed. The Court of First Instance points out, *inter alia*, in the *Cement* cartel case that the concept of 'single agreement' or 'single infringement' presupposes a complex of practices adopted by various parties in pursuit of a single anti-competitive economic aim.[91] The cartel may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. Also, the agreements and concerted practices referred to in Article 81(1) of the Treaty necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged[92].

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[90] Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, at paragraph 258; recently confirmed in Case C-113/04 P *Technische Unie BV v Commission*, [2006] ECR I-8831, at paragraph 178.

[91] Joined Cases T-25/95 and others, *Cement*, ECR [2000] II-491, paragraph 3699.

[92] Case C-49/92, *Commission* v *Anic Partecipazioni* [1999] ECR I-4325, paragraph 79.

Application in the present case

(124) In this case the parties expressed their joint intention to behave on the market in a certain way and adhered to a common plan to limit the autonomy of their individual commercial conduct, in particular in respect of determining prices and price increases, making bids and respecting the planned sales of the other participants.

(125) The various bilateral contacts between the parties which occurred at and after the meeting in Milan served to exchange commercially sensitive information in relation to the agreement reached in Milan.

(126) In this case, where the parties expressed their joint intention to behave on the market in a certain way, 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 for the following reasons: At least for the period from 12 July 2000 to 31 December 2000, the addressees of this Decision colluded, by way of an agreement and/or concerted practices, to align their action in the market, thus limiting the autonomy of their individual commercial conduct. These actions formed part of an overall plan as they were carried out in pursuit of a single and common anti-competitive object, namely to distort the normal movement of prices of aluminium fluoride. In practical terms, the parties exchanged information on prices charged or to be charged and agreed to increase prices. They also exchanged information about the planned sales and their conduct in individual geographic regions or tenders, with a view to maximising the success of the price initiative and therefore their profits. This follows from the minutes of the Milan meeting: "*We examined each market to establish a general price level and in some cases a market division. However, we all agreed regardless of who obtains business we must obtain a higher price level.*"[93]

(127) The particular coordinating measures with respect to the different geographic regions were complementary to each other in their pursuit of the same single economic aim, namely to increase the price of aluminium fluoride in the area covered by the cartel. The world-wide character of the market and the trade flow of aluminium fluoride made price coordination in the various regions necessary in order to succeed with a price increase. Without such world-wide price coordination customers in one region would have been able to invoke the lower price level in another region in negotiations with the aluminium fluoride producers. Industries Chimiques du Fluor's reaction in its contact with Minmet on 8 November 2000 bears out this correlation of prices world-wide. According to Minmet's report to Fluorsid, Industries Chimiques du Fluor "*complained about our low prices* ***[…]*** *public tender and asked how we could now expect to raise the price to $****[…]*** *as the* ***[…]*** *certainly will have access to the results of the* ***[…]*** *tender*'s"[94]. The parties remained in contact after the Milan meeting and

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93 Inspection document.

94 Inspection document.

exchanged commercial information related to the outcome of the cartel meeting. These contacts constitute a further component of the overall infringement and reduced the uncertainties of competition in the market for the participating undertakings. All these events had the same objective, namely to increase the price of aluminium fluoride. This follows from the report of the meeting on 12 July 2000, where it is stated, among other, that "*We examined each market to establish a general price level and in some cases a market division. However, we all agreed regardless of who obtains business we must obtain a higher price level.*"[95] The participants in these arrangements knew that they were part of a common plan in pursuit of this single and unlawful object. They were all individually engaged in bilateral contacts with other addressees of this Decision. These continued contacts show that the parties monitored the agreement reached in Milan with a view to its implementation.

(128) The common plan, which was adhered to by the addressees of this Decision, was developed and foreseen to be applicable over a period that lasted at least until 31 December 2000, through an agreement and follow-up contacts, pursuing the same common objective of eliminating competition between Fluorsid, Industries Chimiques du Fluor, Noralf and Industrial Quimica de Mexico. It would therefore be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was in reality a single infringement which manifested itself in a series of anti-competitive activities throughout the infringement period[96]. The Commission therefore considers that this conduct constitutes a single and continuous infringement.

(129) The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and the same anti-competitive effect. An entity which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. This is certainly the case where it is established that the entity in question was aware of the unlawful behaviour of the other participants or could have reasonably foreseen or been aware of it and was prepared to take the risk[97]. Such a conclusion is not at odds with the principle that responsibility for such infringements is personal in nature, nor does it neglect, in disregard of the applicable rules of evidence, individual analysis

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95 Inspection document.

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

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

of the evidence adduced, or infringe the rights of defence of the undertakings involved.

5.3.3. *Restriction of competition*

(130) The anti-competitive behaviour in the present case had the object of restricting competition in the Community and the EEA.

(131) Article 81(1) of the Treaty and Article 53 (1) of the EEA Agreement expressly mention as restrictive of competition agreements and concerted practices which[98] *"directly or indirectly fix selling prices or any other trading conditions"* or *"share markets or sources of supply"*.

(132) These are the essential characteristics of the horizontal arrangements under consideration in the present case. Price being the main instrument of competition, the prices and price increases agreed by the aluminium fluoride producers were aimed at directly inflating prices to their benefit. Price fixing by its very nature restricts competition within the meaning of Article 81(1) of the Treaty and Article 53 (1) of the EEA Agreement. In addition, the exchange of information regarding the planned sales allowed the parties to take due account of the contemplated behaviour of each participating producer vis-à-vis specific clients and markets.

(133) It is settled case-law that for the purpose of 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[99]. The mere fact of making an agreement whose object is to restrict competition in breach of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement in itself constitutes a failure to comply with those provisions, irrespective of whether that agreement was actually implemented[100]. Concerted practices are also prohibited under Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement, regardless of their effect, when they have an anti-competitive object[101]. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved.

(134) It is established case law that the implementation of agreements on target prices and other commercial terms does not necessarily require that these exact prices and conditions be applied. In line with the Court of First Instance's judgement in *ADM*[102], when there is an agreement relating to

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98 The list is not exhaustive.

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

100 Case T-241/01 *SAS* v *Commission* [2005] ECR II-2917, paragraph 186.

101 Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraphs 157-168.

102 Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 160.

price objectives rather than to fixed prices, "*it is clear that implementation of that agreement simply meant that the parties would endeavour to achieve those objectives*." At the meeting in Milan the undertakings concerned agreed *inter alia* on a target price increase and price levels in various regions world-wide. The extent to which these price increase targets or agreed price levels were transformed into price increases or were implemented in the market place is immaterial to the finding that the agreement existed during the period concerned. It is noted that in follow up to the meeting in Milan the undertakings were in bilateral contacts with each other. These contacts are evidence that the cartel arrangements were monitored with a view to their implementation and that the undertakings endeavoured to achieve the objectives.

(135) With respect to the exchange of commercially sensitive information, implementation was inherent in the exchange of the information itself. It facilitated the coordination of the commercial behaviour of the parties. With the knowledge of its competitors' intentions, the company which received such information necessarily benefited from it in that it could take this information into account in conducting its own commercial policy[103]. It follows that the undertakings involved acted on the market with awareness of the conduct contemplated by the competitors and in accordance with the agreed behaviour and, as a result, the cartel continued to produce its effects at least until the end of the infringement period specified in Section 6.

5.3.4. Geographic scope of the infringement

(136) In the present case, the cartel arrangements were world-wide, covering the regions mentioned in the report of the meeting on 12 July 2000 in Milan. The parties agreed on a general price increase target of ***[…]***%. There was no geographic restriction to this price increase target, which was to apply world-wide. The parties coordinated their actions as to *inter alia* price with respect to various geographic regions. This covered North America, South America, Europe, Australia and other markets (the latter including for instance Turkey). It did not cover every country in the world (in particular China is not mentioned and the reference to Russia does not bear out the existence of arrangements concerning this country), but it did cover a substantial part thereof. Therefore, the geographic scope of the infringement is considered to be world-wide, covering the regions and countries mentioned in the report of the meeting in Milan.

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

(137) The agreement between the aluminium fluoride producers was capable of having an appreciable effect upon trade between the Member States and/or the Contracting Parties of the EEA Agreement.

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[103] Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 148.

(138) Article 81(1) 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.

(139) The Court of Justice and Court of First Instance have consistently held that, "*in order that an agreement between undertakings may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States*"[104]. In any event, whilst 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 be established that the agreements are capable of having that effect*"[105].

(140) As demonstrated in section 2.4 of this Decision, the aluminium fluoride market in the EEA is characterised by a substantial volume of trade between Member States. There is also a considerable volume of trade between the Community and Norway.

(141) The application of Articles 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 State to another. Nor is it necessary, in order 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[106].

(142) In this case, the cartel arrangements included the whole EEA. The parties agreed, also for the EEA, on a general price increase of ***[…]***% for sales in year 2001 as compared to the year 2000 price. For***[…]***, a specific price for 2001 was agreed of USD ***[…]*** per ton depending on whether the product was delivered***[…]***. In addition the undertakings established a general price level and in some cases a market division in various regions world-wide, including Europe, and exchanged commercially sensitive information. These arrangements limited their commercial autonomy and affected the foreseeability of the competitive situation of the aluminium fluoride market. Three of the participating undertakings had extensive sales in the EEA. It was thus objectively foreseeable that these agreements and concerted practices would have an influence, direct or indirect, actual or

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104 Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 22, and Joined Cases T-25/95 *a.o. Cimenteries CBR* [2002] ECR II-491.

105 Case C-306/96 *Javico*, [1998] ECR I-1983, paragraphs 16 and 17; Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services* v *Commission* [1998] ECR II-3141, paragraph 136.

106 Case T-13/89 *Imperial Chemical Industries v Commission* [1992] ECR II-1021, paragraph 304.

potential, on the pattern of trade between Member States and between Member States and the Contracting Parties of the EEA Agreement.[107]

5.4. Non-application of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement

(143) On the basis of the facts before the Commission, there are no indications that suggest that the conditions of Article 81(3) of the Treaty or Article 53(3) of the EEA Agreement could be fulfilled in this case.

6. DURATION OF THE INFRINGEMENT

(144) Whilst there are indications mentioned in recitals (73)-(76) that collusion may already have occurred between the aluminium fluoride producers in the second half of 1990s, and notably following the meeting in Greece in 1999, clear evidence exists of collusion from at least 12 July 2000.

(145) Fluorsid, Industries Chimiques du Fluor and Industrial Quimica de Mexico met in Milan on 12 July 2000. Noralf joined the meeting over the telephone. On that day the four undertakings agreed a common scheme including, *inter alia,* a price-increase. It can be concluded that the infringement described in this Decision started at least on that day.

(146) In the Aluminium fluoride industry supply contracts are negotiated in advance during a period starting some time in the second half of each calendar year and ending at the end of that calendar year or in the very first months of the next calendar year. That remains true even if there was a trend towards multi-year contracts. Some of the multi-year contracts still provided either for an annual price negotiation by the end of each calendar year or for half-yearly revision of prices at the end of each semester[108]. The report of the meeting in Milan confirms that the practice of the industry was to determine prices in advance for the following business year: *"However, as our price of AlF3 for sale in 2000 was determined in mid year 1999 and our costs at mid year 2000 are* ***[…]*** *% higher than 1999, our prices of AlF3 in 2001 should be* ***[…]*** *% higher than those of those of 2000"*[109]. This is also confirmed by a request for a price quote for sales in 2000 from a customer of Fluorsid at the end of 1999 and by offers which Fluorsid made to that effect to customers[110]. Mr. ***[…]*** of Fluorsid and Mr. ***[…]*** discussed on 5 October 1998 an offer to ***[…]*** for the following year.[111] Contracts between

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[107] Joined Cases 209 to 215 and 218/*78 Van Landewyck a.o. v Commission* [1980] ECR 3125, paragraph 170.

[108] See for example, annex to reply to the Statement of Objections.

[109] Inspection document. See also Inspection document: "*Chinese price in 2001 should be …*" or "*For year 2001 ICF wants to raise price to* ***[…]*** *US$/MT* ***[…]*** *European producer price therefore* ***[…]*** *US$/T FCA/FOB […]."*;Inspection document: "***[…]*** *… Price year 2001 –****[…]*** *US$/MT […]*"

[110] Reply to request for information.

[111] Inspection document.

Noralf and its customers for 2001 were made in 2000, which follows from the fact that, by August 2000, Noralf had concluded sales agreements amounting to ***[…]*** tonnes to be delivered in 2001 and, by February 2001, for deliveries in 2001 of ***[…]*** tonnes, which amount more or less to Noralf's***[…]***[112]. Similarly, Minmet made an offer to the companies ***[…]*** for 2002 on 16 November 2001[113]. Therefore, the Commission considers that the result of the collusive contacts in July 2000 applied to the negotiations carried out in the second half of the year 2000.

(147) Furthermore, the Court of First Instance in its judgement in the *Choline Chloride*[114] case has held that *"…It is settled case-law that the system of competition established by Articles 81 EC and 82 EC is concerned with the economic consequences of agreements, or of any comparable form of concertation or coordination, rather than with their legal form. Consequently, in the case of agreements which have ceased to be in force, it is sufficient, in order for Article 81 EC to apply, that they produce their effects beyond the date on which they formally come to an end [*[115]*]. It follows that the duration of an infringement must be appraised not by reference to the period during which an agreement is in force, but by reference to the period during which the undertakings concerned adopted conduct prohibited by Article 81 EC".* In view of this case law and of the circumstances of the present case, and notably the continued contacts in the second half of year 2000, the Commission concludes that the cartel agreement was in force and continued to produce its effects with respect to the cartel members' conduct until at least 31 December 2000.

7. THE PARTIES' ARGUMENTS TO THE STATEMENT OF OBJECTIONS AND THE COMMISSION'S RESPONSE

7.1. Boliden

(148) Boliden at the Oral Hearing ***[…]***.

7.2. Fluorsid

Arguments by Fluorsid

(149) Fluorsid has argued that the Commission based all its charges on the meetings in Athens and Milan of 1999 and 2000, and it was is trying to prove a cartel having only an anti-competitive object but no real anticompetitive effect. According to Fluorsid, the Commission ought to

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[112] *[…]*

[113] Reply to request for information.

[114] Judgment of 12 December 2007 in Joined Cases T-101/05 and T-111/05 *BASF and Others* v *Commission*, not yet reported, paragraph 187.

[115] Reference to Case T-30/91, *Solvay* v *Commission* [1995] ECR II-1775, paragraph 71, and Case T-59/99 *Ventouris* v *Commission* [2003] ECR II-5257, paragraph 182 and the case-law cited. See also Case T-327/94 *SCA Holding Ltd* v *Commission* [1998] ECR II-1373, paragraph 95.

prove the effects of the alleged cartel in the market. Fluorsid has stated that in this case evaluation of the effects is crucial. The Commission disregards the economic facts. The discussion during the meeting on 12 July 2000 in Milan was only hypothetical and disregarded the demand side, which is crucial. This follows from the fact that the parties referred to the desirability of a price increase from "a producer's standpoint". All parties were perfectly aware that such increase in price could not be implemented. Fluorsid's prices and sale volumes did not match the alleged agreed price. Fluorsid sales data for 2000 and 2001 prove the absence of any anticompetitive mark up. The market was in a crisis. Small producers were in great difficulty, there was overproduction and oversupply on the market and production costs progressively increased. Imports from Eastern Europe and China constituted an additional pressure on the market. Fluorsid's mark-ups were often negative from 1997 to 2006 and the final prices were below cost during the period. The documents that in the Commission's opinion would prove collusion are just sterile discussions about prices and quantities. They might prove an intention, but that intention was not implemented. The intention was to gain information.

(150) Fluorsid has furthermore stated that the following proves that a cartel was not in place. The trend of prices in Europe rules out the existence of a cartel. It has stated that there is no correlation whatsoever, no parallelism that hints at collusion. If prices are sometime similar, it is because they are linked to the market quotation of aluminium. Moreover, the companies ***[…]*** and ***[…]*** were charged higher prices, and were willing to pay those higher prices, in order, on the one hand, to have regular supply and, on the other hand, to have higher margin for another product (aluminium hydrate), to which the price of aluminium fluoride was linked. Had a cartel existed, smaller and less informed customers would have been charged higher price than ***[…]*** and ***[…]***, who were well-informed and powerful customers. However, this was not the case. In addition, the aluminium fluoride market suffers from overcapacity. Despite this, Fluorsid has constantly increased its production from 1990 to 2006. Lastly, at the IFPA meetings Fluorsid provided incorrect information about the volumes produced and sold, like all the other members. Fluorsid did not follow price indications, but instead gained customers and market shares from its competitors. This is demonstrated by the fact that other producers considered Fluorsid not trustworthy. Moreover, the demand side of the market was extremely powerful and makes it impossible for small producers like Fluorsid to form and implement a cartel: First of all, vertically integrated aluminium producers like ***[…]*** and ***[…]*** make the sustainability of a cartel unlikely. Secondly, aluminium producers gather information about the production costs of aluminium fluoride producers through supply contracts or questionnaires; they can negotiate extremely favourable contract conditions and impose prices that are linked to the aluminium market price. It is the demand that drives prices, not vice versa.

(151) Fluorsid has also suggested that the agreement of Milan could actually refer to a project for a joint venture, which was never put into place.

(152) Moreover, Fluorsid has argued, the Commission did not pay due attention to the collusive agreements between the companies ***[…]***,***[…]*** and Noralf. ***[…]*** and other IFPA members are not addressees of the Statement of Objections. If the Commission does not regard the exchange of information alone as an infringement of Article 81 of the Treaty, all companies should be excluded from the proceeding, not only ***[…]***.

The Commission's response

(153) With respect to Fluorsid's objection that the Commission did not, and does not intend to, prove the effects of the cartel, it is sufficient to clarify that it is established case law[116] that the Commission, when undertakings have committed an infringement by object of Article 81 of the Treaty, such as price fixing, does not need to show that the infringement had any effects on the market. For there to be an infringement of Article 81 of the Treaty, neither is it necessary that the cartel agreement was implemented. Fluorsid has claimed that the intention was not to come to an anti-competitive agreement, but only to gain information. Insofar as this latter objection refers to the agreement reached at the meeting on 12 July 2000 in Milan, it is not sustainable in view of the report of the meeting on 12 July 2000 ***[...]***. According to the report "*We examined each market to establish a general price level and in some cases a market division. However we all agreed regardless of who obtains business we must obtain a higher price level. Therefore we should discourage deep price discounting"*[117]. This quotation clearly shows that the meeting had as its object the restriction of the competition and that the parties agreed to fix prices and divide markets, in violation of Article 81 of the Treaty and Article 53 of the EEA Agreement. The liability of a particular undertaking in respect of the infringement is properly established where it participated in a meeting of anti-competitive nature with knowledge of its aim, even if it did not proceed to implement any of the measures agreed at that meeting. As to the argument that the market was in a crisis, this cannot exclude in any way that aluminium fluoride producers came together and agreed on a price increase and a price level, and it happens quite often that cartels are organized in sectors which undergo certain difficulties. The fact that the agreed prices could not be achieved does not tell against the parties' participation in the agreement, since even if that fact is assumed to be established, it would at the most tend to show that the prices were not implemented, not that they were not agreed[118].

(154) Inasmuch as Fluorsid argues that all the parties participating in the Milan meeting were perfectly aware that such increase in price could not be

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[116] Case T-241/01, *SAS v Commission*, [2005] ECR II-2917, paragraph 186; Case T-66/99 *Minoan Lines v Commission*, [2003] ECR II-5515, paragraph 208, Case C-1999/92 P *Huls v Commission* [1999] ECR I-4287, paragraphs 158-166.

[117] Inspection document.

[118] See Case T-10/89 *Hoechst v Commission*, [1992] ECR II-629, paragraph 91.

implemented, the Commission finds that argument cannot succeed. It is not capable of demonstrating that the prices actually charged by the cartel members corresponded to those which they would have charged in the absence of a cartel and that the arrangement agreed at that meeting, even if implemented less effectively than the parties envisaged, did not exert pressure on customers. Moreover, it cannot be ruled out that prices would have changed even more markedly in the absence of a cartel which prevented the parties from competing with one another on prices[119].

(155) The Commission in no way asserts that the undertakings Fluorsid, Industries Chimiques du Fluor, Industrial Quimica de Mexico and Boliden charged prices which always corresponded to the price targets agreed upon at the meeting in Milan. The fact that the parties may not have (fully) complied with their agreement and did not entirely implement the agreed prices does not mean that, in so doing, they applied the prices that they would have charged in the absence of a cartel. However, the Commission considers that there is evidence that the cartel arrangements were monitored in view of their implementation.

(156) Such is demonstrated by the fact that the undertakings involved in the Milan agreement maintained bilateral contacts with each other in autumn 2000[120] in follow up to the Milan meeting. The price level offered by Industrial Quimica de Mexico and Noralf in ***[…]*** was in line with what had been agreed in Milan. Also the quantity offered by Industries Chimiques du Fluor in ***[…]*** corresponded to what was agreed in Milan. In particular, the parties divided the market in ***[…]*** as follows: ***[…]*** tonnes for Industries Chimiques du Fluor, ***[…]*** tonnes for Fluorsid and ***[…]*** tonnes for Industrial Quimica de Mexico[121]. In a report of a meeting between Minmet and Industries Chimiques du Fluor on 9 November 2000 in Lausanne, Mr. ***[…]*** of Minmet reported to Fluorsid that Industries Chimiques du Fluor "*confirmed that they will not offer more than* ***[…]*** *MT*". The same report also states that Mr. ***[…]*** asked "*how we could now expect to raise the price to $875 in* ***[…]***". In Milan, a price range in ***[…]*** for 2001 had been agreed of between ***[…]*** and ***[…]*** USD.[122]

(157) The fact that the prices were below costs does not exclude the fact that Fluorsid agreed on a price level and a price increase. Nor does a cartel have to lead to price increases at the time of the cartel agreement. In a market where prices are decreasing, the result of a cartel arrangement can just as well be that the price decrease is smaller than it would have been without

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119 Case T-59/02 *Archer Daniels Midland Co.* v *Commission* [2006] ECR II-3627, paragraph 190.

120 In particular, exchange of information between Noralf and IQM which took place on 25 October 2000, telephone conversation between Minmet and ICF of 8 November 2000 which was reported to Fluorsid and the meeting between Minmet and ICF held in Lausanne (reported to Fluorsid on 9 November 2000).

121 Inspection document.

122 Inspection document.

the cartel in place. Fluorsid's arguments in this respect cannot therefore be accepted.

(158) Fluorsid's argument based on its conduct on the market, intended to show that its participation in anti-competitive meeting had the sole purpose of enabling it to obtain information is not evidence of such a kind as to prove that it had no anti-competitive intention. Rather it indicates the contrary. Indeed, the argument does not prove that Fluorsid's competitors knew that its conduct on the market would not be governed by what occurred at the meeting. Even if its competitors had known that, the mere fact of obtaining information that an independent operator keeps strictly secret as confidential business information is sufficient to demonstrate that Fluorsid had an anti-competitive intention[123].

(159) Fluorsid's objection that certain economic factors show that no cartel can have been in place or that the buyer power of customers made any cartel impossible or unsustainable cannot be accepted. The finding that aluminium fluoride producers entered into an agreement is based on the contemporaneous report drafted by the representative of Fluorsid at the meeting on 12 July 2000 in Milan. This report clearly states that the participants to the meeting"*…examined each market to establish a general price level and in some cases a market division. However we all agreed regardless of who obtains business we must obtain a higher price level. Therefore we should discourage deep price discounting"*[124]. It has thereby been shown that Fluorsid entered into an anti-competitive agreement. The contemporaneous ***[…]*** by Mr ***[…]*** during the meeting, which he attended over the telephone also confirm that the parties concluded that *"the prices must be raised"* and *"price should be USD* ***[…]****/MT =* ***[…]****% LME".* Mr ***[…]*** has also confirmed in his oral statement that Fluorsid actively participated in the meeting as he mentioned: *"****[…]*** *of IQM] and* ***[…]*** *of Fluorsid] were quite outspoken about their plans. They said: we need a* ***[…]****% price increase."* Economic circumstances cannot show that such an agreement was not entered into[125]. Insofar as Fluorsid argues that the cartel was not successful and that it in fact cheated on the agreement, these arguments do not alter the finding that an anticompetitive agreement was reached between the parties. Further, the Commission does not merely allege but demonstrates that the undertakings under investigation entered into an agreement to reduce or restrain capacity. That Fluorsid may have increased its production thus has no bearing on the allegations made by the Commission.

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[123] See to that effect Case T-3/89 *Atochem v Commission* [1991] ECR II-1180, paragraph 54, and Case T-12/89 *Solvay v Commission* [1992] ECR II-907, paragraph 100.

[124] Inspection document.

[125] See Joined Cases T-44/02, T-54/02, T-56/02, T-60/02 and T-61/02 *Dresdner Bank AG et al.* v *Commission* [2006] ECR II-3567, at paragraphs 64-67.

(160) Fluorsid's suggestion that the meeting on 12 July 2000 concerned a project joint venture cannot be upheld either. Although it may be true that in 1999-2000 the producers of aluminium fluoride discussed the possibility to create a joint sales company, these discussions started outside IFPA but were brought within the framework of this organisation. According to minutes from meetings on 16 March 2000 Fluorsid refrained from participating in the project whereas other members of IPFA were to continue the discussion, probably at the next meeting organised by the IFPA[126]. The meeting on 12 July 2000 was not a meeting organised by IFPA. The report of the meeting on 12 July 2000 does not mention any word that could point towards the conclusion that the discussion concerned a joint venture. This argument is hence without ground.

(161) With regard to Fluorsid's allegation relating to the scope of the addressees of this Decision, it is for the Commission to decide what companies or infringements it pursues. Second, the position of another company in these proceedings does not affect the position of Fluorsid in that it has no bearing on whether Fluorsid should be an addressee of this Decision or not. The findings in this Decision are based on the participation in the cartel meeting on 12 July 2000. The Commission's file contains no evidence that the companies ***[…]*** attended that meeting or were associated with the infringement that had its starting point at that meeting. This Decision is therefore not addressed to those companies. None of the other arguments, including those relating to alleged benefits to other parties involved in the proceedings alters the Commission's appreciation of the infringement with respect to Fluorsid.

7.3. Minmet

Arguments by Minmet

(162) Minmet has asked that the Commission explain why ***[…]*** did not receive the Statement of Objections.

The Commission's response

(163) As stated in recital (161), in this respect the Commission firstly notes that it is for the Commission to decide what companies or infringements it pursues. Second, the position of another company in these proceedings does not affect the position of Minmet in that it has no bearing on whether Minmet should be an addressee of this Decision or not. The findings in this Decision are based on the participation in the cartel meeting on 12 July

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[126] On 13 September 1999 the issue was discussed within IFPA, Inspection document. On 27 February 2000 a summary of opinions on a proposal for the organisation of a joint venture was sent around to members of IFPA, Inspection document.. According to the minute of the meeting on 13 March 2000, some members stated they could not enter in such an organisation. Fluorsid abstained. Yet other members would continue the discussion, Inspection document. On 5 September 2000, according to the minutes of the meeting, it was recalled that in March only a few producers had been interested in a joint venture sales organisation and the project was formally abandoned.

2000. The Commission's file contains no evidence that the companies ***[…]*** attended that meeting or were associated in any other way with the infringement that had its starting point at that meeting. This Decision is therefore not addressed to these companies.

7.4. Industries Chimiques du Fluor

Arguments by Industries Chimiques du Fluor

(164) Industries Chimiques du Fluor has argued that no agreement to fix prices was concluded at the meeting on 12 July 2000 in Milan. The unilateral appreciation by Mr ***[…]*** (Fluorsid) in the minute of the meeting cannot be held against Industries Chimiques du Fluor. Industries Chimiques du Fluor has stated that Mr ***[…]*** is not reliable. This meeting did not lead to a price agreement or a market sharing agreement in which Industries Chimiques du Fluor participated. There was no agreement to increase prices. The proposal by Mr ***[…]*** to increase the price by ***[…]***% was actually rejected by Industries Chimiques du Fluor. Mr ***[…]***, states that he did not apply the increase. The consensus was finally that the aluminium fluoride prices would be determined by the market supply/demand. This is not illegal. "Our prices" in the document refers to Fluorsid's own prices. The information exchanged with respect to Europe refers only to current and not future data. Industries Chimiques du Fluor's real prices never reached the price level allegedly discussed. The majority of exchanges described in this document refer to extra-European markets, which are not relevant for Article 81 of the Treaty. Industries Chimiques du Fluor did not express any position on this matter (see Mr ***[…]***, statement that only ***[…]*** and ***[…]*** were quite outspoken about their plans. The reference to the next statistical committee of IFPA cannot be held against Industries Chimiques du Fluor, because it was not a member of that organisation.

(165) Industries Chimiques du Fluor has moreover claimed that it has always pursued an independent commercial policy. There are important differences between Industries Chimiques du Fluor's real prices and the prices mentioned in the report from the meeting in Milan. Industries Chimiques du Fluor's prices in 2000 and 2001 are lower. The price increases in years 2000-2001 are explained by the proportional price increase of spath. Moreover, any attempt to create a cartel would have been detected and pre-empted by the aluminium producers. For European consumers, an alleged price agreement on aluminium fluoride would not have had any significant effect on the aluminium price.

(166) Industries Chimiques du Fluor has claimed that there is a lack of agreement or concerted practice. The Commission has proved neither parallel behaviour, nor a causality link between Industries Chimiques du Fluor's behaviour and the alleged collusion. Even if the Commission has proved that the exchange of information amounts to a collusion, it must prove the restrictive effect on the competition within the meaning of Article 81 of the Treaty. Industries Chimiques du Fluor has acknowledged that it had provided the current price for its customer in Europe but this exchange of information did not have any effect on competition.

(167) Industries Chimiques du Fluor has also argued that according to the principle of non-discrimination, the Commission cannot carry on the proceedings against Industries Chimiques du Fluor if it decides not to litigate against the industry organisation IFPA and ***[…]***.

(168) Industries Chimiques du Fluor has argued that the duration should be limited to the time of the actual exchange of information, that is to say, the day of the meeting on 12 July 2000 (see recital (245)).

The Commission's response

(169) Industries Chimiques du Fluor's claim that no agreement was reached at the meeting on 12 July 2000 in Milan cannot be sustained. The agreement is evidenced by the contemporaneous report from the meeting drafted by Mr ***[…]***, Fluorsid, who attended the meeting. The fact that it is an internal report with the purpose of informing other persons within the Fluorsid group of companies and that it is not an official minute that has been approved or signed by the other participants is not decisive. The report clearly establishes that an agreement was reached. Moreover, important conclusions and information contained in Mr ***[…]*** report are confirmed by the ***[…]*** by Mr ***[…]*** during the meeting, which he attended over the telephone. Mr ***[…]*** has also confirmed in his statement ***[…]***. Considering the above, there is no reason to doubt that Mr ***[…]*** report is a reliable account of what was discussed and agreed at the meeting.

(170) Inasmuch as Industries Chimiques du Fluor has also argued that it was Mr ***[…]*** who proposed to increase prices by ***[…]***% but that this proposal was rejected by Industries Chimiques du Fluor; that the participants would have decided to let demand determine prices and that the term "Our price" in Mr ***[…]*** report referred to Fluorsid's price and not to the common price of the undertakings attending the meeting, the Commission finds that this interpretation of the report is not plausible considering that the price increase of 20% is also mentioned in the ***[…]*** and the fact that Mr ***[…]*** in his statement confirmed that "*it was agreed upon which customers you should stay with, what price level you should maintain in Europe and also outside Europe*" and that "*the agreement between the participants of the meeting and Noralf was that the price for 2001 should be raised by **[…]**%*". Therefore, contrary to what Industries Chimiques du Fluor purports to claim, "Our price" must be held to refer to the price agreed among the meeting participants. In this respect it is irrelevant if Mr ***[…]*** proposed the increase or not. The price increase was thus not left to be determined by demand, although the reference to the customers' ability to support such an increase shows that the participants had some doubts about the feasibility of implementing the price increase. However, those doubts did not prevent them from deciding on the target price increase. Indeed, the object of increasing prices is repeated in another context during the meeting: "*However we all agreed regardless of who obtains business we must obtain*

a higher price level. Therefore we should discourage deep price discounting" [127].

(171) Industries Chimiques du Fluor has moreover claimed that only the discussion relating to Europe is relevant to the present proceedings, and as to the European market, Industries Chimiques du Fluor did not exchange future data. Moreover, as to other regions, Industries Chimiques du Fluor was not outspoken. The Commission considers that these objections have no bearing. They take as the starting point that only the specific arrangements concerning Europe are of relevance in this proceeding. That is not the case. The agreement on a European producer price must be seen in the context of the world-wide cartel arrangement. Not only was the European market discussed, but also Australia, South America (including Venezuela and Brazil), North America and "other markets" (Turkey, Romania, Russia). The undertakings concerned by this Decision are held to have participated in wider cartel arrangements, which also covered Europe. As to the determination of a specific "European producer price", Industries Chimiques du Fluor did not intend to play a passive role. Indeed, its leading role with respect to the determination of the "European producer price" is confirmed by Mr ***[…]*** meeting report and Mr ***[…]***[128]. Industries Chimiques du Fluor's wish for a certain price level in Europe was determining the agreed price level for Europe. Moreover, even if it were true that Industries Chimiques du Fluor was less active or outspoken in the discussions about the price or market situation in other regions, this should also be seen in the perspective of the case law of the Court of First Instance[129]. "*It must also be borne in mind that, according to settled case-law, where an undertaking participates, even if not actively, in meetings between undertakings with an anti-competitive object and does not publicly distance itself from what occurred at them, thus giving the impression to the other participants that it subscribes to the results of the meeting and will act in conformity with them, it may be concluded that it is participating in the cartel in question..."* This case law also applies to a situation in which Industries Chimiques du Fluor's participation in the world-wide price-increase agreement has been proven.

(172) With respect to Industries Chimiques du Fluor's objections that it has always conducted an independent commercial policy, that its prices never reached the agreed level and the fact that a cartel in the aluminium fluoride market could not have been effective since the customers would have pre-empted any such attempts and that in any event a cartel would have not had any significant effect on the price of aluminium, it is sufficient to recall the principle that a distortion of competition by object, such as an agreement to increase or fix prices, amounts to an infringement of Article 81 of the

[127] Inspection document.

[128] ***[…]***

[129] Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00, *JFE Engineering Corp. a.o v. Commission* [2004] ECR II-2501, paragraph 327. See also paragraphs 328-329.

Treaty and Article 53(1) of the EEA Agreement on its own. Possible lack of effects of the agreement or the fact that the participants could not implement the agreement, or cheated on it, does not alter the fact that the agreement infringes the Community and the EEA competition rules. In this respect the Commission also refers to recitals (154) and (156) where the issue of implementation has been addressed.

(173) With regard to Industries Chimiques du Fluor's argument that there is a lack of agreement or concerted practice, the Commission notes that, according to the settled case law referred to in section 5.3.2.1, any direct or indirect contact between economic operators of such a nature as to disclose to a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, constitutes a *concerted practice* prohibited by Article 81(1) of the Treaty[130]. In order to prove that there has been a concerted practice, it is not therefore necessary to show that the competitor in question has formally undertaken, in respect of one or several others, to adopt a particular course of conduct or that the competitors have colluded over their future conduct on the market. It is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct which the others expect of it on the market[131]. Moreover, although in terms of Article 81(1) of the Treaty the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market. Such a concerted practice is caught by Article 81(1) of the Treaty even in the absence of anti-competitive effects on the market[132]. Industries Chimiques du Fluor arguments in this respect are accordingly not sustainable.

(174) With respect to Industries Chimiques du Fluor's argument regarding the obligation of non-discrimination, this argument is essentially addressed in recital (161).

(175) As to Industries Chimiques du Fluor's argument with respect to the duration of the infringement, the Commission makes the following remarks. There is no indication in the case file that any of the four parties to the agreement

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[130] Joined Cases T-25/95 etc., *Cimenteries CBR and others v Commission,* [2000] ECR II-491 (*Cement* cases*)*, at paragraph 1852, Case C-49/92 P *Commission v Anic Partecipazioni SpA,* [1999] ECR I-4125, paragraph 117, and Case C-199/92 P *Hüls* v *Commission* [1999] ECR I- 4287, paragraph 160.

[131] Case T-4/89 *BASF* v *Commission* [1991] ECR II-1523, paragraph 242; and Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, paragraph 260.

[132] Case C-199/92 *P Hüls v Commission*, [1999] ECR I-4287, paragraphs 158-166.

reached in Milan on 12 July 2000 withdrew from the agreement in the period between its conclusion and 31 December 2000, the end of the period in which contracts for 2001 were concluded, until when the cartel agreement remained in force. Indeed, the bilateral contacts described in recitals (93) to (96) between Noralf and Industrial Quimica de Mexico, on the one hand, and Industries Chimiques du Fluor and Minmet (who subsequently reported on the contacts to Fluorsid) on the other, in the months following the meeting in Milan show that the parties continued to be in contact. An undertaking participating in an anti-competitive agreement can certainly not be said to have withdrawn from the infringement if it continues to have bilateral contacts with competitors participating in the cartel, during which market conditions, volumes, prices or the conduct or arrangements of the other participants to the agreement are discussed. Considering the above, the period of infringement is to be held to have lasted between at least 12 July 2000 and 31 December 2000.

7.5. Industrial Quimica de Mexico and QB Industrias

Arguments by Industrial Quimica de Mexico and QB Industrias

(176) Industrial Quimica de Mexico and QB Industrias have admitted that as regards the Milan meeting the file shows discussions and exchanges of information as described in the Statement of Objections. However, Industrial Quimica de Mexico and QB Industrias have submitted, with respect to the examination of the individual markets, and so far as relevant to these proceedings, that with respect to Europe, the file shows that the discussions concentrated on the "European producer price". Unlike Industries Chimiques du Fluor, whose price request is specifically mentioned and who is treated as a European producer, Industrial Quimica de Mexico is not a European producer. None of the subsequent contacts Industrial Quimica de Mexico had with other producers concerned Europe. The offer to a European customer of *[…]*[133], assuming it was made, did not transform Industrial Quimica de Mexico into a European player. It was simply made to put pressure on *[…]*. The *[…]* note itself says it did not result in any orders and lacked effect, besides allegedly destroying prices in Europe[134]. Sales from Industrial Quimica de Mexico to Europe were not economical. To disclaim plans of selling in Europe, as Industrial Quimica de Mexico did in a telephone conversation with *[…]* on 4 July 200[0], does not amount to a declaration that such sales are economically feasible. Industrial Quimica de Mexico's interests lay outside Europe and its sales forecasts were therefore for outside Europe. These forecasts were not made in return for being left undisturbed in its markets by the European producers. To make that conclusion is mere conjecture. Industrial Quimica de Mexico's presence at a meeting with European producers does not alter the scope or focus of Industrial Quimica de Mexico's business activities.

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[133] Statement of Objections, paragraph 46, footnote 64.

[134] Inspection document.

(177) Industrial Quimica de Mexico has further claimed that not every agenda point in the meeting on 12 July 2000 in Milan was of interest to it. Industrial Quimica de Mexico did not participate in a concrete European producer price agreement and, as a result, it did not implement the price agreement by making no sales to the EEA.

The Commission's response

(178) Insofar as Industrial Quimica de Mexico relies on the claim that it did not export aluminium fluoride to Europe during the period of infringement, the Commission does not accept this argument for the reasons that follow. Industrial Quimica de Mexico participated in the meeting in Milan on 12 July 2000. At that meeting an agreement was concluded among the participating undertakings fixing prices and price increases worldwide, including for the European market. Information regarding each participating producer's expected sales volumes to specific markets and customers was also exchanged. This latter information, and the non-contestation thereof by the other participating undertakings, raised the expectation that the sales would be made as foreseen, without competition from the other participating undertakings. It is noted that at the meeting in Milan, Industrial Quimica de Mexico indicated only planned sales outside the EEA. In doing so, it signalled its intention to stay out of the European market, implicitly in exchange for its planned sales in other parts of the world not being disturbed by the European producers. It follows that Industrial Quimica de Mexico, through its participation in the meeting, took part together with its competitors in an agreement and concerted practice within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement, the purpose of which was to influence their conduct on the market and to disclose to each other the course of conduct which each of the producers itself contemplated adopting on the market. By participation at the meeting in Milan, Industrial Quimica de Mexico's competitors were bound to take into account, directly or indirectly, the information disclosed by Industrial Quimica de Mexico about the policy it intended to follow on the market. Similarly, Industrial Quimica de Mexico could not fail to take account, directly or indirectly of the information obtained from its competitors in the course of the meeting.

(179) Moreover, as already noted in the Statement of Objections, Industrial Quimica de Mexico could have made sales to the EEA during the period of the infringement if it had wanted to, either directly or through swaps with European producers. Eurostat has registered imports from Mexico in July 1999. To the best of the Commission's knowledge, Industrial Quimica de Mexico was at that time the only producer of aluminium fluoride in Mexico. Industrial Quimica de Mexico itself has indicated that it exported to the EEA in 2005. It also made at least one offer to a European customer of ***[…]*** in 1998, as retaliation for being disturbed in its own markets by the latter[135]. It may also be presumed that Industrial Quimica de Mexico had an

[135] Inspection document: A note of a conversation between ***[…]*** and Industrial Quimica de Mexico towards the end of 1998: In this conversation ***[…]*** of Industrial Quimica de Mexico informed ***[…]*** that Industrial Quimica de Mexico had made an offer to a customer in Europe "*in order to put*

interest in the prices agreed for the EEA not being lower than the prices agreed for other parts of the world, so as to avoid pressure starting from its customers in other parts of the world. All of these elements show that Industrial Quimica de Mexico was a full participant in the world-wide scheme and benefited from it. Industrial Quimica de Mexico should consequently be an addressee of this Decision, even if it did not export aluminium fluoride to the EEA during the period of the infringement.

(180) Accordingly, the objections related to Industrial Quimica de Mexico's non-participation in the agreement to fix a "European producer" price cannot be sustained. Industrial Quimica de Mexico took part in the meeting in Milan with other producers and agreed a world-wide price increase. Therefore, this also applied to Europe. Industrial Quimica de Mexico and QB Industrias have not contested this finding, which is made independently of whether Industrial Quimica de Mexico had any sales in Europe or not. In this respect it is irrelevant whether Industrial Quimica de Mexico was a "European producer" or not[136]. Industrial Quimica de Mexico's and QB Industrias' objections to the allegations in the Statement of Objections take as the starting point that only the "*European producer price*" agreement is of relevance in this proceeding. However, that is not the case. The agreement on a European producer price must be seen in the context of the world-wide cartel arrangement. Not only was the European market discussed, but also Australia, South America (including Venezuela and Brazil), North America and "other markets" (for example, Turkey, Romania). The undertakings concerned by this Decision are held to have participated in that world-wide cartel arrangements, which indeed covered Europe.

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pressure" on ***[…]***, presumably for having approached customers outside Europe which Industrial Quimica de Mexico considered its own customers. An offer to the ***[…]*** plant in ***[…]***, a traditional customer of ***[…]***, is expressly mentioned. There are also indications ***[…]*** suggesting that Industrial Quimica de Mexico faced no obstacles in approaching European customers and rather refrained from doing so in exchange for not being disturbed in other markets or with customers outside Europe.

[136] Compare Joined Cases C-29/83 and C-30/83 *CRAM and Rheinzink GmbH v Commission* [1984] ECR 1679, paragraph 26: *"In order to determine whether an agreement has as its object the restriction of competition, it is not necessary to inquire which of the two contracting parties took the initiative in inserting any particular clause or to verify that the parties had a common intent at the time when the agreement was concluded. It is rather a question of examining the aims pursued by the agreement as such, in the light of the economic context in which the agreement is to be applied."* This approach was confirmed in Joined Cases T-67/00, T-68/00, T 71/00 and T-78/00 *JFE Engineering Corp a.o. v Commission* [2004] ECR II-2501, paragraph 185, where the Court of First Instance noted that: *"It must be observed, in that regard, that, as far as the existence of the infringement is concerned, it would not matter whether or not the conclusion of the agreement with an anti-competitive purpose referred to by the Commission in Article 1 of the contested decision was in the commercial interests of the Japanese applicants if it were established, on the basis of evidence contained in the Commission's file, that they in fact concluded that agreement."* Moreover, the Court of Justice noted in Joined Cases C-204/00 P C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S and Others v. Commission* [2004] ECR I-123, paragraph 335: *"Furthermore, the fact that commercial reasons led Cementir to participate in the anti-competitive agreement is irrelevant when the agreement had the effect of restricting competition. Since its participation in the agreement is demonstrated, there is no need to examine whether it had any interest in participating in it."*

(181) The Commission does not claim that Industrial Quimica de Mexico is a European producer. However, as the Statement of Objections pointed out, Industrial Quimica de Mexico still had an interest in the price level decided by the cartel members in order to avoid customers entering into negotiations with Industrial Quimica de Mexico. Industrial Quimica de Mexico and QB Industrias have not contested the Commission's conclusions in the Statement of Objections in this respect. It is noticeable that a low price level in Europe may also lead customers elsewhere to contact European producers, thus risking shifting market shares elsewhere in the world to European producers.

(182) Even if the offer to a customer of ***[…]*** in 1999 and the declaration of non-interest to sell in Europe made in the telephone contact with ***[…]*** in 2000 do not turn Industrial Quimica de Mexico into a "European producer", these facts clearly show that Industrial Quimica de Mexico was capable of entering the European market if it wished to do so. At least, as Industrial Quimica de Mexico and QB Industrias point out, ***[…]***'s note about Industrial Quimica de Mexico's trial shipment in 1999 to the Spanish customer testifies that the shipment did have an effect on the price level in Europe[137]. Accordingly, the European producers also had an interest in involving Industrial Quimica de Mexico in the European part of the cartel arrangement, thus guaranteeing that Industrial Quimica de Mexico, were it to enter the European market, would not undercut the agreed price level. The specific price coordination relevant to different regions were complementary to each other. The overall plan was to increase prices by ***[…]***% on the overall world-wide market. Participants at the meeting were necessarily aware of all of the arrangements with respect to the different regions. Industrial Quimica de Mexico has not indicated it was not present when Europe was discussed, only that it was not interested by that discussion.

(183) Moreover, even if it were true that Industrial Quimica de Mexico did not actively participate in the discussions about the "European producer" price, this should be seen in the perspective of the case law of the Court of First Instance[138]. "*It must also be borne in mind that, according to settled case-law, where an undertaking participates, even if not actively, in meetings between undertakings with an anti-competitive object and does not publicly distance itself from what occurred at them, thus giving the impression to the other participants that it subscribes to the results of the meeting and will act in conformity with them, it may be concluded that it is participating in the cartel in question..."* This case law also applies to a situation in which Industrial Quimica de Mexico's participation in the world-wide price increase-agreement has not been contested. Its participation in discussions with respect to the price or volume allocation in other regions is evidenced by the report of the meeting on 12 July 2000. In such a situation, even if it

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137 Reply to the Statement of Objections, Statement of Objections ***[…]***, at paragraph 46.

138 Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00, *JFE Engineering Corp. a.o v. the Commission* [2004] ECR II-2501, paragraph 327. See also paragraphs 328-329.

were true that Industrial Quimica de Mexico was not active in the discussion with respect to the "*European producer price*", it must have given the impression to the other participants that it subscribed to the result also as to the price agreed for Europe and that it would act in conformity with that agreement, were it to sell in the European market. Industrial Quimica de Mexico has not argued that it distanced itself from the cartel arrangement as a whole or from the part that applied specifically to Europe. In the absence of proof that it distanced itself, the fact that the undertaking or association of undertakings does not abide by the outcome of the anti-competitive agreement concluded at the meeting with competitors is not as such as to relieve it of full responsibility of the fact that it participated in the agreement or concerted practice[139]. It is concluded that Industrial Quimica de Mexico participated in the cartel also with respect to the "*European producer price*".

(184) Moreover, the mention of "*European producer price*" and "*FCA/FOB European producer*" in the report of the meeting on 12 July 2000 does not vitiate the conclusion in recital (183). It does not alter the world-wide context of the discussions or the fact that the price agreements and cooperation with respect to the different regions were complementary and had the same overall object, namely to increase world-wide prices for aluminium fluoride. Neither can the term be held to definitely exclude non-European producers from the agreement. The price was set and all participants knew what the price would be, when delivered from a location in Europe. Nothing prevents a producer located outside Europe from transforming the agreed price into a price FOB/FCA another location or to set the price by reference to a location in Europe (warehouse or harbour where the product is stocked or where it arrives). This is also how Industries Chimiques du Fluor refers to its price ("*ex warehouse Mordijk [sic]*"). The use of the term "European producer" may therefore not be relied on to disprove the participation in that specific part of the cartel arrangement of producers that participated in the cartel meeting without being located in Europe.

(185) Insofar as Industrial Quimica de Mexico argues that despite its presence at the Milan meeting it has not concluded or implemented the outcome of that meeting, reference is made to recitals (154) and (156) where the issue of implementation has been addressed.

8. ADDRESSEES

8.1. Principles

(186) In order to identify the addressees of this Decision, it is necessary to determine to which legal entities responsibility for the infringement should be imputed.

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[139] See, to that effect, judgement in Joined Cases T-25/95 etc., *Cimenteries CBR and others v Commission,* [2000] ECR II-491 (*Cement* cases*)*, at paragraph 15.

(187) 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"*[140].

(188) 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[141]. 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"*[142]. 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.

(189) 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

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140 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* [2006] II-3435, paragraph 125; Case T-314/01 *Avebe v Commission* [2006] ECRII-3085, , paragraph 136; case T-330/01 *Akzo Nobel v Commission* [2006] ECR II-3389, paragraph 83.

141 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 which is a natural or legal person to be the addressee of the measure. 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 *Limburgse Vinyl Maatschappij and Others* v *Commission* (*PVC)* [1999] ECR, II-931, paragraph 978.

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

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[143]. 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"*[144].

(190) 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.

Application in the present case

(191) It is established in Section 5 on the basis of the facts described in Section 4 that Noralf, Fluorsid, Minmet, Industries Chimiques du Fluor and Industrial Quimica de Mexico directly participated in the conduct which is the subject matter of this Decision.

8.1.1. Noralf / Boliden Odda

(192) Noralf participated directly in the conduct which is the subject matter of this Decision.

(193) An employee of Noralf participated in the meeting held in Milan by telephone. The minute of the meeting in Milan between aluminium fluoride producers in July 2000 as well as Mr ***[…]***'s and Boliden's statements mention "Noralf" as having participated in the meeting in Milan. Noralf itself does not possess legal personality, but is the business unit of Boliden Odda A/S in charge of the aluminium fluoride business. All action of Noralf on the market must therefore be imputed to the legal entity Boliden Odda A/S.

(194) During the period of infringement Boliden Odda A/S was called Norzink A/S. After the period of infringement Norzink A/S, because of changes to its owners, twice changed names. However, it remained the same legal entity. Boliden Odda A/S is the current name of this legal entity.

(195) This Decision should therefore be addressed to Boliden Odda A/S which is the legal entity that directly participated in the infringement that is the subject matter of this Decision.

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[143] Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon a.o. v Commission*, not reported in the ECR, paragraph 60; Case T-354/94 *Stora Kopparbergs Bergslags v Commission,* [1998] ECR II-2111, paragraph 80, upheld by Court of Justice in Case C-286/98P *Stora Kopparbergs Bergslags v Commission,* [2000] ECR I-9925, paragraphs 27-29; and Case 107/82 *AEG v Commission,* [1983] ECR 3151, paragraph 50.

[144] Judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon a.o. v Commission*, not reported in the ECR, paragraph 61.

8.1.2. Fluorsid / Minmet

(196) Fluorsid participated directly in the conduct which is the subject matter of this Decision. Mr *[…]* of Fluorsid, took the minute of the meeting in Milan. This Decision should therefore be addressed to Fluorsid. Mr *[…]* also drafted a report to Minmet of this meeting, mentioning Fluorsid as one of the participants.

(197) At the time of the infringement, Minmet and C.E. Giulini S.p.r.l. acted as agents of Fluorsid, in so far as the aluminium fluoride market is concerned. These two agents received their instructions concerning the aluminium fluoride market from Fluorsid and represented the latter for sales of aluminium fluoride in Italy (Giulini) and abroad (Minmet) (see recitals (10) to (22)).

(198) The Commission considers that Minmet should, jointly and severally with Fluorsid, be held liable for the infringement on two grounds, namely firstly that it exercised decisive influence over Fluorsid and, secondly, that Minmet was itself involved in the infringement.

(199) As to Minmet's decisive influence over Fluorsid, for the reasons set out in more detail below, the Commission finds that the three companies Fluorsid, CE Giulini and Minmet during the period of infringement together formed a single undertaking for the production and sale of aluminium fluoride. Minmet, as the main shareholder of Fluorsid, exercised decisive influence over Fluorsid, not only by appointing the Board of Directors of Fluorsid, but also by virtue of the fact that *[…]* and one of its Board members occupied key management functions in Fluorsid.

(200) With respect to the second ground for holding Minmet liable, namely its involvement in the infringement, for the reasons set out in more detail below, the Commission considers that the evidence, notably the report dated 14 July 2000 of the meeting on 12 July 2000 in Milan and Minmet's contacts with Industries Chimiques du Fluor following the meeting in Milan, proves that Minmet was aware of the agreements reached at the meeting in Milan. As the majority shareholder Minmet could and should have stopped Fluorsid's participation in the infringement. However, Minmet not only tolerated Fluorsid's behaviour, but actively participated itself in follow-up contacts to the Milan meeting. When acting in this way Minmet became directly involved in the infringement.

(201) Minmet has objected that neither ground should be upheld in this Decision, claiming that it did not in practice exercise any decisive influence over Fluorsid, that it did not have a role in the infringement and that it was not aware of the infringement. Minmet had only a 54% shareholding in Fluorsid, it did not have any right or power to interfere and/or monitor Fluorsid's day-to-day business. Minmets's right on Fluorsid are only those to be exercised in the context of the shareholders meeting. Minmet claims that this is consistent with Swiss corporate governance rules which state that the duty to control the legality of the activities of a company is not on the shareholders but on the directors only. There is no decision or

agreement of Fluorsid's shareholders on how to run Fluorsid's business or share the responsibility therefor. According to Minmet, it is for the Commission to prove that Minmet exercised decisive influence over Fluorsid. This burden of proof is not eased in this case where the shareholding is not close to 100%. Instead the Commission should demonstrate on the basis of factual evidence that the alleged decisive influence has been in fact exercised. In this case this burden may even be raised because the remaining 40,7% of the shares was owned by the Sardinia Region, which is a public body bound by high standards of conduct and legality concerns. Minmet has argued that the elements on which the Commission relies in the Statement of Objections are insufficient. Firstly, Minmet is involved in Fluorsid's business insofar as it is Fluorsid's sales agent. In this role Minmet followed the instructions of Fluorsid, not the other way around. Minmet had no decision power on the quantities or prices offered. Minmet never gave instructions to Fluorsid regarding prices or sales conditions. ***[…]*** Minmet has stated that on one occasion Fluorsid sought Minmet's advice on a price increase suggested by Fluorsid. Minmet then clearly stated that the focus should be better quality and cheaper production. Also in the autumn of 2000 Minmet stressed the need to improve quality. In its capacity as an agent, Minmet did not therefore exercise decisive influence over Fluorsid. Secondly, ***[…]***. Third, there is no evidence of who drafted the memorandum of 14 July 2000 (it is not signed) or that Minmet received the memorandum of 14 July 2000 (there is no transmission report or an acknowledgement of receipt, contrary to other documents in the Commission's case file). Accordingly, in Minmet's submission, there is no evidence that Minmet was aware of any infringement. Anyhow, Minmet has added, it is not enough to show decisive influence to say that Minmet was informed of an infringement and did not take action to stop it. Fluorsid did not report to Minmet on a regular basis.

(202) The Commission responds to Minmet's arguments summarised in recital (201) as follows. With respect to the first ground of liability, the exercise of decisive influence, the Commission recalls that during the period of the infringement Minmet was not only the exclusive sales agent for Fluorsid for sales outside of Italy[145], but at the same time also Fluorsid's majority shareholder, owning 54,8% of the shares of Fluorsid[146].

(203) For the period of the infringement, Minmet has stated that to the best of its knowledge, ***[…]***[147]***[…]***[148]***[…].*** Other personal links between the companies

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[145] Case T-66/99 *Minoan Lines v. Commission* [2003] ECR II-5515, paragraphs 121-130.

[146] Reply to request for information.

[147] Reply to request for information.

[148] Reply to request for information.

existed. *[…]* has since 1992 been *[…]* of Minmet[149]. In 2000 *[…]* took up the position as a *[…]* of the Board of Fluorsid[150].

(204) According to the statutes of Fluorsid, its Board of Directors and auditors are appointed by majority decision of the shareholders of the company[151]. The Board of Directors is responsible for managing the company. The Board appoints a chairman ("Presidente") from among its members. The Board may also delegate its powers to one or more managing directors ("Administratore Delegato")[152]. In practice, since 1997, Fluorsid has always had two managing directors.

(205) Fluorsid has stated that since 1997, the Board of Directors and the auditors of Fluorsid have always been appointed unanimously by the company's shareholders[153]. The Autonomous Region of Sardinia is, with 40,7% of the shares, the second largest shareholder in Fluorsid. According to Fluorsid the unanimous appointment of the Board of Directors should be interpreted to mean that Minmet and the Autonomous Region of Sardinia exert joint control over Fluorsid[154]. The Commission notes, in this respect, that it is a fact that Minmet, as the majority shareholder, had the power to appoint the members of the board of Fluorsid. It may be that the board since 1997 has been appointed unanimously by the shareholders, but this does not affect Minmet's power in this sense. Moreover, the fact is that Minmet *[…]* has used its influence over Fluorsid to appoint members of Minmet's board to the board of Fluorsid (that is to say, *[...]*) *[…]*[155].*[…]*

(206) *[…]*[156]*[…]*[157]*[…]*[158]*[…]*[159]*[…]*[160] *[…]*

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149 Reply to request for information. Mr. *[…]* has been a *[…]* of Minmet since December 2002. *[…]* has been *[…]* of Minmet since March 2005.

150 Reply to request for information.

151 See Articles 8 and 9 of *[…]*, Reply to request for information.

152 Reply to request for information: Article 12 of the Statutes of the company.

153 Reply to request for information.

154 *[...]*.

155 *[…]* Reply to request for information..

156 *[…]* Reply to request for information.

157 *[…]* Inspection documents.

158 *[...]* Inspection document.

159 *[…]* Inspection document.

160 *[…]* Reply to request for information.

(207) As for *[…]*,*[…]* replaced Mr. *[…]* as of June 1999 as one of the *[…]* of Fluorsid[161]. During the period of the infringement, *[…]* was therefore both *[…]* of Minmet and *[…]* of Fluorsid. In this latter capacity, *[…]* was involved in all the key commercial decisions of Fluorsid. The combination of these two functions is another element indicating that Minmet could exercise a decisive influence on Fluorsid.

(208) The description in section 2.2.2 shows that the three companies Fluorsid, CE Giulini and Minmet were during the period of the infringement intertwined in terms of shareholdings, functions *[…]*. None of the three legal entities operated autonomously on the market for aluminium fluoride; in reality, all three of them together operated as a single economic actor on this market. The Commission therefore considers that all three legal entities together formed a single undertaking for the production and sale of aluminium fluoride. Minmet, as the majority owner of Fluorsid, stood at the head of this undertaking. This company exercised decisive influence over Fluorsid, not only by appointing the Board of Directors of Fluorsid, but also by virtue of the fact that *[…]* and one of its Board members (*[…]*) occupied simultaneously key management functions in Fluorsid. On this ground, the Commission considers that Minmet should be held jointly and severally liable with Fluorsid for the infringement.

(209) With respect to the second ground for Minmet's liability, namely its direct association with the infringement, Minmet has denied that it was aware of the infringement. In particular it claimed that it had not received a report dated 14 July 2000 addressed by Mr. *[…]*, then president of Fluorsid, to Mr. *[…]*, then *[…]* of Minmet, which contains the report of the cartel meeting in Milan on 12 July 2000. According to Minmet, there is no proof that this report was ever sent by Fluorsid or received by Minmet.

(210) The Commission considers that it may rightfully assume that when, during an inspection of a suspected cartel, it finds correspondence from one related business entity addressed to another, such correspondence has in fact been duly sent to and received by that other business entity, whether by fax, e-mail, or delivery by normal mail or hand, unless the entities concerned can demonstrate some special circumstances that would explain why exceptionally this had not been the case. Minmet and Fluorsid have brought forth no such circumstances[162]. Minmet has merely argued that two more or

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[161] Reply to request for information.*[…]* also owned a *[…]*% share of the company CE Giulini and was *[…]* of that company between 1997 and 2005. Another member of *[…]*, Mr. *[…]*, has been *[…]* of *[…]* and a *[…]* of CE Giulini from 1997 onwards. As for Mr. *[…]*, he joined Fluorsid's *[…]* in 2002, at which time he also became *[…]* of CE Giulini and *[…]* of Minmet.Reply to request for information.

[162] It is only logical that the report shows no sign of having been transmitted by fax. Given that it concerns a report from Fluorsid to Minmet, the fax transmission data would only be printed on the version as received by Minmet, a company located in Switzerland where no inspection took place. The original document as sent by Fluorsid would not show any sign of having been transmitted by fax. There are in fact a number of other reports from Fluorsid to Minmet that do not physically show any sign of having been transmitted by fax to Minmet. An example is *[…]*, in which Mr. *[…]* reports to Mr. *[…]* that he has reached agreement with Industries Chimiques du Fluor about the sharing and pricing of an offer and in which he asks Mr. *[…]* to please confirm that he agrees.

less contemporaneous notes from Minmet to Fluorsid show that Minmet could not have been aware of the infringement. The first note, dating from two days before the Milan meeting, underlines the need for Fluorsid to improve its competitiveness in the market by reducing costs and improving quality[163]. The second note, from almost three months after the Milan meeting, argues that Fluorsid should improve the quality of aluminium fluoride[164]. However, there is nothing inherently incongruous in the fact that an undertaking would simultaneously acknowledge that it has cost and quality problems (and that it should try to improve in those respects) and participate in a cartel. The Commission therefore considers that, in the absence of any plausible explanation of why Minmet would not have received Fluorsid's report to it of the Milan meeting, this document alone is sufficient indication that Minmet was made aware of the anti-competitive agreements reached in the meeting in Milan.

(211) Minmet had, in any case, been aware of - and indeed had itself participated in - collusion on the market for aluminium fluoride for some time. In particular, several collusive contacts took place with Industries Chimiques du Fluor in the months leading up to the Milan meeting, as well as in the months thereafter. On 19 January 2000, Mr. ***[…]*** of Minmet sent a letter to Industries Chimiques du Fluor confirming the conclusions reached at a visit of Industries Chimiques du Fluor to Minmet a week earlier. This letter states, for instance: ***[...]***[165].

(212) Likewise, after the meeting in Milan, Minmet was involved in collusive contacts with Industries Chimiques du Fluor, following up on some of the issues discussed in Milan[166]. These contacts show that Minmet must have been aware of what had been agreed at the Milan meeting. For instance, in Milan, parties had divided the market in ***[…]***, allocating ***[…]*** to ***[…]*** tonnes to Industries Chimiques du Fluor[167]. In a report of an Industries Chimiques du Fluor visit to Lausanne on 9 November 2000, Mr. ***[…]*** reported that Industries Chimiques du Fluor *"confirmed that they will not offer more than*

Other examples are Inspection documents (a note which says "sent in his absence"), Inspection documents. The only documents that would show physical signs of having been transmitted by fax from Fluorsid to Minmet are documents that had subsequently been faxed back from Minmet to Flurosid, for instance with annotated comments. For an example see Inspection document

163 Reply to Statement of Objections.

164 Reply to Statement of Objections. These two notes also show how involved Minmet was not just in the day-to-day commercial sales operations of Fluorsid but also with regard to Fluorsid's strategic production issues.

165 Inspection document. The letter had been drafted by Mr. ***[…]*** of Fluorsid, Inspection documents. The meeting with Industries Chimiques du Fluor had taken place at the premises of Minmet in Lausanne, Switzerland. Inspection document.

166 See recitals (95) and (96).

167 Inspection document.

[…] MT". Clients in *[…]* and *[…]* were also discussed[168]. Moreover, already in a preparatory note of 8 November 2000, Mr. *[…]* had, based on a phone call from Mr. *[…]* of Industries Chimiques du Fluor earlier that day, reported to Fluorsid that "*Finally he [Mr. […]] reconfirmed that the prices in [[…] client] were above $[…] delivered"*[169]. In the meeting in Milan, a price level in *[…]* had been agreed of *[…] and […]. This means at […] US$ the producer absorbs […]US$/T of the […] US$/T […]"*[170]. The same report also states that Mr. *[…]* asked *"how we could now expect to raise the price to $[…] in […]"*. In Milan, a price level in *[…]* had been agreed for 2001 of between USD *[…]* and USD *[…]*[171]. Indeed, there would have been no sense in Industries Chimiques du Fluor discussing these topics of collusion with Minmet if Minmet had not been aware of the Milan agreement.

(213) Based on these elements, including notably Minmet's contacts with Industries Chimiques du Fluor following the meeting in Milan, the Commission considers that the evidence shows that Minmet was aware of the agreements reached at the meeting in Milan. Far from being shocked about those collusive agreements and ordering Fluorsid to immediately withdraw from them, which as majority shareholder Minmet could and should have done, Minmet in fact not only tolerated those agreements but even actively participated itself in their implementation. In this manner, Minmet itself became directly involved in the infringement[172]. This therefore forms a second ground for holding Minmet jointly and severally liable with Fluorsid for the infringement.

(214) In view of the matters set out in section 8.1.2, this Decision should be addressed to Fluorsid and to Minmet. They should be held jointly and severally liable for the infringement found in this Decision.

8.1.3. Industries Chimiques du Fluor

(215) Industries Chimiques du Fluor participated directly in the conduct which is the subject matter of this Decision.

(216) The minute of the meeting in Milan between aluminium fluoride producers in July 2000 refers to "ICF". This abbreviation refers to Industries Chimiques du Fluor. This Decision should therefore be addressed to Industries Chimiques du Fluor.

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[168] Inspection document.

[169] Inspection document.

[170] Inspection document.

[171] Inspection document.

[172] See Case T-354/94, *Stora Kopparbergs Bergslags AB v Commission*, [1998] ECR II-2111, at paragraph 83.

8.1.4. Industrial Quimica de Mexico / QB Industrias

(217) Industrial Quimica de Mexico participated directly in the conduct which is the subject matter of this Decision.

(218) The minute of the meeting in Milan between aluminium fluoride producers in July 2000 refers to "IQM". This abbreviation refers to Industrial Quimica de Mexico. This Decision should therefore be addressed to Industrial Quimica de Mexico.

(219) During the period of infringement, QB Industrias held 99,99% of the shares in Industrial Quimica de Mexico. Moreover, during this period, ***[...]*** held the position as Chairman of the Board of both Industrial Quimica de Mexico and QB Industrias. QB Industrias did not in its reply to the Statement of Objections or at the Oral Hearing deny that it has, since its acquisition of the shares in Industrial Quimica de Mexico, controlled Industrial Quimica de Mexico.

(220) Taking account of the above, it can be concluded that during the period of infringement QB Industrias and Industrial Quimica de Mexico formed a single undertaking because the former exercised decisive influence over the commercial behaviour of Industrial Quimica de Mexico. QB Industrias should accordingly be held jointly and severally liable for the direct participation of Industrial Quimica de Mexico in the conduct which is the subject matter of this Decision.

(221) This Decision should therefore be addressed to Industrial Quimica de Mexico and to QB Industrias. They should be held jointly and severally liable for the infringement found in this Decision.

9. REMEDIES

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

(222) Where the Commission finds that there is an infringement of Article 81 of the Treaty and 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.

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

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

(224) 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 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty[173] 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[174]. The same limitation results from Article 23(2) of Regulation (EC) No 1/2003.

(225) In fixing the amount of any fine, pursuant to Article 23(3) of Regulation (EC) No 1/2003, regard must be had both to the gravity and to the duration of the infringement. In setting the fines to be imposed, the Commission will refer to the principles laid down in its 2006 Guidelines on fines.

(226) In doing so, the Commission will set the fines at a level sufficient to ensure deterrence. Moreover, the role played by each undertaking party to the infringement will be assessed on an individual basis. In particular, the Commission will reflect in the fines imposed any aggravating or mitigating circumstances pertaining to each undertaking. Finally, the Commission will apply, as appropriate, the provisions of the Leniency Notice.

9.3. The basic amount of the fines

9.3.1. Calculation of the value of sales

(227) Pursuant to the 2006 Guidelines on fines, in determining the basic amount of the fine to be imposed, the Commission will take the value of each undertaking's sales of goods to which the infringement directly or indirectly relates in the geographic area concerned within the EEA for the last full business year of the undertaking's participation in the infringement.[175]

(228) However, according to Point 18 of the 2006 Guidelines on fines, where the geographic scope of an infringement extends beyond the EEA (e.g. worldwide cartels), the relevant sales of the undertakings within the EEA may not properly reflect the weight of each undertaking in the infringement. In such circumstances, in order to reflect both the aggregate size of the relevant sales within the EEA and the relative weight of each undertaking in the infringement, the Commission may assess the total value of the sales of goods and services to which the infringement relates in the relevant geographic area (wider than the EEA), may determine the share of the sales of each undertaking party to the infringement on that market and may apply this share to the aggregate sales within the EEA of the undertakings concerned. The result will be taken as the value of sales for the purpose of setting the basic amount of the fine.

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

[174] 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 *mutatis mutandis*”.

[175] Point 13 of the 2006 Guidelines on Fines.

(229) For the purposes of setting fines imposed in this Decision the Commission considers it appropriate to apply the methodology enshrined in Point 18 of the 2006 Guidelines on fines so that the starting amounts would reflect the nature of the infringement, its actual impact on the market and the scope of the geographic market covered by the collusive behaviour of the parties, which goes well beyond the EEA market. The possibility to take into consideration the value of sales of goods in the area covered by the cartel (wider than EEA) enables the Commission to evaluate the economic capacity of the members of the cartel to harm competition within the EEA. On the basis of the data provided by the parties (section 2.2), the calculated values of sales in the EEA are as follows: Boliden Odda EUR ***[…]***, Fluorsid and Minmet EUR ***[…]***, Industries Chimiques du Fluor EUR ***[…]***, Industrial Quimica de Mexico and QB Industrias EUR ***[…]***.

(230) Industrial Quimica de Mexico and QB Industrias have argued that any fine, if it were imposed, should be calculated by reference to Industrial Quimica de Mexico's turnover in Europe and that since Industrial Quimica de Mexico did not export to Europe in the relevant period, its fine should be zero. Industrial Quimica de Mexico and QB Industrias have contested a fine methodology based on Industrial Quimica de Mexico's market share in a wider geographic area than the EEA to which the cartel applied (Point 18 of the Guidelines on Fines), claiming this alternative methodology is only allowed in the case of market sharing (in the sense that one or more companies promised to stay out of the European market), which they have claimed cannot be proven in this case.

(231) The Commission points out that according to the findings made in this Decision, the cartel had a worldwide scope and, in addition to target price-increase fixing, the parties exchanged commercially sensitive information about their future conduct in various regions world-wide. Instead of providing effective competition on the market the parties were made aware in advance of other parties' intentions to participate in specific tenders or to sell in individual markets. Furthermore, it is worth recalling the judgment in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 (*Tokai II)*[176], where the Court of First Instance held that, whilst a *'worldwide approach'* is particularly appropriate in the case of the sharing of markets on geographic grounds, it cannot be concluded *a contrario* from this that a *'worldwide approach'* should strictly be excluded in the case of a price-fixing cartel which does not have a market-sharing system. The parties' undertaking to make a joint effort to increase prices meant that their overall, that is worldwide, competitive potential was not therefore applied for the benefit of the European market. If they had not taken part in the price-fixing cartel, they would have been free to set their price policy without any commitment to their competitors, and therefore to sell below the prices fixed by the cartel and so increase their market share in Europe.

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[176] Judgment of 15 June 2005, *Tokai Carbon a.o. v Commission*, not published in the ECR, paragraphs 186-197.

(232) The relative strength of each undertaking concerned is determined as the percentage for which its sales of the goods or services to which the infringement relates in the geographic area covered by the cartel account in relation to the aggregate sales in that area of all of the undertakings concerned. This percentage is then applied to the aggregate sales of the goods or services to which the infringement relates of the undertakings concerned in the EEA.

(233) The question as to whether captive sales of other undertakings are taken into account, and exactly how the geographic market should be defined, is thus irrelevant for the calculation of the value of sales and the final fine. What matters is the sales of the goods or services of the undertakings concerned and their respective relative market shares thereof. This market share is then applied to the aggregate sales of the goods or services to which the infringement relates of the undertakings concerned in the EEA. The result will be taken as the value of sales for the purpose of setting the basic amount of the fine.

9.3.2. Determination of the basic amount of the fine

(234) As provided in Point 19 of the 2006 Guidelines on fines, the basic amount of the fine to be imposed should be related to a proportion of the value of sales, depending on the degree of gravity of the infringement multiplied by the number of years of infringement.

a) Gravity

(235) As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30% of the value of sales. In order to decide whether the proportion of the value of sales should be at the lower or at the higher end of the scale, the Commission has regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.

Nature

(236) The infringement in the present case consisted of, *inter alia*, horizontal price-fixing. These kinds of practices are, by their very nature, among the most harmful restrictions of competition. Therefore, this aspect should be reflected in the proportion of the value of sales taken into account.

Combined market share

(237) The estimated combined market share of the undertakings participating in this infringement in 2000 was not more than ***[…]*** % in the EEA (see recital (33)). That joint estimated market share will also be taken into account for determining the proportion of the value of sales to be considered.

Geographic scope

(238) The geographic scope of the infringement covered the states and regions affected by the cartel as described in recital (136) and the cartel was worldwide.

Implementation of the infringement

(239) The degree to which the agreement was implemented (see recitals (134) to (135), (154) to (156), (172) and (185) has also been taken into account by the Commission in setting the proportion of the value of sales to take into account.

Conclusion

(240) In conclusion and taking into account the factors discussed above relating to the nature of the infringement and geographic scope, the proportion of the value of sales of each undertaking involved to be used to establish the basic amount of the fines to be imposed is set at 17 %.

b) Duration

(241) In order to take fully into account the duration of the participation of each undertaking in the infringement, the amount determined on the basis of the value of sales, as described at recitals (235) to (240), should be multiplied by the number of years of participation in the infringement. As set out in Section 6, the undertakings were involved in the infringement at least during the period from 12 July 2000 to 31 December 2000. Periods of less than six months will be counted as half a year. As a result, the multiplying factor to be applied to the amount determined in recital (240) should therefore be 0.5. All the addressees of this Decision should be held liable for the entire infringement period.

c) Additional amount

(242) In order to deter undertakings from entering into horizontal price fixing agreements such as the one currently at issue, the basic amount of the fines to be imposed should be increased by an additional amount, as indicated in Point 25 of the 2006 Guidelines on fines. For this purpose, having considered the circumstances of the case and, in particular, the factors discussed in recitals (236) to (239) it is concluded that an additional amount of 17 % of the value of sales would be appropriate.

9.3.3. Conclusion on the basic amounts

(243) The basic amount of the fine to be imposed on each undertaking should therefore be as follows:

Undertakings	**EUR**
Boliden	1 000 000

Fluorsid, Minmet	1 600 000
Industries Chimiques du Fluor	1 700 000
Industrial Quimica de Mexico, QB Industrias	1 670 000

9.4. Adjustments to the basic amount

9.4.1. Aggravating circumstance

(244) In this case there are no aggravating circumstances for the addressees of this Decision.

9.4.2. Mitigating circumstances

9.4.2.1. Industries Chimiques du Fluor

(245) Industries Chimiques du Fluor has argued that the infringement committed at the meeting on 12 July 2000 in Milan, should the Commission find such an infringement, is not of a serious nature. It would have had no effect on the market and its duration should be limited at the time of the exchange of information. Moreover, Industries Chimiques du Fluor had a passive role and was during this period a fierce competitor. The fine should considering those factors be symbolic.

(246) Those arguments cannot be accepted. Inasmuch as Industries Chimiques du Fluor claims that the infringement committed at the Milan meeting on 12 July 2000 should not be considered serious, the Commission maintains that infringements by object of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement are by their very nature very harmful infringements of competition. Participants in these infringements should realise that they are engaged in illegal activities. As to the alleged passive role of Industries Chimiques du Fluor, the Commission does not accept such a claim. The report of the Milan meeting contains several references to Industries Chimiques du Fluor's future conduct on the market and its expectations regarding the evolution of prices, sales volumes, stock levels and raw material costs[177]. The section of the report dedicated to Europe clearly states that Industries Chimiques du Fluor was leading the discussion as to Europe: *"For year ICF wants to raise price to* ***[…]*** *US$/T Fca Mordijk"*[178]. Furthermore, as indicated in recitals (93) to (96), Industries Chimiques du Fluor remained in bilateral contacts with Minmet (which subsequently reported to Fluorsid) in the months following the meeting in Milan. It follows from the fax message sent by Mr. ***[…]*** of Minmet to Fluorsid on 8

177 Inspection document.

178 Inspection document.

November 2000, that it was Mr. *[…]* of Industries Chimiques du Fluor who called Minmet and requested a meeting to be held in Lausanne[179]. During this phone call Mr. *[…]* expressed his views about the public tenders in *[…]* and *[…]*. In particular he complained about Fluorsid/Minmet having bid low prices in a public tender in *[…]* and, as a result, Industries Chimiques du Fluor would have difficulty increasing the price in *[…]*. The meeting took place on 9 November 2000 and Industries Chimiques du Fluor was represented by Mr. *[…]* and Mr. *[…]*. The participants of the meeting exchanged information on particular tenders and customers, commercial policy, prices and volumes. It follows that Industries Chimiques du Fluor monitored the implementation of the agreement and made an attempt to bring the competitors (Industrial Quimica de Mexico and Fluorsid) back in line and to increase prices. In the light of those circumstances, Industries Chimiques du Fluor's involvement must be seen as intentional and Industries Chimiques du Fluor cannot be said to have had a passive role. Industries Chimiques du Fluor did not put forward any evidence to establish that its participation in the infringement was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in a spirit that was different from theirs. It must therefore be concluded that by attending the cartel meeting in Milan and exchanging information on prices, tenders and volumes, Industries Chimiques du Fluor demonstrated a degree of active participation in the cartel which is clearly incompatible with that required in order to benefit from the attenuating circumstance which it pleads. Therefore, the alleged passive role of Industries Chimiques du Fluor cannot be seen as substantiated and, accordingly, that argument is not capable of reducing Industries Chimiques du Fluor's culpability and does not qualify as an attenuating circumstance.

(247) Industries Chimiques du Fluor did not succeed in demonstrating that it acted on the market as a "*fierce competitor*". As the Court of Justice has held in several cases[180], cheating or lack of discipline in the cartel is not a mitigating factor. The fact that an undertaking which has been proved to have participated in collusion on prices with its competitors did not behave on the market in the manner agreed with its competitors is not necessarily a matter which must be taken into account as a mitigating circumstance when determining the amount of the fine to be imposed. According to that case-law, an undertaking which despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit. In the present case, the evidence adduced by Industries Chimiques du Fluor does not show that its actual conduct on the market was likely to defeat the anti-competitive effects of the infringement found and that during the infringement period it always behaved independently on the market. To the contrary, as indicated in

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179 Inspection document.

180 See Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission*, not published in the ECR, paragraph 297; Case T-44/00 *Mannesmannröhren-Werke AG v Commission*, [2004] ECR II-2223, paragraphs 277-278, and Case T-327/94 *SCA Holding v Commission*, [1998] ECR II-1373, paragraph 142.

recitals (93) to (96), the evidence in the file demonstrates that Industries Chimiques du Fluor remained in bilateral contacts with the competitors even after the cartel meeting in Milan.

9.4.2.2. Fluorsid / Minmet

(248) Fluorsid and Minmet have argued that they have always fully cooperated with the Commission. Fluorsid's late application for leniency was due to the relations of Fluorsid with the companies ***[…]*** and ***[…]*** and the fact that the previous ***[…]***, Mr ***[…]***, the person that managed the commercial relations of Fluorsid, left the company in 2003. Fluorsid has argued that it first considered a leniency procedure on 16 October 2006. Fluorsid submitted documents on 29 March 2007. The Commission – according to Fluorsid – refused to record that meeting. Mr ***[…]*** could at that meeting have provided useful information to the Commission. A formal application for leniency was filed on 22 April 2007. On 27 May 2007, Fluorsid submitted an addendum with further information. The Commission issued the Statement of Objections only some days after Fluorsid's application for leniency, leaving the company in an uncertain position. The Commission rejected the leniency application only two weeks before the deadline for submitting the reply to the Statement of Objections. Fluorsid kept cooperating with the Commission at the expense of its own defence (it had only two weeks to prepare a proper defence). For this effort, the Commission should grant Fluorsid a significant reduction of fines.

(249) The Commission has assessed the value of evidence concerning the infringement provided on a voluntary basis by different undertakings under the Leniency Notice, irrespective of whether it was supplied by means of a formal leniency application or in the form of voluntary self-incriminating information provided in response to a request for information. Cooperation merits a reduction under the Leniency Notice only when the information serves the Commission to establish an infringement[181]. The Commission considers that there are also no exceptional circumstances present in this case that could justify granting Fluorsid and Minmet a reduction for effective cooperation falling outside the scope of the Leniency Notice. As to the meeting of 29 March 2007 in particular, the Commission notes that Fluorsid was, at its request, received by the Commission and that Fluorsid during that meeting (and during other contacts over the telephone around that time) was repeatedly informed that it could submit any document, explanation or statement (be it by Fluorsid or by its employees) to the Commission and that the Commission would examine such submissions. The fact that Fluorsid or Minmet co-operated in the investigation is as such not a mitigating circumstance. The Leniency Notice is a publicly available document and Fluorsid or Minmet had ample time to submit an application under it. Also, Fluorsid was granted sufficient time to defend itself against the allegations in the Statement of Objections. The issue of Fluorsid's

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[181] See Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, at paragraph 588 and the case-law cited therein.

application for immunity and reduction of fines under the Leniency Notice is duly addressed in section 10.2 of this Decision.

9.4.2.3. Conclusion on mitigating circumstances

(250) According to the 2006 Guidelines on fines, the Commission may reduce the basic amount of the fine on the basis of mitigating circumstances. In this case the Commission has assessed whether a reduction of fines is justified, taking into account all the facts of the case, in particular those raised by the parties that have been examined above. In conclusion, the Commission has not found any circumstance that should lead to a reduction of the fine outside the Leniency Notice. Such circumstance, in secret cartel cases, should be of exceptional nature. In particular, mitigating value cannot be attributed to any of the arguments put forward by the parties.

9.4.3. Sufficient deterrence

(251) In determining the amount of the fine, the Commission pays particular attention to the need to ensure that fines have a sufficiently deterrent effect. To that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates (Point 30 of the 2006 Guidelines on fines), even if it is not possible to estimate the amount of gains improperly made as a result of the infringement (Point 31 of the 2006 Guidelines on fines), as the fine imposed must fulfil its objective of disciplining the infringing undertaking having taken into account its overall size.

(252) The Commission does not consider it appropriate, in order to set the amount of the fine at a level which ensures that it has a sufficient deterrent effect, to apply a multiplying factor to the fines to be imposed.

9.5. Application of the 10% of turnover limit

(253) Article 23(2) of Regulation (EC) No 1/2003 stipulates that, for each undertaking participating in the infringement, the fine is not to exceed 10% of the undertaking's total turnover in the preceding business year.

(254) In this case, such ceiling is not attained in respect of the fine to be imposed on any of the undertakings to which this Decision is addressed.

(255) The amounts of the fine to be imposed on each undertaking before application of the Leniency Notice should therefore be the following:

Undertakings	**EUR**
Boliden	1 000 000
Fluorsid, Minmet	1 600 000

Industries Chimiques du Fluor	1 700 000
Industrial Quimica de Mexico, QB Industrias	1 670 000

10. APPLICATION OF THE LENIENCY NOTICE

(256) As indicated in section 3, Boliden applied for immunity under the Leniency Notice. Furthermore, Fluorsid applied for immunity and reduction of fines. These applications are evaluated in this Section.

10.1. Boliden

(257) On 23 March 2005, Boliden applied for immunity from fines and submitted evidence in respect of the alleged cartel. Boliden was the first to inform the Commission about a worldwide secret cartel for aluminium fluoride. ***[…]*** Prior to the application, the Commission had not undertaken an investigation into the alleged cartel activities, nor did it have sufficient evidence to order an investigation in respect of those activities. On the basis of the information provided, the Commission was able to adopt a decision pursuant to Article 20(4) of Regulation (EC) No 1/2003 to carry out unannounced inspections. On 28 April 2005, the Commission therefore granted Boliden conditional immunity from fines, in accordance with point 8(a) of the Leniency Notice.

(258) Boliden continued to cooperate fully with the Commission throughout the administrative procedure in accordance with Point 11 of the Leniency Notice. Boliden ended its involvement in the infringement no later than the time when it submitted evidence under point 8(a) of the Leniency Notice. Boliden has not taken steps to coerce other undertakings to participate in the infringement.

(259) Boliden should therefore be granted immunity from any fines that would otherwise have been imposed on it.

10.2. Fluorsid

(260) Fluorsid was the second undertaking to approach the Commission under the Leniency Notice. On 22 April 2007**,** the Commission received a formal application for immunity from fines or reduction of fines from Fluorsid S.p.A. and other legal entities belonging to the same undertaking. ***[…]*** Earlier, on ***[…]***, in a meeting with the Commission, Fluorsid had voluntarily submitted ***[…]*** information. The Statement of Objections referred to that information. On 27 May 2007, Fluorsid submitted an addendum to its application ***[…]***.

(261) As to the timing of Fluorsid's application, it is noted that it was submitted some two years after the beginning of the Commission's investigation. The Leniency Notice is a publicly available document and Fluorsid had ample time to submit an application under it. It is not for the Commission to evaluate the company's internal circumstances which may have lead to the decision to make such an application and when to make it. Fluorsid, in the meeting of ***[…]*** and prior to that on ***[…]***, was made aware that the Commission was finalising its provisional conclusions, so that for any information to be taken into account it would have to be submitted as soon as possible.

(262) A meeting took place on ***[…]*** at which Fluorsid deposited certain documents with explanations, though it did not apply for leniency. The Commission evaluated that information and did not grant a reduction of fines because the information did not represent significant added value. At the time when the actual formal application was lodged on 22 April 2007, the Statement of Objections had already been signed by the responsible Commissioner and sent for dispatch, after the finalisation of all internal procedures.

(263) The Commission, by letter of 8 May 2007, informed Fluorsid that immunity from fines was no longer available. Nevertheless, and in spite of the fact that the application was made at a late stage, the Commission reviewed the evidence submitted against the information contained in the file prior to the adoption of the Statement of Objections, and concluded that it did not represent significant added value. Fluorsid was made aware of that position formally by a Commission Decision of 13 July 2007. That was four weeks prior to the response deadline for the answer to the Statement of Objections, allowing Fluorsid sufficient time to take the rejection of its application into account for its defence. However, the fact that an undertaking has endeavoured to facilitate the task of the Commission to establish an infringement by providing evidence does not imply that an undertaking cannot otherwise defend itself properly and give its views on what it considers to be unsupported allegations, that is to say, independently of having made such submission under the Leniency Notice. In conclusion, after the examination of the evidence submitted, the Commission found that the information provided by Fluorsid did not represent significant added value within the meaning of Points 21 and 22 of the Leniency Notice, compared to the evidence that was already in the possession of Commission at the time when the submissions concerned were made. Fluorsid was duly informed that the Commission did not intend to apply any reduction of fines under the Leniency Notice to Fluorsid in this proceeding. In any event, as regards evidence provided as of ***[...]*** and consequently not relied upon in the Statement of Objections or in this Decision, the Commission considers, in view of the judgment in *Tokai II*, that an undertaking is not

entitled to a reduction of the fine if the evidence is not relied upon to prove the infringement.[182]

11. INABILITY TO PAY

(264) ***[…]*** has claimed that if the Commission imposes fines on it, the company will go bankrupt (which in itself would lead to competition being harmed seriously). Moreover, ***[…]*** have claimed that the turnover of ***[…]*** should be excluded from the calculation of any fine. In any event, ***[…]*** has asked for a symbolic fine.

(265) ***[…]*** and ***[…]*** have requested that account be taken of the group's financial situation in setting the fine.

(266) Both ***[…]*** and ***[…]*** raised these claims in the undertakings' replies to the Statement of Objections and at the Oral Hearing.

(267) The Commission has assessed the claims of both undertakings against the provision contained in point 35 of the 2006 Guidelines on fines. This reads: "*In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.*"

(268) The Commission requested from the undertakings details about their respective financial situation on 23 May 2008. Answers were received on 2 June 2008 and 3 June 2008 respectively. ***[…]*** provided further data at the request of the Commission on 13 June 2008.

(269) Before dealing with these claims individually, the Commission notes that claims that bankruptcy will follow or of a poor financial situation are assessed at the time when the Commission calculates the fine and on the basis of profitability data submitted by the undertakings. Insofar as the parties argue that if fined the company will go bankrupt or that the poor financial situation be taken into account, the Commission points to settled case law, according to which the Commission is not required, when determining the amount of the fine, to take into account the poor financial situation of an undertaking, since recognition of such an obligation would be tantamount to giving unjustified competitive advantages to undertakings

[182] Judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai and Others v Commission* not published in the ECR, paragraph 368.

least well adapted to the market conditions[183]. That case law is in no way called in question by Point 35 of the Guidelines on fines, which states that an undertaking's inability to pay may, upon request be taken into consideration. That ability can be relevant only in a 'specific social and economic context', namely the consequences which payment of a fine could have, in particular, by leading to an increase in unemployment or deterioration in the economic sectors upstream and downstream of the undertaking concerned[184].

11.1. *[…]*

(270) Having examined the information presented by *[…]*, the Commission concludes that the information provided by *[…]* does not show that the fine imposed by this Decision would irretrievably jeopardise the economic viability of *[…]* and cause its assets to lose all their value.

(271) The conclusion as regards *[…]* is based, among other elements, on the data relating to its profitability with which *[…]* provided the Commission. The fine as imposed is not considered to give rise to a situation of inability to pay in a specific social and economic context. The claim relating to *[…]* ability to pay cannot be accepted.

11.2. *[…]*

(272) *[…]* stated that an 'unabated fine' would 'risk meaning the end of the companies as a going concern'.

(273) The information made available to the Commission shows that this undertaking *[…].*

(274) *[…]*

(275) Having regard to all these circumstances, as well as the level of the fine imposed on the undertaking in this Decision, it is considered that *[…]* not submitted sufficient objective evidence to show that the imposition of the fine in this Decision would irretrievably jeopardise the economic viability of *[…]* and cause the *[…]* assets to lose all their value. As regards the social and economic context criterion, apart from the general reference to *[…]*, substantiation of the claim made by *[…]* is lacking. The claim regarding the inability to pay in a specific social and economic context raised by *[…]* can therefore not be accepted.

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[183] See Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others* v *Commission* [1983] ECR 3369, paragraphs 54 and 55, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 327.

[184] See Case C-308/04 P *SGL Carbon AG* v *Commission* [2006] ECR I-5977, paragraph 106.

12. AMOUNTS OF THE FINES IMPOSED IN THIS PROCEEDINGS

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

Undertakings	**EUR**
Boliden	0
Fluorsid, Minmet	1 600 000
Industries Chimiques du Fluor	1 700 000
Industrial Quimica de Mexico, QB Industrias	1 670 000

HAS ADOPTED THIS DECISION:

Article 1

The following undertakings have infringed Article 81 of the Treaty and Article 53 of the EEA Agreement by participating, from 12 July 2000 until 31 December 2000, in an agreement and/or concerted practice in the aluminium fluoride sector:

(a) Boliden Odda A/S;

(b) Fluorsid S.p.A. and Minmet Financing Company S.A.;

(c) Société des Industries Chimiques du Fluor;

(d) Industrial Quimica de Mexico S.A. de C.V. and Q.B. Industrias S.A.B. de C.V..

Article 2

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

(a) Boliden Odda A/S: EUR 0

(b) Fluorsid S.p.A. and Minmet Financing Company S.A., jointly and severally: EUR 1 600 000

(c) Société des Industries Chimiques du Fluor: EUR 1 700 000

(d) Industrial Quimica de Mexico S.A. de C.V. and Q.B. Industrias S.A.B. de C.V., jointly and severally: EUR 1 670 000

The fines shall be paid in Euro, within three months of the date of notification of this Decision, into bank account No 642-0029000-95 of the European Commission with Banco Bilbao Vizcaya Argentaria S.A., Avenue des Arts, 43, B-1040 Bruxelles.
Code IBAN : BE76 6420 0290 0095
Code SWIFT : BBVABEBB.

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted plus 3.5 percentage points.

Article 3

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

Boliden Odda A/S
Eitrheim
5751 Odda
Norway

Fluorsid S.p.A.
Area Industriale di Cagliari
2° strada Macchiareddu
Casella Postale 288
09032 Assemini (CA)
Italy

Minmet Financing Company S.A.
Avenue de Béthusy 54
1000 Lausanne 12
Switzerland

Société des Industries Chimiques du Fluor
42 Rue Ibn Charaf
1002 Tunis
Tunisia

Industrial Quimica de Mexico S.A. de C.V.
Km. B-522 Via del FF.CC. México-Laredo
Col. Españita
CP 78378 San Luís Potosí S.L.P.
Mexico

Q.B. Industrias S.A.B. de C.V.
Bosque de Ciruelos 304
Bosques de las Lomas
11700 Mexico DF
Mexico

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

Done at Brussels,

For the Commission

Neelie KROES
Member of the Commission