COMMISSION DECISION

of 6 June 1994

amending Decision 88/330/EEC relating to a proceeding pursuant to Article 85 of the EEC Treaty

(IV/32.075 — Bayer/BP Chemicals)

(Only the English and German texts are authentic)

(94/384/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 6 and 8 thereof,

Having regard to a request submitted to the Commission in 1991 by Bayer AG (hereinafter referred to as 'Bayer'), BP Chemicals International Ltd ('BPCL') and Erdölchemie ('EC'), seeking an amendment to Commission Decision 88/330/EEC [2] ('the Decision'),

Having regard to the publication [3] pursuant to Article 19 (3) of Regulation No 17 of a summary of relevant changes which have occured since the Decision, in which the Commission had granted an exemption pursuant to Article 85 (3) in favour of the agreements between the abovementioned parties in the polyethylene sector, for a period ending on 2 October 1998, subject *inter alia* to the condition that Bayer, BPCL and EC close down, by the end of 1991, the older of the two low density polyethylene (LDPE) units currently run by EC, unless the Commission stated that postponement was objectively justified, with respect to the requirements of Article 85 (3) and the purpose of the Decision by the situation in the polyethylene sector,

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

Whereas :

I. THE FACTS

(1) On 1 March 1988 a set of agreements between Bayer, BPCL and EC entered into force concerning the polyethylene sector, under which *inter alia* technical cooperation between BPCL and EC was established, and BPCL was appointed as distributor for EC's production.

(2) Since the Decision was adopted the following changes have occurred :

(a) the product manufactured at PE1 has changed considerably, namely by the replacement of general-purpose products with specific autoclave grades ;

(b) BPCL shut down its 30-year old plant in Grangemouth in November 1989 (100 kilotonnes per year) ;

(c) with the advent of more open access to east European markets, EC has decided to change the geographical mix of its LDPE products to take full advantage of the backlog demand on those markets.

(3) Before the end of 1991, the parties requested the Commission to amend point 2 of Article 2 of the Decision, under which the exemption was subject to the condition that Bayer, BPCL and EC close down the older of EC's two LDPE units (PE1) by the end of 1991, unless the Commission were to state that the situation in the polyethylene sector objectively justified postponement in accordance with the requirements of Article 85 (3) and the purpose of the Decision. The parties requested that the closure of PE1 be postponed until the end of 1994.

(4) Following the publication pursuant to Article 19 (3) of Regulation No 17 of the above facts, in which the Commission announced its intention to authorize the postponement of the PE1 closure date until the end of 1994, interested third parties, namely competitors in the polyethylene sector, sent their observations to the Commission, stating that in their opinion there were no grounds for postponing the closure of the older of EC's LDPE facilities.

These third parties said, in particular, that :

(a) there is already enormous surplus production capacity of LDPE in Europe ;

(b) demand for LDPE is not likely to increase in Europe for some time ;

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No L 150, 16. 6. 1988, p. 35.
[3] OJ No C 44, 19. 2. 1992, p. 11.

(c) east European markets are adequately served by local production capacities;

(d) substitutes for the LDPE produced at the older of EC's facilities can be provided by any other linear low density polyethylene (LLDPE) and LDPE;

(e) the closure of the LDPE plant in Grangemouth does not compensate for the continued operation of the older LDPE unit, because it has been replaced by an LLDPE plant of similar size, whose products are competing for the same markets.

II. LEGAL ASSESSMENT

A. Article 85 (1)

(5) For the same reasons as those stated in the Decision the agreements between Bayer, BPCL and EC are still considered to fall within the scope of Article 85 (1).

B. Article 85 (3)

(6) On the basis of the information at its disposal, the Commission has come to the conclusion, again for the same reasons as those stated in the Decision, that the advantages of the agreements, notably the contribution to improving the production and distribution of goods and to promoting technical and economic progress, while allowing customers a fair share of the resulting benefit, still constitute a sufficient basis for the application of Article 85 (3).

C. Article 8 of Regulation No 17

(7) Point 2 of Article 2 of the Decision established that the exemption was subject to the plant closure condition already mentioned.

(8) This conditions was attached to the Decision, pursuant to Article 8 (1) of Regulation No 17, on the basis of 1988 perceptions of future demand trends. This is confirmed by the option, mentioned by the Decision itself and based on Article 8 (3) (a) of Regulation No 17, of amending the Decision where the had been a change in any of the facts which were basic to the making of the Decision, and in particular a change in the situation of the polyethylene sector justifying postponement of the implementation of the abovementioned condition.

(9) The Commission considers that the facts that can justify postponing the closing-down of PE1 may be related to future trends in polyethylene demand, not only in general terms, but also with regard to all the specific objective elements characterizing the relationship between polyethylene demand and its supply by Bayer, BPCL and EC (their LDPE capacity production).

(10) While, from a general point of view, there are no clear indications of a structural increase in LDPE demand, and while there is therefore no sufficient basis, in that regard, on which to authorize the postponement of the closure, nonetheless various important changes have occurred since the Decision was adopted, to the relationship between the demand for polyethylene and its supply by the parties. Those particular relevant changes have altered the facts which were basic to the making of the Decision.

(11) At the time when the Decision was adopted, the old LDPE plant of BPCL in Grangemouth was active. It is now shut down. Changing the product manufactured at PE1, by replacing general-purpose polyethylene with specific autoclave grades, has required substantial investment and has introduced more advanced technologies offering consumers products more suited to their requirements, thereby allowing the PE1 plant entry into the LDPE market growth sector. EC, by changing the geographical mix of its LDPE products, is able to take full advantage of the backlog demand on the east European markets.

(12) In view of the new market situation explained above, the Commission finds that there is objective justification, with respect to the requirements of Article 85 (3) and the purpose of the Decision, for postponement of the closure of the older of EC's two LDPE plants.

(13) As far as third-party observations are concerned, it has to be admitted that some of these views (the presence of considerable surplus LDPE production capacity in Europe and the improbability of any increase in LDPE demand in Europe for some time) are to some extent shared by the Commission, which has serious reservations regarding the Bayer, BPCL and EC claim that there are clear indications of a structural increase in LDPE demand.

(14) As far, as east European markets are concerned, even though they were, until some time ago, well served by local production capacity (as is claimed by third parties), this was due to the extremely low per capita consumption of LDPE and LLDPE film: around three kilograms in the ex-USSR (while in western Europe it is around 10 kilograms per capita). In east European countries the consumption pattern is beginning to evolve, though not yet reaching levels similar to those of western Europe, and is fuelling an increase in demand which

cannot be met by indigenous producers. This is opening new markets for EC producers.

(15) The facts which were basic to the making of the Decision not only related to the general situation in the polyethylene sector but also to the parties' LDPE production capacity, and these particular facts have considerably changed.

(16) In that connection the two relevant third-party observations (possibility of replacing the LDPE produced at PE1 with any other LDPE/LLDPE and the absence of a relationship between the closure of the LDPE plant in Grangemouth and the retention of PE1) are based on the same implicit assumption, not shared by the Commission : that the existence of a sole combined LDPE/LLDPE market means that LDPE capacity is completely replaceable by LLDPE. In fact, third parties claim that the autoclave grades now being produced at PE1 are capable of substitution by an abundance of high-density polyethylene (HDPE) and LLDPE grades for the same application.

(17) On the contrary, it can be stated that there are some sub-sectors of the combined LLDPE/LDPE market requiring the use of LDPE for technical reasons. Some of these sub-sectors are of a value-adding nature which has developed significantly since the Decision was adopted. PE1 has been converted specifically to the production of products suitable for those sub-sectors.

(18) It has to be pointed out that, according to a Commission inspection (made after receiving third-party observations), after BPCL had assumed responsibility for marketing EC's polyethylene in March 1988, marketing policy was aimed primarily at satisfying the needs of the western European market with an improved product range. This policy was successful, with less general-purpose homopolymers and more specific grades such as coatings being produced and made available for Europe.

In 1989, it became obvious that the marketing policy resulted in production of more added-value products and/or more sales in added-value segments. This was confirmed in 1990. Also, in 1989, segments within the market were either growing or being protected from penetration by LLDPE. BPCL's planning department officially confirmed this in June 1989.

(19) On the basis of this marketing strategy it has been possible for BPCL and EC to examine the potential and to devise a strategy for upgrading the product mix and improving the performance of EC's LDPE operations with a view to meeting the growth in demand for speciality applications of polyethylene in Europe.

(20) The main elements of his strategy are :

(a) replacement of general-purpose products by specific autoclave grades ;

(b) replacement of general-purpose products by performance products generating added value.

Consequently, through selective investment PE1 has been enhanced for the speciality jobs.

(21) The closure of BPCL's LDPE plant at Grangemouth in 1989 has to be considered in this context. By shutting down the Grangemouth plant it was possible to remove supplies of key tubular resins from the market and, in response to customer demand, to develop a new grade at EC to satisfy customer requirements. The demise of the LDPE plant at Grangemouth increased the percentage of polyethylene production at PE1 allocated to specialized applications.

There is therefore an important factual relationship between closing the LDPE plant at Grangemouth and keeping open the PE1 plant.

(22) The third-party observations contest this relationship because, even though the LDPE Grangemouth plant was closed, it was replaced by an LLDPE plant of similar size, of which the products compete for the same markets as PE1. This view is not shared by the Commission.

(23) In fact of the new LLDPE plant is better suited to producing injection moulded product groups while PE1 is well suited to the production of EVA (Ethylene Vinyl Acetate) copolymers and extrusion coatings.

(24) On the basis of the abovementioned considerations, the Commission finds that, as there have been relevant changes in the facts which were basic to the making of the Decision, notably in the specific objective elements characterizing the relationship between polyethylene demand and its supply by Bayer, BPCL and EC (production capacity), postponement of the closure of PE1 is justified.

(25) As far as the duration of the postponement is concerned, the Commission considers a maximum of three years from 1 January 1992 to 31 December 1994 to be appropriate, for the following reasons :

(a) there is no tangible evidence likely to give a reliable indication of the situation in the polyethylene sector after 1994 ;

(b) taking a position now about the post-1994 situation of a market which is rapidly changing would have the effect of jeopardizing the condition imposed in the Decision, depriving the Commission of both the ability and the obligation to verify the implementation of that condition ;

(c) the observations of third parties concerning the general situation in the polyethylene market reflect the Commission's reservations about the Bayer, BPCL and EC claim that there are clear indications of a structural increase in LDPE demand ; it appears therefore inappropriate and unjustified to authorize a lengthy period of postponement for the PE1 closure.

(26) The additional condition was attached to the Decision that Bayer, BPCL and EC should fully implement within the first six months of 1991 the construction and the start-up of a new LLDPE plant. The Commission notes that this condition was satisfied by the construction of the new LLPDE plant (120 kilotonnes per year) by mid-1991 at Cologne (Germany).

(27) Moreover, Article 3 of the Decision made the exemption subject ot the following three obligations :

'1. Bayer, BPCL and EC shall each submit a report on an individual basis to the Commission during the period of the exemption. Each report shall deal with all the activities concerning the products in question and give details on the implementation of the operations provided for in Article 2 and of the progress achieved. It shall state, in particular, the production and sales by the parties or by subsidiaries or companies they control, in the common market as a whole and in each Member State : the amount of output consumed internally by each of the parties giving the name and business of the producer and consumer, and full particulars of each company's total output of the products concerned in the Community and in third countries. The report shall also state all variations as to the production capacity of Bayer, BPCL and EC in the polyethylene sector and give details of all changes in the production and distribution of the products in question.

Until 2 January 1992 each party shall send a report to the Commission every six months, within two weeks of the end of the period to which it refers. However, the first report shall cover the period from 3 October 1987 to 2 January 1989. Starting from 3 January 1992, if the exemption is still in force, the reports shall be sent to the Commission every two years, within four weeks before the end of the period to which they refer. A final report shall cover the period from 3 January to 2 October 1998.

2. Bayer, BPCL and EC shall each inform the Commission individually in advance of any initiative or further operation in which they or their subsidiaries or associated companies will take part with reference to the products referred to by this Decision or other products of the upstream and/or downstream markets.

3. Bayer, BPCL and EC shall individually inform the Commission in advance of any renewals or extensions in the scope or nature of, or amendments or additions to, the agreements referred to in Article 1.'

(28) All these reporting requirements have been fulfilled until now.

However, they have to be slightly changed so as to take into account the current situation. In particular, the first obligation (a periodic report) has to be modified taking into account :

(a) that, as the above analysis concerning polyethylene clearly shows, it is important to distinguish between LDPE, LLDPE and HDPE ;

(b) that, again as stated above, the polyethylene sector is changing rapidly, not only in general terms, but also with particular regard to Bayer, BPCL and EC.

(29) It is therefore no longer appropriate that the periodic reports deal with a single polyethylene sector ; they have to split the polyethylene data into data concerning LDPE, LLDPE and HDPE respectively.

(30) It is also no longer appropriate that the periodicity of the reports should be every two years. As from 3 January 1994, they should be annual and should be sent to the Commission within three weeks of the end of the period to which they refer.

(31) Considering that the changes justifying the adoption of this Decision began to take place at the end of 1991, this Decision should take effect from the beginning of 1992,

HAS ADOPTED THIS DECISION:

Article 1

Decision 88/330/EEC is amended as follows:

1. Point 2 of Article 2 is replaced by the following:

   '2. That Bayer, BPCL and EC close down by the end of 1994, the older of the two LDPE units currently run by EC.'

2. The second subparagraph of point 1 of Article 3 is replaced by the following:

   'Until 2 January 1992, each party shall send a report to the Commission every six months, within two weeks of the end of the period to which it refers. However, the first shall cover the period from 3 October 1987 to 2 January 1989 and a single report shall cover the period from 3 January 1992 to 2 January 1994, to be sent to the Commission within four weeks of the end of the period to which it refers. As from 3 January, if the exemption is still in force, the reports shall split the data concerning LDPE, LLDPE and HDPE respectively and shall be sent to the Commission every year, within three weeks of the end of the period to which they refer. A final report, splitting the data concerning LDPE, LLDPE and HDPE respectively, shall cover the period from 3 January to 2 October 1998.'

Article 2

This Decision shall apply with effect from 1 January 1992.

Article 3

This Decision is addressed to:

— Bayer AG,
Bayerwerk,
D-51368 Leverkusen,

— BP Chemicals International Ltd,
Britannic House,
1 Finsbury Circus,
GB-London EC2M 7BA,

— Erdölchemie GmbH,
Köln-Worringen,
Postfach 75-02-12,
D-50754 Köln.

Done at Brussels, 6 June 1994.

For the Commission

Karel VAN MIERT

Member of the Commission