JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
12 December 2007 *

In Joined Cases T-101/05 and T-111/05,

BASF AG, established in Ludwigshafen (Germany), represented by N. Levy, Barrister, J. Temple Lang, Solicitor, and C. Feddersen, lawyer,

applicant in Case T-101/05,

UCB SA, established in Brussels (Belgium), represented by J. Bourgeois, J.-F. Bellis and M. Favart, lawyers,

applicant in Case T-111/05,

v

Commission of the European Communities, represented in Case T-101/05 by A. Whelan and F. Amato and in Case T-111/05 initially by O. Beynet and F. Amato and subsequently by X. Lewis and F. Amato, acting as Agents,

defendant,

* Languages of the case: English and French.

APPLICATION for annulment or reduction of the fines imposed on the applicants by the Commission Decision of 9 December 2004 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-2/37.533 — Choline chloride) (summary published in OJ 2005 L 190, p. 22),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of A.W.H. Meij, acting as President, N.J. Forwood and S. Papasavvas, Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 13 February 2007,

gives the following

Judgment

Background and contested decision

1 By Decision 2005/566/EC of 9 December 2004 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-2/37.533 — Choline chloride) (summary published in OJ 2005 L 190, p. 22, 'the Decision'), the Commission found that a number of undertakings had infringed Article 81(1) EC and Article 53 of the Agreement on the European Economic Agreement (EEA) by

participating in a complex of agreements and concerted practices consisting of price fixing, market sharing and agreed actions against competitors in the choline chloride sector in the EEA (Article 1 of the Decision).

2 The Commission states that the product concerned, choline chloride, is a member of the B-complex group of water-soluble vitamins (vitamin B4). It is mainly used in the animal feed industry (poultry and swine) as a feed additive and is marketed in two forms: it may take the form of an aqueous solution of 70% choline chloride or be sprayed on a dry cereal or silica carrier to give a choline chloride potency of 50 to 60%. Choline chloride which is not used as an animal feedingstuff additive is refined to provide a higher purity food grade (pharmaceutical grade). In addition to producers, the choline chloride market is made up of converters, who buy the product from producers in liquid form and convert it into choline chloride on a carrier, either on behalf of the producer or on their own behalf, and distributors.

3 Recital 3 to the Decision states that the Commission initiated an investigation into the global choline chloride industry after receiving a leniency application in April 1999 from the United States producer Bioproducts. The investigation covered the period from 1992 to the end of 1998. At recital 45 to the Decision, the Commission states that the Canadian producer Chinook had already approached it about the cartel in question on 25 November and 3 and 16 December 1998 but that it had not opened an investigation at that time.

4 So far as the EEA is concerned, according to recital 64 to the Decision the choline chloride cartel operated at two different but closely-related levels: the global level and the European level. At the global level, the producers Bioproducts (United States), Chinook (Canada), Chinook Group Limited (Canada), DuCoa (United

States), five companies in the Akzo Nobel group (Netherlands) and the applicants participated (directly or indirectly) in anti-competitive activities between June 1992 and April 1994. Those activities were designed, essentially, to increase prices worldwide, including in the EEA, and to control converters, including in the EEA, in order to ensure that converters would not undermine the agreed increases, and to allocate markets worldwide: the North American producers would withdraw from the European markets and, in return, the European producers would withdraw from the North American markets. The Commission identifies nine meetings of the cartel at global level between June 1992 (in Mexico City, Mexico) and April 1994 (in Johor Bahru, Malaysia). The most important meeting was the one held in Ludwigshafen (Germany) in November 1992.

5 Only the European producers (BASF AG, UCB SA and five companies in the Akzo Nobel group) are stated to have participated in the meetings implementing the cartel at European level, which continued from March 1994 until October 1998. The Commission identifies 15 meetings in that regard, between March 1994 (in Schoten, Belgium) and October 1998 (in Brussels, Belgium, or Aachen, Germany). According to recital 65 to the Decision, those meetings served to continue the agreement reached at global level. The purpose of the meetings was to ensure regular price increases across the EEA and to share markets and allocate individual customers and also to control converters in Europe in order to protect the higher price levels.

6 The Commission found that the worldwide arrangements and the European arrangements all formed part, so far as the EEA was concerned, of a global plan which determined the conduct of the members of the cartel and restricted their individual commercial conduct in order to pursue a single anti-competitive economic objective, namely to distort the normal conditions of competition in the EEA. Accordingly, in the Commission's view, the arrangements concluded at worldwide level and at European level must be considered to constitute a single complex and continuous infringement concerning the EEA, in which the North American producers participated for a certain time and the European producers participated throughout the whole of the period in question.

7 As regards the identification of the addressees of the Decision, the Commission stated at recital 166 that five companies in the Akzo Nobel group ('Akzo Nobel'), BASF, Bioproducts, Chinook, DuCoa and UCB must bear responsibility for the infringement. Ertisa, a Spanish company with 50% of the Spanish market, on the other hand, was not an addressee of the Decision, as the Commission concluded at recital 178 that the evidence was, on the whole, insufficient to hold that undertaking liable for the alleged facts.

8 In Article 3 of the Decision, the Commission ordered the addressees of the Decision to bring immediately to an end the infringements referred to in Article 1 of the Decision, in so far as they had not already done so, and to refrain from repeating any of the anti-competitive acts or conduct established and from any act or conduct having the same or similar object or effect.

9 For the purpose of imposing fines, the Commission considered that the North American producers (Bioproducts, Chinook and DuCoa) had ceased to participate in the infringement no later than 20 April 1994, following the Johor Bahru meeting (see paragraph 4 above). According to recital 165 to the Decision, the Commission had no evidence of further meetings or contacts involving North American producers whereby they fixed prices for the EEA or confirmed their original commitment not to export to Europe. Since the first measure taken by the Commission with respect to that infringement was taken on 26 May 1999, or more than five years after the North American producers ceased to participate in the infringement, the Commission did not impose fines on those producers, in accordance with Article 1 of Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1) and Article 25 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1).

10 Since the European producers' participation had lasted until 30 September 1998, on the other hand, the Commission imposed on them fines totalling EUR 66.34 million.

11 The amount of the fines was determined by the Commission on the basis of its Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3; 'the Guidelines') and its Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the 1996 Leniency Notice').

12 At recital 187 to the Decision, the Commission set out the general criteria on which it determined the amount of the fines. It expressed its intention to have regard to all the circumstances of the case, in particular the gravity and duration of the infringement; to make the fine sufficiently deterrent; to assess on an individual basis the role played by each undertaking party to the infringement; to take account, inter alia, of any aggravating or attenuating circumstances; and to apply the 1996 Leniency Notice as appropriate.

13 When assessing the gravity of the infringement, the Commission took account of its nature (price fixing, market sharing, customer allocation, concerted action against competitors), its actual impact on the market owing to its implementation and the size of the relevant geographic market (the whole of the EEA) and concluded that the undertakings to which the Decision was addressed had committed a very serious infringement of Article 81(1) EC and Article 53(1) of the EEA Agreement (recitals 190 to 198 to the contested decision). According to the Guidelines, that degree of gravity entails the imposition of a fine of more than EUR 20 million. However, the

Commission stated at recital 199 to the Decision that it would take into account the relatively low value of the choline chloride market in the EEA (EUR 52.6 million in 1997, the last full year of the infringement).

14 For the purpose of determining the starting amount of the fines, the Commission stated that it would apply differential treatment to the companies involved in order to take account of differences in their effective economic capacity to cause significant damage to competition. Thus, in view of the fact that the infringement had begun at the global level, with the participation of North American companies which agreed, inter alia, to withdraw from the European market, the Commission considered that it should take as a basis the global market shares of the participants in the infringement in order to determine their individual importance (recitals 200 and 201 to the contested decision).

15 Thus, on the basis of the global market shares in 1997, the Commission placed Chinook in the first category, with a market share of 19.3%, DuCoa in the second category, with a market share of 16.3%, UCB, Bioproducts and Akzo Nobel in the third category, with market shares of 13.4%, 12.2% and 12% respectively, and BASF in the fourth category, with a market share of 9.1%. Following that classification, the starting amounts were set at EUR 12.9 million for UCB and EUR 9.4 million for BASF. Those starting amounts were calculated on the basis of a starting amount for the first category of EUR 20 million (recitals 201 and 202 to the Decision).

16 In order to ensure sufficient deterrence, the Commission, by reference to the applicants' turnover in 2003 (EUR 3 000 million for UCB and EUR 33 400 million for BASF), multiplied BASF's starting amount by a factor of 2 (recital 203 to the Decision).

17 Next, the Commission increased each applicant's starting amount, as determined after the application of the deterrence factors, by 10% for each full year of the infringement and 5% for each additional period of six months or more but less than one year. As the infringement had lasted for 5 years and 11 months (from 13 October 1992 until 30 September 1998), the Commission increased the starting amounts by 55%. Thus, the basic amounts of the fines were set at EUR 29.14 million for BASF and EUR 20 million for UCB (recitals 206 and 207 to the Decision).

18 An aggravating circumstance was found against BASF on the ground that it had committed a repeat infringement, since it had already twice been the addressee of prohibition decisions for the same type of anti-competitive conduct. These were Commission Decision 69/243/EC of 24 July 1969 relating to a proceeding under Article [81 EC] (IV/26.267 — Dyestuffs) and Commission Decision 94/559/EC of 27 July 1994 relating to a proceeding pursuant to Article [81 EC] (IV/31.865 — PVC) (OJ 1994 L 239, p. 14). That circumstance gave rise to an increase of 50% in the basic amount of the fine imposed on BASF, bringing it to EUR 43.71 million (recitals 208 and 219 to the Decision).

19 The Commission rejected a series of arguments put forward by the applicants with respect to attenuating circumstances, alleging early termination of the infringement, non-implementation of the agreements, the length of the investigation, the crisis situation in the sector and disciplinary measures taken against employees involved in the infringement with a view to applying a compliance programme; it then reduced the fine imposed on UCB on the ground of effective cooperation outside the framework of the 1996 Leniency Notice. More specifically, it was UCB that had informed the Commission on 26 June 1999 of the existence of the infringement at European level and of nine meetings which had taken place between March 1994 and October 1998, when the Commission had information only about the global level of the cartel. The Commission therefore reduced the basic amount of the fine by 25.8%, bringing it to EUR 14.84 million (recitals 218 and 219 to the Decision).

20 As regards the application of the 1996 Leniency Notice, the Commission states that the applicants all cooperated with it at various stages of the procedure.

21 In response to a request for information of 26 May 1999, BASF (the first of the three European producers to submit evidence voluntarily) provided, on 15 June 1999, a report, section G of which referred to choline chloride. However, as the questions put to BASF did not relate to that product, the Commission considered, at recital 221 to the Decision, that section G of the report must be characterised as a voluntary submission of evidence within the meaning of Section D of the 1996 Leniency Notice. The same applies to the documents provided by BASF on 23 June 1999, which contained documents relating to the Ludwigshafen meeting (recital 221 to the Decision).

22 As regards the appraisal of the value of those documents, the Commission makes clear that the evidence already supplied by Chinook and Bioproducts was in itself manifestly sufficient to constitute decisive evidence within the meaning of section B of the 1996 Leniency Notice. It was the evidence provided by Bioproducts on 7 May 1999 that led the Commission to send a request for information on 22 June 1999 relating specifically to choline chloride. However, section G of BASF's report could, notwithstanding its limited value in light of the information already available, be considered evidence which materially contributed to establishing the existence of the infringement at global level for the purposes of section D of the 1996 Leniency Notice. So far as the European arrangements are concerned, the Commission emphasises that BASF merely stated that, in spite of the efforts of the European producers, no effective agreement had been reached or implemented. A communication from BASF dated 16 July 1999 contained no evidence materially contributing to establishing the existence of the infringement and, in any event, was sent in response to the request for information of 22 June 1999. For the remainder, the Commission states that a communication from BASF dated 4 November 2002, in response to a request for information of 30 August 2002, had only limited value concerning two meetings. Furthermore, after receiving the statement of objections

BASF informed the Commission that it did not substantially contest the facts. On the basis of those factors, the Commission granted BASF a reduction of 20% in the amount of the fine which would otherwise have been imposed (recitals 221 to 226 to the Decision).

23 As regards UCB, the Commission acknowledged that the information provided on 26 July 1999 (see paragraph 19 above) constituted a significant material contribution to the establishment of the infringement at European level, even if no document dating from the period 1995 to 1998 had been provided. On the other hand, the Commission did not consider that a supplementary communication dated 21 September 1999 was of similar importance. Furthermore, the denial of having participated in the cartel at global level led the Commission to refuse to grant a reduction for not substantially contesting the facts. On those grounds, the Commission granted UCB a reduction under section D of the 1996 Leniency Notice of 30% of the amount of the fine which would otherwise have been imposed on it (recitals 227 to 231 to the Decision).

24 Following that procedure, the fines imposed on the applicants were fixed as follows:

— EUR 34.97 million for BASF;

— EUR 10.38 million for UCB.

Procedure and forms of order sought by the parties

25 By applications lodged at the Registry of the Court of First Instance on 25 February (Case T-111/05 *UCB* v *Commission*) and 1 March 2005 (Case T-101/05 *BASF* v *Commission*), the applicants brought the present actions.

26 By application lodged at the Registry on 2 March 2005 (and registered as Case T-112/05), Akzo Nobel, also an addressee of the Decision, brought an action against it.

27 By letter of 25 July 2006 in response to a written question, BASF informed the Court that it was withdrawing the first and seventh pleas in law.

28 By order of 7 September 2006, the President of the Second Chamber of the Court decided, after hearing the parties, to join Cases T-101/05 and T-111/05, and also Case T-112/05, for the purposes of the oral procedure and the judgment, in accordance with Article 50 of the Rules of Procedure of the Court of First Instance.

29 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure and, in the context of the measures of organisation of procedure, put a question in writing to the parties.

30 After hearing the parties' views on the matter at the hearing, the Court decided to disjoin Case T-112/05 from Cases T-101/05 and T-111/05 for the purposes of the judgment, in accordance with Article 50 of the Rules of Procedure.

31 In Case T-101/05, BASF claims that the Court should:

— annul or substantially reduce the fine imposed by the Decision;

— order the Commission to pay the costs and other expenses incurred by the applicant in connection with the present case;

— adopt any measure which the Court might deem appropriate.

32 In Case T-111/05, UCB claims that the Court should:

— annul the Decision or in any event annul or substantially reduce the fine;

— order the Commission to pay the costs.

33 The Commission contends that the Court should:

— dismiss the actions;

— order the applicants to pay the costs.

Law

1. *Preliminary observations*

34 BASF puts forward five pleas challenging the Commission's appraisal concerning, first, the deterrent effect of the fine, second, the increase in the amount of the fine for repeated infringement, third, its cooperation during the administrative procedure, fourth, the overall reduction which ought to be granted independently of the 1996 Leniency Notice and, fifth, the characterisation of the global and European arrangements as a single and continuous infringement.

35 UCB puts forward three pleas, alleging error in the characterisation of the global and European arrangements as a single and continuous infringement, misapplication of the 1996 Leniency Notice and, in the alternative, breach of that notice, even if the Court should find that the global and European arrangements constituted a single and continuous infringement.

36 The Court will first of all examine BASF's first four pleas, then determine the merits of the arguments put forward in support of the joint plea concerning the single and continuous nature of the infringement and, last, examine the second and third pleas put forward by UCB.

2. *First plea raised by BASF: infringement of Regulations No 17 and No 1/2003 and breach of the Guidelines owing to the increase in the amount of the fine by 100% for deterrence*

Arguments of the parties

37 In the application, BASF has raised three objections to the increase in the fine for deterrence. First, it claims that the increase is contrary to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ English Special Edition 1959-62, p. 87) and Regulation No 1/2003 and to the legitimate expectations deriving from the Guidelines. Second, it asserts that the Commission did not consider whether an increase for deterrence was necessary in light of BASF's conduct. Third, it maintains that the increase is incompatible with the application of the 1996 Leniency Notice.

38 At the hearing, BASF withdrew the first and third objections in the present plea. In connection with the second objection, it claims that before increasing a fine for deterrence the Commission is required to determine whether such an increase is necessary for the undertaking concerned by reference to the probability that it will commit a repeat infringement. The size of a company is not a relevant factor in that assessment. On the other hand, other factors might indicate the future conduct of an undertaking. A large undertaking has less need to be deterred owing, for example, to the fact that it is exposed to class actions or on account of any consequences affecting its share value. The need for deterrence cannot be assessed on the basis of the overall size of an undertaking, but must be based on its specific attitude. However, the only ground stated by the Commission for increasing the fine was BASF's global turnover.

39 Since it is the final amount of the fine that indicates whether the penalty is likely to deter the undertaking from committing future infringements, BASF contends that

the need to increase the fine for the purposes of deterrence must be assessed when the calculation of the fine is complete and not at an intermediate stage. Furthermore, such an increase in the amount of the fine must be explained (in the statement of objections and in the decision) by reference to the attitude of each company. In addition, when the Commission adopts the decision it is required to take into account fines which the undertaking concerned has had to pay in third countries for a similar infringement of the law. BASF further submits that the Commission was wrong to increase the amount of the fine on the basis of activities in other, wholly independent, markets. BASF emphasises that no additional increase for the purposes of deterrence was necessary in its case. In fact, following Commission Decision 2003/2/EC of 21 November 2001 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 — Vitamins) (OJ 2003 L 6, p. 1), BASF took unprecedented steps to ensure that no unlawful conduct of that type would be repeated in the future, as it explained in its response to the statement of objections. Its cooperation during the administrative procedure and the fines which it had to pay in non-member countries following the Vitamins case demonstrate that there is no need for deterrence. However, there is nothing in the Decision to refute BASF's arguments.

40 BASF submits that if the Commission maintains that deterrence constitutes a component of the gravity of the infringement, and not an element of the individual conduct of each undertaking, it does not explain why some undertakings rather than others have their fines increased for the purposes of deterrence. Furthermore, given the history and the close relationship between this case and the Vitamins case, paragraph 39 above, Decision 2003/2 should not be considered relevant for the purpose of calculating BASF's fine or evaluating the issue of deterrence, since the Commission has failed to explain why it did not deal with all the vitamin cartels in a single decision.

41 In response to the Commission's argument that the presumption of innocence precludes an appraisal of future conduct, BASF submits that the relevant question is whether an undertaking which is aware of the unlawful nature of its conduct and

which takes steps to prevent a repetition needs further deterrence. It maintains that the examination of that issue bears no relation to the presumption of innocence.

42 The Commission disputes the merits of the present plea.

Findings of the Court

43 It must be borne in mind that the object of the penalties laid down in Article 15 of Regulation No 17 and Article 23 of Regulation No 1/2003 is to suppress illegal activities and to prevent any recurrence. Deterrence is therefore one objective of the fine (Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, '*Vitamins*', paragraphs 218 and 219).

44 The Guidelines refer to that objective at point 1A, which provides that it 'will ... be necessary ... to set the fine at a level which ensures that it has a sufficiently deterrent effect'.

45 Furthermore, the deterrence of fines is one of the factors by reference to which the gravity of infringements must be determined (Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33).

46 In the present case, for the purpose of increasing the starting amount of BASF's fine, the Commission did not evaluate the likelihood of any repeat infringement. As stated at recital 203 to the Decision, the Commission took into consideration only the size of the undertaking.

47 None the less, it must be held that the failure to evaluate the likelihood of repeated infringement on BASF's part does not in any way affect the lawfulness of the increase. A well-established line of case-law has recognised the relevance of the size of undertakings as a factor to be taken into account when setting the fine. That factor may be used as an indication of the influence that the undertaking concerned was able to exert on the market (*Vitamins*, cited in paragraph 43 above, paragraphs 233 to 236, and the case-law cited).

48 As regards the stage at which the need to apply a weighting in order to ensure the deterrence of the fine must be assessed, it is sufficient to observe that the requirements of deterrence must underpin the entire process of setting the amount of the fine and not just a single stage in that process (*Vitamins*, cited in paragraph 43 above, paragraph 238).

49 As regards the need to apply such a weighting in the circumstances of the present case, it must be noted that BASF had a global turnover of EUR 33 400 million in 2003, which shows the significant size of that undertaking, with a turnover much greater than that of UCB and Akzo Nobel.

50 It follows from the foregoing that the Commission did not infringe Regulations No 17 and No 1/2003. Nor did it depart from the Guidelines when it took the view that, in light of BASF's size, it was necessary, for the purposes of deterrence, to double the starting amount from EUR 9.4 million to EUR 18.8 million.

51 So far as the measures which BASF adopted in order to prevent repeated infringement are concerned, the cooperation which it provided and the adverse findings made against it in non-member countries, the Court must ascertain to what extent those circumstances called for a reduction in the fine on the part of the Commission when it assessed the requirements of deterrence with respect to BASF.

52 As regards the measures adopted by BASF in order to prevent repeated infringement, it must be noted that, even though the measures to ensure compliance with competition law are important, they cannot affect the reality of the infringement committed. Thus, the adoption of a compliance programme by the undertaking concerned does not oblige the Commission to grant a reduction in the fine on that account (*Vitamins*, cited in paragraph 43 above, paragraphs 266 and 267). That being so, the assertion that, following the fines imposed by Decision 2003/2, BASF had no need of deterrence in connection with its choline chloride activities must also be rejected. The fact that a fine was imposed on BASF for various anti-competitive activities concerning other vitamin products does not affect the reality of the infringement committed and, accordingly, does not require the Commission to grant a reduction under that head.

53 As regards the adverse findings made against BASF in non-member countries, it should be noted that the objective of deterrence, which the Commission is entitled to pursue when setting fines, is to ensure that undertakings comply with the competition rules laid down in the Treaty when conducting their business within the Community or the EEA. It follows that the deterrent effect of a fine imposed for infringement of the Community competition rules cannot be determined solely by reference to the individual situation of the undertaking sanctioned or by reference to the question whether it has complied with the competition rules in non-member countries outside the EEA (see *Vitamins*, cited in paragraph 43 above, paragraph 269 and the case-law cited).

54 As regards the cooperation provided by BASF during the administrative procedure, the Commission acknowledged that cooperation and rewarded it when applying the 1996 Leniency Notice (see, to that effect, *Vitamins*, cited in paragraph 43 above, paragraph 268). Accordingly, the question whether that cooperation merited any greater reductions in the fine must be assessed in the context of the third plea.

55 The first plea must therefore be rejected.

3. *Second plea raised by BASF: breach of the principles of legal certainty and proportionality owing to the increase in the amount of the fine by 50% for repeated infringement and incorrect calculation of that increase*

Arguments of the parties

56 BASF claims, by way of preliminary point, that Regulations No 17 and No 1/2003 provide no clear legal basis for an increase in the fine for a repeated infringement. Since the infringements for which BASF was fined in 1969 and 1994 had no influence on the gravity or the duration of the infringement forming the subject-matter of the Decision, the Commission breached the principle of legal certainty by taking those findings of infringement into account. It follows from Regulation No 2988/74, Article 25 of Regulation No 1/2003 and the principle of legal certainty that the penalty for repeated infringement must be subject to limitation rules in order to preclude absurd consequences, like the decision not to fine the North American producers because their collusive conduct in 1994 was time-barred, whereas BASF is being punished for an infringement which took place in 1964. As a general principle, it is irrational that a company cannot be punished for an infringement committed five years ago but can be punished more severely on the ground of an infringement which has long been time-barred. BASF maintains that

while the Guidelines are defective in that they fail to prescribe a period after which a previous infringement can no longer be taken into account under the head of repeated infringement, the laws of the Member States do prescribe such a limitation. BASF contends that while Decision 69/243 (see paragraph 18 above) was not taken into account in connection with the increase in the fine for repeated infringement, it must be accepted either that that increase is incorrect or that the Commission shares the view that an infringement committed 40 years ago cannot be taken into account under that head.

57 In the absence of a provision establishing a limitation period during which previous infringements may be taken into account under the head of repeated infringement, the Commission is required, in BASF's submission, to use its discretion reasonably and proportionately in clearly defined and relevant circumstances. BASF maintains that that argument must apply *a fortiori* when the previous infringement was committed in the distant past, when Community competition law was little known and little understood. The second decision on which the Commission relies under the head of repeated infringement was adopted in 1994 and concerned the period 1980 to 1984 and in BASF's submission the Commission cannot take advantage of the slowness of the decision-taking process in order to rely on such old infringements under the head of repeated infringement. Furthermore, the Commission did not impose an increase in the fine on account of repeated infringement in Decision 2003/2, and in the applicant's submission was correct not to do so.

58 In addition, in BASF's submission, the finding of repeated infringement on the basis of conduct dating from more than 20 years ago presupposes that the two infringements are of the same type, which is precluded if they relate to different markets. That is so here, however, since dyestuffs (to which Decision 69/243 relates), PVC (to which Decision 94/559 relates) and choline chloride belong to entirely different markets.

59 In any event, the calculation of the increase in question is unlawful, since the Commission ought to have applied it, in accordance with paragraphs 226 and 229 of the judgment in Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, to the starting amount of EUR 9.4 million before applying any increase for the size of the undertaking or deterrence (see paragraph 15 above) and not to the basic amount of EUR 29.14 million (see paragraphs 17 and 18 above).

60 The Commission maintains, first of all, that when calculating the fine it did not take account of BASF's participation in the vitamin cartel that gave rise to the adoption of Decision 2003/2. Nor was Decision 94/599 adopted during the choline chloride infringement period. Furthermore, it is the failure on behalf of the undertaking concerned to amend its conduct that aggravates its culpability in the context of the decision establishing a new infringement, irrespective of the time which may have elapsed between the first infringement and the adoption of the decision relating to it. The Commission fails to understand why the fact that BASF's previous infringements concerned different markets from the choline chloride market might vitiate the increase in question, since, inter alia, the nature of all of those infringements was similar.

61 As regards the principle of legal certainty, the Commission claims that when it imposes fines it takes account of the universal rules such as the principle of proportionality, but also, in accordance with the case-law, the rules specific to the imposition of penalties, such as the recognition of circumstances that might aggravate or attenuate the responsibility of the guilty party. An undertaking cannot claim that attenuating circumstances are applicable and at the same time reject as a matter of principle the possibility that aggravating circumstances will also be taken into account in calculating the fine. Furthermore, repeated infringement is expressly mentioned as an aggravating circumstance in the first indent of section 2 of the Guidelines and BASF was also warned to that effect at paragraph 217 of the statement of objections.

62 As regards the fact that the previous infringements took place in the distant past, the Commission observes that the case-law provides authority for an increase of 50% in the basic amount on the ground of repeated infringement, on the basis of an infringement which had given rise to the adoption of a decision 20 years previously, which entitles the Commission to take account in the present case of Decision 94/599. In the Commission's contention, that decision is sufficient to impose the increase at issue even without taking account of Decision 69/243. Furthermore, the fact that the Commission did not identify the specific previous infringements as aggravating circumstances for the purpose of calculating the fine when adopting Decision 2003/2 does not prevent it from doing so when adopting a subsequent decision.

63 As regards the objection alleging miscalculation of the increase, the Commission contends that BASF is confusing the starting amount (see paragraph 15 above) with the basic amount of the fine as determined by reference to the gravity and duration of the infringement (see paragraph 17 above). It is to the latter amount that any increase for aggravating circumstances must be applied, in accordance with *Cheil Jedang* v *Commission*, cited in paragraphh 59 above, which the Commission states was done in this case.

Findings of the Court

64 The Court rejects at the outset BASF's argument that a case of repeated infringement can be recognised only where the infringements relate to the same product market. It is sufficient that the Commission is dealing with infringements falling under the same provision of the EC Treaty.

65 Next, it should be observed that Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003 are the relevant legal bases on which the Commission may impose fines on undertakings and associations of undertakings for infringements of Articles 81 EC and 82 EC. Under those provisions, in order to determine the amount

of the fine, the duration and gravity of the infringement must be taken into consideration. The gravity of the infringement is determined by reference to numerous factors, for which the Commission has a margin of discretion. The fact that aggravating circumstances are taken into account in setting the fine is consistent with the Commission's task of ensuring compliance with the competition rules (Case C-3/06 *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraphs 24 and 25).

66 Furthermore, the analysis of the gravity of the infringement must take any repeated infringement into account (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, paragraph 91, and *Groupe Danone* v *Commission*, cited in paragraph 65 above, paragraph 26), and such repeated infringement may justify a significant increase in the basic amount of the fine (Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 293). In the light of that case-law, the Court rejects BASF's assertions, first, that its previous infringements have no influence on the gravity of the infringement in question and, second, that there is no clear legal basis for the application of an increase for repeated infringement.

67 As regards the objection that a time-limit must be placed on the possibility to take any repeated infringement into account, the Court finds that the fact that Regulation No 17, Regulation No 1/2003 and the Guidelines lay down no maximum period for making a finding of repeated infringement does not breach the principle of legal certainty. The finding and the appraisal of the specific features of a repeated infringement come within the Commission's discretion in relation to the choice of factors to be taken into consideration for the purpose of determining the amount of fines. In that connection, the Commission cannot be bound by any limitation period for such a finding. In that regard, it must be borne in mind that repeated infringement is an important factor which the Commission is required to appraise, since taking repeated infringement into account is intended to provide undertakings which have shown a propensity to breach the competition rules with an incentive to change their conduct. The Commission may therefore, in each case, take into

consideration the indicia which tend to confirm such a propensity, including, for example, the time which has elapsed between the infringements at issue (*Groupe Danone* v *Commission*, cited in paragraph 65 above, paragraphs 37 to 39).

68 In the present case, the decisions on which the Commission based its assessment of repeated infringement (see paragraph 18 above) show that BASF infringed the competition rules between 1964 and 1967 (fixing the rate of price increases and the conditions under which those increases were applied in the dyestuffs sector) and between August 1980 and May 1984 (fixing 'target' prices and 'target' quotas and planning concerted initiatives to raise prices and to monitor their implementation).

69 It is held that the latter of those two infringements can in itself justify the application of an increase of 50% to the basic amount of the fine imposed on BASF (see, to that effect, *Michelin* v *Commission*, cited in paragraph 66 above, paragraph 293).

70 In any event, the Court points out that the exercise of its unlimited jurisdiction may justify the production and taking into consideration of additional information which did not have to be referred to as such under the obligation to state reasons laid down in Article 253 EC (Case C-248/98 P *KNPO BT* v *Commission* [2000] ECR I-9641, paragraph 40).

71 In that context, account must be taken of the fact that BASF was also the object of Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding pursuant to Article [81 EC] (IV/31.149 — Polypropylene) (OJ 1986 L 230, p. 1). Following the judgment of the Court of First Instance of 17 December 1991 in Case T-4/89 *BASF* v *Commission* [1991] ECR II-1523, BASF was fined ECU 2.125 million for participating in agreements and concerted practices in order to define its

business policy, fixing target prices and agreeing on measures for that purpose, increasing prices and sharing the market between the end of 1978 or the beginning of 1979 until November 1983. When questioned at the hearing, the Commission was unable to explain why that decision had been omitted, although it is mentioned at paragraph 29 of the statement of objections.

72 In the light of that factor, it must be held that between 1964 and 1993 BASF was in flagrant breach of the competition rules for approximately 13 years. It follows that the increase of the basic amount by 50% is appropriate.

73 The complaint alleging miscalculation of the increase for repeated infringement must also be rejected, since it is the result of confusion on BASF's part between the concepts of starting amount and basic amount (see paragraphs 15 to 17 above). According to paragraph 229 of *Cheil Jedang* v *Commission*, cited in paragraph 59 above, on which BASF relies in support of its assertion, the percentages corresponding to the increases or reductions applied for aggravating or attenuating circumstances must be applied to the basic amount of the fine, which is determined by reference to the gravity and duration of the infringement. That is precisely what the Commission did in this case, as may be seen from recital 219 to the Decision (see paragraphs 17 and 18 above). In any event, in the present case the method of calculation proposed by BASF would have led to the same result.

74 The second plea must therefore be rejected in its entirety.

4. *Third plea raised by BASF: incorrect application of the 1996 Leniency Notice*

Arguments of the parties

75 BASF contends that the 20% reduction granted under section D of the 1996 Leniency Notice (see paragraph 22 above) is too low by reference to the extent of its cooperation. In application of the principle of proportionality, the Commission is required to grant reductions which are proportionate to the cooperation provided by each undertaking. According to the Commission's consistent practice, BASF was entitled to a reduction of 10% for not substantially contesting the accuracy of the facts attributed to it. It follows that its early, complete and voluntary cooperation in any form other than not disputing the facts deserved a much greater reduction than the 10% granted.

76 In BASF's submission, the Decision did not provide an objective and precise record of its cooperation, since it describes incorrectly the content of certain communications, remains silent as to other significant aspects of BASF's cooperation and does not allow BASF to appraise the Commission's evaluation of certain aspects of its cooperation. Those shortcomings also demonstrate a breach of the principle of sound administration.

77 In support of its claims, BASF submits that in the Decision the Commission:

— makes no reference to BASF's letter of 6 May 1999 in which it informed the Commission of the existence of unlawful agreements in the vitamin sector, in

respect of which the United States authorities had initiated an investigation, and sought a meeting in order to discuss the matter in detail. BASF believes that the Commission has lost that letter;

— makes no reference to a meeting held on 17 May 1999, during which BASF described a number of collusive agreements and provided information which materially contributed to establishing the infringement, including the then-imminent conclusion of a judicial settlement with the United States authorities, which was eventually signed on 19 May 1999 and also concerned choline chloride;

— makes no reference to BASF's letter of 21 May 1999 in which it provided documents relating to the investigation carried out in the United States. BASF believes that the Commission has lost that letter;

— misrepresents BASF's communication of 23 July 1999;

— provides an incomplete description of a request for information of 26 May 1999, in such a way that it disregards the fact that the report of 15 June and the communication of 23 June 1999 were provided voluntarily;

— wrongly considered that BASF's communication of 16 July 1999 was a response to a request for information of 22 June 1999.

78 BASF maintains that the omission of the letter of 6 May 1999 and of the meeting of 17 May 1999 is impossible to explain, since there is a reference to them at recital 127 to Decision 2003/2.

79 The fact that the Commission lost substantial evidence from the file prevented it from obtaining a full picture of BASF's cooperation. Thus, BASF was unable to find in the Commission's file the letters of 6 and 21 May 1999 or any indication (in the form of notes or minutes drafted by Commission officials) of the meeting of 17 May 1999.

80 The value of the evidence provided to the Commission cannot be disputed on the ground that the Commission did not accept production of additional evidence in the form, inter alia, of oral testimony offered by BASF, but insisted on receiving only written evidence. Its insistence on written evidence deprived BASF of the possibility of producing important information, which it would have been able to do in writing if the Commission had made its argument clear by responding to the letter of 6 May 1999. That conduct on the Commission's part is contrary to the principle of sound administration.

81 In BASF's submission, the Commission ought to have ensured that a proper minute of the meeting of 17 May 1999 was drawn up. Even the shorthand notes kept by the person responsible for the file show that the meeting was substantial and that it covered in detail a number of sectors, including choline chloride, which the Commission does not dispute. The failure to include those notes in the choline chloride file is also a breach of the principle of sound administration.

82 BASF claims that it supplied at that meeting information which substantially contributed to establishing the infringement (it identified the collusive agreements,

the products and undertakings involved, the duration, the imminent conclusion of a judicial settlement with the United States Department of Justice concerning, inter alia, choline chloride). That, in BASF's submission, is demonstrated by a statement of 24 February 2005, drawn up by its counsel, Mr J. Scholz, which it calls the 'Scholz statement'.

83 Following the meeting of 17 May 1999, BASF considered that it had done everything necessary to benefit from the maximum possible reduction under the 1996 Leniency Notice. In those circumstances, BASF contends that its subsequent communications merely confirmed, in writing, the information which it had communicated orally, which means that the written evidence must be regarded as having been submitted during that meeting. That information was all supplied voluntarily, which the Commission disregarded in the Decision. Furthermore, the Commission does not dispute that information for the purposes of section D of the 1996 Leniency Notice may be supplied orally.

84 As regards the report of 15 June 1999, BASF maintains that it was submitted not in response to the request for information of 26 May 1999 but in response to the request for written evidence made by the Commission at the meeting of 17 May 1999. BASF began drafting that report before the request for information was issued. That circumstance is also proved by BASF's communication of 21 May 1999. Furthermore, the report also provides information about vitamins not covered by the request of 26 May 1999, such as vitamin D3 and carotenoids. It was the Commission's request to receive a written report that gave rise to the delay in submitting the information. However, interviews with members of BASF's staff, as proposed by BASF, would have been an effective way of gathering the necessary evidence. The communication of 23 June 1999, which constituted a supplement to the report of 15 June 1999, was also provided at BASF's initiative. That communication of 23 June 1999 contains further evidence which was not in the Commission's possession at the time and which related to the Ludwigshafen meeting (see paragraph 4 above). In addition, the communication of 16 July 1999 also supplements the evidence requested at the meeting of 17 May 1999 and must therefore be regarded as voluntary. It concerns the implementation of the

arrangements in question and provides evidence relating to them. The communication of 4 November 2002 (see paragraph 22 above) also contains a set of relevant materials, in particular about two cartel meetings.

85 In any event, the distinction which the Decision draws between voluntary and involuntary communications is incorrect, since a request for information from the Commission cannot be decisive for reducing an undertaking's cooperation under section D3, first indent, of the 1996 Leniency Notice.

86 Thus, in BASF's submission, it is incorrect for the Commission to consider that the report of 15 June 1999 and the communications of 23 June, 16 July 1999 and 4 November 2002 did not substantially contribute to establishing the infringement. Nor has the Commission explained why it waited six weeks after the information was sent by Bioproducts (on 7 May 1999, see paragraph 22 above) before sending the request for information on 22 June 1999, when it had all the information provided at the meeting of 17 May 1999 and by the report of 15 June 1999. In reality, the documents submitted by Bioproducts contain no detailed or exhaustive information, unlike those offered by BASF on 17 May and 15 June 1999, which refer to the meetings held and also to the names of the participants and would have allowed the Commission to begin its investigations. Furthermore, the information supplied by Chinook six months before the submissions of Bioproducts and BASF (see paragraph 3 above) were of limited value and irrelevant in part, which was the reason why the Commission did not initiate an investigation at that time. In any event, it was the meeting of 17 May 1999 that prompted the Commission to request information on choline chloride.

87 The Commission confirms that the reduction of 20% granted to BASF may be broken down into a reduction of 10% for not substantially disputing the facts and a reduction of 10% for providing evidence. Moreover, it disputes the merits of BASF's assertions.

Findings of the Court

88 Section D of the 1996 Leniency Notice reads as follows:

'D. Significant reduction in a fine

1. Where an [undertaking] cooperates without having met all the conditions set out in Sections B or C, it will benefit from a reduction of 10% to 50% of the fine that would have been imposed if it had not cooperated.

2. Such cases may include the following:

— before a statement of objections is sent, an [undertaking] provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement;

— after receiving a statement of objections, an [undertaking] informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.'

89 As stated in Section E, paragraph 3, of the 1996 Leniency Notice, that notice created legitimate expectations on which undertakings may rely when disclosing the existence of a cartel to the Commission. In view of the legitimate expectation which

undertakings intending to cooperate with the Commission were able to derive from that notice, the Commission must adhere to it when, for the purposes of determining the fine to be imposed on the applicant, it assesses the cooperation of the undertaking concerned (see *Vitamins*, cited in paragraph 43 above, paragraph 488 and the case-law cited).

90 Furthermore, in order for an undertaking to be able to benefit from a reduction in its fine on account of its cooperation during the administrative procedure, its conduct must facilitate the Commission's task of establishing and punishing infringements of the competition rules (Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 505).

91 It follows from the very wording of Section D, paragraph 2, of the 1996 Leniency Notice, and, in particular, from the introductory words '[s]uch cases may include the following ...', that the Commission has a discretion as to the reductions to be granted under that notice (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 394).

92 Furthermore, a reduction based on the 1996 Leniency Notice can be justified only where the information provided and, more generally, the conduct of the undertaking concerned might be considered to demonstrate genuine cooperation on its part. It is clear from the very concept of cooperation, as described in the wording of the 1996 Leniency Notice, and in particular in the introduction and at Section D, point 1, of that notice, that it is only where the conduct of the undertaking concerned shows such a spirit of cooperation that a reduction may be granted on the basis of that notice (*Dansk Rørindustri and Others* v *Commission*, cited in paragraph 91 above, paragraphs 395 and 396). The conduct of an undertaking which, even though it was not required to respond to a question put by the Commission, responded in an

incomplete and misleading way cannot therefore be considered to reflect such a spirit of cooperation (see, to that effect, Case C-301/04 P *Commission* v *SGL Carbon* [2006] ECR I-5915, paragraph 69).

93 It is in the light of those considerations that the Court must assess the merits of the present plea.

The document of 6 May 1999

94 The document of 6 May 1999 refers, without providing further detail, to investigations carried out in the United States against, among others, BASF in the vitamins sector. By sending that document, BASF merely offered its assistance (together with Hoffman-La Roche, which had already contacted the Commission two days previously) in the context of the 1996 Leniency Notice and requested a meeting on the subject with the office of the responsible Member of the Commission.

95 It is clear that the fact that there is no reference to that document in the Decision cannot affect the Commission's assessment of BASF's cooperation. The document makes no mention of the global choline chloride cartel (in which Hoffman-La Roche did not participate, moreover), nor does it refer to the cartel set up by the European producers of choline chloride. At the very most, and by implication, that document could concern only the global choline chloride cartel, but without containing 'information, documents or other evidence which materially contribute to establishing the existence of the infringement' within the meaning of Section D, paragraph 2, of the 1996 Leniency Notice (see, to that effect, *Vitamins*, cited in paragraph 43 above, paragraph 507).

The meeting of 17 May 1999

96 No minutes of that meeting were drawn up, either on the day of the meeting or afterwards, and no audio recording was made. BASF complains that the Commission omitted such formalities, but does not claim that it requested the Commission to take minutes or to record the meeting. In those circumstances, the Commission cannot be criticised for any breach of the principle of sound administration (see, to that effect, *Vitamins*, cited in paragraph 43 above, paragraphs 501, 502 and 509).

97 The Court notes that BASF remains very vague as to the information on choline chloride which it claims to have provided at that meeting, which took place between Commission officials and representatives of BASF and of Hoffman-La Roche. As regards the documentary evidence of what was discussed at the meeting, the file contains shorthand notes taken by a Commission official. BASF reproduces in its pleadings extracts from the Scholz statement which it annexed to its application. As regards the appraisal of that statement as evidence, the Rules of Procedure do not preclude the parties from producing such statements; however, their appraisal is a matter for the Court, which, if the facts described therein are crucial to the outcome of the case, may order, by way of a measure of inquiry, that the author of such a document be heard as a witness (see, to that effect, order of the Court of 24 October 2003 in Case T-172/03 *Heurtaux* v *Commission*, not published in the ECR, paragraph 3). In the present case there is no need to adopt such a measure.

98 The shorthand notes give an incomplete picture of what was discussed at the meeting of 17 May 1999. On the basis of those notes, it is clear that the Commission, Hoffman-La Roche and BASF essentially discussed the preliminary aspects of possible cooperation, leading to the denunciation of the cartels in an undefined number of vitamin products. The discussion covered the undertakings' willingness to cooperate, the state of the proceedings in the United States, the steps to be taken with respect to the disclosure of evidence in the light, in particular, of the class actions pending in the United States, the proposed timetable and the Commission's view of what cooperation entails for the undertakings. The only reference to choline chloride is on the third page, where it is merely stated that that product was the subject of collusive arrangements. BASF cannot therefore claim that those notes

demonstrate that essential information, such as the names of the participating undertakings (mention is made only of the involvement of the Japanese undertakings, but without any reference to the choline chloride cartel) or the duration of the infringement, was provided. As for the fact that there were collusive arrangements concerning choline chloride, it is sufficient to observe that the Commission was aware of those arrangements well before the meeting in question as a result of Chinook's communication (see paragraph 3 above).

99 According to the Scholz statement (point 10), '[at that meeting, BASF stated that it was] involved in illegal activities relating to choline chloride, including blends and pre-mixes, as the Commission's own account of the meeting makes clear. We further informed the staff that the unlawful arrangements had affected the European market, involving all major European and Japanese vitamins producers. We named the main players involved for the major vitamins, certainly Takeda, Eisai, Merck, and Rhône-Poulenc. The European Commission representatives seemed to have no interest in the names of any other participants. In light of the relatively small number of producers of the other vitamins, including choline chloride, the identity of any other market participants would in any event have been easily ascertainable by the European Commission.' Clearly, therefore, that meeting concerned all the cartels set up at global level concerning a significant number of vitamin products. It therefore did not relate specially to choline chloride, in respect of which very little information was provided apart from the fact, already known to the Commission, that a cartel concerning that product had been arranged.

100 It is apparent from that statement, moreover, that the Commission insisted on receiving information in writing, in the form of a report. Point 12 of the statement provides, in that regard:

'[The then Director General of DG IV] told us that the European Commission would prefer the "traditional" means of gathering information, that is to receive

information in written form with the "usual specifics", [for example] describing meetings, their locations, dates, attendees, and topics discussed. In the circumstances, I proposed to [the Director General] that BASF would provide the European Commission with a comprehensive report on the incidents affecting the European Union ... [The Director General] readily agreed to this proposal.'

101 The report in question is the report of 15 June 1999 (see paragraphs 21 and 84 above). In part G, which covers choline chloride and consists of 3 pages, BASF refers to four meetings of the global choline chloride cartel held between spring 1992 and November 1992, including the Ludwigshafen meeting, and also to six other meetings culminating in the April 1994 meeting in Johor Bahru. The report also mentioned that until the end of 1996 there had been other meetings concerning exports to South America and Latin America, which were inconclusive for the participants. Since, according to BASF's assertions, the report of 15 June 1999 contained a full account of events relating to the arrangements on choline chloride, it is unlikely that the meeting of 17 June 1999 resulted in fuller information being sent. That is borne out by the application itself, which states at paragraph 153 that 'the only reason why BASF did not provide further detailed oral evidence immediately was because of the Commission's insistence on written evidence'. Furthermore, it is stated at point 11 of the Scholz statement that the meeting in question lasted for approximately one hour, which would clearly not have allowed a detailed presentation of the various global cartels, which concerned 13 vitamin products, namely 12 products covered by the *Vitamins* case, cited in paragraph 39 above, plus choline chloride.

102 Nor was the reference to the then-imminent conclusion of the judicial settlement with the United States authorities of assistance to the Commission, since that information, as such, provides no material evidence concerning the European choline chloride market.

103 It follows that BASF's assertion that the information provided on 17 May 1999 enabled the Commission to establish an infringement of Community competition law cannot be accepted. Even a summary examination of part IV of the Decision, entitled 'Description of events', shows that its historical basis (which consists of 25 pages) contains far more detailed and substantial information than the generalities to which BASF confined itself both at the meeting of 17 May 1999 and in the report of 15 June of that year.

104 The complaint that the Commission refused to accept evidence in the form of oral testimony which, according to BASF, could have been produced in a very short time, must also be rejected. The time which elapsed pending the drafting of the report of 15 June 1999, which, according to BASF, was a full and detailed report, did not affect the Commission's assessment of BASF's cooperation. The Commission asserts that it did not rely on any evidence submitted by another undertaking, which qualified the value of that report. The Commission emphasises, without being contradicted, that it received no information between the meeting of 17 May 1999 and the communication of the report of 15 June 1999.

105 Accordingly, BASF's assertions are based on the mistaken premiss that the time which elapsed between the meeting of 17 May 1999 and 15 June 1999 had a negative impact on the reduction of its fine. For the same reasons, the Court rejects the argument that all communications subsequent to the meeting of 17 May 1999 must be regarded as having been supplied on that date, as they confirm what was said at that meeting.

106 In those circumstances, the Court finds that while the evidence that BASF states that it supplied at the meeting of 17 May 1999 undoubtedly put the Commission in a position to send the requests for information, and indeed to order investigations, it was none the less still for the Commission, in light of the general nature of the information provided, to reconstruct and prove the facts, notwithstanding BASF's admission of liability (see, to that effect, *Vitamins*, cited in paragraph 43 above, paragraph 517).

107 Contrary to BASF's suggestion, moreover (see paragraph 78 above), the Commission never took either the document of 6 May 1999 nor the meeting of 17 May 1999 into account for the purpose of applying the 1996 Leniency Notice in *Vitamins*, cited in paragraph 39 above. An initial reference to those matters is made at recital 127 to Decision 2003/2, where the Commission states that no statement or documentary evidence had been provided at that time. Furthermore, it follows from recitals 743, 747, 748, 761 and 768 to Decision 2003/2 that the Commission granted a reduction of 50% of the fine that would otherwise have been imposed on BASF solely on the basis of the documents which BASF had communicated to it between 2 June and 30 July 1999 concerning vitamins A, E, B2, B5, C and D3, beta-carotin and carotinoids. The reference to the document of 6 May 1999 at recital 747 to that decision serves only to indicate the date on which BASF informed the Commission that it intended to cooperate in the investigation. No reduction for cooperation was therefore granted to BASF by Decision 2003/2 on account of those actions.

The communication of 21 May 1999

108 By the communication of 21 May 1999, BASF sent the Commission the judicial settlement and also the accompanying memorandum, which constitutes the charge in the proceedings initiated in the United States. As regards the value of those documents by reference to the 1996 Leniency Notice, the Court observes that the Commission does not use them either directly or indirectly in the Decision in order to establish the existence of the infringement in the EEA. Therefore, in the absence of other matters showing that the disclosure of the judicial settlement in question helped to confirm the existence of an infringement affecting the EEA, that disclosure does not fall within the scope of section D of the 1996 Leniency Notice (see, to that effect, Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 297).

109 Accordingly, the omission of any reference to those documents does not imply any breach of section D of the 1996 Leniency Notice.

The communication of 23 July 1999

110 BASF maintains that recital 49 to the Decision is incorrect in that it states that the information sent by the communication of 23 July 1999 was the same as that which BASF had already sent in connection with the *Vitamins* case, cited in paragraph 39 above. BASF claims that it produced additional documents concerning choline chloride.

111 The parties are agreed that those documents were sent in response to a request for information dated 22 June 1999 and issued pursuant to Article 11 of Regulation No 17. In fact, documents supplied to the Commission in response to a request for information are supplied under a legal obligation and cannot be taken into account under the 1996 Leniency Notice even if they may serve to establish, as against the undertaking which supplies them or as against a different undertaking, the existence of anti-competitive conduct (*Commission* v *SGL Carbon*, cited in paragraph 92 above, paragraphs 41 and 50). BASF's argument must therefore be rejected as unfounded. For the same reasons, the Court also rejects the general complaint that the Commission was wrong, when appraising BASF's cooperation, to accord greater significance to BASF's communications which were not preceded by a request for information (see paragraph 85 above).

The appraisal of the report of 15 June and the communication of 23 June 1999 in light of the request for information of 26 May 1999

112 As stated at paragraph 21 above, the Commission considered, at recital 221 to the Decision, that, notwithstanding that BASF had submitted the report of 15 June and

the communication of 23 June 1999 in response to the request for information of 26 May 1999, those documents must be taken into consideration as a voluntary submission of evidence. Contrary to BASF's contention, therefore, the Commission did not overlook the voluntary nature of the submission of those documents.

The communication of 16 July 1999

113 According to recital 223 to the Decision, the communication of 16 July 1999 contained no evidence which contributed to establishing the existence of the infringement. A reading of that document substantiates that appraisal. The two tables annexed to that communication which, apparently, concern choline chloride (entitled 'Premixes and Blends') show only the value and volume of BASF's production and sales in the EEA between 1994 and 1998. Consequently, whether or not that communication was a response to a request for information dated 22 June 1999, it could not be taken into consideration under the 1996 Leniency Notice.

Global assessment of the reduction granted to BASF

114 It follows from all of the foregoing considerations that the Commission was correct to treat the report of 15 June 1999 and the communication of 23 June 1999 as the sole bases on which to assess the extent of BASF's cooperation and to assess the reduction to be applied to the basic amount of its fine under section D of the 1996 Leniency Notice. BASF acknowledges, moreover, that it could not benefit from section B or section C of that notice.

115 The report of 15 June 1999 describes, in the three pages which make up part G, a number of meetings which took place in connection with the global cartel, but provides no details of the matters discussed at those meetings. The first two meetings described by BASF (in spring and summer 1992 in Mexico) proved irrelevant for the purposes of these proceedings, since the Commission acknowledged, at recitals 136 and 163 to the Decision, that no agreement was reached at the close of those meetings and proceeded to set the starting date of the infringement at 13 October 1992 (the date of the third meeting in Mexico).

116 It must be borne in mind, moreover, that BASF did not disclose any information as to the existence of the European arrangements, which proved particularly harmful to the EEA market. Even in its communication of 4 November 2002, BASF mentions only two potentially relevant meetings having as their subject-matter a 'discussion on the European market for choline chloride' (February 1995, with UCB and Akzo Nobel) and another on 'the choline chloride market' (July 1995, with no indication of those taking part). It was only after receiving the statement of objections that, by not substantially contesting the facts, BASF acknowledged the existence of a cartel at European level. The information in question was therefore at the very least incomplete, since it failed to mention a very significant part of the collusive action.

117 The communication of 23 June 1999 contains five documents, distributed at the Ludwigshafen meeting, which concern 1992 production capacities for producers and converters as well as international dispatches for that year. Apart from that, that communication contains documents of limited interest, which, moreover, were not used by the Commission in the Decision.

118 While those documents confirm the infringement, and therefore fall within the scope of section D of the 1996 Leniency Notice, their contribution is none the less marginal, in view of the scope and detailed nature of the matters which the Commission explained at section 1.4 of the statement of objections and,

subsequently, at recitals 63 to 121 of the Decision in order to describe the facts of the case.

119 In those circumstances, BASF's argument that the Commission delayed in sending the first requests for information, in order to evaluate the value of the evidence supplied by Bioproducts on 7 May 1999, cannot succeed. Furthermore, in light of its limited value, the evidence supplied by BASF cannot be compared with that provided by Bioproducts or Chinook. Accordingly, even on the assumption that the value of the latter evidence did not achieve the level claimed by the Commission, that cannot alter the assessment of BASF's cooperation.

120 The Commission therefore did not err in assessing the value of BASF's cooperation and granting it a reduction of 20% of the fine that would otherwise have been imposed on it. Accordingly, the third plea must be rejected. It must be made clear, however, that this finding is without prejudice to the consequences that the Court's findings in respect of the fifth plea may have for that reduction (see paragraphs 212 to 223 below).

5. *Fourth plea raised by BASF: insufficiency of the reduction in the fine, independently of the 1996 Leniency Notice*

Arguments of the parties

121 Independently of the 1996 Leniency Notice, BASF maintains that it deserved a greater reduction, on the following grounds:

— it offered to cooperate at a very early stage (6 May 1999);

— it brought its participation in the cartel to an end before that date;

— it provided detailed information at the meeting of 17 May 1999 and then in writing, sending additional information that had not been requested;

— it supplied the Commission with the judicial settlement concluded with the United States authorities, which also covered choline chloride;

— it immediately dismissed all the employees responsible for the cartel and implemented a competition compliance programme.

122 Since, according to recital 221 to the Decision, BASF was the first of the three European producers to communicate evidence of the infringement on a voluntary basis, and in light of the reductions granted to the other European producers, BASF requests the Court to use its unlimited jurisdiction to reduce the fine imposed on it.

123 BASF also emphasises that any argument as to the relevance of the evidence supplied by way of cooperation must be set out in the Decision and that the Commission cannot provide additional information where it fails to state reasons.

124 BASF refutes the Commission's assertion that the crucial documents were produced after the class actions in the United States had been closed. The last pleadings lodged by BASF were dated 23 July 1999 (see paragraph 110 above), or more than three months before the first class action was closed.

125 The Commission contends that the arguments put forward in connection with this plea and those presented in support of the preceding plea overlap. The fact that BASF ceased to participate in the cartel before offering to cooperate is not an attenuating circumstance and is not an element of cooperation. Furthermore, the subsequent implementation of a compliance programme has no relevance to the value of BASF's cooperation. The Commission therefore submits that those arguments are also unfounded.

126 As regards BASF's request that the Court exercise its unlimited jurisdiction, the Commission claims that the evidence supplied to it by BASF does not concern the European aspect of the cartel. The Commission refers to its assertions concerning the value of those elements and emphasises the importance of the information supplied by UCB and Akzo Nobel concerning the European aspect of the cartel. BASF's conduct was deceptive, since it attempted to mislead the Commission as to the importance of the meeting held in Mexico in October 1992 and the existence of the European level of the cartel.

Findings of the Court

127 The items in the first, third and fourth indents of paragraph 121 above have already been appraised in the context of the preceding plea. In view of the analysis of that plea, the Court considers that there is no ground on which to grant a reduction greater than the 20% applied by the Commission under the sixth indent of point 3 of the Guidelines, owing, in particular, to what is at best the incomplete nature of the information which BASF supplied to the Commission (see paragraph 116 above).

128 The fact that BASF voluntarily brought the infringement to an end before the Commission initiated its inquiry was taken sufficiently into account by the calculation of the duration of the infringement period found against BASF, so that it

cannot rely on the third indent of point 3 of the Guidelines (see, to that effect, Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraph 341, and Case T-50/00 *Dalmine* v *Commission* [2004] ECR II-2395, paragraphs 328 to 332). Indeed, termination of the infringement as soon as the Commission intervenes can logically constitute an attenuating circumstance only if there are reasons to suppose that the undertakings concerned were encouraged to cease their anti-competitive activities by the interventions in question, whereas a case where the infringement has already come to an end before the date on which the Commission first intervenes is not covered by that provision of the Guidelines (Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraph 158).

129 The dismissal of the employees who played a decisive role in the infringement does not in the Court's view constitute action that justifies a reduction in the fine. It represents a measure designed to ensure that BASF's employees comply with the competition rules, which in any event is an obligation borne by BASF and cannot therefore be regarded as an attenuating circumstance.

130 The argument that BASF was the first European producer to have supplied evidence to the Commission clearly does not affect the foregoing assessments. The information which BASF provided voluntarily about the global cartel was of minor importance and utility, while it submitted no substantial information on the European cartel, the extent of which was revealed by UCB and Akzo Nobel. Accordingly, the fact that BASF was the first European producer to have cooperated cannot lead to a reduction in the fine.

131 The fourth plea must therefore be rejected.

6. *The plea whereby BASF and UCB allege an error of law in the characterisation of the global and European arrangements as a single and continuous infringement*

Arguments of the parties

132 BASF develops its arguments in two parts, alleging breach of the rights of the defence and an error of law in the characterisation of the cartel as single and continuous.

133 In the first part, BASF claims that the Commission did not suggest in the statement of objections that the global and European cartels formed a single infringement so far as the EEA market was concerned. Since the statement of objections referred to an agreement to share the global market, of which the actions relating to Europe constituted 'sub-arrangements', BASF did not have the opportunity to comment on the substantially different characterisation made in the Decision, according to which the factor establishing the single nature of the infringement was its single anti-competitive objective. That difference between the statement of objections and the Decision amounts to a breach of the rights of the defence, since BASF would have defended itself against that incorrect legal description of the facts had it appeared in the statement of objections.

134 In the second part, the characterisation of the cartel as a single infringement is incorrect, because the participants in the two cartels were different. It is acknowledged in some recitals to the Decision, moreover, that there were two separate infringements. The expression 'distortion of normal competitive conditions' used in recital 150 to the Decision to describe the objective of the cartel are not sufficiently specific to prove that there was a single infringement. Furthermore, the global cartel had as its objective market-sharing at global level, whereas the European cartel was primarily aimed at price-fixing and customer-allocation in the

EEA, which is a different objective. The Commission's assertion that the sole objective of the conduct in question was to increase prices, while all the other objectives were deemed to be ancillary and contributory, does not reflect the findings made in the Decision. The duration of the two infringements was different, moreover, and there was a break between them, since the global price agreement remained in force from January 1993 to January 1994, whereas the European cartel lasted from March 1994 to October 1998. The European cartel was of no interest to the North American producers, since they were required to stay out of the European market and exports to North America were insignificant. That balance of interests was not altered after the end of the global cartel.

135 BASF never accepted the characterisation of the cartel as a single infringement, contrary to the assertion at recital 149 to the Decision. The Commission's position runs counter to its previous practice in taking decisions, according to which collusion at geographically different but closely linked levels were considered to be separate infringements, and also to the argument it put forward before the Court in the action against Decision 2003/2. It follows from the Commission's previous decisions that collusion at geographically different levels can constitute a single infringement when the arrangements reached at one level were designed to implement, reinforce or organise objectives agreed at a different level provided that one did not outlast the other. The Commission is unable to explain why the European producers should have continued to implement the global cartel after it had come to an end. In reality, the European producers committed a fresh infringement by becoming involved in a European cartel which was set up after the global cartel had expired and was quite separate from it.

136 Accordingly, the Commission cannot impose a penalty on BASF for the global cartel because it is time-barred under Regulation No 2988/74.

137 UCB contends that the two levels of what is alleged to be a single cartel are not closely linked. The global cartel was negotiated by the main global producers of choline chloride, namely the North American and European producers, and its object was the sharing of the large global markets, in particular by means of an agreement under which the price increases and the control of converters were intended to ensure the stability of that sharing of the global markets. However, there was never any question of sharing customers and national markets within the EEA or of a price cartel in Europe, as may be seen from the statement attributed to a representative of DuCoa which is reproduced at recital 85 to the Decision. As those arrangements proved unsuccessful, the undertakings concerned, including UCB, terminated them in April 1994.

138 In contrast, contacts between the European producers began in March 1994, or almost two years after the Ludwigshafen meeting (see paragraph 4 above), and continued until 1998, or more than four years after the end of the negotiations at global level. The object of the arrangements between the European producers was not the regulation of the global market but only the regulation of the EEA market, in the form of sharing national markets and customers. There were therefore two fundamentally separate initiatives, negotiated at different times by different parties and having manifestly different objectives. The mere fact that both practices had the consequence of distorting normal competitive conditions in the EEA is not sufficient to establish that they constitute a single infringement. To accept that a common objective defined in such vague terms could suffice to demonstrate the existence of a single and continuous infringement would amount to allowing a number of infringements of Articles 81 EC and 82 EC, irrespective of the sector, to be automatically characterised as a single and continuous infringement. UCB emphasises that, since both cartels related to the same sector, the practices employed inevitably had certain similarities. However, that fact cannot suffice to establish a close link between the two cartels, since those practices had an economically different object and purpose.

139 The Commission's reason for characterising the two cartels as a single infringement is to be able to avoid the limitation rules. A distinction must be drawn between the present case and cases in which the concept of a single and continuous infringement

overcomes the difficulty of demonstrating that all the members of a cartel participated in all the anti-competitive activities which pursued the same objective and took place against a background of the same economic situation. The situation in the present case is, on the other hand, similar to that in Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 22, where the Commission distinguished a global infringement from a European infringement, in spite of the fact that it found that the latter constituted a means of implementing the former. The present case must also be distinguished from those in which the Court examined whether different forms of conduct (agreements, concerted practices) could be characterised together as a single infringement. A distinction must also be drawn between the present case and cases in which the functioning and the implementation of the agreements remained the same throughout the duration of the cartel.

140 It follows that the European cartel cannot be regarded as the continuation within the EEA of the arrangements initially negotiated at global level. Such a conclusion must be precluded on the sole ground that the question of the allocation of the national markets within the EEA was never raised by the participants in the global meetings, or even by the European producers before 1994. The Commission has presented no evidence capable of casting doubt on that fact.

141 The Commission's argument that the European cartel would not have been possible if the parties had not continued to implement the global agreements throughout the duration of the European arrangements contradicts the Decision. The Commission stated in the Decision that the global cartel had ended in April 1994 following the Johor Bahru meeting (see paragraph 9 above) and that it had no evidence of subsequent unlawful activities on the part of the North American producers. As the cartel did not continue at global level after 1994, the Commission's entire reasoning fails. It follows that, in the absence of any temporal overlap between the two agreements, the Commission cannot validly claim that the two levels of anti-competitive agreements were necessary for each other.

142 The Commission rejects BASF's assertions and contends that it never considered that the conduct of the North American and European producers before 1994 and the conduct of the European producers after 1994 constituted two separate agreements. Nor did draw a distinction in the Decision between a global cartel and a European cartel. On the contrary, it stated, at recital 64 to the Decision, that the single cartel operated at two different, but closely-related, levels, thus stating a view which was expressed in a number of other recitals. It is therefore incorrect to claim that the Commission considered that the unlawful conduct constituted a single infringement for the sole purpose of determining the amount of the fine and of circumventing the limitation period.

143 As regards the consistency between the statement of objections and the Decision, the Commission asserts that no difference can be established in that regard. The principles of the concept of a single and continuous infringement established in the case-law were analysed at points 164 to 166 of the statement of objections and recapitulated at recitals 145 to 148 to the Decision. In addition, point 168 of the statement of objections refers to a common objective of eliminating competition on the choline chloride market, to the same anti-competitive objective and to a single economic objective, namely the distortion of the normal evolution of prices on the choline chloride market. The same grounds led the Commission to conclude in the Decision that there was a single and continuous infringement. It was because the Commission's powers are limited to infringements producing effects within the EEA that it concentrated on the EEA at recital 150 to the Decision. Furthermore, the Commission included in the statement of objections all the necessary factors relating to the application of the concept of a single and continuous infringement in the present case, the duration and gravity of the infringement, in order fully to respect BASF's rights of defence.

144 In any event, on the assumption that there is a discrepancy between the wording of the statement of objections and the Decision, the statement of objections contains the information required to give BASF the opportunity to be heard on the submission relating to a single and continuous infringement, in such a way as to respect its rights of defence.

145 As regards what is alleged to be the incorrect application of the concept of a single and continuous infringement, the Commission rejects the argument based on the difference between the participants in the two cartels (see paragraph 134 above). First, the Commission never mentioned 'two cartels' and, second, of the undertakings involved in the infringement, at least three (BASF, UCB and Akzo Nobel) were the same. The fact that the Commission has no evidence proving that Bioproducts, Chinook and DuCoa had continued to participate in the infringement after 20 April 1994 (see paragraph 9 above) does not mean that the unlawful conduct at European level became a separate infringement from that date.

146 It is artificial and unrealistic, moreover, to take the view that a new, separate cartel, involving the remaining undertakings, is created whenever an undertaking enters or leaves a cartel. That applies, in particular, when the cartel consists in conduct relating to the same product markets, essentially pursuing the same economic objective, having the same anti-competitive character and having been maintained over a long period by a hard core of undertakings. The fact that the European producers adapted, and indeed intensified, their anti-competitive activities after the North American producers abandoned the cartel does not alter its continuous nature or its main objective, the achievement of which continued to depend on the control exercised on converters and on market allocation. The conduct adopted by the participants at global level and European level of the cartel is of the same nature, moreover (allocation of customers and markets, control of converters, exchange of sensitive information and price fixing) and seeks to achieve a single objective, namely the distortion of the normal conditions of competition in the EEA for choline chloride in order to set its price at an artificially high level.

147 The Commission therefore did not err and did not contradict its argument in *Vitamins*, cited in paragraph 39 above, by taking the view that the conduct of the European producers from 1994 was purely the continuation of earlier agreements concluded with the North American producers. In the Commission's submission, the North American producers had a very special interest, first, in the application of high prices in Europe in order to be able to maintain high prices in the regions in which they operated and, second, in ensuring that they controlled the European

converters in order to prevent them from exporting to the other markets at low prices. Accordingly, the departure of those producers from the European market does not mean that they have no interest in that market. If it had to be accepted, as BASF suggests, that the producers did not have the same interests or the same objectives as the European producers, it would be impossible to explain why the cartel was implemented at global level.

148 The Commission also expresses surprise that BASF should dispute the single and continuous nature of the cartel, since it did not do so in its response to the statement of objections.

149 The Commission emphasises that there was no break in continuity between the two levels of the cartel, since minimum prices and the control of converters were the object of the Johor Bahru meeting in April 1994 (see paragraph 9 above) and since the cartel was set up at European level in March 1994.

150 The Commission also disputes the merits of UCB's arguments. It emphasises that, according to the case-law, the essential element for the purpose of determining whether an infringement is single and continuous, or whether there are several separate infringements, is a common objective, that is to say, in the present case, affecting competition in the choline chloride sector in the EEA market (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 113, and Cases T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 186, and T-21/99 *Dansk Rørindustri and Others* v *Commission* [2002] ECR II-1681, paragraph 67). That effect was initially manifested by the disappearance of the North American producers from the EEA market and then by that geographic market being shared. The evidence on which the Commission based its assessment consists of the participation of the same undertakings in a cartel for the purposes of Article 81 EC, of the continuity in time of the activities concerned, of the identity of the anti-competitive action and of the intended effects.

151 The North American producers were or ought to have been aware that the logical consequence of their withdrawal from the EEA market would be the allocation of that market among the European producers. Market allocation at global level would have made no sense had it not been followed by the allocation of the Community market, which in turn would not have been possible had there been no previous arrangement at global level. Apart from the fact that the infringements at global and European levels constituting the single infringement had the same purpose, they also involved the same undertakings during a continuous period and through the same practices. The Commission claims that the fact that the North American producers did not participate in the cartel at European level does not change either its objective or its nature as a continuous infringement, since, inter alia, their absence from the EEA market distorted competition on that market.

152 As regards that last observation, the Commission disputes UCB's assertion that there was no agreement at global level on prices in the EEA. The statement of DuCoa's representative reproduced at recital 85 to the Decision (see paragraph 137 above) refers only to a meeting in January 1993. The Ludwigshafen agreement also concerned prices in Europe, as indicated at recital 77 to the Decision.

153 Furthermore, the agreements concluded at the global level of the cartel were indispensable for the achievement of the cartel at European level, since in order to be able to divide the European market between the European producers, while maintaining high prices, the producers had to be sure that they would not face competition from North American producers. The difference in the geographic markets, the allocation of which affected each level of the cartel, is not a relevant factor, since the allocation of those markets provided a means of artificially increasing the profitability of choline chloride, which was the sole objective of the cartel. The purpose of the 'single and continuous infringement' theory is to preclude the artificial division of what is fundamentally single, namely a set of acts having the same objective. In the present case, if the global market had not been allocated, it would have made no sense to allocate the European market and if there had been no allocation at European level the global cartel would have been of no advantage.

154 Thus, in the Commission's contention, the maintenance of high prices in Europe enabled the North American producers to apply similar conditions on the American market. Contrary to UCB's assertion, European prices were actually discussed, since any agreement on global prices necessarily presumed price-fixing at European level. As regards the control of converters, that was of interest to the North American producers who wished to avoid low-price exports from the EEA, while the European producers intended to prevent low-price sales by converters within the EEA.

155 Furthermore, paragraphs 369 and 374 of the judgment in *JFE Engineering and Others* v *Commission*, cited in paragraph 139 above, undermine UCB's argument by precluding the artificial division of a single set of rules aimed at market-sharing. It is clear that the agreements at European level constituted the continuation and implementation of the global agreements by merely substituting the division of the European national markets for the global division. That substitution was possible only because, after the end of the global agreements, the parties continued to implement them and the North American producers continued to remain outside the European market, by applying the global agreements. UCB has confused the continuation of the agreements at global level with the continuation of their effects. There is no inconsistency in accepting that the cartel came to an end at global level but that it is at European level that it continued to benefit from the effect of the global agreements. In those circumstances, lack of simultaneity does not alter the single and continuous nature of the infringement.

156 As regards the complaint that the Commission used the concept of a single infringement in order to avoid the limitation rules, the Commission emphasises that it does not seek to benefit financially by imposing fines and that its objective is not to impose high amounts. The Commission also took into account, for the purposes of calculating the starting amount, global market shares and not European market shares. If it had taken European market shares into account, it would have been led to impose higher fines. As regards the North American producers, their conduct would have attracted penalties for the whole of the infringement period if their actions at global level had not been time-barred.

Findings of the Court

Preliminary observations

— The scope of BASF's arguments

157 It must be observed at the outset that the first part of this plea seeks to show inconsistency between the statement of objections and the Decision as regards the characterisation of the global and European aspects of the single and continuous infringement. That part constitutes a separate plea, alleging breach of BASF's rights of defence, which will fall to be examined, if necessary, after the Court has examined the plea alleging an error of law in the characterisation of the global and European arrangements as a single and continuous infringement. Indeed, should the Court consider that that characterisation is vitiated by an error of law and must therefore be rejected, any finding of a breach of the rights of the defence with respect to that characterisation would have no consequences (see, to that effect, 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 and Others* v *Commission* ('*Cement*') [2000] ECR II-491, paragraph 3436, and Case T-210/01 *General Electric* v *Commission* [2005] ECR II-5575, paragraph 833).

— The concept of a single and continuous infringement

158 The characterisation of certain unlawful actions as constituting one and the same infringement affects the penalty that may be imposed, since a finding that a number of infringements exist may entail the imposition of several distinct fines, each time

within the limits defined in Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003. However, a finding of a number of infringements may be advantageous to those responsible when some of the infringements are time-barred (see, to that effect, *Vitamins*, cited in paragraph 43 above, paragraph 72).

159 The concept of single infringement can be applied to the legal characterisation of anti-competitive conduct consisting of agreements, of concerted practices and of decisions of associations of undertakings (*Commission* v *Anic Partecipazioni*, cited in paragraph 150 above, paragraphs 112 to 114; Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, paragraphs 125 to 127; Joined Cases T-305/94 to 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 Maatschappij and Others* v *Commission* (*'PVC II'*) [1999] ECR II-931, paragraphs 696 to 698; and *HFB and Others* v *Commission*, paragraph 150 above, paragraph 186).

160 The concept of single infringement can also be applied to the personal nature of liability for the infringements of the competition rules. An undertaking which has participated in an infringement by virtue of its own conduct, which met the definition of an agreement or a concerted practice within the meaning of Article 81(1) EC and which was intended to help to bring about the infringement as a whole, may also be responsible for the conduct of other undertakings followed in the context of the same infringement throughout the period of its participation in the infringement. That is the case where it is proved that the undertaking in question was aware of the unlawful conduct of the other participants, or that it could reasonably have foreseen that conduct, and that it was prepared to accept the risk. That conclusion has its origin in a widespread conception in the legal orders of the Member States concerning the attribution of responsibility for infringements committed by several perpetrators according to their participation in the infringement as a whole. It is not therefore contrary to the principle that responsibility for such infringements is personal in nature, it does not ignore the individual analysis of the incriminating evidence and it does not breach the rights of defence of the undertakings involved (*Commission* v *Anic Partecipazioni*, cited in paragraph 150 above, paragraphs 83, 84 and 203, and *HFB and Others* v *Commission*, cited in paragraph 150 above, paragraph 231).

161 Thus, it has been held that a case of infringement of Article 81(1) EC could result from a series of acts or from continuous conduct which formed part of an 'overall plan' because they had the same object of distorting competition within the common market. In such a case, the Commission is entitled to attribute liability for those actions on the basis of participation in the infringement considered as a whole (*Aalborg Portland and Others* v *Commission*, cited in paragraph 66 above, paragraph 258), even if it is established that the undertaking concerned directly participated in only one or some of the constituent elements of the infringement (*PVC II*, cited in paragraph 159 above, paragraph 773). Likewise, the fact that different undertakings played different roles in the pursuit of a common objective does not mean that there was no identity of anti-competitive object and, accordingly, of infringement, provided that each undertaking contributed, at its own level, to the pursuit of the common objective (*Cement*, cited in paragraph 157 above, paragraph 4123, and *JFE Engineering and Others* v *Commission*, cited in paragraph 139 above, paragraph 370).

162 In the present case, the characterisation by the Commission of the global and European parts of the cartel as a single and continuous infringement had the consequence that a single cartel was found to have lasted from 13 October 1992 until 30 September 1998. On the other hand, should the Court consider that those two parts constitute separate infringements, it must be held, in consequence, that the global cartel, which lasted from 13 October 1992 until 20 April 1994, is time-barred (see paragraph 9 above). In addition to the partial annulment of the Decision, that finding would have consequences for the calculation of both BASF's and UCB's fines.

163 The Court must therefore examine whether, in light of the case-law cited at paragraphs 159 to 161 above, the Commission erred in law in characterising the applicants' actions as a single and continuous infringement. To that end, it is also necessary to describe, in the preliminary observations, the position which the Commission adopted in that regard in the statement of objections and to compare it with the findings in the Decision.

— The position adopted by the Commission in the statement of objections and findings in the Decision

164 It follows from point 111 of the statement of objections, dated 22 May 2003, that the Commission considered, at that time, that the cartel had lasted at global level from 1992 until 1998 and at European level from March 1993 until October 1998. Thus, the Commission considered that the cartel had operated at different levels: global, regional, and even national, depending on the interests and involvement of the participants in the markets concerned (point 78 of the statement of objections). According to the Commission, the cartel consisted of a continuing agreement between producers of choline chloride, which comprised, in essence, global arrangements and regional 'sub-arrangements' at European level (points 79 and 84 of the statement of objections).

165 It follows from points 168 and 169 of the statement of objections that, according to the Commission's appraisals, the European part of the cartel constituted a particular application of the principles adopted at global level, which was made possible because the North American producers provided an assurance that they would not interfere in the European market by exporting choline chloride to that market. There were therefore 'sub-arrangements' relating to Europe, according to the expression used by the Commission at a number of points in the statement of objections (see, for example, points 79, 84, 90 and 169). As regards the North American producers, the Commission considered that their responsibility for all the behaviour at issue was based on the fact that they were aware of the existence of the 'sub-arrangements' (point 169 of the statement of objections).

166 It is apparent, therefore, that when the statement of objections was issued to the parties the Commission considered that the global and European infringements constituted a single infringement and that each participant had played a particular role in its implementation.

167 However, following the observations submitted by the North American producers on the contents of the statement of objections, the Commission withdrew its objections relating to collusive contacts at global level which were alleged to have taken place after 20 April 1994 (points 121 to 123, 144 to 147, 149 and 151 of the statement of objections).

168 It was in those circumstances that the Commission adopted the approach taken in the Decision to the relationship between the global and European levels of the arrangements in question.

169 Thus, at recital 64 to the Decision, under the heading 'The organisation of the cartel', the Commission asserts that the cartel operated 'at two different, but closely related levels'. According to the same recital, the objective of the activities engaged in at global level was to increase prices worldwide; to control converters and distributors of choline chloride so as to ensure that they would not offer choline chloride at low prices; and to allocate markets worldwide by means of an agreement that the North American producers would withdraw from the European market.

170 At recital 65 to the Decision, which deals with meetings at European level, the Commission states that those meetings served to continue the agreement reached at the global level, including among the European producers themselves, to raise prices and control converters in Europe. Those meetings therefore concerned price increases not only throughout the EEA but also on national markets and in relation to individual customers. That was all arranged in such a way as to respect the market shares of the European producers with the aim of ensuring greater profitability and stabilising the markets. That stabilisation was brought about, according to recital 68 to the Decision, by eliminating or avoiding exports by competitors into geographic areas in which other competitors held large market shares. The key element in that respect was, according to the same recital, the agreement stipulating that the European producers would not export to the North American market and that the North American producers would not export to the European market. Through that market allocation, the producers would be able to 'stabilise' their home market and

improve profitability in their area. An agreement was also reached to increase prices worldwide to identical levels. That agreement would make it possible not only to improve the profitability of the market but also to avoid any destabilisation of exports between regions. It was the pursuit of those objectives that made it essential to control converters and distributors.

171 According to recital 69 to the Decision, the agreements reached at the global level concerned four related anti-competitive activities, which consisted in the setting and increase of worldwide prices; the allocation of worldwide markets (involving the withdrawal of the North American producers and the European producers from the European and North American markets respectively); the control of distributors and converters; and, last, regular exchanges of commercially sensitive information in order to ensure that the agreements were being implemented.

172 After describing the meetings held at global and European level, the Commission devotes 10 recitals to the analysis of the concept of a single and continuous infringement and to the application of the principles relating to the present case. Thus, at recitals 145 to 148 to the Decision, under the heading 'The concept of single and continuous infringement — Principles', the Commission confirms the greater part of the reasoning set out in the statement of objections (see paragraph 166 above), citing *Commission* v *Anic Partecipazioni*, cited in paragraph 150 above. However, it is at recitals 150 to 154 to the Decision that the Commission sets out the grounds of its new reasoning relating to the application of the principle of single and continuous infringement to the present case.

173 According to recital 150 to the Decision, the global arrangements and the European arrangements had a single anti-competitive aim, namely the distortion of normal competitive conditions in the EEA. More specifically, a comparison of the arrangements entered into at those two levels shows that the arrangements reached

at the European level might be regarded as the continuation by the European producers of what had been initially agreed not only with the North American producers but also among the European producers themselves, at the global level with respect to price increases and the control of converters. The Commission states that, in order to increase the prices charged to some European customers, those customers were allocated among the European producers concerned. For those producers to be able to agree such allocations, it was clear, in the Commission's view, that they had to respect each other's overall market shares in Europe.

174 According to recital 151 to the Decision, Akzo Nobel, UCB and BASF participated in the activities at both the European and the global level by initially agreeing at the global level to certain actions to be carried out in the EEA and then continuing those actions by meeting at the European level. The North American producers did not participate in the European meetings because at the time when the European meetings began the global arrangements were on the point of being terminated. In addition, even on the assumption that the European arrangements did commence before 14 March 1994 (which the Commission acknowledges it is unable to prove), it would have been pointless for the North American producers to participate in them, since they had agreed to withdraw from the European market.

175 According to recital 152 to the Decision, the North American producers were, or ought to have been, aware of the European arrangements. The European producers' main objective in having the North American producers withdraw from the European market was the 'stabilisation' of the European market. However, that 'stabilisation' would have been impossible without further collusive arrangements among the European producers.

176 In conclusion, the Commission states at recital 153 to the Decision that in reality the European producers had agreed to distort competition in the EEA from the beginning of the global arrangements until the end of the European arrangements.

According to the Commission, the fact that the European producers together held 80% of the European market proves that they were capable of implementing their arrangements even after the global arrangements had lapsed.

The characterisation of the offending conduct

177 In accordance with the case-law cited at paragraph 159 above, the anti-competitive activities at the global level described at recital 69 to the Decision constitute in themselves a single infringement. That infringement consists of agreements (on fixing and increasing worldwide prices, on the withdrawal of the North American producers from the European market and on the control of distributors and converters) and concerted practices (the exchange of sensitive information with a view to mutually influencing the business conduct of the participants).

178 The same applies to the anti-competitive activities at the European level which in themselves constitute a single and continuous infringement consisting of agreements (on fixing and increasing prices for the EEA, for home markets and also for individual customers, on the allocation of customers, on the allocation of market shares and on the control of distributors and converters) and also of concerted practices (the exchange of sensitive information for the purpose of mutually influencing the participants' business conduct).

179 However, it does not automatically follow from the application of that case-law to the present case that the arrangements at the global and European levels, taken together, form a single and continuous infringement. It appears that, in the cases which the case-law envisages, the existence of a common objective consisting in distorting the normal development of prices provides a ground for characterising the various agreements and concerted practices as the constituent elements of a single

infringement. In that regard, it cannot be overlooked that those actions were complementary in nature, since each of them was intended to deal with one or more consequences of the normal pattern of competition and, by interacting, contributed to the realisation of the set of anti-competitive effects intended by those responsible, within the framework of a global plan having a single objective.

180 In that connection, it must be made clear that the concept of single objective cannot be determined by a general reference to the distortion of competition in the choline chloride market, since an impact on competition, whether it is the object or the effect of the conduct in question, constitutes a consubstantial element of any conduct covered by Article 81(1) EC. Such a definition of the concept of a single objective is likely to deprive the concept of a single and continuous infringement of a part of its meaning, since it would have the consequence that different types of conduct which relate to a particular economic sector and are prohibited by Article 81(1) EC would have to be systematically characterised as constituent elements of a single infringement.

181 The Court must therefore ascertain whether the two sets of agreements and concerted practices penalised by the Commission in the Decision as a single and continuous infringement are complementary in the way described at paragraph 179 above. The Commission itself bases its theory on the fact that the global and European arrangements were 'closely linked' (see paragraphs 4, 142 and 169 above). In that regard, it will be necessary to take into account any circumstance capable of establishing or casting doubt on that link, such as the period of application, the content (including the methods used) and, correlatively, the objective of the various agreements and concerted practices in question.

182 As regards the period of application of the agreements in question, it must be held that the fact that the global arrangements came to an end no later than 20 April 1994 means that from that date the North American producers were no longer required not to export to Europe. The Commission itself states that it has no evidence of other meetings or contacts involving North American producers

whereby they fixed prices for the EEA or confirmed their initial commitment not to export to Europe after that date (see recital 165 to the Decision). It follows that the finding that, in order to be able to share the European market among them, and maintain high prices, the European producers had to be sure that they would not face competition from North American producers (see paragraph 153 above) ignores the fact that the global agreements had no longer been in force since 20 April 1994. In effect, the agreements on the sharing of the European market were implemented without there being any agreement prohibiting exports from the United States.

183 In addition, the Commission's argument that the sharing of the global markets would have been of no benefit to the participating undertakings without the sharing of the European market, and vice versa (see paragraph 153 above), cannot be accepted. In this case, the purpose of the prohibition on exports to the European market was to avoid the disruption of that market by sales of choline chloride at artificially low prices leading to the recovery of part of the fixed costs of excess production (recitals 39 and 68 to the Decision). The elimination of that trade threat is an objective distinct from that of division of the European market, which, as described below, required the application of different mechanisms in order to be achieved.

184 Consequently, the European arrangements, which were agreed only on 14 March 1994 at the Schoten meeting — whereas the parties noted the failure of the global agreements at the last meetings in Bruges and in Johor Bahru in November 1993 and April 1994 (recitals 92 to 95 to the Decision) — were, from that point of view, autonomous by reference to the agreement on mutual withdrawal from the European and North American markets. That finding applies a fortiori with respect to the period after the formal termination of any attempt to reach agreement at global level (at the meeting in Johor Bahru between 14 and 20 April 1994). The Commission is therefore incorrect to maintain at recital 68 to the Decision that the European producers were able to 'stabilise' the EEA market owing to the prior division of the global markets, since those markets were no longer shared between the North American producers and the European producers during the period when the agreements were implemented at European level.

185 Furthermore, by claiming that, after the formal termination of the global agreements, the parties continued to implement them and that the North American producers continued to remain outside the European market, by applying the global markets (see paragraph 155 above), the Commission contradicts recital 165 to the Decision, which states that the Commission had no evidence of further meetings or contacts involving North American producers whereby they fixed prices for the EEA or confirmed their original commitment not to export to Europe (see paragraph 9 above).

186 Questioned on that point at the hearing, the Commission stated that, by that argument, it did not mean to claim that the global agreement had persisted after the date of termination established in the Decision but that, in practice, the conduct of the undertakings involved remained more or less the same as it had been when the agreements were in force. It was therefore necessary to distinguish that circumstance from the one invoked at recital 165 to the Decision, which concerns the duration of the global agreement.

187 It must be held that that distinction, which, moreover, contradicts the Commission's written pleadings (see paragraph 155 above), is based on an incorrect interpretation of Article 81 EC. 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 (see 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). 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. The Commission's argument offers no explanation as to why, if the North American producers continued to act beyond 20 April 1994 in the way provided for by the global agreements, no fine was imposed on them. The interpretation of recital 165 to the Decision proposed by the Commission cannot therefore be accepted.

188 As regards the circumstance on which the Commission relies in the rejoinder in Case T-111/05, namely that the effects of the global cartel continued after it had been formally terminated (see paragraph 155 above), it must be held that, like the assertion mentioned in the preceding paragraph, it is not to be found in the Decision. The explanation which the Commission provided at the hearing, that it referred to that circumstance at recital 96 to the Decision in so far as it stated that exports from North America to the EEA remained relatively low after the end of the global arrangements, cannot be accepted. It follows from recitals 40 and 44 to the Decision that in 1990 imports of choline chloride represented almost 9% of the estimated market value in the Community composed of 12 Member States whereas in 1997 imports of choline chloride reached 9.3% of the volume of sales in the entire EEA. Those figures do not support the Commission's argument, since they show that the situation with respect to imports into the European market was more or less the same for both the period preceding the agreements at global level and the period following their expiry and that, accordingly, those agreements did not substantially influence the structure of the European market in terms of intercontinental imports.

189 In any event, even on the assumption that recital 96 to the Decision refers, in substance, to alleged changes in the structure of the European market occasioned by the global arrangements and which had facilitated the completion of the European arrangements, that circumstance has not been proven. The Court invited the parties and Akzo to give an assessment of the market shares held by the applicants and by Akzo Nobel on the European market (taken to mean that including the Member States of the Community and the EFTA States which formed the EEA in 1994) in the third quarter of 1992, that is to say at the beginning of the global arrangements. However, none of the parties submitted precise information in that regard, because the operations in question had taken place so long ago. It is therefore necessary to make an assessment on the basis of the information resulting from the Decision and also from the information deriving from the administrative file referred to in the Decision.

190 As stated at recitals 97 and 153 to the Decision, Akzo Nobel, BASF and UCB held more than 75% of the European market when the European arrangements began (in

March 1994) and were therefore able to divide that market without being concerned about the conduct of the other global producers. However, that high market share does not appear to have been the result of the global arrangements. It follows from recital 40 to the Decision that in 1990 imports of choline chloride represented almost 9% of the value of the Community market (3 525 tonnes imported out of 40 000 tonnes). During the first seven months of 1992, the first year of the infringement at global level, imports into Europe from North America came to 2 900 tonnes out of a market of 43 800 tonnes, or 6.6% of the European market (recital 71). In the same year, Ertisa's market share came to 7.9% at most (production capacity of 3 500 tonnes according to page 1999 of the administrative file annexed to the defence in Case T-101/05). If the market share of approximately 15% held by ICI (the fourth European producer and not involved in the activities in question, because it traditionally kept to the United Kingdom market), according to footnote 152 to the Decision, is taken into account, the collective market share for Akzo Nobel, BASF and UCB in 1992 is still at least 70.5%. It must therefore be held that the global arrangements did not cause a sufficiently significant change in the structure of the European market, in particular as regards the collective market share of BASF, UCB and Akzo Nobel, to support the conclusion that it was those arrangements that allowed the three European producers to share the EEA market.

191 In those circumstances, the assertion that the agreements at the European level constituted the continuation and the implementation of the global agreements by merely substituting the allocation of the European home markets for the global allocation (see paragraph 155 above) cannot be accepted. An anti-competitive agreement cannot, in principle, be regarded as a means of implementing another agreement which has already come to an end (see, to that effect, *JFE Engineering and Others* v *Commission*, cited in paragraph 139 above, paragraph 363).

192 As regards the objective pursued by each of the two sets of arrangements, it follows from recitals 64 to 68 and 150 to 153 to the Decision that the Commission invoked the existence of a single anti-competitive objective, consisting in arriving at artificially high prices. However, while it is true that the global agreement specified minimum prices to be charged by producers (see, for example, recitals 77, 79, 85, 88,

90, 91 and 92 to the Decision), the fact remains that the sole objective of that measure was to protect the key element of that agreement, namely to avoid exports from Europe to North America and vice versa, and not to bring about a division of the European market between European producers. If the producers had decided to sell to converters and to European distributors at prices that were too low (because of excess capacity), that, according to recital 151 to the Decision, would have allowed those converters and distributors to export choline chloride to the United States at competitive prices. Clearly, the North American producers would, in return, have had to adopt appropriate conduct within the meaning of the agreement vis-à-vis their customers (converters and distributors) in the United States.

193 According to recital 85 to the Decision, which cites a statement by DuCoa, 'it was fair to say that when [DuCoa's representative] said they discussed trying to get worldwide pricing up, that pricing was pricing in the Far East and Latin America primarily; and that they were not discussing or agreeing on prices in North America with the Europeans or not agreeing with prices in Europe with the Europeans, those were not subjects of any type of any attempted agreement'. According to the same statement, 'there was no attempt to say, to the American producers, what choline pricing should be in Western Europe ... other than if — if the prices were very low in Europe ... there [were] discussions for fear that product could be shipped sideways back to the [United States]'. Contrary to the Commission's contention, the terms of that statement do not allow it to be interpreted as referring exclusively to the meeting in January 1993.

194 The last two sentences of recital 152, which state that the link between the global and European parts is proved by the fact that the stabilisation of the European market, which was one of the objectives of the global agreement, would have been impossible without further collusive arrangements among the European producers, are based on an incorrect premiss. It does not follow either from the Decision or from the documents in the file produced before the Court, on which the Commission relies for support, that the 'stabilisation' of the markets at which the global agreement was aimed was represented in this case by the allocation of the European and American markets among the producers who remained active on those markets.

195 On the other hand, as has been noted (see paragraph 192 above), that 'stabilisation' was intended to avoid intercontinental exports at prices lower than those applicable in the region of import. According to recital 39 to the Decision, '[i]f this is the case, [those imports] can, despite the small volumes involved, have a destabilising effect on the prevailing price level in the area of importation, especially if this price level were relatively high'. That recital states that sales of that type may be attractive for a company with excess production which is trying to recover part of its fixed costs.

196 The fact that the 'stabilisation' of the markets must be understood in that way is confirmed by recital 68 to the Decision, which deals with the functioning of the cartel at the global level, and which states '... there was always a risk that producers would offload any surplus production in the form of occasional spot exports, just to cover fixed production costs. Even in small quantities, such exports could spoil the price climate in the import market, as customers could use their (potential) occurrence to negotiate price decreases. Market stabilisation would therefore be pursued by eliminating or avoiding export sales by competitors into geographic areas in which other competitors held important market shares. The key element in this respect was an agreement for the European producers not to export to the North American market and for the North American producers not to export to the European market. Through this market allocation, it would be possible for the remaining market players to "stabilise" their home market and to improve profitability in "their" area.' Even on the assumption that, by the expression 'improve profitability in "their" area', the Commission is not referring solely to the withdrawal of the North American producers, but also to the allocation of the EEA market among the European producers, such an analysis cannot prevail in light of the consequences of the termination of the anti-competitive activities at the global level by 20 April 1994 at the latest (see paragraphs 184 to 190 above).

197 It must be added that, as stated at recitals 71 and 75 and footnotes 31 and 66 to the Decision, at the time when the global agreement was implemented, all the producers had excess capacity, which favoured intercontinental exports of choline chloride at low prices and thus threatened the stability of the global markets (see paragraphs

192 and 195 above). Accordingly, the concept of 'stabilisation' of the markets in the context of the global agreement did not refer to sharing within the European and North American markets as recital 152 to the contested decision suggests. The fact that the European producers shared the European market only upon termination of the global cartel, and at a time when the failure of that cartel had been noted by the participants (recital 93 to the Decision), shows that their objective was not to participate in the global arrangements in order subsequently to share the markets reserved for them. It must be held, moreover, that the Commission does not mention in the Decision any evidence showing the existence of such an objective.

198 Correlatively, the control exercised over distributors and converters varies according to the objective pursued. In connection with the global arrangements, that control took the form of 'proper pricing' for choline chloride being charged (recital 69(c) to the Decision). As regards that measure, the Commission states at recital 81 to the Decision: 'this control over converters was to be obtained by making sure that they purchased their choline chloride from cartel members, at the right conditions. Bioproducts' notes read: "Have to control converters[']raw material. Will have profit from price increase". The same objective is also clear from the document cited in recital 75, where it reads: "Converters and distributors should be controlled by proper pricing". Finally, another meeting document reads: "Each [choline chloride] producer is responsible in his home market in controlling converters. Supply of [choline chloride] liquid from out of area undermines this rule and ruins the market'. Accordingly, that control entailed observance of the 'floor' prices agreed at the meetings of the European and North American producers (recitals 77 and 79 to the Decision).

199 As regards the objective of that control, the Commission states at recital 151 to the Decision: 'As for price increases in Europe, the interest of the North American producers was limited to ensuring that the price level in Europe did not drop significantly below that of other regions in the world. As this was clearly not going to happen as long as converters were controlled, there was no need to discuss specific

European prices in the global meetings, other than as part of the agreed worldwide price increases.' Thus, the objective of that control was to prevent distributors and converters from jeopardising the objective of the arrangements, namely mutual withdrawal from the European and North American markets. In fact, the parties to the agreements on mutual withdrawal put an end to those agreements on 20 April 1994 at the latest, according to recital 165 to the Decision (see paragraphs 185 to 187 above).

200 On the other hand, the control of the distributors and converters in connection with the European arrangements, according to recital 99(d) to the decision, took several forms, consisting in avoiding sales at preferential prices (a measure applicable to distributors), ensuring that converters bought raw materials from the cartel members under the right conditions, informing them of the price levels agreed by members of the cartel and establishing exclusive corporate ties over them. As regards the objective of that control, recital 99 to the Decision emphasises that the objective was to ensure the effectiveness of the agreements regarding market shares, customer allocations and prices, as agreed between the European producers.

201 Accordingly, the global price agreements are not 'closely linked', as the Commission claims, with the allocation of the EEA market among the European producers made after those agreements were definitively terminated. That is also demonstrated by the fact that, according to recitals 65, 103, 105 and 113 to the Decision, the allocation of that market necessitated the application of a different technique consisting in fixing prices differentiated by each European producer with respect to each customer in order that the customer would be 'allocated' to a specific producer pursuant to collusive agreements at European level. Such a result could not have been achieved on the basis of a single 'floor' price designed to be applied by all the producers, as defined by the global agreements (recitals 77 and 79 to the Decision).

202 Furthermore, after the end of the global arrangements the European producers were under no obligation to rely on the 'floor' prices agreed in the context of those arrangements in order to share the European customers among themselves. In those circumstances, the Commission's argument that the fixing of a 'floor' price at the global level necessarily implies price fixing at the European level is inoperative.

203 It must also be emphasised that there is nothing in the Decision to demonstrate that the European producers had entered into an agreement on the allocation (even at a later stage) of the EEA market at the meetings relating to the global cartel or that they intended to use the global arrangements in order to facilitate a subsequent allocation of the EEA market. The Commission acknowledges, moreover, at recital 151 to the Decision that it is not in a position to prove that. Had that been the case, there would have been no reason not to put the beginning of the arrangements relating to the allocation of the EEA before 14 March 1994, the date of the first meeting among the European producers. However, that was not the case.

204 In those circumstances, recital 151 to the Decision (see paragraph 174 above) is irrelevant in so far as it is intended to explain why the North American producers did not participate in the European meetings. In fact, that part of recital 151 responds to an inoperative argument put forward by the European producers during the administrative procedure, claiming that the parties to the global and European agreements were not the same.

205 Likewise, recital 152 to the Decision (see paragraph 175 above) does not support the Commission's theory in so far as it states that the North American producers were or ought to have been aware of the existence of the European arrangements. In fact, if the North American producers had been aware of those arrangements, that would have had the consequence that, in the event of a finding of a single infringement, their liability would have been extended to the whole of that infringement, provided

that the arrangements had been linked to the global arrangements (see, to that effect, *JFE Engineering and Others* v *Commission*, cited in paragraph 139 above, paragraph 371). Accordingly, that factor cannot affect the liability of the European producers and does not establish the existence of a single and continuous infringement.

206 The general assertion that the European arrangements may be regarded as the continuation by the European producers of what had been originally agreed at global level, not only with the North American producers but also among the European producers themselves with respect to price increases and the control of converters, is therefore incorrect. The same necessarily applies to the finding that all of the arrangements constitute a single infringement, from which the North American producers withdrew at a given time and the characteristics of which were adapted by the remaining parties following that withdrawal.

207 In light of the foregoing considerations, the Commission cannot find support in paragraph 67 of *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 150 above. While it is true that, with respect to an infringement which initially concerned the Danish market for pre-insulated pipes and, after an interval, the whole of the European market, the Court took into account the single aim of controlling the district heating market in order to characterise those activities as a single and continuous infringement, the fact remains that that finding was also based on other equally important considerations. Thus, in that judgment, the Court, like the Commission, emphasised that there had been, 'from the beginning of the cartel in Denmark, ... a longer-term objective of extending control to the entire market ... and that there was clear continuity in terms of methods and practices between the new agreement entered into at the and of 1994 for the whole of the European market and the previous arrangements' (paragraphs 65 and 68). Paragraph 67, moreover, on which the Commission relies, also emphasises that it followed from the first agreement on the coordination of a price increase for the export markets that 'from the outset, the cartel between the Danish producers went beyond the framework of the Danish market alone'.

208 In the present case, the Commission has not established that in participating in the global arrangements the applicants had a longer-term objective of allocating the EEA market as was done in the framework of the European arrangements. Nor has it demonstrated a connection between the methods and practices used in each set of arrangements.

209 In light of the consequences drawn from the absence of any temporal overlap between the implementation of the global and European arrangements (see paragraphs 182 to 191 above), from the fact that the mutual withdrawal from the European and North American markets and the sharing of the EEA market by the allocation of customers constitute different objectives implemented by dissimilar methods (see paragraphs 192 to 202 above) and, last, from the absence of evidence that the European producers intended to adhere to the global arrangements in order to divide the EEA market (see paragraph 203 above), it must be concluded that the European producers committed two separate infringements of Article 81(1) EC and not a single and continuous infringement.

210 The Decision must therefore be annulled in so far as it imposes a fine on the applicants for their participation in the global infringement, as that infringement must be held to be time-barred. The impact of that annulment on the calculation of the amount of the fine imposed on BASF will be examined at paragraphs 212 to 223 below. The Court will consider the impact of that annulment on the calculation of the fine imposed on UCB after it has examined that applicant's second plea (see paragraphs 235 to 241 below).

211 In those circumstances, there is no further need to adjudicate on the plea alleging breach of BASF's rights of defence (see paragraph 157 above).

The calculation of BASF's fine

212 It must be emphasised first of all that, at the Court's request, the applicants and the Commission explained at the hearing the way in which they considered that the amount of the fines should be calculated in the event that the plea alleging an error of law in the characterisation of the global and European arrangements as a single infringement should be held to be well founded by the Court. As observed at paragraph 120 above, the finding made with respect to BASF's cooperation in the context of its third plea is without prejudice to the consequences which the finding of the Court relating to the fifth plea may have on that reduction.

213 By virtue of the unlimited jurisdiction conferred on it by Article 31 of Regulation No 1/2003, the Community judicature is empowered, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute its own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed where the question of the amount of the fine is before it (*Groupe Danone* v *Commission*, cited in paragraph 65 above, paragraphs 61 and 62). In that context, it must be borne in mind that the Guidelines are without prejudice to the assessment of the fine by the Community judicature when it exercises that unlimited jurisdiction (Joined Cases T-49/02 to T-51/02 *Brasserie nationale and Others* v *Commission* [2005] ECR II-3033, paragraph 169).

214 It is therefore appropriate for the Court to exercise its unlimited jurisdiction, as BASF has requested it to examine the question of the amount of the fine imposed.

215 In that regard, the Court must examine, as a preliminary matter, the Commission's assertion in the defence in Case T-111/05 that a fresh calculation of the amount of the fines necessarily entails a change in the division into categories of the European producers. That assertion is based on the fact that the Decision made that division into categories by reference to the global market shares of the undertakings which

were parties to the infringement in 1997, the last full year of the infringement. On the basis of that assessment, UCB and Akzo Nobel were placed in the third category (with market shares of 13.4% and 12% respectively), while BASF was placed in the fourth category, with a market share of 9.1% (see paragraph 15 above).

216 However, since the only infringement to be considered is the one relating to the EEA market (see paragraph 210 above), the market shares to be taken into account for the purposes of dividing the European producers into categories are those relating to that market. None the less, such a modification does not alter the classification of the undertakings by category or the starting amounts determined by reference to the gravity of the infringement. It is apparent from recital 44 to the Decision that in 1997 Akzo Nobel and UCB held 28.9% and 28.5% of the European market respectively, whereas BASF's share came to 20.9%. That configuration of market shares means that it is correct to maintain the division into categories made by the Commission, with Akzo Nobel and UCB in the same category and BASF in the lower category.

217 The general level of the starting amounts must remain the same as those set out at recital 202 to the Decision. Those amounts were fixed on the basis of the very serious nature, both at the global level and at the European level, of the unlawful conduct adopted and also of the relatively low value of the European market for choline chloride (EUR 52.6 million in 1997) and those factors continue to be relevant even though the only infringement to be taken into account is the one relating to the EEA.

218 The starting amount for the gravity of the infringement fixed for BASF must therefore remain unaltered at EUR 18.8 million.

219 As regards the duration of BASF's participation in the European arrangements, it follows from recitals 101, 102, 105 and 206 to the Decision that it began on 29 November 1994, at a meeting in Amersfoort (Netherlands) and that it ended on

30 September 1998. In that regard, the Court notes that the approach proposed by the Commission, which consists in increasing the starting amount by 10% for each full year and by 5% for each additional period of six full months, may give rise to considerable disparities between the applicants in the circumstances of the present case. As BASF's participation in the infringement lasted for 3 years and 10 full months, if the Court were to apply an increase of 5% in order to take those 10 months into account it would ignore the four additional months. The Court also notes that in the present case it has precise evidence of the duration of each applicant's participation in the infringement and that it is therefore able to calculate their fines in a way that reflects the precise duration of that participation and thus makes the fines more proportionate.

220 Thus, in the exercise of its unlimited jurisdiction, the Court considers that it should apply an increase of 38% to take account of the period of 3 years and 10 months of BASF's participation in the infringement.

221 The basic amount of BASF's fine is therefore fixed at EUR 25.944 million. That amount must be increased by 50% for a repeated infringement (see paragraph 18 above), which brings the amount of the fine to EUR 38.916 million.

222 The final amount of BASF's fine will be fixed following the reduction, under the head of cooperation, of 10% for not substantially disputing the accuracy of the facts. On the other hand, as regards the evidence supplied by BASF under the head of cooperation and for which it was given an additional reduction of 10% (see paragraph 87 above), it must be borne in mind that where an undertaking makes available to the Commission information concerning actions for which it could not have been required to pay a fine under Regulations No 17 or No 1/2003, that does not amount to cooperation falling within the scope of the 1996 Leniency Notice (*Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, cited in paragraph 108 above, paragraph 297). Since that evidence related exclusively to the global arrangements, whereas the information on the European arrangements

which BASF provided was only of minimal value (see paragraph 116 above), since the infringement relating to the global arrangements has been held to be time-barred (see paragraph 210 above) and since, consequently, BASF is not required to pay any fine in respect of those arrangements, it can no longer benefit from the reduction of 10% which it had been granted under that head.

223 The amount of BASF's fine must therefore be set at EUR 35.024 million.

7. *UCB's second plea, alleging incorrect application of the 1996 Leniency Notice*

Arguments of the parties

224 UCB maintains that the distinction that must be drawn between the global arrangements and the European arrangements would have repercussions on the application to it of the 1996 Leniency Notice. More specifically, as UCB was the first undertaking to report the secret cartel at Community level (see paragraph 19 above) and to have fulfilled all the other conditions laid down in section B of the 1996 Leniency Notice, it believes that it is entitled to a reduction of between 75 and 100% of the amount of the fine that would otherwise have been imposed on it.

225 UCB claims that the new Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the 2002 Leniency Notice', which replaces the 1996 Leniency Notice, states that the Commission will grant immunity to any undertaking which is the first to submit evidence which may enable the Commission find an infringement of Article 81 EC. The standard of protection of fundamental rights in the Community legal order requires the application of the principle of

retroactivity *in mitius*, a general principle of law which is internationally recognised and the corollary of the principle of non-retroactivity of laws which increase a penalty. The Commission is required to apply that principle in any procedure capable of leading to penalties under the competition rules. It follows that the Commission ought to have applied section A of the 2002 Leniency Notice as a softer 'law' by comparison with section B of the 1996 Leniency Notice, in that it introduces complete immunity without leaving the Commission any discretion as to the amount of the reduction, as the 1996 Leniency Notice did. The application of the 2002 Leniency Notice would therefore have given rise to complete immunity from the fine imposed on UCB.

226 In UCB's submission, the concept of retroactivity of the *lex mitior* encompasses the amendment of any specific provision which an authority intends to apply against a person, such as the Commission notices on fines imposed in competition cases. That principle also prevails over point 28 of the 2002 Leniency Notice, which limits its application to the period after 14 February 2002. The fact that the legitimate expectation which UCB enjoyed when it cooperated was based on the 1996 Leniency Notice does not serve to preclude the application of the *lex mitior* principle.

227 In any event, the application of the 1996 Leniency Notice ought to have led the Commission not to impose a fine on UCB, since it was the first to provide information about the European cartel before the Commission had issued any request, at a time when the Commission was wholly unaware of that cartel.

228 The Commission contends that this plea constitutes in reality an analysis of the consequences to be drawn in the event that UCB's first plea should be held to be well founded. It therefore refers to its arguments relating to that plea and submits that the present plea must be rejected.

229 In the alternative, the Commission acknowledges that if the applicants' activities had not formed part of a single and continuous infringement, UBC would have received a reduction of at least 75% of its fine. In that case, other aspects of the calculation of the amount of the fine would have been altered, such as duration, attenuating and aggravating circumstances and the turnover taken into account for the purpose of the differentiated treatment.

230 As regards the principle of the retroactive application of the *lex mitior*, the Commission submits that while it is true that that is a general principle in criminal law, the fact remains that decisions imposing fines in competition cases are not of a criminal nature. The case-law does not confirm the applicant's argument concerning the mandatory retroactive application of the *lex mitior* in competition cases. Furthermore, the application of that principle presupposes a change in the legal basis for the calculation of the fine, that is to say of Article 15(2) of Regulation No 17, which was not amended by the 2002 Leniency Notice.

231 The Commission has a discretion when determining the amount of fines and that discretion is defined by the Leniency Notices. The case-law has confirmed that, while those notices remain within the framework of Regulation No 17, the Commission has a wide scope for manoeuvre when determining the level of fines responding to the needs of its competition policy. Furthermore, the Commission binds itself in the exercise of that discretion only for so long as the applicable notice is in force. The Commission observes in that regard that the 2002 Leniency Notice replaced the 1996 Leniency Notice from 14 February 2002. However, the legitimate expectation which UCB enjoyed is limited by the application *ratione temporis* of each notice, in this instance the 1996 Leniency Notice.

232 In any event, the Commission expresses doubt as to the generally more favourable nature of the 2002 Leniency Notice by comparison with the 1996 Leniency Notice. That nature cannot be examined on the basis of a selective assessment of the

provisions of the 2002 Leniency Notice. Were that not so, the Commission would be required to apply that notice retroactively solely with respect to undertakings which find it favourable to them, which would jeopardise the Commission's policy.

Findings of the Court

The application of the *lex mitior*

233 It follows from the case-law that the principle of non-retroactivity does not preclude the application of guidelines which, *ex hypothesi*, have the effect of increasing the level of the fines imposed for infringements committed before they were adopted, on condition that the policy which they implement was reasonably foreseeable at the time when the infringements concerned were committed (*Dansk Rørindustri and Others* v *Commission*, cited in paragraph 91 above, paragraphs 202 to 232).

234 Consequently, the fact that the Commission is entitled, albeit conditionally, to apply retroactively, to the detriment of those concerned, rules of conduct designed to produce external effects, such as the Guidelines, means that it is under no obligation to apply the *lex mitior*.

The calculation of UCB's fine

235 For the purposes of calculating UCB's fine, it is appropriate to refer first of all to the findings set out at paragraphs 212 to 217 above.

236 Next, the fact that the Commission's findings as to the single and continuous nature of the infringements are incorrect has an influence on the amount of the fine imposed on UCB by reference to the 1996 Leniency Notice. As the Commission acknowledges (see paragraph 229 above), UCB would have benefited from the provisions of section B of the 1996 Leniency Notice, entitled 'Non-imposition of a fine or a very substantial reduction in its amount', if the global arrangements had been considered to be a separate infringement from the European arrangements and therefore time-barred. In those circumstances, it must be noted that UCB reported the European cartel to the Commission and satisfied the other conditions laid down in section B of the 1996 Leniency Notice (see paragraph 237 below).

237 Section B of the 1996 Leniency Notice provides:

'An [undertaking] which:

(a) informs the Commission about a secret cartel before the Commission has undertaken an investigation, ordered by decision, of the [undertakings] involved, provided that it does not already have sufficient information to establish the existence of the alleged cartel;

(b) is the first to adduce decisive evidence of the cartel's existence;

(c) puts an end to its involvement in the illegal activity no later than the time at which it discloses the cartel;

(d) provides the Commission with all the relevant information and all the documents and evidence available to it regarding the cartel and maintains continuous and complete cooperation throughout the investigation;

(e) has not compelled another [undertaking] to take part in the cartel and has not acted as an instigator or played a determining role in the illegal activity,

will benefit from a reduction of at least 75% of the fine or even from total exemption from the fine that would have been imposed if they had not cooperated.'

238 In those circumstances, the starting amount of EUR 12.9 million, determined by the Commission for the gravity of the infringement (see paragraph 15 above), must be increased by 45% to reflect the duration of the infringement of approximately four and a half years (from 14 March 1994 until 30 September 1998). The basic amount must therefore be fixed at EUR 18.705 million.

239 Since no aggravating circumstance has been identified as against UCB, the basic amount must be reduced by a percentage under the head of cooperation. For the purpose of determining that percentage, it must be borne in mind that UCB reported the European cartel, which enabled the Commission to impose significant penalties, which it would not have been able to do solely on the basis of the global

cartel, which was time-barred when the Commission first took action (see paragraph 9 above). Furthermore, it follows from recitals 102, 105, 107, 108, 109, 114, 118, 119 and 120 to the Decision that the nine meetings disclosed by UCB covered the entire duration of the infringement relating to the EEA, whereas the six meetings reported by Akzo Nobel were merely intermediate, as stated at recitals 110, 112, 113, 115, 116 and 117.

240 None the less, UCB reported a little under two thirds of the meetings. In addition, although UCB acted on its own initiative, the fact remains that on the date on which it supplied that information (26 July 1999) it was already aware that the Commission had initiated action in respect of the global choline chloride cartel.

241 In those circumstances, a reduction of 90% must be applied to the basic amount, as fixed at paragraph 238 above, which brings the amount of the fine to EUR 1.870 million.

242 As the third plea was raised by UCB in the alternative in case the Court should uphold the Commission's theory that the global and European arrangements constituted a single and continuous infringement (see paragraph 35 above), there is no longer any need to adjudicate on that plea. Even though UCB also claimed in the context of that plea that no fine should be imposed on it, the fact remains that its argument relies, first, on the existence of a single and continuous infringement, which the Court has not upheld; second, on the application of the 2002 Leniency Notice (see paragraph 225 above); and, third, on the fact that in the absence of cooperation on its part the Commission would not have been able to impose any fine. The argument based on the application of the 2002 Leniency Notice has already been rejected (see paragraphs 233 and 234 above), whereas the Court, in the exercise of its unlimited jurisdiction, has assessed the value of UCB's cooperation and granted it a reduction of 90% of the amount of the fine that would otherwise have been imposed.

243 The amount of UCB's fine must therefore be fixed at EUR 1.870 million.

244 On the basis of the foregoing, the Court must, first, annul Article 1(b) and (f) of the Decision in so far as it concerns the infringement which the applicants are alleged to have committed during a period before 29 November 1994 in the case of BASF and before 14 March 1994 in the case of UCB; second, fix the amounts of the fines imposed on BASF and UCB at EUR 35.024 million and EUR 1.870 million respectively; and, third, dismiss the remainder of the applications.

Costs

245 Under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that each party bear its own costs.

246 In Case T-101/05, as BASF has failed on a number of pleas, but been successful in its fifth plea, the parties must be ordered to bear their own costs.

247 In Case T-111/05, as the Commission has failed on most of its heads of claim, it must be ordered, in addition to bearing its own costs, to pay 90% of the costs incurred by UCB.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Disjoins Case T-112/05 *Akzo Nobel and Others* v *Commission* from Cases T-101/05 and T-111/05 for the purposes of the judgment;**

2. **Annuls Article 1(b) and (f) of Commission Decision 2005/566/EC of 9 December 2004 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-2/37.533 — Choline Chloride) in so far as it makes a finding of infringement against BASF AG and UCB SA during the period before 29 November 1994 in BASF's case and before 14 March 1994 in UCB's case;**

3. **In Case T-101/05, sets the fine imposed on BASF at EUR 35.024 million;**

4. **In Case T-111/05, sets the fine imposed on UCB at EUR 1.870 million;**

5. **Dismisses the remainder of the applications;**

6. In Case T-101/05, orders the parties to bear their own costs;

7. In Case T-111/05, orders the Commission, in addition to bearing its own costs, to pay 90% of the costs incurred by UCB.

Meij Forwood Papasavvas

Delivered in open Court in Luxembourg on 12 December 2007.

E. Coulon A.W.H. Meij

Registrar Acting President

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