COMMISSION DECISION

of 9 December 2004

relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No C.37.533 — Choline Chloride)

(notified under document number C(2004) 4717)

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

(Text with EEA relevance)

(2005/566/EC)

On 9 December 2004, the Commission adopted a decision relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement. In accordance with the provisions of Article 30 of Council Regulation (EC) No 1/2003 [1], the Commission herewith publishes the names of the parties and the main content of the decision, including any penalties imposed, while having regard to the legitimate interest of undertakings in the protection of their business interests. A non-confidential version of the full text of the decision can be found in the authentic languages of the case and in the Commission's working languages at DG COMP's website at the following address: http://europa.eu.int/comm/competition/index_en.html

I. SUMMARY OF THE INFRINGEMENT

1. Introduction

(1) This Decision is addressed to Akzo Nobel N.V., Akzo Nobel Nederland B.V., Akzo Nobel Chemical Internationals B.V., Akzo Nobel Chemicals B.V. and Akzo Nobel Functional Chemicals B.V., jointly and severally (hereinafter Akzo Nobel), BASF A.G. (hereinafter BASF), Bioproducts Incorporated (hereinafter Bioproducts), Chinook Group Limited Partnership and Chinook Group Limited, jointly and severally (hereinafter Chinook), DuCoa L.P. (hereinafter DuCoa) and UCB S.A. (hereinafter UCB).

(2) The addressees participated in a single and continuous infringement of Article 81(1) of the Treaty establishing the European Community (hereinafter the EC Treaty or the Treaty) and, from 1 January 1994, Article 53(1) of the Agreement on the European Economic Area (hereinafter EEA Agreement), covering the whole of the EEA territory.

(3) The Commission initiated an investigation into the global choline chloride industry after it received a leniency application in April 1999 from the US supplier Bioproducts. The investigation covered the period from 1992 to the end of 1998 (hereafter referred to as the period of investigation).

[1] OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

2. The market for choline chloride

(4) Choline chloride belongs to the B-complex group of water-soluble vitamins (vitamin B4). It is mainly used in the animal feed industry as a traditional feed additive, especially for poultry and swine, to increase growth, reduce mortality rates, increase feed efficiency, increase egg production and improve meat quality.

(5) At the start of the period of investigation, choline chloride was produced mainly in Europe and North America (United States and Canada), although there was also choline chloride production capacity in China, India, Japan, Korea and Taiwan. The North American producers were exporting to Central and South America, Europe, the Far East and South-East Asia. The European producers were starting to export to Central and South America, Africa, South-East Asia and the Far East. European and North American producers also had production facilities in different areas of the world and were expanding local production in order to cut transportation and storage costs and better penetrate local markets. In particular, BASF established production facilities in Mexico, Brazil and Thailand, Akzo Nobel and UCB in China, Ducoa in Mexico and Chinook in Singapore.

(6) The size of the worldwide market for choline chloride was estimated at EUR 183,7 million in 1997, the last full year of the infringement, the EEA accounting for EUR 52,6 million. During the period of investigation, the producers involved in the infringement controlled more than 80 % of the world market. The European producers concerned controlled close to 80 % of the EEA area.

3. **Description of the cartel**

(7) In so far as the EEA is concerned, the choline chloride cartel operated at two different, but closely related levels, the global level and the European level. At the global level, all producers subject to this proceeding participated in anti-competitive activities concerning the EEA between June 1992 and April 1994. These activities included the setting and increase of worldwide prices, the allocation of worldwide markets, the control of distributors and converters and the exchange of commercially sensitive information.

(8) The North American producers did not participate in a series of further anti-competitive meetings strictly among the European producers to coordinate their behaviour on the European market. These meetings took place in the period between March 1994 and October 1998. Activities included the setting and increase of prices (both for the EEA as a whole, for particular national markets and for individual customers), the allocation of individual customers among the participating undertakings, the allocation of markets shares for each undertaking for the EEA market as a whole, the control of distributors and converters and the exchange of commercially sensitive information.

(9) The Commission has found that the arrangements at the global and European levels together were part of an overall scheme which laid down the lines of action in the EEA of the members of the cartel and restricted their individual commercial conduct in order to pursue a single anti-competitive economic aim, namely the distortion of normal competitive conditions in the EEA for choline chloride. The North American producers participated in this scheme for some time (between October 1992 and April 1994, a period of one year and six months) and the European producers for the entire period (between October 1992 and September 1998, a period of five years and eleven months).

II. **FINES**

1. **Limitation period**

(10) The North American producers ended their participation in the infringement at the end of the global meeting which took place between 14 and 20 April 1994. The first action taken by the Commission to investigate the infringement was on 26 May 1999. As this action took place more than five years after the North American producers had ended their participation to the infringement [1], no fines can be imposed on the North American producers, Bioproducts, Chinook and DuCoa.

[1] See Article 1 of Council Regulation (EC) No 2988/74 (OJ L 319, 29.11.1974, p. 1) and Article 25 of Council Regulation (EC) No 1/2003.

2. **Basic amount**

Gravity

(11) The infringement in this case consisted primarily of secret collusion among cartel members to fix prices in the EEA, supported by market sharing and agreed actions against competitors there. These kinds of horizontal restrictions are, by their very nature, among the worst kinds of violations of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement. Taking into account the nature of the infringement committed and the fact that it covered the whole of the common market and, following its creation, the EEA in its entirety, the Commission considers that Akzo Nobel, BASF and UCB have committed a very serious infringement of Article 81(1) of the Treaty and 53(1) of the EEA Agreement. In the Commission's view these factors are such that the infringement must qualify as very serious, even if the actual impact of the infringement cannot be measured.

Differential treatment

(12) Within the category of very serious infringements, the scale of likely fines makes it possible to apply differential treatment to undertakings in order to take account of the effective economic capacity of the offenders to cause significant damage to competition. Taking into account that the infringement started at the global level, with the participation of North American companies which agreed, *inter alia*, to withdraw from the European market, the Commission considers it appropriate in this case to use the global market shares of the undertakings participating in the infringement to determine their respective weight. Chinook was the largest market operator in the world, with a market share of 19,3 %. It is therefore placed in a first category. DuCoa, with a market share of 16,3 %, is placed in a second category. UCB, Bioproducts and Akzo Nobel, with market shares of 13,4 %, 12,2 % and 12 % respectively, are placed in a third category. Finally, BASF, with a market share of 9,1 %, is placed in a fourth category.

Sufficient deterrence

(13) Within the category of very serious infringements, the scale of likely fines also makes it possible to set the fines at a level which ensures that they have sufficient deterrent effect, taking into account the size of each undertaking. In this respect, the Commission notes that in 2003, the most recent financial year preceding this Decision, the turnover of UCB was EUR 3 billion, that of Akzo Nobel EUR 13 billion and that of BASF EUR 33,4 billion. Accordingly, the Commission considers it appropriate to multiply the fine for Akzo Nobel with a factor of 1,5 and that of BASF with a factor of 2.

Duration

(14) Akzo Nobel N.V, together with Akzo Nobel Nederland B.V., Akzo Nobel Chemicals International B.V., Akzo Nobel Chemicals B.V. and Akzo Nobel Functional Chemicals B.V., BASF A.G and UCB S.A participated in the infringement at least from 13 October 1992 until 30 September 1998, a period of five years and eleven months.

3. **Aggravating circumstances**

Recidivism

(15) At the time the infringement took place, BASF had already been subject to previous Commission prohibition decisions for cartel activities in Decisions 69/243/EEC [1] and 94/599/EC [2]. The fact that BASF repeated the same type of conduct, albeit in a sector other than those in which it had previously incurred penalties, shows that the first penalties did not prompt BASF to change its conduct throughout the undertaking. This constitutes for the Commission an aggravating circumstance. This aggravating circumstance justifies an increase of 50 % in the basic amount of the fine to be imposed on BASF. A 50 % rate is the normal rate employed by the Commission in cases involving recidivism.

4. **Attenuating circumstances**

Early termination of the infringement

(16) BASF and UCB claim a reduction for early termination. Cartel infringements are by their very nature hard-core anti-trust violations. Participants in these infringements normally realise very well that they are engaged in illegal activities. In the Commission's view, in such cases of deliberate illegal behaviour, the fact that a company terminates this behaviour before any intervention of the Commission does not merit any particular reward other than that the period of infringement of the company concerned will be shorter than it would otherwise have been.

Non-implementation

(17) Akzo Nobel, BASF and UCB claim that the infringement or elements thereof were not, not fully or not effectively implemented. In the Commission's view, the arrangements, in so far as they pertained to the EEA market, were implemented, at least by the European producers. They were implemented in particular in respect of the key elements of prices and allocation of clients in Europe and the control of converters, even if such implementation may have been less than fully successful in achieving an actual impact on the market because of remaining competition on that market. None of the three producers concerned have provided any indication that they had any desire, and undertook any action, to deliberately abstain from implementing the agreements they concluded in respect of the EEA during the period in which they adhered to them.

Length of the investigation

(18) BASF argues that a reduction should be granted because of the long duration of the investigation. The Commission observes that in general there is no requirement on the Commission to reduce the fine because of the length of an investigation. The normal limitation periods spelled out in Article 25 of Regulation (EC) No 1/2003 apply. In particular, paragraph 5 of that Article states that the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a periodic penalty payment. This period is far from having expired in this proceeding.

Crisis situation

(19) BASF argues that a reduction should be granted for the alleged fact that the choline chloride industry was in a crisis situation. The Commission observes that the fact that an undertaking may not happen to make profits on a certain commercial activity is no licence for it to enter into secret collusion with competitors to cheat customers and other competitors. As a general rule, cartels risk coming into play not when undertakings make large profits but precisely when a sector encounters problems.

Disciplinary measures and compliance programme

(20) BASF argues that it should receive a reduction for having taken disciplinary measures against employees involved in the infringement and for having introduced a compliance programme. While the Commission welcomes measures taken by undertakings to avoid cartel infringements in the future, such measures cannot change the reality of the infringement and the need to sanction it appropriately in this Decision.

[1] OJ L 195, 7.8.1969, p. 11.
[2] OJ L 239, 14.9.1994, p. 14.

Effective cooperation outside of the 1996 Leniency Notice

(21) UCB was the first undertaking to voluntarily inform the Commission of the fact that in addition to meetings at the global level, the European producers had held a number of meetings among themselves at the European level. The evidence voluntarily provided by UCB on these meetings allowed the Commission to determine the duration of the infringement as five years and eleven months. Had the Commission remained aware only of the arrangements at the global level, the duration of the infringement would have been one year and six months. In order to reward UCB for this increase in the duration, the Commission considers it appropriate to grant UCB a reduction for attenuating circumstances equal to 25,8 % of the basic amount. This reduction corresponds to the 40 % increase in the basic amount resulting from a duration of the infringement of five years and eleven months instead of one year and six months.

5. **Application of the 1996 Leniency Notice**

Significant reduction of a fine ('Section D': reduction from 10 % to 50 %)

(22) Akzo Nobel, BASF and UCB all co-operated with the Commission at different stages of the investigation with a view to receiving the favourable treatment set out in the 1996 Leniency Notice, which applies in this proceeding [1].

BASF

(23) BASF was the third company to voluntarily submit evidence on the global arrangements. When BASF submitted its evidence, the Commission already had at its disposal evidence regarding these arrangements submitted by Chinook and by Bioproducts. Irrespective of the value of the evidence submitted by Chinook, Bioproducts' evidence in itself was clearly sufficient to constitute decisive evidence of the cartel's existence within the meaning of section B of the 1996 Leniency Notice. Therefore, when BASF made its submissions, it was not the first undertaking to provide decisive evidence of the cartel's existence to the Commission. As a result, sections B and C of the 1996 Leniency Notice do not apply to BASF, nor to the other two European producers.

(24) As to its substance, the evidence submitted by BASF, which was limited to the global arrangements, may be said to have materially contributed to establishing the existence of the infringement within the meaning of section D of the 1996 Leniency Notice, which provides for possible reductions of between 10 % and 50 %. But the value of these submissions remained quite limited taking into account the extensive evidence on the global arrangements already in the Commission's possession.

(25) After receiving the Statement of Objections, BASF informed the Commission that it did not substantially contest the facts on which the Commission based its allegations, except for certain factual corrections which the Commission has accepted.

(26) Taking into account the different elements of cooperation mentioned, the Commission considers that BASF is entitled to a 20 % reduction of the fine that would otherwise have been imposed.

UCB

(27) UCB voluntarily informed the Commission of nine cartel meetings held at the European level, from March 1994 until October 1998. It mentioned the participants and provided a brief general description of the contents of these meetings. It also added contemporaneous reports of the first two of these cartel meetings, which took place in 1994. At the time when UCB made this submission, the Commission was not aware of any meetings at the European level. Together, this evidence constituted a significant material contribution to the establishment of the infringement, even if no written contemporaneous evidence was provided for the period from 1995 to 1998.

(28) After receiving the Statement of Objections, UCB informed the Commission that it did not substantially contest the facts on which the Commission based its allegations, except for certain factual corrections which the Commission has accepted. However, in the same submission UCB claimed that, although it participated in a number of meetings at the global level, it was never a party to any agreement at the global level. In the Decision, the Commission has rejected this claim as unfounded. Therefore, as UCB did in fact, after receiving the Statement of Objections, contest an essential element of the facts on which the Commission based its allegations, it does not receive any reduction for not contesting the facts on which the Commission bases its allegations.

(29) Taking into account the different elements of cooperation mentioned, the Commission considers that UCB is entitled to a 30 % reduction of the fine that would otherwise have been imposed.

[1] According to point 28 of the 2002 Leniency Notice, from 14 February 2002, the 2002 Notice replaces the 1996 Notice for all cases in which no undertaking has contacted the Commission in order to take advantage of the favourable treatment set out in that notice. As in this case several undertakings applied for leniency with the Commission before 14 February 2002, the 1996 Leniency Notice applies.

Akzo Nobel

(30) In January 2002, Akzo Nobel submitted a voluntary report on the European arrangements. This report gave a detailed description of the contents of the arrangements at the European level, including considerable information that UCB had not provided. However, the fact that Akzo Nobel filed this report two and a half years after UCB had made its submission on these arrangements should be taken into account in the leniency reduction granted.

(31) After receiving the Statement of Objections, Akzo Nobel informed the Commission that it did not substantially contest the facts on which the Commission based its allegations, except for certain factual corrections which the Commission has accepted.

(32) Taking into account the different elements of cooperation mentioned, the Commission considers that Akzo Nobel is entitled to a 30 % reduction of the fine that would otherwise have been imposed. This assessment takes into account, on the one hand, that Akzo Nobel's report on the European arrangements was about as valuable to the Commission as the information and evidence on those arrangements supplied earlier by UCB, but arrived two and a half years later and, on the other hand, that Akzo Nobel, as opposed to UCB, did not contest the facts on which the Commission based its allegations. As a result, both undertakings merit the same percentage reduction.

6. **Decision**

(33) The following undertakings infringed Article 81(1) of the Treaty and, from 1 January 1994, Article 53(1) of the EEA Agreement by participating, for the periods indicated, 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:

(a) Akzo Nobel N.V, together with Akzo Nobel Nederland B.V., Akzo Nobel Chemicals International B.V., Akzo Nobel Chemicals B.V. and Akzo Nobel Functional Chemicals B.V., from 13 October 1992 until 30 September 1998;

(b) BASF A.G., from 13 October 1992 until 30 September 1998;

(c) Bioproducts Incorporated, from 13 October 1992 until 14 April 1994;

(d) Chinook Group Limited Partnership, together with Chinook Group Limited, from 13 October 1992 until 14 April 1994;

(e) DuCoa, L.P., from 13 October 1992 until 14 April 1994;

(f) UCB S.A., from 13 October 1992 until 30 September 1998.

(34) For these infringements, the following fines are imposed:

(a) Akzo Nobel N.V, Akzo Nobel Nederland B.V., Akzo Nobel Chemicals International B.V., Akzo Nobel Chemicals B.V. and Akzo Nobel Functional Chemicals B.V., jointly and severally	EUR 20,99 million;
(b) BASF AG	EUR 34,97 million;
(c) UCB SA	EUR 10,38 million.

(35) The undertakings listed in recital 33 shall immediately bring their infringement to an end, insofar as they have not already done so. They shall refrain from repeating any act or conduct as the infringement found in this case, and from any act or conduct having the same or similar object or effect.