



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 9.12.2004

COMMISSION DECISION

of

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

(Case COMP / E-2 / 37.533 - Choline Chloride)

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

(Text with EEA relevance)

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty¹ and, in particular, Articles 7(1) and 23(2) thereof,

Having regard to the Commission Decision of 22 May 2003 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 19(1) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty², Article 27(1) of Regulation (EC) No 1/2003 and Commission Regulation (EC) No 2842/98 of

(*) The square brackets marked with an asterisk denote confidential information which has been deleted from the text.

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

² OJ 13, 21.2.1962, p. 204/62. Regulation as last amended by Regulation (EC) No 1216/1999 (OJ L 148, 15.6.1999, p. 5).

22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty³,

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

Having regard to the final report of the Hearing Officer in this case⁴,

WHEREAS:

I. Introduction

- (1) This Decision is addressed to the following undertakings, producers of choline chloride:

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 (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”);

UCB S.A. (hereinafter “UCB”).

- (2) This Decision concerns an infringement by the addressees of Article 81(1) of the Treaty establishing the European Community and, from 1 January 1994, Article 53(1) of the Agreement on the European Economic Area, covering the whole of the European Economic Area.
- (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”).

³ OJ L 354, 30.12.1998, p. 18.

⁴ OJ [...], [...], p. [...].

II. The industry subject to the proceeding

1. THE PRODUCT

- (4) Choline chloride is a part of the chemical family Quaternary Ammonium Salt. Its chemical formula is $(\text{CH}_3)_3\text{N}(\text{Cl})(\text{CH}_2\text{CH}_2\text{OH})$. Choline chloride is made by reacting trimethylamine with ethylene oxide and hydrochloric acid.
- (5) Choline chloride is a member of the B-complex group of water-soluble vitamins (vitamin B4). Choline chloride 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.
- (6) Choline chloride is marketed in either an aqueous solution of 70% choline chloride or is sprayed on a dry cereal (or silica) carrier for a choline chloride potency of 50% to 60%. Some producers produce both varieties but are particularly strong in one variety while other producers have a tolling agreement whereby the tolling company converts for example liquid choline chloride into choline chloride fixed on a carrier, which it then returns to the producer of the liquid choline chloride.
- (7) Over 95% of choline chloride is sold as unrefined feed grade which is combined in pre-mixes and animal feeds. About two-third of this choline chloride is used for poultry feed, with swine feed making up the bulk of the remainder. The remaining 5% of choline chloride is refined further to a higher purity food grade (pharmaceutical grade) which is used for the preparation of vitamins, nutrient supplements and infant formulae. Choline chloride also has minor uses as a catalyst, a curing agent and as a neutralising agent. Demand in these applications is very low. Choline chloride is the most widely used – most economical and easy to handle – form of choline for the animal feed industry. Choline is used to maintain commercial production levels of poultry and swine. The absence of choline would lead to drastically reduced growth rates, longer growth periods, smaller animals, and lower yields.

2. PRODUCERS SUBJECT TO THE PROCEEDING

- (8) The following undertakings involved in the production and supply of choline chloride are subject to this proceeding:

2.1. Akzo Nobel

- (9) The Akzo Nobel group of companies is active in the areas of healthcare, coatings, chemicals, and, until the end of 1999, was also active in the area of fibres. The group's parent company is Akzo Nobel N.V., Arnhem, the Netherlands.
- (10) In the period under investigation, Akzo Nobel had two choline chloride production facilities in Europe, one in Italy (Marano), with an estimated capacity in 1992 of 15 000 metric tonnes and one in the Netherlands (Delfzijl), with an estimated

production capacity in 1992 of 7 500 metric tonnes⁵. In 1996, Akzo Nobel also created a production facility for choline chloride in China (Yixing)⁶.

- (11) The choline chloride activities in Italy are performed by Akzo Nobel Chemicals SpA, a subsidiary of Akzo Nobel Chemicals International B.V., which in turn is a subsidiary of Akzo Nobel N.V. The choline chloride activities in the Netherlands are performed by Akzo Nobel Functional Chemicals B.V., a subsidiary of Akzo Nobel Chemicals B.V., which in turn is a subsidiary of Akzo Nobel Nederland B.V. The latter is a wholly owned subsidiary of Akzo Nobel N.V. All of these subsidiaries were, in the period under investigation, directly or indirectly 100% owned by Akzo Nobel N.V.
- (12) The reported consolidated worldwide turnover of Akzo Nobel N.V. in 2003, the most recent financial year preceding this Decision, was EUR 13 thousand million⁷. The reported worldwide consolidated turnover of Akzo Nobel for choline chloride in 1997, the last full year of the infringement, was EUR 23 million⁸. The reported consolidated turnover of Akzo Nobel for choline chloride in the EEA in 1997 was EUR 15,1 million⁹.

2.2. BASF

- (13) BASF AG, the headquarters of which are in Ludwigshafen, Germany, is the ultimate holding company of the BASF Group, a corporate structure covering 164 wholly-owned subsidiaries and six joint ventures that are at least 50 percent owned by BASF. The group's product range includes high-value chemicals, plastics, colorants and pigments, dispersions, automotive and industrial coatings, agricultural products and fine chemicals as well as crude oil and natural gas. The Health and Nutrition segment of BASF includes the Fine Chemicals Division, which in turn includes Vitamins (including choline chloride) for human and animal nutrition.
- (14) During the period under investigation, BASF was one of the principal European manufacturers and marketers of choline chloride with production facilities in Germany (Ludwigshafen), Mexico, Brazil and Thailand. Its estimated production capacity of choline chloride in 1992 in Germany was 15 000 metric tonnes¹⁰.
- (15) The worldwide turnover of BASF AG in 2003 was EUR 33,4 thousand million¹¹. The reported worldwide consolidated turnover of BASF for choline chloride in 1997 was EUR 16,9 million¹². The reported consolidated turnover of BASF for choline chloride in the EEA in 1997 was EUR 9,9 million¹³.

⁵ Bioproducts' submission of 7 May 1999 [1999]. Page numbers in square brackets refer to the scanned file on CD-ROM.

⁶ Akzo Nobel's submission of 8 January 2002 [5553].

⁷ Homepage: www.akzonobel.com.

⁸ Akzo Nobel's submission of 21 February 2003 [5974].

⁹ Akzo Nobel's submission of 21 February 2003 [5975].

¹⁰ Bioproducts' submission of 7 May 1999 [1999], UCB's submission of 26 July 1999 [1703].

¹¹ Homepage : www.corporate.basf.com.

¹² BASF's submission of 24 February 2003 [5980].

¹³ BASF's submission of 24 February 2003 [5980].

2.3. Bioproducts

- (16) Bioproducts Incorporated is a subsidiary of Mitsui and Co. Inc. (USA) and operates from its Fairlawn, Ohio headquarters. Bioproducts is one of the three principal North American producers of choline chloride. Bioproducts operates plants in California, Kentucky, Louisiana, and Missouri. Its main product groups are pet foods, nutritional dairy products and choline chloride. Its estimated production capacity of choline chloride in 1992 at its US plants was 14 000 metric tonnes¹⁴.
- (17) Bioproducts had no sales of choline chloride in Europe prior to 1990. Bioproducts started exporting choline chloride to Europe as from 1990, but its activity was limited to spot sales¹⁵. The reported worldwide consolidated turnover of Bioproducts for choline chloride in 1997 was EUR 23,6 million¹⁶.

2.4. Chinook

- (18) The Chinook Group of companies specialises in the production of methylamine, choline and derivative products. Chinook Group is the only Canadian manufacturer of choline chloride and is one of the three principal North American producers of that product. Its estimated production capacity of choline chloride in Canada was 20 000 metric tonnes in 1992¹⁷.
- (19) At the start of the period of investigation, Chinook Group was a limited partnership organised under the laws of Ontario, Canada, with its principal place of business in Toronto, Canada. It was engaged in the manufacture and sale of choline chloride worldwide. On 30 June 1999, Chinook Group Limited acquired the assets of Chinook Group. On 31 December 2002, Chinook Group Limited transferred all of its assets to Chinook Group Limited Partnership, a limited partnership organised under the laws of Ontario, Canada, with its principal place of business in Toronto, Canada. At that point in time, Chinook Group Limited became a limited partner in Chinook Group Limited Partnership.
- (20) Chinook Group Inc. was in the period of investigation a wholly owned US subsidiary of Chinook Group Limited. Chinook Group Inc.'s principal place of business was in White Bear Lake, Minnesota, USA. It was engaged in the sale of choline chloride. Since the end of the period of investigation, this company has ceased to exist.
- (21) Of the three North American producers, Chinook was the largest exporter to Europe at the start of the 1990s, exporting 1 288 metric tonnes (100%) in 1991 and 1 994 metric tonnes (100%) in the first seven months of 1992¹⁸. The reported worldwide consolidated turnover of Chinook for choline chloride in 1997 was EUR 37,8 million¹⁹.

¹⁴ Bioproducts' submission of 7 May 1999 [1997].

¹⁵ Bioproducts' submission of 7 May 1999 [1818].

¹⁶ Bioproducts' submission of 25 February 2003 [6059].

¹⁷ Bioproducts' submission of 7 May 1999 [1997].

¹⁸ Bioproducts' submission of 7 May 1999 [1998].

¹⁹ Chinook's submission of 23 May 2000 [0754].

2.5. DuCoa

- (22) DuCoa L.P. (an affiliate to DCV Inc.) was originally established as a joint venture between DuPont and ConAgr. Since 1997 it has been owned by a private investment fund. DuCoa was a premix and feed speciality operation with three production facilities; its headquarters were in Highland (Illinois), USA. DuCoa produced marketed premixes, innovative feed additives, animal health products and had a special focus on the growing pet food-premix sector. During the period of investigation, DuCoa was one of the three principal North American producers of choline chloride. Its estimated production capacity of choline chloride in the US in 1992 was 20 000 metric tonnes²⁰.
- (23) In 2001, BCP Ingredients Inc., a subsidiary of Balchem Corporation, acquired the choline animal feed, encapsulated products and human choline nutrient assets of DCV (Wilmington, Delaware, USA) and of its affiliate DuCoa L.P. The latter continues to exist as a legal entity, albeit with no further activity in the choline chloride business.
- (24) The reported worldwide consolidated turnover of DuCoa for choline chloride in 1997 was EUR 21,6 million²¹.

2.6. UCB

- (25) UCB S.A., the headquarters of which are in Brussels, Belgium, is the parent company of the UCB Group, comprised of about one hundred and forty subsidiaries and associated companies, mainly in Western Europe but also in the Americas and in Asia. The group is active in particular in pharmaceuticals and specialty chemicals. In 1992, UCB had production facilities of choline chloride only in Belgium, with an estimated production capacity of 14 000 metric tonnes²². Between 1992 and 1998, UCB increased its production capacity in Belgium for choline chloride and acquired considerable additional production capacity for choline chloride in Spain and China²³.
- (26) The worldwide turnover of UCB S.A. in 2003 was EUR 3 thousand million²⁴. The reported worldwide consolidated turnover of UCB for choline chloride in 1997 was EUR 26,8 million²⁵. The reported consolidated turnover of UCB for choline chloride in the EEA in 1997 was EUR 15 million²⁶.

²⁰ Bioproducts' submission of 7 May 1999 [1997].

²¹ DuCoa's submission of 22 July 1999 [3324].

²² Bioproducts' submission of 7 May 1999 [1999].

²³ UCB's response to the Statement of Objections, page 17.

²⁴ Homepage : www.ucb-group.com

²⁵ UCB's submission of 13 March 2003 [6088].

²⁶ UCB's submission of 13 March 2003 [6088].

3. OTHER ACTORS IN THE INDUSTRY

3.1. Ertisa

- (27) Ertisa S.A. has its headquarters in Madrid, Spain. Ertisa was a wholly owned subsidiary of the group ERCROS up to 1994. It has been a wholly owned subsidiary of the group CEPSA since then.
- (28) Ertisa has been devoted to the production and sale of methylamine and its derivatives since 1976, expanding its field to basic petrochemical products such as cumene, phenol and acetone since 1978 and alphamethylstyrene since 1997.
- (29) In the period of investigation, Ertisa supplied a relatively small amount of choline chloride to the EEA market, in particular Spain, where the company had a 50% market share, and to a much lesser extent Portugal and Italy. Ertisa did not manufacture the choline chloride itself but had, since 1991, a tolling agreement with the company Algrý. Algrý produced choline chloride with trimethylamine obtained from Ertisa and provided choline chloride back to Ertisa. Ertisa's estimated supply capacity of choline chloride in 1992 was 3 500 metric tonnes (100%)²⁷. Due to a major accident on 13 January 1997, Algrý's production plant was closed in June 1997. At that latter point in time, Ertisa sold its choline chloride business (mostly a customer data base) to UCB.
- (30) The reported consolidated turnover of Ertisa for choline chloride in the EEA in 1997 was EUR 1,3 million.

3.2. ICI

- (31) ICI, a large international chemical company with headquarters in the United Kingdom, was a producer of choline chloride until 1998, when its choline chloride business was purchased by the US company Air Products. The reported consolidated turnover of ICI for choline chloride in the EEA in 1997 is estimated at EUR 4,9 million²⁸.

3.3. Converters

- (32) So-called "converters" are companies that receive liquid choline chloride from producers and convert it into choline chloride on a carrier form, either for the account of the producer or for their own account. They are not themselves producers of choline chloride. When producers of choline chloride did not have enough capacity to produce choline chloride on a carrier to satisfy demand, they would sometimes conclude toll conversion agreements with converters (or other producers) whereby the latter would convert the choline chloride for the producers. In addition, converters would often also sell the choline chloride on a carrier for their own account. The large quantities converters purchased, sometimes over extended periods, and their own low cost structure allowed converters, in principle, to sell choline chloride at a competitive price.

²⁷ Bioproducts' submission of 7 May 1999 [1999].

²⁸ Air Products' submission of 18 October 2002 [4399]. See also note 3 to table 2.

- (33) During the period of investigation, there were nine European, one Latin American and four Far Eastern converters. Together, they had approximately 30,500 metric tonnes of production capacity for choline chloride (of which 20,000 metric tonnes was held by the European converters)²⁹. The three major European converters are further described in recitals (34) to (36)³⁰.
- (34) Randstad was a company registered in the Netherlands. It no longer exists. It was a converter and a distributor of choline chloride during the period of investigation. Until the early 1990's Randstad purchased liquid choline chloride from Akzo Nobel. This arrangement with Akzo Nobel was then stopped and instead Randstad started converting for BASF. BASF ended its toll-conversion agreement with Randstad after several years and engaged in a toll conversion agreement with Akzo Nobel, whereby the latter would convert liquid choline chloride from BASF into choline chloride on a carrier.
- (35) Franklin Holland, hereafter also referred to as "Franklin", was also registered in the Netherlands. It was a converter and distributor of choline chloride during the period of investigation. Originally, Franklin was engaged in the marketing and sales of choline chloride (liquid, silica and vegetable) in its own name, probably using exclusively choline chloride produced by Akzo Nobel. In or around 1997 or 1998, Akzo Nobel entered into a toll conversion arrangement with Franklin, after which Franklin worked exclusively for Akzo Nobel and no longer sold choline chloride for its own account. In 1999, Akzo Nobel purchased Franklin and the company ceased its marketing and sales activities. Production was taken over by Akzo Nobel.
- (36) Impextraco is a company registered in Belgium. During the period of investigation, it was a converter and a distributor of choline chloride. Impextraco regularly purchased choline chloride from UCB under a long-term contract.

3.4. European Chemical Industry Council (CEFIC)

- (37) The European Chemical Industry Council, hereafter referred to as "CEFIC", is the European trade association for the chemical sector. It represents, directly or indirectly, about 40 000 large, medium and small chemical producers in Europe, which employ about two million people and account for more than 30% of the world's chemicals production. CEFIC is made up of the national chemical industry federations of 25 countries in Europe and large international producers which are members in their own right.
- (38) One Sector Group of CEFIC is referred to as "Methylamines & Derivatives", the members of which are Air Products, Akzo Nobel, BASF, UCB and Ertisa. The Sector Group's key roles are to promote the quality image of choline chloride and to monitor trends in the use of methylamines and choline chloride. The Sector Group gathers data on choline chloride production of European producers and consolidates such data. Producers regularly meet in official CEFIC meetings. Non-European choline chloride

²⁹ Bioproducts' submission of 7 May 1999 [2002], UCB's submission of 26 July 1999 [1703].

³⁰ BASF's submission of 23 June 1999 [2908-2909], Akzo Nobel's submission of 8 January 2002 [5553-5554], UCB's submission of 18 October 2002 [3348-3349].

producers and European companies that are not producers, such as converters, cannot become members of CEFIC.

4. SIZE, VALUE AND MARKET SHARES

4.1. The geographic scope of the choline chloride business

- (39) By its nature, choline chloride, whether in liquid or dry form, is a product that can be easily transported. Nevertheless, because it is a commodity product with a relatively low cost price, producers located on the same continent as the customer have, because of lower transport and storage costs, a significant competitive advantage compared to producers located in other parts of the world. This does not, however, prevent producers in all parts of the world from being able and sometimes willing to sell in other areas of the world. In areas of the world with little local production and expanding demand, such as the Far East and Central and South America during the period of investigation, exports by the large producers in North America and Europe to such areas were of considerable commercial interest, at least until such time as the producers concerned could create local production facilities in those areas. Import sales for a product like choline chloride may be relatively infrequent where the import market is a mature one with well-established local producers, as is the case in Europe and North America. But such sales may still be an attractive commercial policy for a company with an excess of production, trying to reclaim part of its fixed costs. Any such imports from other parts of the world can in such circumstances be made at prices below the prevailing prices in the area of importation. If this is the case, they can, despite the small volumes involved, have a destabilizing effect on the prevailing price level in the area of importation, especially if this price level were relatively high³¹.
- (40) Eurostat figures show that in 1990, before the infringement described in this Decision took place, imports of choline chloride (at 100%) into the Community amounted to 3 525 metric tonnes (4 700 metric tonnes at 75%, as registered by Eurostat), close to nine percent of the estimated market in the Community at that time of around 40 000 metric tonnes (at 100%)³². Exports of choline chloride (at 100%) from the Community

³¹ One example is mentioned by UCB : « *The competition from the Far East has also had an effect in Europe, for example, UCB lost an order of 24 metric tonnes of [client name] to Norel, which offered a price well below those available on the market in that period* » (in the French original: “La concurrence de l’Extrême Orient a également eu un effet en Europe, p. ex. UCB a perdu une commande de 24 M/T de [nom client] au bénéfice de Norel, qui a offert un prix bien plus bas que ceux disponibles sur le marché en cette période »), UCB’s response to the Statement of Objections, page 51. See also the following statement by BASF : « *However, in 1992, all six producers had excess capacities and were dumping excess Choline Chloride into South/Latin America and into Asia, which had serious adverse effects on BASF’s local production in those two regions* ». These particular sales did not concern North America or Europe. But when in 1992 BASF started selling from its production facility in Mexico into the United States, “*the three North American producers obviously did not like South Central Products [BASF’s distributor] reselling even small quantities of Choline Chloride in the U.S. from BASF’s Mexico facilities*”, BASF’s submission of 15 June 1999 [2901].

³² In 1992, the nearest available year for which data are available, the volume of the West and East European market was estimated at 43 800 metric tonnes. See Bioproducts’ submission of 7 May 1999 [1995].

to other parts of the world in 1990 were only 548 metric tonnes (730 metric tonnes at 75%, as registered by Eurostat)³³. In 1999, Community exports had grown to 12 413 metric tonnes (at 100%)³⁴.

- (41) 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 Taiwan³⁵. The North American producers were exporting to Central and South America, Europe, the Far East and the South East. The European producers were starting to export to Central and South America, Africa, the South East 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 Singapore³⁶.
- (42) According to the best estimates of the Commission, worldwide sales of choline chloride (100%) by the producers subject to this proceeding in 1997, the last full year of the infringement, were as follows:

Table 1: Estimated choline chloride sales volumes, sales values and market shares (based on volumes) in the world in 1997

Undertaking	Sales volumes in metric tonnes	Sales values in EUR millions	Market share (based on volumes) in %
Akzo Nobel	20 000	23	12,0
BASF	15 280	16,9	9,1
UCB	22 400	26,8	13,4
Bioproducts	20 390	23,6	12,2
Chinook	32 200	37,8	19,3

³³ Import and export figures based on CN 29.23.10.00 (choline and its salts). These Eurostat figures, based on choline chloride at 75%, have been multiplied by three fourth in order to arrive at the import and export volume for choline chloride at 100%. See Akzo Nobel's submission of 8 January 2002 [5556]. At that time, CN 23.09.90.95 (preparations of a kind used in animal feeding, containing by weight >=49% of choline chloride, on an organic or inorganic base) was not used yet for the collection of import statistics.

³⁴ This figure is composed of 7 480 metric tonnes for CN 29.23.10.00 (choline and its salts), 75% of which is 5 610 metric tonnes at 100%, and 11 339 metric tonnes for CN 23.09.90.95 (preparations of a kind used in animal feeding, containing by weight >=49% of choline chloride, on an organic or inorganic base), 60% of which is 6 803 metric tonnes at 100%.

³⁵ Akzo Nobel's submission of 8 January 2002 [5556].

³⁶ UCB's submission of 26 July 1999 [1703] and response the Statement of Objections, page 17, Akzo Nobel's submission of 8 January 2002 [5553].

DuCoa	27 210	21,6	16,3
Others	29 525	34,0	17,7
Total	167 005	183,7	100

- Notes:
1. Sales volumes as reported here include sales of liquid choline chloride to converters and distributors.
 2. Market shares have been based on volumes, as being a more reliable indicator than sales values, the latter including sales at different levels of choline chloride concentration. The producers subject to the proceeding also calculated market shares based on volumes.
 3. Akzo Nobel's sales volume, which was not reported to the Commission, is based on an estimated average selling price of EUR 1 150 per metric tonne choline chloride (at 100%) in 1997. See UCB's submission of 13 March 2003 [6090]. This ratio between sales volume and sales value is in line with the sales volume and sales value figures reported by the other producers (with the exception of DuCoa, which shows a considerably lower sales value per metric tonne).
 4. The sales value figures of Bioproducts and DuCoa are based on EUR 1 = USD 1,12035 in December 1997.
 5. The sales value figure of Chinook is based on EUR 1 = CAD 1,59605 in December 1997.
 6. The sales volume of "Others" is based on an estimate by Bioproducts. See Bioproducts' submission of 25 February 2003 [6062]. The largest part of these "other" sales are local sales by Chinese producers, followed by worldwide sales by ICI, followed by sales of small Latin American, Korean and Japanese producers. The sales volume of Ertisa has also been included in this category. The sales value of "Others" is based on an estimated average selling price of EUR 1,15 per kilo choline chloride (at 100%). See UCB's submission of 13 March 2003 [6090].

Sources: DuCoa's submission of 22 July 1999 [3324], UCB's submission of 26 July 1999 [1658], Chinook's submission of 23 May 2000 [0754], Ertisa's submission of 23 October 2002 [4452], Akzo Nobel's submission of 21 February 2003 [5974], BASF's submission of 24 February 2003 [5980], Bioproducts' submission of 25 February 2003 [6059, 6062], Chinook's submission of 3 March 2003 [6073], UCB's submission of 13 March 2003 [6088].

4.2. Trade between Parties to the EEA Agreement

- (43) Choline chloride is produced in six Member States (United Kingdom, the Netherlands, Belgium, Germany, Italy, and Spain) and marketed throughout the EEA where demand exists. Akzo Nobel, BASF, UCB and Ertisa (through its tolling agreement with Algry) had production facilities in the Community during the period of investigation. EEA Contracting Parties without production facilities on their territory necessarily have to import the totality of their requirements, the large majority of such

imports originating from production sites in other EEA Contracting Parties. Contracting Parties with production facilities on their territory also showed considerable import volumes, due to the effective functioning of the EEA market. There was accordingly a substantial amount of trade between Contracting Parties to the EEA Agreement in the choline chloride market during the period of investigation. In 1997, the volume of choline chloride (at 100%) traded among Member States was 33 685 metric tonnes³⁷.

- (44) According to the best estimates of the Commission, sales volumes, sales values and market shares in the EEA for choline chloride (100%) in 1997, the last full year of the infringement, were as follows:

Table 2: Estimated choline chloride sales volumes, sales values and market shares (based on volumes) in the EEA in 1997

Undertaking	Sales volumes in metric tonnes	Sales values in EUR millions	Market share (based on volumes) in %
Akzo Nobel	12 670	15,1	28,9
BASF	9 150	9,9	20,9
UCB	12 500	15	28,5
Ertisa	1 095	1,3	2,5
ICI	4 320	4,9	9,9
Imports	4 060	6,4	9,3
Total	43 795	52,6	100

- Notes:
1. Sales volumes as reported here include sales of liquid choline chloride to converters and distributors.
 2. Market shares have been based on volumes, as being a more reliable indicator than sales values, the latter including sales at different levels of choline chloride concentration. The producers subject to the proceeding also calculated market shares based on volumes.
 3. The sales volume figure for ICI is based on the figure Air Products reported for the year 1998, starting from March. This figure has been multiplied by twelve tenth to arrive at a full year. As Air Products did not report any sales figures for 1997, the 1998 figure has been taken as the best available. The sales

³⁷ According to Eurostat figures, trade among Member States of CN 29.23.10.00 (choline and its salts) in 1997 was 37 850 metric tonnes at 75% = 28 387 metric tonnes at 100%. The corresponding figure for CN 23.09.90.95 (preparations of a kind used in animal feeding, containing by weight >=49% of choline chloride, on an organic or inorganic base) was 8 830 metric tonnes at 60% = 5 298 metric tonnes at 100%.

value figure for ICI has been calculated based on 1 Euro = 1,17561 USD in December 1998, extrapolating the reported ten last months of 1998 to a full year.

4. The sales value figure for Ertisa is based on EUR 1 = ESP 166,386.

5. Import volume and import value figures are based on Eurostat statistics for:

(i) CN 29.23.10.00 (choline and its salts), which indicate an import volume in 1997 of 4880 tonnes. This figure, based on choline chloride at 75%, has been multiplied by three fourth in order to arrive at the import volume for choline chloride at 100%;

(ii) CN 23.09.90.95 (preparations of a kind used in animal feeding, containing by weight \geq 49% of choline chloride, on an organic or inorganic base), which indicate an import volume in 1997 of 640 tonnes. This figure, based on choline chloride at 60%, has been multiplied by six tenth in order to arrive at the import volume for choline chloride at 100%. See Akzo Nobel's submission of 8 January 2002 [5556].

Sources: UCB's submission of 26 July 1999 [1658], Akzo Nobel's submission of 8 January 2002 [5556], Air Products' submission of 18 October 2002 [4399], Ertisa's submission of 23 October 2002 [4452], Akzo Nobel's submission of 21 February 2003 [5975], BASF's submission of 24 February 2003 [5980], UCB's submission of 13 March 2003 [6088], Eurostat import statistics.

III. Procedure

5. THE COMMISSION'S INVESTIGATION

- (45) The Commission was approached by Chinook in relation to the cartel arrangements dealt with in this Decision on 25 November 1998 and 3 and 16 December 1998³⁸. At that time, the Commission did not open an investigation.
- (46) At a meeting with the Commission held on 28 April 1999, Bioproducts informed the Commission of its participation in a cartel with regard to choline chloride, and offered its full co-operation under the 1996 Commission Notice on the non-imposition or reduction of fines in cartel cases (hereafter referred to as "the 1996 Leniency Notice")³⁹. Bioproducts confirmed its intention to co-operate through a formal application for leniency on 7 May 1999, submitting evidence and explaining the

³⁸ Chinook's submissions of 3 December 1998 [1295-1304], 16 December 1998 [0001-0237, 6587-6593], 19 February 2003 [5534].

³⁹ OJ C 207, 18.7.1996, p. 4.

context and objectives of the cartel, the contents of the cartel meetings and the evidence submitted⁴⁰.

- (47) On 26 May 1999, in the context of an investigation into several cartels in the field of vitamins, the Commission sent a request for information pursuant to Article 11 of Regulation No 17 to BASF. The product description in that request for information also covered choline chloride. BASF replied to this request for information by sending a report, part G of which covered choline chloride, on 15 June 1999⁴¹, followed by further documents sent on 23 June 1999 and 16 July 1999⁴².
- (48) On 22 June 1999, the Commission sent requests for information pursuant to Article 11 of Regulation No 17 dealing specifically with choline chloride to Akzo Nobel, BASF, Chinook, UCB and DuCoa.
- (49) On 22 July 1999, BASF replied to the Commission's request for information of 22 June 1999, submitting the same information on choline chloride it had already sent in the vitamin case⁴³.
- (50) DuCoa also replied to the Commission's request for information on 22 July 1999. The answer was very brief at that time because three individuals named by the Commission had agreed to plead guilty to violations of United States antitrust law. In addition the only copies of certain relevant records had been seized by the United States authorities⁴⁴. Supplementary responses were submitted on 23 August 1999⁴⁵ and 31 December 2002⁴⁶.
- (51) Akzo Nobel replied to the Commission's request for information on 26 July 1999, submitting evidence and offering its full co-operation⁴⁷.
- (52) Following receipt of the Commission's request for information of 22 June 1999, Chinook claimed, in a letter dated 26 July 1999, that it was the first party to have advised the Commission of the existence of the cartel through its legal counsel during the meeting on 25 November 1998. Chinook stated that it had attended cartel meetings and forwarded evidence of the so-called "1992 agreement"⁴⁸. The Commission replied in a letter of 14 September 1999⁴⁹ that certain corrections to Chinook's presentation of events had to be made. Notably, the Commission's letter stated that Chinook's legal counsel had insisted in his contacts with the Commission on the provisional, exploratory and informal nature of the contacts. He had not taken any position as to the facts or disclosed any further information beyond what was contained in the documents handed over. In response, Chinook sent supplementary information on 13

⁴⁰ Bioproducts' submission of 7 May 1999 [1817-2412].

⁴¹ BASF's submission of 15 June 1999 [2900-2902].

⁴² BASF's submissions of 23 June 1999 and 16 July 1999 [2903-3183].

⁴³ See recital (47).

⁴⁴ DuCoa's submission of 22 July 1999 [3318-3321].

⁴⁵ DuCoa's submission of 23 August 1999 [3223-3324].

⁴⁶ DuCoa's submission of 31 December 2002 [5420-5446].

⁴⁷ Akzo Nobel's submission of 26 July 1999 [2418-2740].

⁴⁸ Chinook's submission of 26 July 1999 [1232-1353].

⁴⁹ Commission letter of 14 September 1999 [1354-1355].

October 1999, insisting that the first meeting it had had with the Commission was to be considered in the context of the 1996 Leniency Notice⁵⁰. On 14 December 1999, Chinook provided documentation relating to the criminal proceedings in Canada⁵¹. On 23 May 2000, Chinook forwarded documents seized by the US Department of Justice in September 1998, relating to Europe and the European market⁵².

- (53) Following receipt of the Commission's request for information of 22 June 1999, UCB offered its full co-operation to the Commission investigation on 26 July 1999 and submitted evidence⁵³. UCB provided supplementary information on 21 September 1999⁵⁴.
- (54) In a submission dated 8 January 2002, Akzo Nobel submitted evidence in the context of the 1996 Leniency Notice in respect of alleged anti-competitive arrangements regarding choline chloride in the European and Spanish markets, which it claimed were different from those mentioned in the Commission's letter of 22 June 1999 pursuant to Article 11 of Regulation No 17⁵⁵.
- (55) On 30 August 2002 and 13 September 2002, the Commission sent further requests for information pursuant to Article 11 of Regulation No 17 to Akzo Nobel, BASF, UCB, Air Products and Ertisa. Air Products replied on 18 October 2002⁵⁶. It submitted further information on 21 October 2002⁵⁷. Akzo Nobel replied on 30 October 2002⁵⁸. It sent further information on 2 December 2002⁵⁹. BASF replied on 4 November 2002 and 8 May 2003⁶⁰. Ertisa replied on 23 October 2002⁶¹. UCB replied on 18 October 2002 and 14 January 2003⁶².
- (56) On 17 September 2002 and 22 October 2002, the Commission sent requests for information to DuCoa. Replies were received on 10 October 2002 and 31 December 2002⁶³.
- (57) On 22 May 2003, the Commission initiated proceedings in this case and adopted a statement of objections against Akzo Nobel, BASF, Bioproducts, Chinook, DuCoa, UCB and Ertisa.
- (58) All the parties to which the statement of objections had been addressed submitted written comments in response to the objections raised by the Commission.

⁵⁰ Chinook's submission of 13 October 1999 [1356-1361].

⁵¹ Chinook's submission of 14 December 1999 [1362-1431].

⁵² Chinook's submission of 23 May 2000 [1432-1433, 0238-1223].

⁵³ UCB's submission of 26 July 1999 [1438-1441, 1651, 1653-1816].

⁵⁴ UCB's submission of 21 September 1999 [1442-1497, 1500-1649].

⁵⁵ Akzo Nobel's submission of 8 January 2002 [2741, 5548-5679].

⁵⁶ Air Products' submission of 18 October 2002 [3405-4406].

⁵⁷ Air Products' submission of 21 October 2002 [4407-4418].

⁵⁸ Akzo Nobel's submission of 30 October 2002 [4464-4751].

⁵⁹ Akzo Nobel's submission of 2 December 2002 [5383-5416].

⁶⁰ BASF's submissions of 4 November 2002 [4914-5339, 5448-5452, 5489-5490, 5369-5371] and 8 May 2003 [6702-6703].

⁶¹ Ertisa's submission of 23 October 2002 [4448-4463].

⁶² UCB's submissions of 18 October 2002 [3338-3404] and 14 January 2003 [5453-5454].

⁶³ DuCoa's submissions of 10 October 2002 [3316] and 31 December 2002 [5420-5446].

- (59) The undertakings had access to the Commission's investigation file in the form of a copy on CD-ROM, which was sent to them on 23 May 2003. With the CD-ROM, the undertakings received a list specifying the documents contained in the investigation file (with consecutive page numbering) and indicating the degree of accessibility of each document. In addition, the undertakings were informed that the CD-ROM gave the parties full access to all the documents obtained by the Commission during the investigation, except for business secrets and other confidential information.
- (60) A hearing on the case was held on 16 September 2003. All the undertakings to which the statement of objections had been addressed, with the exception of DuCoa, took part.

6. INVESTIGATIONS IN OTHER JURISDICTIONS

- (61) In March 1999, the US Department of Justice charged five executives of the US company DuCoa L.P. and the Canadian company Chinook Group Limited with participation in a conspiracy to fix prices and allocate customers and sales of choline chloride. In September 1999 Chinook Group Limited agreed to plead guilty and pay a USD 5 million criminal fine for participating in an international conspiracy to raise and fix prices and allocate market shares for choline chloride sold in the United States and elsewhere. In September 2002, DuCoa L.P. agreed to plead guilty and pay a fine of USD 500,000 for the same reasons.
- (62) In Canada, the Federal Court of Canada imposed in September 1999 a fine of CAD 2,25 million on Chinook Group Limited for its participation in an international conspiracy to fix prices and share markets for choline chloride in Canada and abroad. A Chinook executive was sentenced to a nine-month prison term, to be served in the community, for participating in this conspiracy. BASF A.G. and later Akzo Nobel Chemicals BV pleaded guilty and were convicted for offences relating to its forbearance to compete in the sale of choline chloride in Canada. They paid fines of CAD 1 million each. In August 2003, Bioproducts pleaded guilty and was fined CAD 600 000 for its participation in an international conspiracy to fix prices and share markets for choline chloride in Canada and abroad.

IV. Description of events

7. THE DOCUMENTARY EVIDENCE

- (63) The facts as set out in this Chapter are based principally on the following evidence:
- Chinook's submission of 3 December 1998 [1295-1304];
 - Bioproducts' submission of 7 May 1999 [1817-2412];
 - BASF's submission of 15 June 1999 and documents of 23 June 1999 and 16 July 1999 in response to the Commission's request for information of 26 May 1999 [2899-3183];

- BASF's submission of 23 July 1999 in response to the Commission's request for information of 22 June 1999 [2885-2897];
- Akzo Nobel's submission of 26 July 1999 in response to the Commission's request for information of 22 June 1999 [2418-2740];
- Chinook's submission of 26 July 1999 in response to the Commission's request for information of 22 June 1999 [1232-1353];
- UCB's submission of 26 July 1999 in response to the Commission's request for information of 22 June 1999 [1438-1441, 1651, 1653-1816];
- UCB's supplementary submission of 21 September 1999 in response to the Commission's request for information of 22 June 1999 [1442-1497, 1500-1649];
- Chinook's supplementary submission of 14 December 1999 in response to the Commission's request for information of 22 June 1999 [1362-1431];
- Akzo Nobel's submission of 8 January 2002 [2741, 5548-5679];
- UCB's submission of 18 October 2002 in response to the Commission's requests for information of 30 August 2002 and 13 September 2002 [3338-3404];
- BASF's submission of 4 November 2002 in response to the Commission's request for information of 30 August 2002 [4914-5339, 5448-5452, 5489-5490, 5369-5371];
- DuCoa's supplementary submission of 31 December 2002 in response to the Commission request for information of 22 June 1999 [5420-5446].

8. THE ORGANISATION OF THE CARTEL

- (64) 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. The core of their activities was an agreement among all participants to:
- increase prices worldwide, including in the EEA;
 - control converters, including in the EEA, so as to ensure that higher price levels would not be undone by low-priced competition from converters;
 - allocate markets worldwide among the participating undertakings, including an agreement that the North American producers would withdraw from the European market.
- (65) The North American producers did not participate in a further series of anti-competitive meetings strictly among the European producers to co-ordinate their

behaviour on the European market. These meetings took place in the period between March 1994 and October 1998. They served to continue the agreement reached at the global level, including among the European producers themselves, to raise prices and control converters in Europe. The continuation of the agreement regarding prices took the form not only of recurring general agreements among the European producers concerned to raise prices across the EEA, but also of regular specific price agreements in respect of particular national markets and individual clients. Price agreements regarding individual clients were implemented by allocating clients to particular producers and by agreeing that the other European producers concerned would offer higher prices than the European producer to whom the client had been allocated. This was done in such a way as to respect the overall market shares in the EEA of the participating producers. Price agreements, client allocation and market share agreements therefore all worked hand in hand, serving the same purpose of greater profitability and market stabilization. With respect to the control of converters, certain actions were undertaken by the European producers to try to bring European converters under control, partially with success. The purpose of these actions was to ensure that the higher price levels agreed at the global and European levels would not be undercut by European converters, whether in Europe or in third countries.

- (66) At the global level, the start of exploratory anti-competitive contacts can be identified as 9 June 1992, when a first meeting among BASF, Bioproducts and DuCoa took place in Mexico City, Mexico. These exploratory contacts were enlarged in the following months to include Chinook, Akzo Nobel and UCB. They resulted in a clear anti-competitive agreement, which was concluded in Ludwigshafen, Germany, in November 1992. Anti-competitive meetings among all of these parties to implement this agreement continued at the global level until 14 April 1994.
- (67) At the European level, the first clear evidence the Commission has of anti-competitive discussions dates from 14 March 1994, when a meeting took place in Schoten, Belgium, among Akzo Nobel, UCB and Impextraco (but not yet BASF). Such meetings, henceforth without Impextraco, but with BASF, continued until October 1998.

9. OPERATION OF THE CARTEL AT THE GLOBAL LEVEL

9.1. General elements

- (68) The general purpose of the cartel as it operated at the global level was to improve the profitability of the choline chloride business, what DuCoa euphemistically called “to bring discipline to the worldwide pricing of choline chloride”⁶⁴, and to stabilize the market positions of participating companies (together accounting for more than 80% of the world market⁶⁵) around the world. As mentioned in recital (39), choline chloride is by its nature a relatively low-margin product and transport and storage costs tend to make selling in distant areas unprofitable. Nevertheless, there was always a risk that

⁶⁴ DuCoa’s submission of 31 December 2002 [5429].

⁶⁵ See recital (42).

producers would offload any surplus production⁶⁶ 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 decreases⁶⁷. 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 “stabilize” their home market and to improve profitability in “their” area. In those areas of the world where all or most participants would continue to participate in the market, profitability would be increased and stability created by agreeing on the volumes to be marketed and by avoiding “harmful” price competition⁶⁸. An agreement was made to increase prices world-wide to identical levels. These identical price levels around the world would not only increase profitability but also help to avoid destabilising exports between regions. Finally, the control of converters and distributors was also an integral part of the price increase and market stabilisation objectives.

(69) It is apparent from the meeting reports and descriptions of meetings supplied by Bioproducts⁶⁹, BASF⁷⁰, Akzo Nobel⁷¹, Chinook⁷², UCB⁷³ and Ducoa⁷⁴ that the arrangements at the global level concerned essentially four related anti-competitive activities⁷⁵:

- (a) **The setting and increase of worldwide prices.** Staggered world-wide price increases were agreed for the period between January 1993 and January 1994.
- (b) **The allocation of worldwide markets.** In particular, the North American producers agreed to withdraw from the European market in exchange for the European producers’ withdrawal from the North American market. Market sharing arrangements were made regarding other geographical areas.
- (c) **The control of distributors and converters.** To ensure the effectiveness of the market allocation and price agreements, it was important for the producers to control the behaviour of distributors and converters of choline chloride in

⁶⁶ According to Bioproducts’ notes of the meeting in Mexico City, Mexico on 13 October 1992, all producers had excess capacity, Bioproducts’ submission of 7 May 1999 [1956]. See also the low utilization rate of 62% of producers’ worldwide capacity in Bioproducts’ submission of 7 May 1999 [1995].

⁶⁷ See Bioproducts’ submission of 7 May 1999 [1818], BASF’s submission of 15 June 1999 [2901-2902].

⁶⁸ Bioproducts’ submission of 7 May 1999 [1956], BASF’s submission of 15 June 1999 [2901-2903].

⁶⁹ Bioproducts’ submission of 7 May 1999 [1827-1833, 1956-1957, 2005-2006, 2011-2017, 2088, 2090].

⁷⁰ BASF’s submission of 15 June 1999 [2900-2902].

⁷¹ Akzo Nobel’s submission of 26 July 1999 [2421-2422, 2426-2474].

⁷² Chinook’s submissions of 3 December 1998 [1295-1298, 1300—1301], 26 July 1999 [1233-1235,] and 14 December 1999 [1376-1377].

⁷³ UCB’s submission of 26 July 1999 [1805-1810, 1669-1674, 1677, 1698-1701].

⁷⁴ DuCoa’s supplementary submission of 31 December 2002 [54520-5446].

⁷⁵ See sections 9.2, 9.3 and 9.4.

the world market. It was therefore agreed that each producer was responsible in his home market for controlling converters and distributors, in particular through “proper pricing” of choline chloride to them.

- (d) **The exchange of commercially sensitive information.** Whether the agreed actions were being accomplished in practice was regularly checked. The parties agreed to meet every six months to monitor, discuss and correct any problems. In these follow-up meetings, the parties compared information on sales actually made during the last period and discussed whether the group’s goals were being achieved.

(70) Reported participants in cartel meetings at the global level were as follows:

Table 3: Reported participants in cartel meetings at the global level

Date and Place	Akzo Nobel	BASF	UCB	CHINOOK	DUCOA	BIO-PRODUCTS
8-10 June 1992 Mexico City, Mexico	No evidence of participation	[*] [*]	No evidence of participation	No evidence of participation	[*] [*] [*]	[*] [*]
15-17 July 1992 Mexico City, Mexico	No evidence of participation	[*] [*]	No evidence of participation	[*]	[*] [*] [*]	[*]
13 October 1992 Mexico City, Mexico	[*]	[*] [*] [*]	[*] [*]	[*] [*]	[*] [*] [*]	[*]
16 or 23 November 1992 Ludwigshafen, Germany	[*]	[*] [*] [*]	[*] [*]	[*] [*]	[*] [*]	[*]
18-21 January 1993 Atlanta, Georgia, USA	[*]	[*] [*]	[*] [*]	[*] [*]	[*] [*]	[*]
10-13 May 1993 Amsterdam	[*] [*]	[*] [*]	[*] [*]	[*] [*]	[*]	[*]
17 June 1993 Toronto, Canada	[*]	Participated	[*]	[*] [*]	[*]	[*]
7-8 November 1993 Bruges, Belgium	[*]	[*] [*]	[*] [*]	[*] [*] [*]	[*]	[*]
14-20 April 1994, Johor Baru, Malaysia	[*]	[*] [*]	[*]	[*] [*]	[*]	[*]

Sources: Bioproducts’ submission of 7 May 1999 [1827-1833], BASF’s submission of 15 June 1999 [2900-2902], Ducoa’s submission of 22 July 1999 [3320-3321], Akzo Nobel’s submission of 26 July 1999 [2422], Chinook’s submission of 26 July 1999 [1233-1235], UCB’s submission of 26 July 1999 [1805-1811], Ducoa’s submission of 31 December 2002 [5420-5446].

9.2. Initial anti-competitive contacts

- (71) On the European market, in 1991, 2 500 metric tonnes (100%) choline chloride had been imported from North America and this figure was increasing over time, from only 71 metric tonnes in 1989 to 2 900 metric tonnes in the first 7 months of 1992⁷⁶. Of these quantities, Chinook exported 1 288 metric tonnes of choline chloride (100%) to Europe in 1991 and 1 994 metric tonnes (100%) in the first seven months of 1992⁷⁷. DuCoa, from its side, did not export any substantial amounts of choline chloride to Europe at that time⁷⁸. According to Akzo Nobel, some North American exports of choline chloride entered the European market under different, more favourable customs headings (for example, cattle feed instead of choline chloride)⁷⁹. Akzo Nobel states that this led to “a reaction” from the European producers, in the sense that in 1992, BASF's subsidiary in Mexico entered into a contract to supply about 400 metric tonnes of choline chloride to a US trading company, South Central products, for resale in the United States⁸⁰. According to Bioproducts, the background to this sale to the United States was that “*BASF is not happy with DuCoa’s announcement to take 40-50% of Mexico and Latin American market*”⁸¹.
- (72) Having first discussed the matter with Chinook⁸² and apparently concerned about South Central's pricing of choline chloride in the United States, representatives of the US producers Bioproducts and DuCoa met on **9 June, 1992**, with BASF in **Mexico City, Mexico**⁸³, in order to, in the words of BASF, “*complain about South Central's pricing and to suggest setting limit prices in the US*”⁸⁴. According to Bioproducts, the discussions covered market sharing and pricing⁸⁵ and BASF’s plans to enter the US market⁸⁶. DuCoa⁸⁷ confirmed that the discussions related to South Central Products: “*They expressed their disappointment that [BASF was] planning to ship material to the US; that it would be very disruptive to the market (...) could lead to retaliatory action from either BioProducts or Chinook against [DuCoa] and BASF and possibly even stepping up shipments to Europe*”⁸⁸. According to DuCoa, at the end of the

⁷⁶ Bioproducts’ submission of 7 May 1999 [1998]. According to Akzo Nobel, the quantity imported into Europe from North America in 1991 was 4 000 metric tonnes, see Akzo Nobel’s submission of 26 July 1999 [2421].

⁷⁷ Bioproducts’ submission of 7 May 1999 [1998].

⁷⁸ DuCoa’s submission of 31 December 2002 [5421].

⁷⁹ Akzo Nobel’s submission of 26 July 1999 [2421].

⁸⁰ BASF’s submission of 15 June 1999 [2900].

⁸¹ Bioproducts’ submission of 7 May 1999 [1860]. DuCoa had just established a new choline chloride plant in Mexico, which entered into competition with BASF’s plant there. See DuCoa’s submission of 31 December 2002 [5425, 5456-5457].

⁸² DuCoa’s submission of 31 December 2002 [5425].

⁸³ Bioproducts’ submission of 7 May 1999 [1827, 1837-1873].

⁸⁴ BASF’s submission of 15 June 1999 [2900].

⁸⁵ Bioproducts’ submission of 7 May 1999 [1827].

⁸⁶ Bioproducts’ submission of 7 May 1999 [1860].

⁸⁷ DuCoa’s submission of 31 December 2002 [5425, 5456-5457].

⁸⁸ The retaliatory action BioProducts and Chinook were claimed to be envisaging against DuCoa would presumably have its ground in DuCoa’s upsetting the market situation in Mexico and Central America by creating a new plant in Mexico, an action which in turn had led to BASF’s Mexican exports to the US, which upset the North American market, to the disadvantage of not only DuCoa, but also Chinook and Bioproducts.

meeting, the participants “did not have “any resolution to anyone’s satisfaction”, but “agreed to look at alternatives to try to work out a mutually beneficial plan to keep this from happening”⁸⁹. According to BASF, no agreement was reached⁹⁰.

- (73) **Between 15 and 17 July 1992**, the same companies and this time Chinook held a new meeting in **Mexico City, Mexico**⁹¹. According to Bioproducts, the main subject of the meeting was again BASF’s allegedly below-cost shipment of products into the US market⁹². According to BASF, the subject of the meeting was the same as that of the meeting in June 1992⁹³. DuCoa states that BASF agreed to end its distribution agreement in the US: “[A]t the meeting, [DuCoa] asked BASF to desist from distributing Mexican choline in the United States. [BASF] agreed that [it] would desist, although ...it would take some time to end their United States distribution agreement. At that meeting, we initiated discussions about BASF closing its Mexican plant and buying choline from our new Mexican plant, which was later agreed to”⁹⁴.
- (74) A third meeting in **Mexico City, Mexico** took place on **12 and 13 October 1992**. This time, the four previously participating companies were joined by Akzo Nobel and UCB⁹⁵. The meeting was mostly concerned with a general discussion on worldwide choline chloride capacity and market shares, by region. According to a contemporaneous meeting report by Bioproducts, it was stated that all producers had excess capacities, market shares were stable, and attempts to obtain a higher market share by price cutting had had little success and served no one. Inflation in past years had not been reflected in prices and the profit situation in chemical companies asked for a price increase. In addition, converters and distributors should be controlled by proper pricing⁹⁶. At that time, Chinook and Bioproducts (but not DuCoa in any significant manner⁹⁷) were selling choline chloride into the European market. According to Chinook, BASF suggested that they stop doing so, in return for which it would not sell in North America, other than Mexico. BASF’s offer was not accepted during that meeting, but the parties agreed to meet again in November⁹⁸. DuCoa states that “Also to a certain degree, prices in each one of those markets were discussed”. DuCoa “can’t say that [they] agreed then and there of a price on every market throughout the world. There were too many prices. [They] did talk about those prices, though, and [they] did talk about trying to get prices up”. DuCoa also states that “[a]t that meeting we discussed, among other things, firming up prices. We discussed what everybody’s market share was in each region of the world. We discussed North

⁸⁹ DuCoa’s submission of 31 December 2002 [5425].

⁹⁰ BASF’s submission of 15 June 1999 [2900]

⁹¹ Bioproducts’ submission of 7 May 1999 [1827, 1880-1904], BASF report of 15 June 1999 [2900], DuCoa’s submission of 31 December 2002 [5425].

⁹² Bioproducts’ submission of 7 May 1999 [1827].

⁹³ BASF’s submission of 15 June 1999 [2900].

⁹⁴ DuCoa’s submission of 31 December 2002 [5426].

⁹⁵ Bioproducts’ submission of 7 May 1999 [1828, 1956-1957], Chinook’s submission of 26 July 1999 [1233, 1377], UCB’s submission of 26 July 1999 [1805-1806], Akzo Nobel’s submission of 26 July 1999 [2422].

⁹⁶ Bioproducts’ submission of 7 May 1999 [1956-1957]. For a similar description of the contents of the discussion, see UCB’s submission of 26 July 1999 [1805-1806].

⁹⁷ DuCoa’s submission of 31 December 2002 [5421].

⁹⁸ Chinook’s submission of 26 July 1999 [1233].

*American producers not shipping choline to Europe and European producers not shipping to North America. DuCoa agreed that it would not ship to Europe if Europeans did not ship to North America*⁹⁹. According to BASF, the six producers discussed, but did not reach agreement on, prices and volume allocations in Latin America¹⁰⁰.

9.3. The Ludwigshafen Agreement

(75) On **16 and/or 23 November 1992**, the six producers, DuCoa, Bioproducts, Chinook, Akzo Nobel, UCB and BASF, met again, in a meeting or meetings organised by BASF in **Ludwigshafen, Germany**¹⁰¹. Their discussion on what to do started from the following analysis of the world market situation for choline chloride at that time:

- *“All producers have excess capacities*
- *Market shares of major producers are fairly constant*
- *Intentions for a higher market share by price cutting had little success and serves no one*
- *Present profit situation in chemical companies asks for price increases in general*
- *Converters and distributors should be controlled by proper pricing*

Conclusion

- *Price cutting is nonsense when market positions are firm*
- *Choline deserves higher prices*¹⁰².

(76) There was discussion about certain “general rules” that all producers should follow. As listed by UCB, these were:

“GENERAL RULES

- *Major areas of interest are clearcut*
- *Temporary advantage of exchange rate is no reason and no solid base for substantial market shift*
- *Capital expenditure is a major reason for market share in a region*

⁹⁹ DuCoa’s submission of 31 December 2002 [5426-5427].

¹⁰⁰ BASF’s submission of 15 June 1999 [2900].

¹⁰¹ Bioproducts’ submission of 7 May 1999 [1828], BASF’s submission of 15 June 1999 [2901, 2904-2909], Akzo Nobel’s submission of 26 July 1999 [2421], UCB’s submission of 26 July 1999 [1806], Chinook’s submission of 26 July 1999 [1233], DuCoa’s submission of 31 December 2002 [5428-5432].

¹⁰² Bioproducts’ submission of 7 May 1999 [2003], Akzo Nobel’s submission of 26 July 1999 [2440].

- *New capacities need slow market penetration; grow with growing market in order not to rock the boat*
- *Aggressive behaviour puts pressure on prices only and for everybody. There are no substantial market shifts possible on a long term base*
- *Adequate burden sharing with regard to capacity utilisation in major areas of interest is indicated”¹⁰³.*

(77) Most importantly, according to an internal report from Chinook of 23 November 1992, “an accord was reached between the European and North American producers on November 16, 1992 in Ludwigshafen”¹⁰⁴. This agreement consisted of the following::

“The Agreement:

- 1. Bio Products and Chinook give up W. Europe by mid-1993.*
- 2. Bio Products and Chinook give up E.Europe by mid-1994.*
- 3. Asia:*
 - *Ducoa decrease shipments to Asia by 250 TPA.*
 - *Europeans freeze shipments to Asia at current levels – to be audited – approximately 3500 TPA combined.*
 - *Bio Products and Chinook continue to expand market share in Asia.*
- 4. North America - Europeans and Mexicans out, completely, by mid-1993.*
- 5. Latin America - BASF transfer exports from Europe to Latin production. Other Europeans hold exports to Latin America at existing levels.*
 - *Bio Products and Chinook hold Latin America exports at existing levels.*
- 6. Pricing - World-wide pricing will be adhered to by all according to the following schedule:*

World Wide C & F Choline Chloride Prices

	<u><i>50% Dry</i></u>	<u><i>60% Dry</i></u>	<u><i>Bulk 75% Liquid</i></u>
<i>Jan. 1993</i>	<i>1000</i>	<i>1200</i>	<i>1000</i>
<i>July 1993</i>	<i>1100</i>	<i>1320</i>	<i>1100</i>
<i>Jan.1994</i>	<i>1100</i>	<i>1320</i>	<i>1200</i>

Prices are US\$/MT C&F. Liquid in drums – add drum cost.

Meet every 6 months to monitor, discuss and correct any problems.

¹⁰³ UCB’s submission of 26 July 1999 [1653, 1674], see also Akzo Nobel’s submission of 26 July 1999 [2471].

¹⁰⁴ Chinook’s submission of 3 December 1998 [1295].

*Latin America: Europeans freeze exports to LA at 3.500 t/a until end of 94
NA freeze exports to LA at 1.700 t/a*

*North America: Europeans phase out of exports to NA until 6/93 (from Mexico).
There will be no more imports from out of area without any
time limit.*

<i>Minimum prices:</i>		<i>50% powder</i>	<i>60% powder</i>	<i>75% liquid bulk</i>
<i>(US \$, world wide)</i>	<i>Jan. 93</i>	<i>1.000,--</i>	<i>1.200,--</i>	<i>1.000,--</i>
	<i>July 93</i>	<i>1.100,--</i>	<i>1.320,--</i>	<i>1.100,--</i>
	<i>Jan. 94</i>			<i>1.200,--</i>
				<i>(for full container loads c + f; drum costs are added</i>

US-prices should be max. 5% lower.

*Meetings: Every half year for verification of volume and prices (data
comparison)
Next: 18.01.93 near Atlanta*

23.11.92”¹⁰⁷.

- (80) DuCoa states regarding the Ludwigshafen agreement that “in terms of the discussions [DuCoa] was having with the Europeans about not selling in Europe, [there was no question...that] there [was] a distinction between shipping products over to Europe and actually establishing a manufacturing presence over there”. In DuCoa’s view, the “agreement not to sell [meant] that [DuCoa] wouldn’t ship product into Europe”¹⁰⁸.
- (81) According to the contemporaneous meeting documents supplied by Bioproducts, it was considered necessary, in order to make the general agreement among producers work, to prevent any disruptive sales from converters and distributors. In particular, 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*”¹⁰⁹. 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 CC producer is responsible in his*

¹⁰⁷ Akzo Nobel’s submission of 26 July 1999 [2426]. See also Akzo Nobel’s contemporaneous notes of the meeting [2427, 2449]. These notes are headed “Agreement” [2427] and “Agreed to Point” [2449]. BASF, for its part, describes the meeting in the following words: “The participants agreed...” and “the key provisions of the agreement were...” [2901]. Bioproducts describes the Ludwigshafen meeting as “1992 Agreement”: division of market – BASF passed out “The Book” “ [1828].

¹⁰⁸ DuCoa’s submission of 31 December 2002 [5422]. No North American producer established a manufacturing presence in the EEA market in the period covered by this proceeding.

¹⁰⁹ Bioproducts’ submission of 7 May 1999 [2006].

*home market in controlling converters. Supply of CC liquid from out of area undermines this rule and ruins the market*¹¹⁰.

- (82) A later document of Chinook makes the following report regarding the situation in respect of converters in 1993:

“UCB has “solved” the Impextraco problem as follows:

UCB will supply Impextraco with liquid. Impextraco will have this dried, absorb it or build a dry plant. UCB claim they cannot, by law, control where Impextraco sell it, or at what price, other than by liquid price.

...

Moving on to Akzo – both Franklyn and Randstad were Akzo’s problems. The latter they simply squeezed out by liquid costs, while supplying the market from their Italian plant. Then in collaboration with BASF, BASF moved in and set up Randstad as their toll drier – 100% i.e. Randstad cannot dry for anyone else including themselves. And now BASF have a drier.

*Franklyn is however not falling into line*¹¹¹.

9.4. Follow-up anti-competitive contacts

- (83) As agreed at the Ludwigshaven meeting, a first follow-up meeting to monitor implementation of the November 1992 Agreement was organised by Bioproducts in **January 1993**, probably on the 19th, near **Atlanta** (at the conference centre Stone Mountain) in Georgia, **United States**. The meeting coincided with the Southeastern Poultry Convention. All six companies, namely Chinook, BASF, UCB, Akzo Nobel, DuCoa and Bioproducts, participated in this meeting¹¹².
- (84) According to an UCB participant in the meeting, it was during this meeting that the global meetings began to bear fruit. Participants were ready to “*work out the world market*”. In particular, information on exports to and local production in Asian and Latin American markets was exchanged. The representatives of the North American producers were pushing for greater market shares in Asia. The representatives of the European producers preferred a better price level in Asia. In exchange for that, they were willing to freeze their market shares in Asia and to leave the market growth to

¹¹⁰ Akzo Nobel’s submission of 26 July 1999 [2468].

¹¹¹ Chinook’s submission of 26 July 1999 [1300]. As mentioned in recital (35), Akzo Nobel concluded an exclusive toll-conversion arrangement with Franklin Holland in 1997. Under this arrangement, Franklin Holland converted exclusively for Akzo Nobel and no longer sold choline chloride in its own name. In 1999, Akzo Nobel purchased Franklin Holland. See Akzo Nobel’s submission of 8 January 2002 [5554].

¹¹² Bioproducts’ submission of 7 May 1999 [1829, 2037-2069], BASF’s submission of 15 June 1999 [2902], Chinook’s submission of 26 July 1999 [1234], Akzo Nobel’s submission of 26 July 1999 [2422, 2428], 5432-5433.

the North American producers. The representatives of the European producers had discussed this strategy before the meeting¹¹³.

- (85) The recollection of a DuCoa participant in this meeting was that “*we continued to try to increase prices where we could on a worldwide basis. We looked at ways to reduce or balance out shipments to various parts of the world. We had those types of discussions, but basically at the end there was just an agreement to meet again*”. According to this participant, “*it was fair to say that when he 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*”. The same participant stated regarding Europe, “*that there was no attempt to say, by the American producers, what choline pricing should be in Western Europe...other than if – if the prices were very low in Europe...there was discussions for fear that product could be shipped sideways back to the U.S*”. At the time, this participant stated that he “*did not know whether the Europeans had among themselves any agreements regarding Europe or any place else in the world*”. He felt they did, but “[w]e didn’t know any specifics”¹¹⁴.
- (86) According to Chinook, the prices discussed at the previous meeting had not been put into effect. There were discussions as to who had not implemented the price increases. It became apparent that the information shared previously as to market shares and volumes was not accurate. The participants agreed to meet again in Amsterdam in May 1993¹¹⁵.
- (87) According to BASF, at this and all subsequent follow-up meetings until the meeting in Johor Baru, Malaysia, in April 1994, “*the six companies confirmed the North America-West Europe export prohibitions and attempted to agree upon export volumes to specified countries in South/Latin America and in Asia*”¹¹⁶. BASF, from its side, effectively terminated the export contract to the United States by its expiry date of April 1994¹¹⁷.
- (88) The meeting in **Amsterdam, the Netherlands**, organised by Akzo Nobel, took place on **13 May 1993**, with the participation of the same six producers. According to Chinook, there was discussion that prices had not reached the level agreed upon¹¹⁸. The situation in various areas of the world at that time was reviewed, including Europe. With respect to Europe, according to a contemporaneous meeting report provided by Bioproducts, the discussion covered suppliers that were not participants,

¹¹³ UCB’s submission of 26 July 1999 [1807]. For contemporaneous meeting reports, see Chinook’s submission of 3 December 1998 [1300-1302] and Akzo Nobel’s submission of 26 July 1999 [2428].

¹¹⁴ DuCoa’s submission of 31 December 2002 [5433].

¹¹⁵ Chinook’s submission of 26 July 1999 [1234].

¹¹⁶ BASF’s submission of 15 June 1999 [2902].

¹¹⁷ BASF’s submission of 15 June 1999 [2917].

¹¹⁸ Chinook’s submission of 26 July 1999 [1234].

such as Ertisa, Franklin and Randstad. The meeting report also mentions: “*Control Impextraco – May 1. Contract with Impextraco*”¹¹⁹.

- (89) According to Chinook, “*Akzo Nobel (and perhaps UCB as well) complained that Chinook had not pulled out of the U.K. market and Chinook advised it had no intention of doing so*”¹²⁰.
- (90) According to a DuCoa participant, “*we went through the same type of discussions. We would talk about prices; we would talk about regions of the world; we would talk about what we knew about market size, and we had discussions over who had what size by country*”¹²¹. Another DuCoa participant recalls that “[o]ther than to try to get the price up in the world and to respect each other’s markets, European and North American, no agreements came out of that meeting on choline pricing customers or territories”. This participant states that it was “*fair to say when [he] had talks about getting prices up in the world [he was] talking about Latin America and the Far East*” and that “*there would be actual prices discussed. There would be prices, for instance, we’d have a target price of maybe a thousand dollars a ton for the Latin America and a target price for the Far East of maybe \$970 a ton, and those prices would be implemented generally after a meeting*”¹²².
- (91) The next follow-up meeting took place on **17 June 1993 in Toronto, Canada**¹²³. According to Bioproducts, Chinook organised this meeting. In Bioproducts’ recollection, pricing and problems with the November 1992 Agreement were discussed¹²⁴. Chinook itself does not list this meeting which is, however, confirmed by the other companies. DuCoa does not “*recall [that] anything that was discussed at that meeting was any different than what [they] had talked about before. At these meetings, [they] often discuss[ed] prices in Latin America and Asia*”¹²⁵.
- (92) UCB was next in line to organise a follow-up meeting. This meeting took place on **8 November 1993, in Bruges, Belgium**¹²⁶. According to UCB, during this meeting each producer introduced its estimated 1993 sales volumes in a personal computer that UCB brought to the meeting. For the Far East and Latin America, this information was collected on a country by country basis. For Western Europe, Eastern Europe, North America and the rest of the world, it was assembled for each of these regions as a

¹¹⁹ Bioproducts’ submission of 7 May 1999 [2088].

¹²⁰ Chinook’s submission of 26 July 1999 [1234]. There is some uncertainty whether the UK was considered included when the North American producers promised to withdraw from Western Europe, see the handwritten notes of the Ludwigshafen meeting in Akzo Nobel’s submission of 26 July 1999 [2449].

¹²¹ DuCoa’s submission of 31 December 2002 [5434].

¹²² DuCoa’s submission of 31 December 2002 [5435].

¹²³ Bioproducts’ submission of 7 May 1999 [1830, 2094-2112], BASF’s submission of 15 June 1999 [2902], UCB’s submission of 26 July 1999 [1808], Akzo Nobel’s submission of 26 July 1999 [2422], 5435, DuCoa’s submission of 31 December 2002 [5435-5436].

¹²⁴ Bioproducts’ submission of 7 May 1999 [1830].

¹²⁵ DuCoa’s submission of 31 December 2002 [5435-5436].

¹²⁶ Bioproducts’ submission of 7 May 1999 [1830, 2126-2146], BASF’s submission of 15 June 1999 [2902], UCB’s submission of 26 July 1999 [1808], Akzo Nobel’s submission of 26 July 1999 [2422], DuCoa’s submission of 31 December 2002 [5436-5437].

whole. UCB created tables from these data¹²⁷. Prices for Latin America and the Far East were also agreed¹²⁸.

- (93) According to Chinook's statement, the pricing goals established at previous meetings had not been met. There was discussion as to why this was the case. Further information on the state of the market was exchanged. UCB complained that Chinook had not pulled out of the United Kingdom market and again Chinook advised that it had no intention of doing so¹²⁹. UCB, on the other hand, reports that in 1993, Chinook had sold 350 tonnes of choline chloride at 100% in the United Kingdom, that UCB had strongly protested this action (the more so as the product had been sold to UCB clients) and that Chinook had promised to withdraw completely as of the beginning of 1994. As for DuCoa, according to UCB's report, DuCoa claimed to have stopped all sales to Impextraco, a Belgian converter, since June 1993. On the other hand, DuCoa had not yet succeeded in controlling Niasa, a Mexican converter whose products had ended up on the Dutch market¹³⁰.
- (94) The last meeting among all six producers, Chinook, DuCoa, Bioproducts, BASF, UCB and Akzo Nobel, took place **between 14 and 20 April 1994 in Johor Bahru, Malaysia**¹³¹. According to UCB, the meeting was organised by Chinook, which made a slide presentation comparing the group's objectives at the time of the Ludwigshafen agreement with the current situation. The evaluation was not very positive. For instance, regarding Europe, Chinook and Bioproducts had given up around 2 500 tonnes of choline chloride sales, but no European producer claimed to have increased volumes. European prices were as low or lower, while Impextraco, a converter, was actually stronger and uncontrolled. Similar problems existed in other markets around the world. For instance, regarding the Far East, the presentation stated that "*Franklin and Impextraco will continue to make any agreements next to impossible unless they can be controlled*" One of the questions raised at the end of the presentation was therefore: "*What are we going to do with Impextraco and Franklin?*"¹³².
- (95) According to Bioproducts, price floors were discussed¹³³. UCB reports that the discussion focused on the Latin American and Asian markets, with the European producers trying to hold on to their existing market shares. This was, however, not acceptable to Chinook, which had just opened a new production facility in Singapore¹³⁴. According to DuCoa, "*there was just a total inability to agree on anything*"¹³⁵. At the end of the meeting, Chinook advised the participants that Chinook

¹²⁷ BASF's submission of 15 June 1999 [2919-2922], UCB's submission of 26 July 1999 [1808, 1679-1696].

¹²⁸ UCB's submission of 26 July 1999 [1678]. See also BASF's submission of 15 June 1999 [2918].

¹²⁹ Chinook's submission of 26 July 1999 [1234-1235].

¹³⁰ UCB's submission of 26 July 1999 [1677].

¹³¹ Bioproducts' submission of 7 May 1999 [1831, 2148-2216], BASF's submission of 15 June 1999 [2902], UCB's submission of 26 July 1999 [1809, 1697-1703], Akzo Nobel's submission of 26 July 1999 [2422], Chinook's submission of 26 July 1999 [1235], DuCoa's submission of 31 December 2002 [5438-5440].

¹³² UCB's submission of 26 July 1999 [1809, 1697-1703].

¹³³ Bioproducts' submission of 7 May 1999 [1831].

¹³⁴ UCB's submission of 26 July 1999 [1809].

¹³⁵ DuCoa's submission of 31 December 2002 [5438-5440].

would no longer participate in further group meetings. The others in attendance at the meeting appeared to agree¹³⁶. BASF confirms that during the meeting, it was determined that efforts to regulate exports to Asia were not productive and should not be continued¹³⁷.

9.5. Further contacts between the European and North American producers

- (96) According to UCB, Chinook's declaration at the Malaysia meeting that it was no longer interested in global meetings among choline chloride producers effectively put an end to UCB's efforts to talk to the North American producers. Thereafter, UCB was no longer informed of any further such meetings nor did it receive any invitation to any such meetings¹³⁸. According to BASF, "a few further meetings were held to continue efforts to regulate exports to South/Latin America, which ultimately ended in failure in about the end of 1996"¹³⁹. DuCoa states that "the meeting in Malaysia was the last meeting [it] had with European choline producers in which [it] made any attempt to reach agreement on pricing, territories or customers for choline chloride". Although following the Malaysia meeting, DuCoa "had individual meetings with the Europeans during that period, ...there were no world meetings or global meetings and ...those meetings related to the possibility of a joint venture in Europe"¹⁴⁰. However, no such joint ventures between North American producers and European producers in the EEA market emerged. Exports from North America to the EEA market remained relatively low¹⁴¹. Since the collapse of the arrangements at the global level in 1994, DuCoa also occasionally exported choline chloride to Western Europe from its plant in Mexico, first a minimal quantity of around 66 tonnes in 1994, then around 1 000 tonnes in 1997 and in 1998¹⁴².

10. OPERATION OF THE CARTEL AT THE EUROPEAN LEVEL

10.1. General elements

- (97) The existence of anti-competitive contacts also at the European level regarding choline chloride is recognised by UCB and Akzo Nobel. UCB confirms that there were meetings and regular contacts between Akzo Nobel, BASF and itself to exchange information relating specifically to the European market. Together these three producers controlled more than three quarters of the European market. Meetings took place every three months in order to discuss companies' performance during the past trimester as well as to agree on prices for the next trimester. The meetings UCB reports took place in the period between March 1994 and October 1998. In addition,

¹³⁶ Chinook's submission of 26 July 1999 [1235], UCB's submission of 26 July 1999 [1809].

¹³⁷ BASF's submission of 15 June 1999 [2902].

¹³⁸ UCB's submission of 26 July 1999 [1809].

¹³⁹ BASF's submission of 15 June 1999 [2902].

¹⁴⁰ DuCoa's submission of 31 December 2002 [5438-5440].

¹⁴¹ The most significant import quantity in a single year from the US or Canada was that of 1 591 metric tonnes (at 100%) of CN 23.09.90.95 (preparations of a kind used in animal feeding, containing by weight \geq 49% of choline chloride, on an organic or inorganic base) from Canada in the year 2000 (2 652 metric tonnes at 60% as reported by Eurostat).

¹⁴² DuCoa's submission of 23 August 1999 [3223-3224].

phone calls among the three companies took place every week or every two weeks to exchange information regarding the European market¹⁴³.

- (98) Akzo Nobel, from its side, recalls that contacts between itself, UCB and BASF took place between 1995 and 1998. It states that these contacts were limited to discussions of the market in Europe and did not pertain to the North American market or other markets. Meetings were organised four or five times a year, most of the time before or after CEFIC meetings. But there were also meetings separate from any CEFIC activities.
- (99) It is apparent from the meeting reports supplied by Akzo Nobel¹⁴⁴ and UCB¹⁴⁵ and the general descriptions provided by Akzo Nobel¹⁴⁶ and UCB¹⁴⁷ of the arrangements at the European level that these arrangements concerned essentially five activities:
- (a) **The setting and increase of prices**, both for the EEA as a whole¹⁴⁸, for particular national markets¹⁴⁹ and for individual customers¹⁵⁰. In this last respect, by agreeing that the other companies would offer higher price quotes than the company to which the customer was allocated, the price agreements for individual customers served not only to maintain or increase prices to those customers, and thereby ultimately to that national market, but also to maintain the agreed customer allocations and thereby ultimately the agreed market shares.
- (b) **The allocation of individual customers** among the participating undertakings¹⁵¹. Customers in specific national markets were regularly

¹⁴³ UCB's submission of 26 July 1999 [1812].

¹⁴⁴ Akzo Nobel's submission of 8 January 2002 [5654-5664].

¹⁴⁵ UCB's submission of 26 July 1999 [1734-1741].

¹⁴⁶ Akzo Nobel's submission of 8 January 2002 [5560-5561].

¹⁴⁷ UCB's submission of 26 July 1999 [1813].

¹⁴⁸ For example :

*« Price increase planning for CC 50% veg :
Q4'96 at DM.1350
Q1'97 at DM.1500
Q2'97 at DM.1650
Q3'97 at DM.1800 ».*

See Akzo Nobel's submission of 8 January 2002 [5654].

¹⁴⁹ For example :

*« Per 1.7.96 prices in Italy will be :
Lit.1300 for CC 50% veg
Lit 1560 for CC 60% veg
Lit. 1350 for CC 75%
Lit 1800 for CC 50% min ».*

See Akzo Nobel's submission of 8 January 2002 [5654]. See also UCB's submission of 26 July 1999 [1741].

¹⁵⁰ For example :

*« Q4
Salvana : B-DM.1350, C-DM.1360, A-DM.1390 . »*

See Akzo Nobel's submission of 8 January 2002 [5658]. "B" stands for BASF, "C" for UCB and "A" for Akzo Nobel.

¹⁵¹ UCB's submission of 26 July 1999 [1741], Akzo Nobel's submission of 8 January 2002 [5655-5661].

allocated by agreeing that the other participating undertakings would offer higher prices than the undertaking to which the customer was allocated.

- (c) **The allocation of market shares** for each undertaking for the EEA market as a whole. According to Akzo Nobel, it was understood that Akzo Nobel and UCB could claim 35% and 28% respectively, while BASF would have 15%¹⁵². The principle was accepted that compensation should be provided if these shares were exceeded¹⁵³.
 - (d) **The control of distributors and converters.** To ensure the effectiveness of the agreements regarding market shares, customer allocations and prices, it was important for the producers to control the behaviour of distributors and converters of choline chloride in the market. The control over distributors was pursued by agreeing not to sell at preferential prices to distributors, while the control over converters was pursued either by ensuring that they purchased their raw materials from the cartel members, under the right conditions, or by informing them of the price levels agreed among the three producers, in the hope that they would follow these price levels, or, if necessary, by establishing exclusive corporate ties over them¹⁵⁴.
 - (e) **The exchange of commercially sensitive information.** Whether the agreed market shares, customer allocations and prices were being achieved in practice was regularly checked by comparing information on sales actually made during the previous period. Starting from CEFIC statistics, participants would report their actual sales volumes and sales prices in national markets, including to individual customers. They also discussed their experiences with individual customers¹⁵⁵.
- (100) As for BASF, it appears to have only a faint recollection of any wrong-doing at the European level. In its submission of 15 June 1999, it merely states that “*While there were sporadic efforts among the three European producers to reach agreements regarding European markets and prices in the same time frame [as that of the arrangements at the global level], no effective agreement was ever reached or implemented by the [sic] regarding Choline Chloride in Europe*”¹⁵⁶. In its later submission of 4 November 2002, BASF recognizes that a number of meetings took place at the European level from 1992 onward, but claims that it was partially ignorant of the contents of the discussions. Three of the meetings it lists in an annex do not

¹⁵² ICI, not a cartel member, was estimated at 15%. The agreed share of Akzo Nobel apparently included sales by Franklin Holland, while the agreed share of UCB included sales by Impextraco. See Akzo Nobel’s submission of 8 January 2002 [5560, 5605, 5654, 5663-5664] and recitals (110) and (111) below.

¹⁵³ Akzo Nobel’s submission of 8 January 2002 [5654].

¹⁵⁴ Akzo Nobel’s submission of 8 January 2002 [5561, 5655-5657].

¹⁵⁵ UCB’s submission of 26 July 1999 [1734-1741]. Akzo Nobel’s submission of 8 January 2002 [5655-5662].

¹⁵⁶ BASF’s submission of 15 June 1999 [2902].

concern cartel activities, for two others the contents were unknown to BASF, while finally two meetings are referred to as discussions of the market situation in Europe¹⁵⁷.

(101) Reported participants in cartel meetings at the European level were as follows:

Table 4: Reported participants in cartel meetings at the European level

Date and place	AKZO NOBEL	BASF	UCB
14 March 1994 Schoten, Belgium	[*]	No evidence of participation	[*]
29 November 1994 Amersfoort, the Netherlands	[*]	[*] [*]	[*] [*]
15 February 1995 Kerpen, Germany	[*] [*]	[*]	[*] [*]
8 June 1995 Amersfoort, the Netherlands	[*] [*]	[*]	[*] [*]
11 July 1995 Sindorf, Germany	Participated	[*]	[*]
3 June 1996 Brussels, Gent or Herentals, Belgium	[*]	Participated	Participated
19 July 1996 Düren, Germany	[*]	Participated	Participated
2 Sep. 1996 Düren, Germany	[*]	Participated	Participated
27 Feb. 1997 Breda, the Netherlands	[*]	[*]	[*] [*]
3 June 1997 Brouwershaven, the Netherlands	[*] [*] [*]	Participated	Participated
10-12 Sep. 1997 The Ardennes, Belgium	[*] [*]	[*]	[*] [*]
End 1997, location unknown	[*] [*]	Participated	Participated
10 Feb. 1998 Brussels, Belgium	[*] [*]	[*]	[*] [*]

¹⁵⁷ BASF's submission of 4 November 2002 [4917, 5490].

15 July 1998 Maastricht, the Netherlands	[*] [*]	[*]	[*] [*]
October 1998 Brussels, Belgium or Aachen, Germany	[*] [*]	[*]	[*] [*]

Sources: UCB's submission of 26 July 1999 [1812-1813], Akzo Nobel's submission of 8 January 2002 [5563-5565], BASF's submission of 4 November 2002 [5490].

10.2. Specific anti-competitive contacts

(102) The first well-documented evidence that anti-competitive discussions took place among European choline chloride suppliers regarding specifically the European market concerns a meeting held on **14 March 1994 in Schoten, Belgium**, at the offices of Impextraco. Akzo Nobel, UCB and Impextraco (but not BASF) participated in this meeting¹⁵⁸. A contemporaneous meeting report of UCB records that the parties exchanged sales information regarding several Member States, in particular regarding Italy. For the Italian market, they fixed prices, as follows:

“We make the following agreements for April-June 1994:

- Prices: liq.75 at 1250 from 1/4, 1325 from 1/5;

Si50 at 1600 from 1/4;

Veg50 at 1300 from 1/4”¹⁵⁹.

(103) At that meeting, the same parties also agreed a client allocation list for the Italian market, in which each of the three suppliers received a “preference” for certain specified clients. Several clients were shared among two suppliers. The agreement regarding these clients was that *“We give a preference for the most special liquid clients, for which the non-preferential suppliers offer from 10 to 40 lire more than the agreed price, payment terms not to exceed 60 days everywhere”¹⁶⁰.*

(104) The same meeting report of UCB records information provided by Ertisa (presumably in a separate contact with one or more of the companies present) identifying its clients in Italy and the type of choline chloride sold to them¹⁶¹.

(105) On **29 November 1994**, a meeting took place between UCB, Akzo Nobel and BASF in **Amersfoort, the Netherlands**¹⁶². A contemporaneous meeting report of UCB¹⁶³ shows that during that meeting, the three companies agreed sales prices as follows:

¹⁵⁸ UCB's submission of 26 July 1999 [1813, 1739-1741].

¹⁵⁹ UCB's submission of 26 July 1999 [1741].

¹⁶⁰ Original in Dutch *“We geven een preferentie voor de bijzonderste klanten vloeibaar, waarbij de niet-prefertieële suppliers op 10 à 40 lire aanbieden boven de afgesproken prijs, betalingstermijn overal niet méér dan 60 dagen”*, see UCB's submission of 26 July 1999 [1741].

¹⁶¹ UCB's submission of 26 July 1999 [1741].

¹⁶² UCB's submission of 26 July 1999 [1812], BASF's submission of 4 November 2002 [5489-5490].

- (110) A meeting took place between UCB, Akzo Nobel and BASF on **3 June 1996** in **Belgium** (in Brussels, Gent or Herentals). A contemporaneous meeting report of Akzo Nobel is worth quoting in full:

“Agreement on shares and volumes:

A: 36%

B: 15%

C: 24%

D: 8%

E: 17%

F: 1500 mt, resp. of A.

I: 2700 mt, resp. of C.

Shares are based on the Cefic figures excl. F and I.

Example 1995:

Cefic total 32601 mt

F+I 2088 mt

Cefic, excl. 30513 mt

Compensations will be made on this basis.

Prices:

Per 1.7.96 prices in Italy will be:

Lit. 1300 for CC 50% veg

Lit. 1560 for CC 60% veg

Lit. 1350 for CC 75%

Lit. 1800 for CC 50% min

Price increase planning for CC 50% veg:

Q4'96 at DM.1350

Q1'97 at DM.1500

Q2'97 at DM.1650

Q3'97 at DM.1800

Based on a/m prices the surcharge for other grades will be the following:

DM.100 for CC 75%

DM.300 for CC 50% min

6/5 of the price of CC 50% veg will be the price for CC 60% veg

7/5 of the price of CC 70[sic]% veg will be the price for CC 70% veg

All prices are net/net prices, so discounts and bonuses are already deducted”¹⁷².

- (111) Akzo Nobel clarifies that A refers to Akzo Nobel, B to BASF, C to UCB, D to Ertisa, E to ICI, F to Franklin Holland, and I (sometimes G) to Impextraco¹⁷³. The reference to the CEFIC figures (32 601 metric tonnes) shows that this agreement on shares and volumes pertains to the entire EEA market, plus Switzerland and Turkey¹⁷⁴. Akzo

¹⁷² Akzo Nobel's submission of 8 January 2002 [5654].

¹⁷³ Akzo Nobel's submission of 8 January 2002 [5563]

¹⁷⁴ See the CEFIC figure of 32601 metric tonnes for total Western Europe listed in Akzo Nobel's market survey for choline chloride, Akzo Nobel's submission of 8 January 2002 [5604].

Nobel's report also shows that the prices agreed for Italy were very precise and were given a clear date of implementation. The price increases planned for each of the quarters from 4/96 to 3/97 were also very precise. Akzo Nobel confirms that these prices, expressed in German marks, concerned "overall" price increases¹⁷⁵. This seems to indicate that these planned price increases were to be implemented across the EEA. It should also be noted that the share of Franklin Holland was to come out of that of Akzo Nobel, while the share of Impextraco had to come out of that of UCB.

- (112) A meeting took place between UCB, Akzo Nobel and BASF on **19 July 1996** in **Düren, Germany**¹⁷⁶. Akzo Nobel's contemporaneous meeting report shows that the three companies exchanged detailed information regarding their sales volumes and prices to named clients in Germany, the Netherlands and Belgium. They also agreed the allocation of lists of named clients in each of these three Member States among themselves. They agreed not to offer special prices to certain named traders in Germany. Finally, they agreed that Akzo Nobel would control Denkavit, a Dutch converter that was being supplied by Akzo Nobel: "*Denkavit is big problem in the market. Either they have to be controlled or not being able to trade as today. A will take necessary steps in sales appointing excl. distributorship*". Apparently, Ertisa had been invited to this meeting, but had declined, stating that it "*had no interest to sell in Germany*". The meeting report notes the intention to organise, at the occasion of the next meeting, a separate meeting with Ertisa to discuss the countries in which it was present, in particular Italy, Spain and Portugal¹⁷⁷.
- (113) Another meeting in **Düren, Germany**, took place on **2 September 1996**, again between the same three producers¹⁷⁸. A contemporaneous meeting report of Akzo Nobel indicates that the three companies exchanged detailed information regarding their sales volumes and prices to named clients in Germany, Belgium, France and Italy. They also agreed the allocation of lists of named clients in each of these four Member States among themselves. Finally, they agreed the sales prices each supplier would offer in the fourth quarter of 1996 to certain named clients in Germany¹⁷⁹. Akzo Nobel explains this last arrangement in the following way: "*Price arrangements were made on a customer specific basis. For example, an agreement was made on BASF offering the lowest price (i.e. 1350 DM) to one of its traditional customers, Vilomix. As a result of competitors offering a higher price than BASF, the latter would indeed keep the customer*"¹⁸⁰.

¹⁷⁵ Akzo Nobel's submission of 8 January 2002 [5563]. The conclusion that these price increases applied to the entire Western European market also follows from a document in which Akzo Nobel's headquarters informs sales staff in different Member States of the new minimum prices to be applied. The prices are all quoted in German marks. According to the note, "*As you may notice all prices are related to each other and of the same value in order to have a general price level for the W. European market*"., see Akzo Nobel's submission of 26 July 1999 [2706].

¹⁷⁶ Akzo Nobel's submission of 8 January 2002 [5563].

¹⁷⁷ Akzo Nobel's submission of 8 January 2002 [5655-5657].

¹⁷⁸ Akzo Nobel's submission of 8 January 2002 [5563, 5658-5661].

¹⁷⁹ Akzo Nobel's submission of 8 January 2002 [5658-5661].

¹⁸⁰ Akzo Nobel's submission of 8 January 2002 [5563].

(114) The next meeting between UCB, Akzo Nobel and BASF regarding the European market took place on **27 February 1997** in **Breda, the Netherlands**¹⁸¹. A contemporaneous meeting report of Akzo Nobel shows that the parties exchanged detailed information regarding their sales prices and volumes to named clients in Germany, the Netherlands and France. On prices, they agreed: “*Prices Q2 = Q1 + 3%, with rock bottom at major accounts at Q1 level*”. They also exchanged information regarding competitors (ICI supplies to Denkavit; fears were expressed that Chinook might be looking for a convertor in the Community). UCB states that the topics discussed in this meeting and all subsequent meetings UCB reported were always the same, namely to:

- *clarify the situation in respect of betaine (a substitution product for choline chloride) and its effect on the undertakings represented by the participants;*
- *try to identify the imports of choline chloride and their effect on the undertakings represented by the participants;*
- *exchange information permitting to individualise statistics elaborated by CEFIC;*
- *agree target prices of choline chloride for the next trimester or the next six months*”¹⁸².

(115) On **3 June 1997**, the same three undertakings met again, this time in **Brouwershaven, the Netherlands**¹⁸³. A contemporaneous meeting report prepared by Akzo Nobel shows that they exchanged information on sales volumes in Europe for each year from 1990 to 1996, covering their own sales and those of Franklin Holland and Impextraco. The sales of Franklin Holland were added to those of Akzo Nobel and the sales of Impextraco were added to those of UCB. They then analysed the European market in 1996 in greater detail, by breaking up the figures country by country and comparing them to CEFIC figures. Based on CEFIC’s 1996 figure for the total volume of the European choline chloride market, the old shares, as agreed in the meeting on 3 June 1996 were updated and a new, slightly changed, allocation made for Europe as a whole. Shares were also provided for Ertisa and ICI, which were, however, not present at the meeting. The shares allocated to Akzo Nobel and UCB included sales by Franklin Holland and Impextraco respectively¹⁸⁴.

(116) The next meeting between Akzo Nobel, UCB and BASF took place between **10 and 12 September 1997** in **the Ardennes, Belgium**, prior to a CEFIC meeting on 12 September 1997. According to Akzo Nobel, market share issues, imports of choline chloride, prices and big customers, all relating to Europe, were discussed¹⁸⁵.

¹⁸¹ UCB’s submission of 26 July 1999 [1813], Akzo Nobel’s statement of 8 January 2002 [5563, 5662].

¹⁸² UCB’s submission of 26 July 1999 [1813]. The subsequent meetings reported by UCB are a meeting in September 1997 in the Ardennes, Belgium, a meeting in 1998 in Maastricht, the Netherlands, a meeting on 10 February 1998 in Aachen, Germany and a meeting in October 1998 in Aachen, Germany.

¹⁸³ Akzo Nobel’s submission of 8 January 2002 [5564].

¹⁸⁴ Akzo Nobel’s submission of 8 January 2002 [5663-5664].

¹⁸⁵ Akzo Nobel’s submission of 8 January 2002 [5564-5565].

- (117) By the **end of 1997**, according to Akzo Nobel, another meeting between the three undertakings took place. The exact date, location and substance of the discussions are not known¹⁸⁶. Akzo Nobel states that during this and subsequent meetings between the three undertakings, *“parties established the respective sales volumes subdivided per customer and per European country. On that basis, an overall estimate was made of the actual market shares in Europe. Parties then agreed on prospective market shares in Europe. A number of individual customers were discussed”*¹⁸⁷. This allowed Akzo Nobel to create a so-called “CC survey”. Starting from CEFIC market figures, the list identifies the sales volumes of individual suppliers per country and subsequently per customer in each country of Europe¹⁸⁸.
- (118) UCB and Akzo Nobel report that the next meeting between the three undertakings took place on **10 February 1998 in Brussels, Belgium**¹⁸⁹.
- (119) **Maastricht, the Netherlands**, was the location for the next meeting between the three undertakings. This meeting took place on **15 July 1998**¹⁹⁰.
- (120) The last reported meeting(s) between the three undertakings regarding the European market took place in the **second half of 1998**, either in **October 1998 in Aachen, Germany**, as reported by UCB, or in **Brussels in the second half 1998**, as reported by Akzo Nobel, or both¹⁹¹. According to Akzo Nobel, *“Apparently, price increases in Europe were discussed”*¹⁹².
- (121) Akzo Nobel states that *“At the end of 1998, the choline chloride case erupted in the United States. Although this case did not relate to the arrangements made discussed in this statement, parties decided to end all pending discussions relating to Europe. There have not been any other arrangements between parties since then”*¹⁹³.

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

11. RELATIONSHIP BETWEEN THE TREATY AND THE EEA AGREEMENT

- (122) Both the global and the European arrangements applied to the entire territory of the EEA for which a demand for choline chloride existed. These arrangements extended to

¹⁸⁶ Akzo Nobel’s submission of 8 January 2002 [5565].

¹⁸⁷ Akzo Nobel’s submission of 8 January 2002 [5564].

¹⁸⁸ Akzo Nobel’s submission of 8 January 2002 [5564-5565, 5602-5637]. The subsequent meetings referred to by Akzo Nobel are a meeting on 10 February 1998 in Brussels, Belgium, 15 July 1998 in Maastricht, the Netherlands, and a meeting in the second half of 1998 in Brussels, Belgium.

¹⁸⁹ UCB’s submission of 26 July 1999 [1813], Akzo Nobel’s statement of 8 January 2002 [5565], UCB’s submission of 18 October 2002 [3346].

¹⁹⁰ UCB’s submission of 26 July 1999 [1813], Akzo Nobel’s statement of 8 January 2002 [5565].

¹⁹¹ UCB’s submission of 26 July 1999 [1813], Akzo Nobel’s statement of 8 January 2002 [5565].

¹⁹² Akzo Nobel’s submission of 8 January 2002 [5565].

¹⁹³ Akzo Nobel’s submission of 8 January 2002 [5565].

Austria, Sweden and Finland prior to their accession to the European Union on 1 January 1995.

- (123) The EEA Agreement, which contains provisions on competition analogous to the Treaty, came into force on 1 January 1994. For the period prior to that date, the only provision applicable in this proceeding is Article 81 of the Treaty. For the period after 1 January 1994, this Decision includes the application of the relevant EEA rules (primarily Article 53(1) of the EEA Agreement) to the arrangements to which objection is taken.
- (124) In so far as the arrangements affected competition and trade between Member States, Article 81 of the Treaty is applicable. The operation of the cartel in EFTA States that are part of the EEA and its effect upon trade between the Community and Contracting Parties to the EEA or between Contracting Parties to the EEA fall under Article 53 of the EEA Agreement.

12. JURISDICTION

- (125) On the basis of Article 56 of the EEA Agreement, the Commission is, in this case, the competent authority to apply both Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement, since the cartel had an appreciable effect on trade between Member States and on competition within the Community.

13. APPLICATION OF ARTICLE 81 OF THE TREATY AND ARTICLE 53 OF THE EEA AGREEMENT

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

- (126) Article 81(1) of the Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production and markets, or share markets or sources of supply.
- (127) Article 53(1) of the EEA Agreement (which is modelled on Article 81(1) of the Treaty) contains a similar prohibition. However, the reference in Article 81(1) of the Treaty to "trade between Member States" is replaced in the EEA Agreement by a reference to "trade between Contracting Parties" and the reference to "competition within the common market" is replaced by a reference to "competition within the territory covered by ... [the EEA] Agreement".

13.2. Agreements and concerted practices

13.2.1. Principles

- (128) Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement prohibit "agreements between undertakings, decisions by associations of undertakings or concerted practices".

- (129) An *agreement* can be said to exist when the parties, expressly or implicitly, jointly adopt a plan determining the lines of their mutual action (or abstention) on the market¹⁹⁴. It does not have to be made in writing. No formalities are necessary, and no contractual sanctions or enforcement measures are required. Parties do not need to feel bound by it. The agreement may be express or implicit in the behaviour of the parties, since a line of conduct may be evidence of an agreement. If an undertaking is present at meetings that have a manifestly anti-competitive purpose, unless it openly distances itself from what is agreed, it will be considered to be a party even if it does not in fact abide by the outcome of the meetings. Furthermore, it is not necessary, in order for there to be an infringement of Article 81(1) of the Treaty, for the participants to have agreed in advance upon a comprehensive common plan. The concept of agreement in Article 81(1) of the Treaty may apply to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement.
- (130) An agreement for the purposes of Article 81(1) of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract at civil law. Moreover, in the case of a complex cartel of long duration, the term “agreement” can properly be applied not only to any overall plan or to the terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose. As the Court of Justice, upholding the judgment of the Court of First Instance, has pointed out in Case C-49/92P *Commission v Anic Partecipazioni SpA*¹⁹⁵ it follows from the express terms of Article 81(1) of the Treaty that an agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.
- (131) Although Article 81 of the Treaty and Article 53 of the EEA Agreement draw a distinction between the concept of “concerted practice” and that of “agreements between undertakings”, the object is to bring within the prohibition of those Articles a form of co-ordination between undertakings by which, without having reached the stage where an agreement properly so-called has been concluded, they knowingly substitute practical co-operation between them for the risks of competition¹⁹⁶.
- (132) The criteria of co-ordination and co-operation laid down by the case law of the Court, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the commercial policy which it intends to adopt in the common market. Although that requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators the object or effect of which is either to influence the conduct on the market of an actual or potential

¹⁹⁴ The case law of the Court of Justice and the Court of First Instance in relation to the interpretation of Article 81 of the Treaty applies equally to Article 53 of the EEA Agreement. See recitals No 4 and 15 as well as Article 6 of the EEA Agreement, Article 3(2) of the EEA Surveillance and Court Agreement, as well as Case E-1/94 of 16 December 1994, recitals 32-35.

¹⁹⁵ See [1999] ECR I - 4125, at paragraph 81.

¹⁹⁶ Case 48/69 *Imperial Chemical Industries v Commission* [1972] ECR 619 at paragraph 64.

competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market¹⁹⁷.

- (133) Thus, conduct may fall under Article 81(1) of the Treaty as a *concerted practice* even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour¹⁹⁸. Furthermore, the process of negotiation and preparation culminating effectively in the adoption of an overall plan to regulate the market may well also (depending on the circumstances) be characterised as a concerted practice¹⁹⁹.
- (134) Although in terms of Article 81(1) of the Treaty the concept of a concerted practice requires not only concerting behaviour between undertakings but also conduct on the market resulting from the concerting behaviour and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such concerting behaviour and remaining active on the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concerting behaviour occurs on a regular basis and over a long period. Such a concerted practice is caught by Article 81(1) of the Treaty even in the absence of anti-competitive effects on the market²⁰⁰.
- (135) In its *PVC II* judgment, the Court of First Instance confirmed that “[i]n the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [81] of the Treaty”²⁰¹.

13.2.2. Application

- (136) The facts described in Chapter IV demonstrate that the meeting in Mexico City, Mexico on 12 and 13 October 1992 was the start of a concerted practice between the participating undertakings, BASF, Bioproducts, DuCoa, Chinook, Akzo Nobel and UCB, affecting the EEA market. Although BASF had already in the previous meeting in Mexico City, Mexico between 15 and 17 July 1992 agreed to desist from distributing choline chloride from Mexico in the United States, the meeting on 12 and 13 October 1992 was the first meeting when the parties started to co-ordinate their commercial behaviour in respect of choline chloride generally, for all regions, including the EEA. The discussion and exchange of information among the parties in

¹⁹⁷ Joined Cases 40-48/73, etc. *Suiker Unie and others v Commission* [1975] ECR 1663.

¹⁹⁸ See also the judgment of the Court of First Instance in Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, at paragraph 256.

¹⁹⁹ See, for example, Case T-148/89 *Trefilunion v Commission* [1995] ECR II-1063, paragraph 82.

²⁰⁰ See also the judgment of the Court of Justice in Case C-199/92 P *Hüls v Commission*, [1999] ECR I-4287, at paragraphs 158-166.

²⁰¹ Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij NV, Elf Atochem SA, BASF AG, Shell International Chemical Company Ltd, DSM NV and DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst AG, Société artésienne de vinyle, Montedison SpA, Imperial Chemical Industries plc, Hüls AG and Enichem SpA v Commission*, [1999] ECR II-00931, at paragraph 696.

this meeting about production capacities, market shares by region, previous attempts at price cutting, inflation, price levels, companies' profit situation and the need to control converters and distributors through proper pricing was meant to - and could not fail to - influence each party's subsequent conduct on the market. It also served to prepare the terrain for the negotiation and possible adoption of a common plan to regulate the global market subsequently.

(137) This common plan indeed materialized and was agreed at the Ludwigshafen meeting in November 1992. With respect to the EEA, it consisted of:

- an agreement to increase prices world-wide, including in the EEA;
- an agreement to control distributors and converters, including in the EEA;
- an agreement that the North American producers would withdraw from the European market.

These activities qualify as "agreements" within the meaning of Article 81(1) of the Treaty, in the sense that the undertakings concerned expressed their joint intention to conduct themselves on the market in a specific way. In addition, at this meeting, the undertakings in question exchanged sensitive commercial information, with a view to - and with the effect of - influencing each other's commercial behaviour. This behaviour qualifies as a concerted practice.

(138) In its reply to the Statement of Objections, UCB denies that it ever engaged in a global agreement, whether at the Ludwigshafen meeting or at any time before or after. This claim cannot be upheld. All the other undertakings participating at the Ludwigshafen meeting have expressly recognized that one or more agreements were reached among all of the parties present at this meeting²⁰². In support of its argument that there was no agreement at the global level, UCB refers to testimony by a Chinook representative. The testimony in question reads as follows:

"Q. What came out of the [Ludwigshafen] meeting?"

A. An agreement came out of the meeting in which BASF agreed to end their relationship with [its US distributor]....

Q. What came out of the meeting about any other subjects?"

A. There was agreement by the - by Chinook and by Bioproducts to at the same time frame, July of '93, stop exporting choline chloride to western Europe. There was a further agreement to stop exporting choline chloride to eastern Europe but it was at a later date, either the end of '93 or perhaps even the end of '94.

There were also agreements relative to Chinook and Bioproducts having access to try to grow their markets in the Pacific Rim faster than the other competitors. The other

²⁰² See section 9.3 of this Decision.

competitors were supposed to maintain a market share in the Pacific Rim while Chinook and Bioproducts were allowed to grow theirs.

There were also decisions made to try to increase prices in virtually all export markets”²⁰³.

- (139) It is difficult to understand how UCB can take this testimony as an indication that there was no agreement, given that the words “agreement(s)”, “agreed” and “decisions” appear six times in the answers given in this short piece of text.
- (140) There is, moreover, no indication that UCB indicated any reservation during the meeting or expressed any opposition to the conclusions that were retained at the end of it and that were laid down in contemporaneous notes by several participating undertakings in virtually identical terms. UCB’s representatives participated in all of the follow-up meetings subsequent to the Ludwigshafen meeting, which served to implement the measures agreed, without ever indicating to the other participants that UCB considered that no agreement had been reached at Ludwigshafen. UCB must therefore be considered to have at least implicitly endorsed the common plan adopted at the Ludwigshafen meeting. It may well be that UCB’s representatives felt that the agreement was not implemented properly or failed to have the expected impact on the market²⁰⁴. But that is very different from concluding that there was no agreement to begin with.
- (141) Implementation of the Ludwigshafen agreement was the object of all the follow-up meetings at the global level up to and including the meeting between 14 and 20 April 1994 in Johor Baru, Malaysia. As indicated in recital (87), BASF has confirmed that throughout all these follow-up meetings, all companies continued to confirm the North America-West Europe export prohibitions. At least this part of the Ludwigshafen agreement must therefore be considered to have continued in operation until the meeting at Johor Baru. In addition, throughout these meetings, the participating undertakings continued to co-ordinate other aspects of their commercial behaviour in respect of the EEA. Such co-ordination included discussion of efforts to control European converters and discussion of Chinook’s behaviour in the United Kingdom. Concerted practices regarding the EEA therefore existed throughout the period between the meeting in Mexico City, Mexico on 12 and 13 October 1992 and the meeting in Johor Baru, Malaysia between 14 and 20 April 1994.
- (142) The facts described in Chapter IV also demonstrate that throughout the period from the meeting in Schoten, Belgium on 14 March 1994 until the meeting in October 1998 in Brussels, Belgium or Aachen, Germany, with respect to the EEA as a whole or parts thereof, Akzo Nobel, BASF and UCB agreed on:

²⁰³ UCB’s reply to the Statement of Objections, page 8, including footnote 18 and annex 3, page 662.

²⁰⁴ In its response to the Statement of Objections, UCB writes that one of its representatives, upon coming out of the global meetings in which he participated, would have the feeling that “we are going nowhere”. Another UCB representative remembered that the follow-up meetings were “a kind of battlefield”. See UCB’s response to the Statement of Objections, page 13.

- prices and price increases, both in general, for particular national markets and for individual customers;
- the allocation of individual customers among themselves;
- the allocation of market shares among themselves;
- the control of distributors and converters.

(143) These activities qualify as “agreements” within the meaning of Article 81(1) of the Treaty, in the sense that the undertakings concerned expressed their joint intention to conduct themselves on the market in a specific way. In addition, throughout this period, the undertakings in question exchanged sensitive commercial information, with a view to – and with the effect of – influencing each other’s commercial behaviour. Such exchange of information took place both in the meetings of the cartel and through regular phone calls among the three undertakings²⁰⁵. This behaviour qualifies as a concerted practice.

(144) It is, in any case, not necessary for the Commission, particularly in the case of a complex infringement of long duration, to characterise conduct as exclusively one or other of these forms of illegal behaviour. The concepts of agreement and concerted practice are fluid and may overlap. The anti-competitive behaviour may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when considered in isolation some of its manifestations could accurately be described as one rather than the other. It would however be artificial analytically to sub-divide what is clearly a continuing common enterprise having one and the same overall objective into several different forms of infringement.

13.3. The concept of single and continuous infringement

13.3.1. Principles

(145) A complex cartel like the one which is the subject of this proceeding may properly be viewed as a *single and continuous infringement* for the time frame in which it existed. This is the case in particular where the activities of a cartel formed part of an overall scheme which laid down the lines of cartel members' action in the market and restricted their individual commercial conduct with the aim of pursuing an identical anti-competitive object and economic aim. The Commission considers that it would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was in reality a single infringement which manifested itself in a series of anti-competitive activities throughout the period of operation of the cartel²⁰⁶. The agreement may well be varied from time to time, or its mechanisms adapted or

²⁰⁵ See recital (97).

²⁰⁶ See the judgment of the Court of First Instance of 24 October 1999, in case T-1/89, *Rhône-Poulenc S.A. v Commission*, [1991] ECR II-867, paragraphs 125 and 126.

strengthened to take account of new developments. The validity of this assessment is not affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute a violation of Article 81(1) of the Treaty.

- (146) Although a cartel is a joint enterprise, each participant in the agreement may play its own particular role. Some participants may have a more dominant role than others. Internal conflicts and rivalries, or even cheating may occur, but that will not prevent the arrangement from constituting an agreement/concerted practice for the purposes of Article 81(1) of the Treaty where there is a single common and continuing objective.
- (147) The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and the same anti-competitive effect. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. This is certainly the case where it is established that the undertaking in question was aware of the unlawful behaviour of the other participants or could have reasonably foreseen or been aware of them and was prepared to take the risk²⁰⁷.
- (148) As the Court of Justice stated in its judgment in *Commission v Anic Partecipazioni*, the agreements and concerted practices referred to in Article 81(1) of the Treaty necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged. It follows that infringement of that Article may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves an infringement of Article 81 of the Treaty²⁰⁸.

13.3.2. Application

- (149) UCB and Akzo Nobel have argued that the global and European arrangements should be considered two separate infringements²⁰⁹. They hope to benefit from the fact that, if the global arrangements were to be considered a separate infringement, the imposition of a fine for those arrangements would be prescribed. Their arguments can, however, not be accepted.

²⁰⁷ See judgment in *Commission v Anic Partecipazioni*, at paragraph 83.

²⁰⁸ See the judgment in *Commission v Anic Partecipazioni*, paragraphs 78-81, 83-85 and 203.

²⁰⁹ BASF does not challenge that the global and European arrangements constitute a single infringement : « Die Dauer der Zuwiderhandlung, and der BASF beteiligt war, ist...begrenzt auf den Zeitraum vom 16. November 1992 bis Ende 1998” (The duration of the infringement in which BASF participated ...is limited to the period from 16 November 1992 until the end of 1998).

- (150) In so far as the EEA is concerned, the Commission finds that the global arrangements described in section 9 and the European arrangements described in section 10 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 identical anti-competitive economic aim, namely the distortion of normal competitive conditions in the EEA for choline chloride. All of the concrete anti-competitive activities at the global level in respect of the EEA fit within that overall anti-competitive object, as do the activities at the European level. More particularly, as is clear from a comparison of the arrangements at the two levels²¹⁰, the arrangements and activities at the European level may be properly viewed as the continuation among 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. In particular, as indicated in recitals (64) and (65), the arrangements at the European level served to continue the agreements reached at the global level regarding price increases and control of converters in Europe. To increase prices in respect of individual European clients, those clients were allocated among the European producers concerned. For those producers to be able to agree such allocations, it was clear that they had to respect each other's overall market shares in Europe. The Commission therefore views the measures agreed and taken at the European level as one coherent set of measures to continue the arrangements initially agreed at the global level in respect of the EEA.
- (151) As regards participation in the arrangements, Akzo Nobel, UCB and BASF participated in the activities at both the European and global level, agreeing first at the global level to certain actions in respect of the EEA and then continuing those actions by meetings among themselves at the European level. The North American producers did not participate in the meetings at the European level for two reasons: Firstly, at the time the meetings at the European level started (at least in terms of the evidence the Commission possesses), the global arrangements were very close to being terminated. Secondly, even if the European arrangements had started earlier, which the Commission cannot prove, it would have been useless for the North American producers to participate in them, given that they had agreed to withdraw from the European market. The implementation of what the European producers had agreed at the global level to do in Europe could be, and was, checked by the North American producers in the global meetings. They did not have to participate in any European meetings for this purpose. This concerned in particular the control of European converters. Such control was important for the North American producers because European converters, through exports from Europe, had real potential for undercutting the price levels in other regions of the world where the North American producers were active. Global meetings therefore regularly touched on this topic. 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 world-wide price increases. The fact that each participant in a cartel may play its own role and may not participate in all the

²¹⁰ Compare recitals (69) and (99).

activities of the cartel does not mean that all undertakings concerned were not party to a single common plan to distort competition on choline chloride in Europe.

- (152) Although the North American cartel members did not participate in the meetings at the European level, they were aware of those meetings or, at least, should have been aware of them. As mentioned in recital (78), Chinook considered that the Ludwigshafen agreement offered the Europeans “a chance to stabilise the European markets, east and west, get rid of converters and produce and sell directly”. As mentioned in recital (85), DuCoa felt that the European cartel members had agreements regarding Europe among themselves, even if it did not know the specifics. That the North American cartel members realised, or should have realised, that the European cartel members would organise meetings among themselves was only logical, since a primary purpose of the agreement that the North American producers would withdraw from Europe was precisely to offer the European producers the possibility to “stabilize” that market among themselves. Such “market stabilization” among the three main European competitors would have been impossible without further collusive arrangements among those competitors. This again shows how closely related the arrangements at the global and European levels were.
- (153) Nor is it a valid argument to say that the European arrangements must constitute a separate infringement from the global arrangements because the European arrangements continued long after the global arrangements had ceased. The simple fact is that the European producers from the start of the global arrangements until the end of the European arrangements agreed among themselves (as well as for some time with the North Americans) to distort competition for choline chloride in Europe. The fact that after some time the North American participants terminated their participation in this infringement does not mean that the infringement as such ended and that a new one began. Rather, the same infringement concerning the EEA continued, albeit with fewer participants. Continuity in the infringement is also indicated by the fact that the representatives of Akzo Nobel and UCB participating in the early meetings at the European level were the same individuals who had participated in the meetings at the global level²¹¹. The European arrangements could continue even after the lapsing of agreement that the North Americans would stay out of the European market, simply because the three European producers concerned together controlled around 80% of the European market and were thus usually able to implement their price and client allocation agreements.
- (154) For all of these reasons, the arrangements at the two levels are properly to be considered as a single and continuous complex infringement regarding the EEA, in which the North American producers participated for some time and the European producers for the entire period.

13.4. Restriction of competition

- (155) Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement prohibit agreements between undertakings, decisions by associations of undertakings or

²¹¹ Compare recitals (70) and (101).

concerted practices which “have as their object or effect the prevention, restriction or distortion of competition” within, respectively, the common market or the territory of the EEA Agreement.

- (156) The anti-competitive arrangements described in sections 9 and 10 had the object of restricting competition in the entire EEA where demand existed.
- (157) Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement expressly mention as restrictive of competition agreements and concerted practices which “fix...prices”²¹². This is precisely the essential characteristic of the horizontal arrangements in respect of the EEA described in sections 9 and 10 of this Decision. At the global level, price increases were agreed worldwide, including for the EEA. At the European level, prices and price increases were agreed for the EEA as a whole, for specific national markets within the EEA and for individual European clients. As part of these price agreements at the European level, agreements were also reached regarding the allocation of clients among the European producers concerned and the respect of their market shares. The agreement to control converters, reached at the global level and confirmed at the European level, was also essentially a means to ensure that agreed price levels would not be undercut. Finally, the arrangements at the global and European levels included the exchange of commercially sensitive information about the European market, necessary to agree to and implement those arrangements. All of these arrangements therefore had the object of restricting competition within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.
- (158) It is settled case-law that for the purpose of application of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement there is no need to take into account the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved²¹³. The same applies to concerted practices²¹⁴.
- (159) In its reply to the Statement of Objections, UCB claims that the Commission must show that the global arrangements had not only the object, but also the effect of restricting competition and trade within the EEA²¹⁵. UCB bases itself upon the Commission’s Decision in the *Seamless Steel Tubes* case²¹⁶. However, in that case, the Commission held that agreements regarding third markets, i.e. outside the EEA, would also be caught by Article 81 of the Treaty if it were established that those practices enabled producers to limit supply within the common market. The Commission found in that case that it was not able to provide evidence of such a restrictive effect. In this case also, the Commission does not hold the cartel members liable for their

²¹² The list is not exhaustive.

²¹³ See, for example, case T-62/98 *Volkswagen AG v Commission* [2000] ECR II-2707, paragraph 178 and case-law cited therein.

²¹⁴ See recital (134).

²¹⁵ UCB’s reply to the Statement of Objections, page 29.

²¹⁶ Commission Decision 2003/382/EC in Case IV/E-1/35.860 – seamless steel tubes, OJ L 140 , 6.6.2003, p. 1.

arrangements regarding third markets, but merely for those parts of the global arrangements which concerned the EEA. For those latter parts, it suffices for the Commission to demonstrate that they had as their object the restriction of competition within the EEA.

13.5. Effect upon trade between Member States and between EEA Contracting Parties

- (160) Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement prohibit agreements between undertakings, decisions by associations of undertakings or concerted practices which “may affect trade” between, respectively, Member States or the Contracting Parties to the EEA Agreement. The Commission has provided guidelines on the interpretation of the effect on trade concept in its Notice of 27 April 2004 – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty²¹⁷.
- (161) The complex of agreements and concerted practices between the members of the cartel was capable of affecting trade between Member States and between the Contracting Parties to the EEA Agreement. When the largest producers of choline chloride in the world, together controlling around 80% of the world market and of the EEA market, conclude agreements to fix prices, control converters and share markets, agreements which pertain to the entire territory of the EEA, such action cannot fail to be capable of affecting trade between Member States and between Contracting Parties to the EEA. When undertakings agree to allocate geographic territories, it is possible that sales from other areas into the allocated territories will be eliminated or reduced. When undertakings agree to fix prices, they eliminate competition and any resulting price differentials that would entice both competitors and customers to engage in cross-border trade. When undertakings agree to control converters, they threaten to eliminate competitors, thereby potentially affecting the competitive structure and cross-border trade in the geographic area concerned²¹⁸.
- (162) Furthermore, the application of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement to a cartel is not limited to that part of the members’ sales that actually involves the transfer of goods from one State to another. Nor is it necessary, in order for those provisions to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States²¹⁹.

13.6. Duration of the infringement

- (163) As indicated in recital (136), the infringement was initiated at the global level, with the meeting in Mexico City, Mexico on 12 and 13 October 1992, in which all members of the cartel participated and in which they commenced an anti-competitive concerted

²¹⁷ OJ C 101, 27.4.2004, p. 81.

²¹⁸ Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, points 64, 65 and 20.

²¹⁹ See the judgment of the Court of First Instance in Case T-13/89 *Imperial Chemical Industries v Commission* [1992] ECR II-1021, at paragraph 304.

practice. This infringement lasted until the last meeting among the European members in October 1998 in Brussels, Belgium or Aachen, Germany. As it is not possible for the Commission to establish the exact date when this meeting took place, the Commission will take 30 September 1998 as the end of the infringement period.

- (164) The European members of the cartel participated in this infringement for its entire duration. The duration of the infringement committed by Akzo Nobel, UCB and BASF is therefore five years and eleven months.
- (165) The North American members of the cartel participated in this infringement until the global meeting between 14 and 20 April 1994, in Johor Baru, Malaysia. As indicated in recital (95), Chinook indicated in this meeting that it would no longer participate in any further group meetings. The Commission does not have 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. The duration of the infringement by Bioproducts, Chinook and DuCoa is therefore one year and six months.

13.7. Addressees of this Decision

- (166) The Commission considers that Akzo Nobel, BASF, Bioproducts, Chinook, DuCoa and UCB should bear responsibility for the infringement.

13.7.1. Akzo Nobel

- (167) In its reply to the Statement of Objections, Akzo Nobel argues that the Commission should not hold Akzo Nobel N.V., the group's parent company, liable for any infringement. The Commission does not accept this argument.
- (168) As a general consideration, the subject of Community and EEA competition rules is the "undertaking", a concept that is not identical with the notion of corporate legal personality in national commercial or fiscal law. The "undertaking" that participated in the infringement is therefore not necessarily the same entity as the precise legal entity within a group of companies whose representatives actually took part in the cartel meetings. The term "undertaking" is not defined in the Treaty. However, in *Shell International Chemical Company v. Commission*, the Court of First Instance held that "in prohibiting undertakings *inter alia* from entering into agreements or participating in concerted practices which may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the common market, Article 85(1) [now Article 81(1)] of the EEC Treaty is aimed at economic units which consist of a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision"²²⁰.

²²⁰

Case T-11/89, [1992] ECR II-757, at paragraph 311. See also the judgment of the Court of First Instance in Case T-352/94 *Mo Och Domsjö AB v Commission*, [1998] ECR II-1989, paragraphs 87-96.

- (169) In the case of Akzo Nobel, the Commission has chosen to address this Decision to 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.
- (170) Akzo Nobel Chemicals B.V., Akzo Nobel Chemicals International B.V. and Akzo Nobel Nederland B.V. (or their legal predecessors) all participated directly in the infringement. The Akzo Nobel employees who participated in the cartel meetings represented Akzo Nobel Chemicals B.V. and Akzo Nobel Chemicals International B.V. (or their legal predecessors) in the cartel meetings. They were employed either by Akzo Nobel Chemicals B.V. or by Akzo Nobel Nederland B.V.²²¹.
- (171) Akzo Nobel Functional Chemicals B.V. was created in July 1999 as a new subsidiary of Akzo Nobel Chemicals B.V, at which time the latter became a holding company. In this sense, Akzo Nobel Functional Chemicals B.V. is the legal successor to most of the choline chloride activities previously performed by Akzo Nobel Chemicals B.V. For this reason, it should also be an addressee of this Decision²²².
- (172) As for Akzo Nobel N.V., the Commission considers that during the infringement period this legal entity formed an economic unit with the other legal entities to which this Decision is addressed. It was this economic unit that was responsible for the production and sale of choline chloride in the EEA and which participated in the cartel. This conclusion could only be different if the (direct or indirect) operational subsidiaries of Akzo Nobel N.V. were able to – and actually did – operate an autonomous commercial policy in the period concerned. This is, however, not the case. Akzo Nobel N.V. is not simply an investment vehicle which serves merely to invest capital in companies whose commercial operations it then leaves to those companies, withdrawing capital as soon as it considers that an investment in other companies, possibly not belonging to the Akzo Nobel group, would provide a better return. As Akzo Nobel itself describes the functions of Akzo Nobel N.V., this legal entity serves as “the corporate centre” of the Akzo Nobel group of companies. This corporate centre, again in the words of Akzo Nobel, “coordinates the main activities with regard to the general strategy of the group, finances, legal affairs and human resources”²²³. Through these functions, Akzo Nobel N.V. was able to exercise decisive influence over the commercial policy of its group subsidiaries, all of which were directly or indirectly 100% owned by Akzo Nobel N.V., and, it may be assumed, in fact did so²²⁴. Akzo Nobel has provided no evidence to refute this assumption and has, in fact, confirmed that Akzo Nobel N.V. does in practice exercise decisive influence over the most important commercial decisions for the entire group of Akzo Nobel companies.

²²¹ Akzo Nobel’s submission of 8 January 2002 [5543-5547].

²²² Akzo Nobel presentation at the hearing.

²²³ Akzo Nobel’s submission of 30 October 2002 [4466]. See also Akzo Nobel’s response to the Statement of Objections, pages 9-11.

²²⁴ See the judgments of the Court of Justice in Case 107/82 *AEG v Commission* [1983] ECR 3151, at paragraph 50, and in Case C-286/98 P, *Stora v Commission* [2000] ECR I-9925, at paragraph 29.

- (173) The lack of commercial autonomy of the group’s operating companies or business units within the Akzo Nobel group is also clear from the so-called “Authority Schedules” submitted by Akzo Nobel²²⁵. These schedules show that [*].
- (174) The fact that the legal entity Akzo Nobel N.V. was not itself involved in the production and sale of choline chloride is not determining for the question whether it should be considered to constitute a single economic unit with the operational units in the group that were directly involved in the production and sale of choline chloride. Division of tasks is a normal phenomenon within a group of companies. An economic unit by definition performs all of the main functions of an economic operator within the legal entities of which it is composed. Group companies and business units that are dependent on a corporate centre for the basic orientation of their commercial strategy and operations, for their investments and finances, for their legal affairs and for their leadership cannot be considered to constitute an economic unit in their own right.
- (175) In the case of Akzo Nobel, it is, moreover, evident from the corporate structure of the group itself that the economic unit producing and selling choline chloride must include Akzo Nobel N.V. As indicated in recital (11), Akzo Nobel has choline chloride activities in Italy and in the Netherlands. The activities in Italy are performed by Akzo Nobel Chemicals SpA, a subsidiary of Akzo Nobel Chemicals International B.V. The activities in the Netherlands are performed by Akzo Nobel Functional Chemicals B.V., a subsidiary of Akzo Nobel Chemicals B.V., which in turn is a subsidiary of Akzo Nobel Nederland B.V. Akzo Nobel has not argued that the legal entities responsible for its choline chloride activities in Italy constitute a separate and autonomous economic unit from the legal entities responsible for its choline chloride activities in the Netherlands. Indeed, Akzo Nobel’s choline chloride business is a single business, whether the choline chloride is produced in Italy or the Netherlands. However, the only ownership link existing between the choline chloride activities in Italy and the Netherlands is the fact that Akzo Nobel N.V. owns both Akzo Nobel Chemicals International B.V. and Akzo Nobel Nederland B.V. This again demonstrates that Akzo Nobel’s choline chloride business can only operate as a single economic unit through the participation of Akzo Nobel N.V.
- (176) Finally, with respect to Akzo Nobel Chemicals SpA, which was an addressee of the Commission’s Statement of Objections, it was alleged to be a participant in certain anti-competitive activities regarding choline chloride in Spain. However, as the Commission has found that the evidence in respect of these activities was, on the whole, insufficient to hold the allegedly participating undertakings liable, the Commission has decided not to address this Decision to Akzo Nobel Chemicals SpA²²⁶.

13.7.2. *Chinook*

- (177) As indicated in recital (70), Chinook sent two main representatives to the cartel meetings at the global level. One of these, [*]. The other, [*]. As indicated in section

²²⁵ Akzo Nobel’s submission of 30 October 2002 [4512-4517].

²²⁶ See section 13.7.3.

2.4, on 30 June 1999, Chinook Group Limited became the legal successor to Chinook Group. On 31 December 2002, Chinook Group Limited transferred all of its assets to Chinook Group Limited Partnership and became itself a limited partner in the latter. As for Chinook Group Inc., this company has ceased to exist since the period of investigation. The Commission has therefore chosen to hold jointly and severally liable both Chinook Group Limited and Chinook Group Limited Partnership, as legal successors to Chinook Group, which was a direct participant at the time of the infringement.

13.7.3. *Ertisa*

- (178) In its submission of 8 January 2002, Akzo Nobel drew the Commission's attention to the role the Spanish undertaking Ertisa may have played in alleged anti-competitive arrangements specifically for sales of choline chloride on the Spanish market, where Ertisa held a market share of 50%. According to Akzo Nobel, those arrangements were agreed by Akzo Nobel, UCB and Ertisa (BASF not having any sales on the Spanish market). The Commission has investigated these allegations. It has found that, although certain indications exist that anti-competitive discussions may occasionally have taken place between these undertakings regarding the specific market for choline chloride in Spain, the evidence is, on the whole, insufficient to hold Ertisa liable for these alleged facts²²⁷. In particular, the Commission found that the evidence submitted by Akzo Nobel was inconclusive as to Ertisa's actual participation at the alleged meetings in question.
- (179) The possible existence of any such anti-competitive contacts does not detract from the conclusion that the European cartel applied to the entire EEA market where demand existed, including Spain. It is clear from the facts described in sections 9 and 10 that agreements were made at the global and European levels which covered the entire EEA, including Spain, in particular in terms of agreed European-wide price increases and the agreement to control possible competition from converters on the entire EEA.
- (180) The addressees of this Decision are therefore:
- 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.;
 - BASF A.G.;
 - Bioproducts Incorporated;
 - Chinook Group Limited Partnership and Chinook Group Limited;
 - DuCoa, L.P.;

²²⁷ Compare UCB's reply to the Statement of Objections, pages 39-40 and Ertisa's reply to the Statement of Objections.

VI. Remedies

14. ARTICLE 3 OF REGULATION NO 17 AND ARTICLE 7 OF REGULATION NO 1/2003

- (181) Where the Commission finds that there is an infringement of Article 81(1) of the Treaty or Article 53 (1) of the EEA Agreement it may require the undertakings concerned to bring such infringement to an end in accordance with Article 3 of Regulation No 17 and Article 7 of Regulation (EC) No 1/2003.
- (182) While it appears from the facts that in all likelihood the infringement effectively ended in October 1998, it is necessary to ensure with absolute certainty that the infringement has ceased. It is therefore indispensable for the Commission to require the undertakings to which this Decision is addressed to bring the infringement to an end (if they have not already done so) and henceforth to refrain from any agreement, concerted practice or decision of an association which might have the same or a similar object or effect.

15. ARTICLE 15(2) OF REGULATION NO 17 AND ARTICLE 23(2) OF REGULATION NO 1/2003

- (183) Under Article 15(2) of Regulation No 17 and Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose fines on undertakings where, either intentionally or negligently, they infringe Article 81(1) of the Treaty and/or Article 53(1) of the EEA Agreement. However, according to Article 1 of Council Regulation (EC) No 2988/74²²⁸ and Article 25 of Regulation (EC) No 1/2003, the power of the Commission to impose fines or penalties for such infringements is subject to a limitation period of five years. For continuing infringements, the limitation period begins to run on the day the infringement ceases. Any action taken by the Commission for the purpose of the preliminary investigation or proceedings in respect of an infringement interrupts the limitation period.
- (184) As mentioned in recital (165), 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, in Johor Baru, Malaysia. As mentioned in recital (47), the first action taken by the Commission to investigate the infringement was the sending of a request for information under Article 11 of Regulation No 17 to BASF on 26 May 1999, received by BASF on 4 June 1999²²⁹. As this action took place more than five years after the North American producers had ended their participation in the infringement,

²²⁸ OJ L 319, 29.11.1974, p. 1.

²²⁹ BASF's reply to the Statement of Objections, annex.

no fines can be imposed on the North American producers, Bioproducts, Chinook and DuCoa, for their infringement.

- (185) As for the European producers, Akzo Nobel, BASF and UCB, as mentioned in recitals (163) and (164), their participation in the infringement lasted until 30 September 1998. No limitation period therefore applies in respect of those undertakings.
- (186) Under Article 15(2) of Regulation No 17²³⁰ which was applicable at the time of the infringement, the fine for each undertaking participating in the infringement cannot exceed 10% of its total turnover in the preceding business year. The same limitation results from Article 23(2) of Regulation (EC) No 1/2003.
- (187) Pursuant to both Article 15(2) of Regulation No 17 and Article 23(3) of Regulation (EC) No 1/2003, the Commission must, in fixing the amount of the fine, have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in these Regulations. In doing so, the Commission will set the fines at a level sufficient to ensure deterrence. Moreover, the role played by each undertaking party to the infringement will be assessed on an individual basis. In particular, the Commission will reflect in the fines imposed any aggravating or mitigating circumstances pertaining to each undertaking. Finally, the Commission will apply, as appropriate, the 1996 Leniency Notice²³¹.

16. THE BASIC AMOUNT OF THE FINES

- (188) The basic amount is determined according to the gravity and duration of the infringement.

16.1. Gravity

- (189) In assessing the gravity of the infringement, the Commission takes account of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

16.1.1. Nature of the infringement

- (190) 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.

²³⁰ Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area “the Community rules giving effect to the principles set out in Articles 85 and 86 [now Articles 81 and 82] of the EC Treaty [...] shall apply *mutatis mutandis*”. (OJ L 305, 30.11.1994, p.6)

²³¹ OJ C 207/4 of 18 July 1996.

16.1.2. The actual impact of the infringement

- (191) In this proceeding, it is not possible to measure the actual impact on the EEA market of the complex of arrangements of which the infringement consists. What can be said, however, is that with regard to the EEA, the cartel arrangements were implemented, in particular by the European producers, and that such implementation did have an impact on the market, even if its precise significance cannot be measured.
- (192) With respect to the withdrawal of the North American producers from Europe, even though exports from North America to the Community did not cease during the period of operation of the global arrangements, Chinook withdrew from most of the Western European market²³². It did, however, continue to sell choline chloride in the United Kingdom, despite the protests of the European producers. As for the agreement to control converters, Akzo Nobel and BASF were successful in obtaining exclusive contracts with, respectively, Franklin Holland and Randstad, thus in effect removing these undertakings as independent competitors. DuCoa stopped selling to Impextraco, as had been agreed. As indicated in section 10.2, UCB, the main supplier to Impextraco, tried to ensure compliant behaviour from Impextraco by including it for some time in the meetings at the European level, by accepting that Impextraco's sales in the EEA should be considered as part of UCB's agreed market share, and by informing Impextraco of the price and client allocation agreements reached among the three European producers. On the whole, however, despite these acts of implementation, UCB apparently failed, primarily because of contractual restraints, to get the market behaviour of this converter under effective control²³³. The end result was, therefore, that at least two of the main European converters were effectively controlled. But whether this led to higher prices for choline chloride in the EEA market cannot be determined.
- (193) As for the detailed price and client allocation agreements reached in the meetings at the European level, there are no indications that these were not implemented in the market. Indeed, Akzo Nobel has stated that "*Prices were sometimes also conferred to CC converters in order for them to be aware of the level of prices quoted in the market*"²³⁴. This indicates that the prices agreed among the European producers were indeed subsequently quoted in the market to the clients. The same is confirmed in testimony of an UCB participant:

"Q: And did you subsequently adjust prices to that target price?"

*A: We tried to increase the prices on some occasions but they repeatedly afterwards not to work and to be successful [sic]"*²³⁵.

The conclusion that the price and client allocation agreements were implemented is further supported by the fact that the three European producers continued meeting regularly among themselves for a period of more than four years, stopping only out of

²³² UCB's response to the Statement of Objections, annex 3, page 666.

²³³ See UCB's reply to the Statement of Objections, page 52.

²³⁴ Akzo Nobel's submission of 8 January 2002 [5561].

²³⁵ UCB's reply to the Statement of Objections, page 43.

fear of being discovered. During this entire period they contacted each other by phone weekly or at least once every two weeks²³⁶. Such frequent and long-standing contacts would have had no use if it were not to monitor the application in concrete situations of the regular and highly detailed price and client allocation agreements made. The Commission therefore considers that this part of the arrangements, which was in fact the most important part, was implemented and did have an impact on the market in Europe.

- (194) However, to what extent prices to clients became higher through this implementation of the price and client allocation agreements than they would otherwise have been cannot be measured. In general, it appears that the price trend of choline chloride in the period of infringement in Europe was downward, linked to developments in the prices of raw materials²³⁷. Akzo Nobel has pointed out that the effectiveness of the arrangements was undermined by continued competition in the EEA from ICI and its successor Air Products and from Impextraco, as well as from some imports²³⁸. This may well be true. Clients may or may not have accepted the artificially high prices quoted to them by the three European producers. But that does not mean that the price and client allocation agreements among the three European producers were not implemented. Nor does it mean that prices could not have dropped more in the absence of agreed prices and client allocations among the three largest European producers, which together controlled around three quarters of the EEA market.
- (195) Finally, with respect to the overall market shares agreed in Europe, it is clear that the European producers did allocate clients among each other in such a way as to respect each other's market shares. This lack of competition for clients among the three main European producers necessarily had an impact on the market. There are no indications that customers massively switched to alternative suppliers. Customers were therefore disadvantaged by the agreed allocations and lack of price competition in their respect. At the same time, the actual overall market shares of parties in the EEA market appear to have been different from the agreed target shares²³⁹. However, a comparison is difficult to make as the agreed market shares included sales by converters into the market shares of "their" producers, whereas the actual market shares indicated in recital (44) do not.
- (196) On the whole, the Commission's conclusion is that the arrangements, in so far as they pertained to the EEA market, were implemented, in particular by the European producers, and did have an impact on the market. They were implemented in particular in respect of the key elements of prices and allocation of clients in Europe and the control of converters. However, the actual impact of those actions on the market cannot be measured.

²³⁶ UCB's submission of 26 July 1999 [1812].

²³⁷ Akzo Nobel's submission of 8 January 2002 [5561, 5645]. See also BASF's reply to the Statement of Objections, page 15.

²³⁸ Akzo Nobel's submission of 8 January 2002 [5562]. See also UCB's reply to the Statement of Objections, pages 49-52.

²³⁹ Compare recitals (44) and (110).

16.1.3. *The size of the relevant geographic market*

- (197) For the purposes of assessing gravity it is important to note that the infringement covered the whole of the common market and, following its creation, the whole of the EEA.

16.1.4. *The Commission's conclusion on the gravity of the infringement*

- (198) 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 be regarded as very serious, even if the actual impact of the infringement cannot be measured.
- (199) The likely fine for very serious infringements is above EUR 20 million. However, in this case the Commission will take into account that the value of the choline chloride market in the EEA is relatively low. In the last full year of the infringement (1997) the EEA market value was EUR 52,6 million²⁴⁰.

16.2. **Differential treatment**

- (200) 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 differences in their effective economic capacity to cause significant damage to competition. For this purpose, the undertakings concerned can be divided into different categories, established according to their relative importance in the relevant market. 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. In this respect, the Commission notes, in particular, that the arrangements at the global level harmed consumers in the EEA not only because the European producers agreed in those arrangements to increase prices in the EEA, but also because they were able to do so without having to fear competition from the North American producers. The latter thereby contributed significantly to the overall effectiveness of the agreed price increases in the EEA²⁴¹.
- (201) In order to determine the individual weight of participants in the infringement, the global market shares in 1997, the last full year of the infringement, as indicated in recital (42), will be used. Because of the different concentrations in which choline chloride is sold, sales volumes based on 100% concentration appear a more reliable indicator of operators' capacities in respect of choline chloride than sales values. The industry itself also used sales volumes to calculate market shares²⁴². These figures

²⁴⁰ See recital (44).

²⁴¹ See recital (68).

²⁴² See for instance Akzo Nobel's submission of 8 January 2002 [5564].

show that 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 12,0 % respectively, are placed in a third category. Finally, BASF, with a market share of 9,1 %, is placed in a fourth category.

(202) On this basis, the appropriate starting amounts for those undertakings that will receive a fine are as follows:

- Third category (UCB and Akzo Nobel) EUR 12,9 million;
- Fourth category (BASF) EUR 9,4 million.

The starting amounts for the third and fourth categories are based on a starting amount for the first category of EUR 20 million.

16.3. Sufficient deterrence

(203) 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 thousand million, that of Akzo Nobel EUR 13 thousand million and that of BASF EUR 33,4 thousand million. Accordingly, the Commission considers it appropriate to multiply the fine for BASF by a factor of 2. Akzo Nobel, with a turnover of around 40% of that of BASF is still a very large undertaking, with a turnover well exceeding EUR 10 thousand million. It is therefore considered appropriate to multiply the fine for Akzo Nobel by a factor of 1,5.

(204) BASF considers that there is no need to increase the fine for the purpose of deterrence in its particular case because it claims that it has already taken measures to prevent future cartel violations following the Vitamin case, which infringement took place at the same time as the present infringement. The Commission disagrees. Firstly, it is impossible to know for the Commission how effective the measures taken by BASF will prove to be in preventing cartel infringements by BASF in the future. Secondly, in general the Commission considers that each separate infringement merits a separate fine, which should be proportionate to the size of the undertaking in order to be effective. If the Commission were to decide, on the basis of BASF's argument, that a lower fine should be imposed on BASF than is justified by its size, the message this would send, not only to BASF but also to other undertakings, would be that a very large undertaking involved in one or several cartels has relatively less to lose from entering into additional cartels than smaller undertakings. Imposing a sufficiently high fine on very large undertakings for each separate infringement they commit deters such behaviour.

(205) As a result, the starting amounts for each undertaking become as follows:

- Akzo Nobel EUR 19,35 million;
- BASF EUR 18,80 million;
- UCB EUR 12,90 million.

16.4. Duration of the infringement

(206) As mentioned in recitals (163) and (164), Akzo Nobel, BASF and UCB participated in the infringement at least from 13 October 1992 until 30 September 1998, i.e. a period of five years and eleven months. All three undertakings committed an infringement of long duration. The starting amounts of the fines should consequently be increased by 10 % for each full year of infringement. They should be further increased by 5 % for any remaining period of 6 months or more but less than a year. This leads to a percentage increase of the starting amount for each undertaking of 55 %.

16.5. Conclusion on the basic amounts

(207) The basic amounts of the fines for each undertaking are therefore as follows:

- Akzo Nobel EUR 29,99 million;
- BASF EUR 29,14 million;
- UCB EUR 20,00 million.

17. AGGRAVATING AND ATTENUATING CIRCUMSTANCES

17.1. Aggravating circumstances

17.1.1. Recidivism

(208) At the time the infringement took place, BASF had already been subject to previous Commission prohibition decisions for cartel activities in Decisions 69/243/EC²⁴³ and 94/599/EC²⁴⁴. The fact that BASF repeated the same type of conduct, albeit in a different sector from those in which it had previously incurred penalties, shows that the first penalties did not prompt BASF to change its conduct. 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.

17.2. Attenuating circumstances

17.2.1. Early termination of the infringement

(209) BASF and UCB claim that the fact that the infringement was terminated before the Commission initiated an investigation should be taken into account as an attenuating circumstance.

(210) 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

²⁴³ OJ L 195, 7.8.1969, p. 11.

²⁴⁴ OJ L 239, 14.9.1994, p. 14.

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. Indeed, if the infringement had continued after the intervention of the Commission, this would have constituted an aggravating circumstance. In its *Graphite Electrodes* judgment, the Court of First Instance confirmed that the fact that an undertaking voluntarily puts an end to the infringement before the Commission has opened its investigation is sufficiently taken into account in the calculation of the duration of the infringement period and does not constitute an attenuating circumstance²⁴⁵.

17.2.2. *Non-implementation*

- (211) Akzo Nobel, BASF and UCB all claim that the infringement or elements thereof were not, not fully or not effectively implemented. The Commission's conclusion on this point is mentioned in recital (196), where it is stated that 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. Also, UCB may have been relatively unsuccessful in obtaining effective control over Impextraco, but that does not mean that it did not make efforts to that effect. In particular, as mentioned in recital (192), it included Impextraco for some time in the meetings at the European level, it accepted that Impextraco's sales in the EEA should be considered as part of UCB's agreed market share, and it informed Impextraco of the price and client allocation agreements reached among the three European producers. 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 them²⁴⁶.

17.2.3. *Length of the investigation*

- (212) BASF also argues that a reduction should be granted because of the long duration of the investigation. It points, in particular, to the long period of time between the Commission's request for information of 22 June 1999 and its requests for information of 30 August 2002 and 13 September 2002.
- (213) 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 expires at the latest on the day on which a period equal to twice the limitation period has elapsed without the

²⁴⁵ Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-242/01, *Tokai Carbon Co. Ltd and Others v Commission*, not yet published, at paragraph 341.

²⁴⁶ 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* [2000] ECR II-491, paragraphs 4872 to 4874.

Commission having imposed a fine or a periodic penalty payment. That period is far from having expired in this proceeding.

- (214) The Commission notes, moreover, that the requests for information of 30 August 2002 and 13 September 2002 followed the submission, on 8 January 2002, of a detailed submission by Akzo Nobel regarding the European arrangements. Had Akzo Nobel's submission been made sooner, these requests for information would have been sent sooner as well.

17.2.4. *Crisis situation*

- (215) BASF argues that a reduction should be granted for the alleged fact that the choline chloride industry was in a crisis situation. It states that often BASF "even" made losses on sales of choline chloride²⁴⁷. The Commission observes that in a free market economy, entrepreneurial risk includes the risk of occasional losses or even bankruptcy. 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.
- (216) As a general rule, cartels risk coming into play not when undertakings make large profits but precisely when a sector encounters problems. Therefore, if BASF's reasoning were followed, fines on cartels would have to be reduced in virtually all cases. In its *Graphite Electrodes* judgment, the Court of First Instance confirmed that the Commission is not required to regard as an attenuating circumstance the poor financial state of the sector in question²⁴⁸.

17.2.5. *Disciplinary measures and compliance programme*

- (217) BASF finally 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 in this Decision, the more so as the infringement concerned is a manifest breach of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement²⁴⁹.

17.2.6. *Effective cooperation outside of the 1996 Leniency Notice*

- (218) On 26 July 1999, 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. Although UCB's submission was made in response to a request for information sent by the Commission

²⁴⁷ « Oft hat das Unternehmen mit Cholinchlorid sogar Verluste gemacht » in the German original. See BASF's reply to the Statement of Objections, page 29.

²⁴⁸ Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-242/01, *Tokai Carbon Co. Lt and Others v Commission*, at paragraph 345.

²⁴⁹ See Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-242/01, *Tokai Carbon Co. Ltd and Others v Commission*, at paragraph 343.

on 22 June 1999, that request for information was targeted at the global arrangements. The Commission was not aware, at that point in time, of any meetings at the European level. UCB indicated nine meetings at the European level in the period from March 1994 to October 1998. 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, the difference being four years and five months. In order to compensate UCB for this increase in the duration of which it was the first to make the Commission aware, 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 starting amount resulting from a duration of the infringement of five years and eleven months instead of one year and six months. In addition, the intrinsic value of UCB's voluntary submission will be rewarded under the application of the 1996 Leniency Notice in section 18.

17.3. Conclusion on aggravating and attenuating circumstances

- (219) As a result of aggravating and attenuating circumstances, the basic amount of the fine to be imposed on BASF should be increased by 50 % to EUR 43,71 million and that to be imposed on UCB reduced by 25,8 % to EUR 14,84 million. The basic amount of the fine to be imposed on Akzo Nobel remains as it was at 29,99 million.

18. APPLICATION OF THE 1996 LENIENCY NOTICE

- (220) 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 proceeding²⁵⁰.

18.1. BASF

- (221) BASF was the first of the three European producers to voluntarily submit evidence on the infringement which is the subject of this proceeding. On 15 June 1999, it submitted a report to the Commission, section G of which dealt with choline chloride. BASF did so, not on its own initiative, but in reaction to a request for information sent by the Commission on 26 May 1999 in the Vitamins case. As mentioned in recital (47), that request for information covered choline chloride (“vitamin premixes in...animal feed”) together with several other products. It must be recognised, however, that the questions which the Commission put to BASF in that request for information did not pertain to any meetings with the undertakings subject to this proceeding, but rather pertained to meetings with other undertakings, regarding other products. The Commission therefore finds that section G of the report submitted by BASF must be

²⁵⁰ See footnote 231. 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 to the Commission for leniency before 14 February 2002, the 1996 Leniency Notice applies.

considered a voluntary submission of evidence on the part of BASF²⁵¹. The same applies to the contemporaneous documents BASF submitted on 23 June 1999, including notably five documents distributed and discussed at the Ludwigshafen meeting²⁵².

- (222) To assess the value of section G and the contemporaneous documents submitted on 23 June 1999 under the 1996 Leniency Notice, account must be taken of the evidence already in the Commission's possession at the time BASF made these submissions. On 15 June 1999, the Commission already had at its disposal evidence regarding the infringement submitted by Chinook²⁵³ and by Bioproducts²⁵⁴. The evidence already submitted by Chinook clearly described the agreement reached at the Ludwigshafen meeting. The evidence already submitted by Bioproducts clearly described not only the Ludwigshafen meeting and the agreement reached there, but also the other meetings at the global level. A number of relevant contemporaneous documents were included by Bioproducts, such as meeting reports and documents distributed at the Ludwigshafen meeting. 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. Indeed, it was the evidence submitted by Bioproducts that led the Commission to send a request for information specifically on choline chloride on 22 June 1999. Therefore, when BASF made its submissions of 15 and 24 June 1999, 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.
- (223) As to its substance, section G of BASF's report, consisting of a general three page description of the global arrangements, and the five pages of documents distributed at the Ludwigshafen meeting, 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. On the European arrangements BASF merely stated that "*While there were sporadic efforts among the three European producers to reach agreements regarding European markets and prices in the same time frame, no effective agreement was ever reached or implemented by the [sic] regarding Choline Chloride in Europe*". As for the annexes submitted by BASF on 23 June 1999 and 16 July 1999²⁵⁵, apart from the five pages of documents distributed at the Ludwigshafen meeting, these consisted of internal company documents regarding choline chloride prices, which did not materially contribute to establishing the existence of the infringement. Moreover, the documents submitted on 16 July 1999 must be considered to have been sent as a

²⁵¹ BASF's submission of 15 June 1999 [2900-2902].

²⁵² Documents [2905-2909].

²⁵³ Chinook's submission of 3 December 1998 [1295-1304].

²⁵⁴ Bioproduct's submission of 7 May 1999 [1817-2412].

²⁵⁵ BASF's submissions of 23 June 1999 and 16 July 1999 [2903-3183].

response to the Commission's request for information of 22 June 1999, which was received by BASF on 28 June 1999²⁵⁶.

- (224) The only other submission by BASF in this proceeding was that of 4 November 2002. This submission was made in response to a request for information by the Commission of 30 August 2002. This request for information dealt in particular with the European arrangements. Annex 3 to BASF's reply is the only indication BASF gives of a possible infringement. There it lists as the content of two meetings "discussion about the European market" and "discussion of the choline chloride market situation". This description of the content of these two meetings may be considered to have been provided voluntarily. However, the value of these vague descriptions as evidence is very limited. For one of these two meetings, BASF also provides the names of the participants. However, this information must be considered a response to the request for information. The main information regarding this meeting had, in any case already been provided by UCB²⁵⁷.
- (225) 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.
- (226) Taking into account the different elements of cooperation mentioned in recitals (221) to (225), the Commission considers that BASF is entitled to a 20 % reduction of the fine that would otherwise have been imposed.

18.2. UCB

- (227) As mentioned in recital (218), on 26 July 1999, UCB listed nine meetings, 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, on 14 March 1994 in Schoten, Belgium and on 29 November 1994 in Amersfoort, the Netherlands. 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. As for the global arrangements, the information and evidence provided did not add much to the extensive evidence already in the Commission's possession at that point in time.
- (228) UCB made a supplementary submission on 21 September 1999. In this submission UCB voluntarily added one cartel meeting to the infringement, the meeting on 15 February 1995 in Kerpen, Germany. For the remainder, this submission contained a number of contemporaneous internal company documents (memos, faxes and reports of visits to clients) which did not contain any evidence that materially contributed to the establishment of the infringement, taking into account the evidence already in the Commission's possession.

²⁵⁶ See BASF's submission of 23 July 1999 [2885].

²⁵⁷ UCB's supplementary submission of 21 September 1999 [1444].

- (229) UCB made a final submission on 18 October 2002, in response to the Commission's requests for information of 30 August 2002 and 13 September 2002. Apart from the answers to the Commission's request for information, this submission contained a correction to information previously provided voluntarily (annex 2) and some contemporaneous internal company reports on visits to clients (annex 3). These did not provide any evidence that materially contributed to the establishment of the infringement, taking into account the evidence already in the Commission's possession.
- (230) 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 level²⁵⁸. In recitals (138) and (140), 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, namely its participation in the Ludwigshafen agreement, it is not entitled to any reduction for not contesting the facts on which the Commission bases its allegations.
- (231) Taking into account the different elements of cooperation mentioned in recitals (227) to (230), the Commission considers that UCB is entitled to a 30 % reduction of the fine that would otherwise have been imposed. As BASF before it, UCB was not the first undertaking to provide decisive evidence of the cartel's existence. As a consequence, sections B and C of the 1996 Leniency Notice do not apply to UCB. As for section D, which provides for possible reductions of between 10 % and 50 %, the Commission has chosen to grant UCB 30 % under this section for two reasons. First, the written contemporaneous evidence and description of the European arrangements supplied by UCB were not comprehensive in terms of scope and level of detail. In particular, contemporaneous written evidence was provided only for the year 1994 and not for the period from 1995 to 1998. Secondly, as indicated in recital (230), UCB's reduction is affected by it having incorrectly contested the facts on which the Commission has based its allegations.

18.3. Akzo Nobel

- (232) On 26 July 1999, Akzo Nobel replied to the Commission's request for information of 22 June 1999. It provided a short description of the global arrangements. This voluntary description did not add much to the information already in the possession of the Commission at that time. Akzo Nobel also included a number of contemporaneous documents. Most of these, or similar ones, were already in possession of the Commission. Moreover, these documents must be considered to have been supplied in response to the Commission's request for information and not as a voluntary submission. But even if these documents had been submitted voluntarily, they would not have materially contributed to the establishment of the infringement.

²⁵⁸ UCB's reply to the Statement of Objections, in particular pages 2, 8 and 13.

- (233) On 8 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. It also listed five meetings at the European level that UCB had not mentioned. Finally, it provided a number of detailed contemporaneous reports of cartel meetings at the European level in 1996 and 1997. This information and evidence, taken together with that already provided by UCB, allowed the Commission to prove the full scope and duration of the European component of the infringement. The Commission observes, however, that Akzo Nobel filed its report on the European arrangements two and a half years after UCB had made its submission on these arrangements. This delay must be taken into account in the leniency reduction granted.
- (234) Akzo Nobel's report of 8 January 2002 also made mention of certain alleged anti-competitive activities by itself, UCB and Ertisa on the market in Spain. However, on the whole, the elements of proof in this respect were insufficient for the Commission to hold these alleged facts against the undertakings in question. This part of Akzo Nobel's report cannot therefore be taken into account for a reduction under the 1996 Leniency Notice.
- (235) 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.
- (236) As BASF and UCB before it, Akzo Nobel was not the first undertaking to provide decisive evidence of the cartel's existence. As a consequence, sections B and C of the 1996 Leniency Notice do not apply to Akzo Nobel. As for section D, which provides for possible reductions of between 10 % and 50 %, the Commission, taking into account the different elements of cooperation mentioned in recitals (232) to (235), considers that Akzo Nobel is entitled to a 30 % reduction of the fine that would otherwise have been imposed. In particular, 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, in contrast to UCB, did not contest the facts on which the Commission based its allegations. As a result, both undertakings merit the same percentage reduction.

18.4. Conclusion on the application of the 1996 Leniency Notice

- (237) In conclusion, the Commission grants BASF, UCB and Akzo Nobel the following reductions of the fines that would otherwise have been imposed on them:
- BASF a reduction of 20 %;
 - UCB a reduction of 30 %;
 - Akzo Nobel a reduction of 30 %.

19. THE AMOUNTS OF THE FINES IMPOSED IN THIS PROCEEDING

(238) In conclusion, the fines to be imposed pursuant to Article 15(2) of Regulation No17 and Article 23(2) of Regulation No 1/2003 should be as follows:

- | | |
|--------------|--------------------|
| – Akzo Nobel | EUR 20,99 million |
| – BASF | EUR 34,97 million |
| – UCB | EUR 10,38 million. |

HAS ADOPTED THIS DECISION:

Article 1

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.

Article 2

For the infringements referred to in Article 1, 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 A.G. EUR 34,97 million;
- (c) UCB S.A. EUR 10,38 million.

The fines shall be paid in euro, within three months of the date of the notification of this Decision to the following account:

Account N°

001-3953713-69 of the European Commission with :

FORTIS Bank, Rue Montagne du Parc 3, 1000 Brussels

(Code SWIFT GEBABEBB – Code IBAN BE71 0013 9537 1369)

After expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3,50 percentage points, i.e. 5,53%.

Article 3

The undertakings listed in Article 1 shall immediately bring to an end the infringements referred to in that Article, insofar as they have not already done so.

They shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or similar object or effect.

Article 4

This Decision is addressed to:

1. Akzo Nobel N.V.

Velperweg 76
6824 BM Arnhem
The Netherlands

2. Akzo Nobel Nederland B.V.

Velperweg 76
6824 BM Arnhem
The Netherlands

3. Akzo Nobel Chemicals Internationals B.V.

Stationsplein 4
3818 LE Amersfoort
The Netherlands

4. Akzo Nobel Chemicals B.V.

Stationsplein 4
3818 LE Amersfoort
The Netherlands

5. Akzo Nobel Functional Chemicals B.V.

Stationsplein 4
3818 LE Amersfoort
The Netherlands

6. BASF A.G.

Central Legal Dept
67056 Ludwigshafen
Germany

7. Bioproducts Incorporated

320 Springside Drive, Suite 300
Fairlawn, Ohio 44333-2435
United States of America

8. Chinook Group Limited Partnership

446 Lyndock Street, Suite 100A
Corunna, Ontario, N0N 1G0

Canada

9. Chinook Group Limited

446 Lyndock Street, Suite 100A
Corunna, Ontario, N0N 1G0
Canada

10. DuCoa, L.P.

125 Elizabeth Road
New Rochelle, New York 10804
United States of America

11. UCB S.A.

Allée de la Recherche, 60
1070 Bruxelles
Belgium

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

Done at Brussels,

For the Commission
Neelie KROES
Member of the Commission