

**CFI INCREASES FINE FOR ONE COMPANY FOR THE FIRST TIME, WHILE  
SIGNIFICANTLY DECREASING FINE FOR ANOTHER COMPANY**

For the first time, on December 12, 2007, the Court of First Instance (the “CFI”) increased a fine imposed by the European Commission (the “Commission”) for a violation of the European Union’s competition laws. The fine imposed on BASF for its participation in the *Choline Chloride* cartel was increased by 0.15% (€54,000) to reach €35.02 million. At the same time, the Commission decreased the fine imposed on another company, UCB, by 82% (€8.51 million). The recalculation of fines resulted from a finding by the CFI that conduct that the Commission had found to constitute a single conspiracy in fact constituted two separate conspiracies, one of which was time-barred.

In 2004, the Commission ordered BASF, UCB, and Akzo Nobel to pay fines totaling €66.34 million for their anticompetitive arrangements, which took place at the global and European levels. The crucial issue raised by BASF and UCB on appeal was whether the Commission correctly found that their conduct constituted a single and continuous agreement covering both Europe and the rest of the world. The CFI reversed the Commission on that point and held that the conduct constituted two separate agreements. All modifications concerning the fines and the leniency reductions resulted from this finding.

More specifically, the CFI held that, to characterize agreements and concerted practices as the constituent elements of a single infringement, the Commission must show that such actions seek to achieve a common objective. Moreover, the single objective cannot be demonstrated by a general reference to a distortion of competition, since such a distortion is necessary to any violation of Article 81(1) EC.

The Commission had found a single infringement because the global and European arrangements were “closely linked.” But the CFI found that chloride producers had committed two separate infringements because (i) the global and European arrangements were implemented during different time periods; (ii) the mutual withdrawal from European and North American markets and the sharing of the EEA market by way of customer allocation pursued different objectives; (iii) the implementation methods of the various concerted practices were not the same at the European and global levels; and (iv) there was no proof that European producers intended to adhere to the global arrangements in order to divide the EEA market.

The CFI thus annulled the Commission’s decision insofar as it imposed a fine on the applicants for their participation in a global infringement, which was time-barred as a stand-alone conspiracy disconnected from the more recent European conspiracy. Since only the EEA infringement, and not the global conspiracy, could serve as a basis for the fines, the sanctions imposed by the Commission on BASF and UCB had to be reviewed.

The first consequence of the CFI's finding was that the duration of the infringement was deemed to be shorter than the Commission had determined. Therefore, the Commission's increase of the basic amount of the fine due to the extended duration of the single infringement was reduced accordingly. Further, the CFI confirmed that BASF should be granted a 10% reduction in its fine for not disputing the accuracy of the facts as set out by the Commission. The CFI questioned, however, the value of the evidence supplied by BASF, evidence for which the Commission had granted an additional reduction of 10%. The CFI noted that, according to settled case law, providing the Commission with information concerning actions that cannot result in a fine cannot be considered cooperation within the scope of the 1996 Leniency Notice.

In light of this principle, the CFI held that BASF could not benefit from the second reduction of 10% because (i) the evidence provided by BASF related almost exclusively to the global arrangements and was of only minimal value regarding the European arrangements; and (ii) the infringement relating to the global arrangements was time-barred as a stand-alone conspiracy. The CFI's elimination of the second reduction led to a modest increase in BASF's fine (0.15%). That increase resulted purely from a "mechanical" recalculation that was based upon the CFI's finding of two separate infringements. The CFI did not reassess the culpability of BASF's conduct or question the methodology used by the Commission in calculating fines.

In addition, the finding that the global and European arrangements constituted two separate infringements led the CFI to *decrease* the fine imposed on UCB because its contributions under the Leniency Notice were regarded as having a greater importance than under the Commission's single-infringement determination. The CFI thus granted a 90% reduction under the leniency program, which decreased UCB's fine by 82% or €8.51 million.

In sum, although the CFI's judgment increased a fine by € 50,000 for one company, it also reduced the fine of another company by 82% or €8.51 million. Overall, from 1998 to 2007, 56% of the appeals that were lodged (64 out of 114) led to a reduction in the fine (with an average reduction of 29%, not including full annulments). Still, the CFI may alter legal conclusions by the Commission, such as the scope of an illegal agreement, which in turn may alter (either decrease or increase) the fine calculations.

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