

Action brought on 1 March 2005 by BASF Aktiengesellschaft of Ludwigshafen against the Commission of the European Communities

(Case T-101/05)

(2005/C 115/51)

(Language of the case: English)

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 1 March 2005 by BASF Aktiengesellschaft of Ludwigshafen, established in Ludwigshafen (Germany), represented by N. Levy and J. Temple Lang, Solicitors and C. Feddersen, lawyer.

The applicant claims that the Court should:

- annul or substantially reduce the fine imposed on BASF pursuant to the decision;
- order the Commission to pay BASF's legal and other costs and expenses in relation to this matter.

Pleas in law and main arguments

The applicant contests the fine imposed on it by the Commission's Decision of 9 December 2004 relating to a proceeding under Article 81 EC and Article 53 EEA (Case COMP/E-2/37.533-Choline Chloride), finding that the applicant was involved 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.

In support of its application, the applicant submits that its rights of defence were infringed in that the Statement of Objections did not clearly state the elements relevant to the calculation of the fine imposed on the applicant by the final decision. The applicant states that in particular the 100 % increase of the fine for deterrence was not fully explained to it in the Statement of Objections.

The applicant also submits that the increase of the fine for deterrence and for size is not permitted under Regulation 17/62⁽¹⁾, now Regulation 1/2003⁽²⁾, or the Fining Guidelines⁽³⁾, and is furthermore not necessary. According to the applicant, the overall size of a company can only be used to measure the impact of an infringement on the market and not as a basis for an increase of the fine. The applicant also claims that an increase for deterrence should be used with moderation and when there are clear reasons, which was not the case for the applicant.

The applicant furthermore submits that the 50 % increase of its fine for recidivism, based on infringements that happened almost 40 and 20 years ago, is contrary to the principle of legal certainty and the principle of proportionality. The applicant also states that the increase for recidivism is wrongly calculated because the 50 % was not calculated on the starting amount, but on the starting amount already increased for size and deterrence.

The applicant claims that it was also entitled to a greater reduction of its fine under section D of the Leniency Notice⁽⁴⁾. The applicant states first of all that, since it was entitled to a reduction for not substantially contesting the facts, the only issue is whether the Commission correctly assessed the applicant's cooperation in other respects of the Leniency Notice. According to the applicant, the Commission, because it lost parts of the case file, made a wrong and incomplete assessment of the applicant's cooperation. According to the applicant, the decision incorrectly describes the content of certain submissions of the applicant, omits other elements of the applicant's cooperation with the investigation and contains inconsistent descriptions of the cooperation. The applicant claims also that it was in any event entitled to a greater reduction of its fine.

Finally, the applicant submits that the Commission erred in finding that there was one continuous infringement and that the disclosure of the amount of the fine to the media prior to the adoption of the decision constitutes an infringement of the Commission's obligation of professional secrecy and its duty of good administration which impeded a proper evaluation and an independent review of the case by the College of Commissioners.

⁽¹⁾ EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty (OJ English special edition: Series I Chapter 1959-1962, p. 87)

⁽²⁾ 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 Treaty (OJ L 1, p. 1)

⁽³⁾ Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty (OJ 1998 C 9, p. 3)

⁽⁴⁾ Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4)