## FINES (LYSINE): THE LYSINE CARTEL CASE

Subject: Fines
Pricing policy
Sales restrictions
Information exchanges
Oligopoly

Industry: Lysine; animal feedstuffs
(Implications for most industries)

Parties: Cheil Jedang Corporation
Archer Daniels Midland
(For full list see table in report below)

Sources: Judgments of the Court of First Instance, dated 9 July 2003, in Joined Cases T-220/00, T-223/00, T-224/00 and T-230/00 (*Cheil Jedang Corporation and Others v Commission of the European Communities*); Court Press Release NI-58/03

*(Note. This case has two points of interest and importance. The first concerns the policy on assessing fines: the Court's long and detailed judgment gives parties, including the Commission, full guidance on the appropriate levels of fines. In the cases involved in the lysine cartel, the Court made a reduction of €7,316,760 in the fines imposed by the Commission. The judgment is summarized in the Court's press release, the contents of which are set out below; the relevant paragraphs of the judgment run to some two hundred and fifty paragraphs. The second point concerns matters of substance, with particular reference to the impact of the cartel on the market. The purpose of the Court's observations on this aspect of the case is partly to examine the economic issues but mainly to test the argument, put forward by one of the applicants, Archer Daniels Midland, that the seriousness of the circumstances and hence the level of the fine needed to be judged in the light of the actual economic effects of the cartel's activities and not on some theoretical assessment. To a limited extent, this plea succeeded. The relevant paragraphs of the Court's judgment are set out in full in the second part of the report below.)*

### Text of the Court Statement

Lysine is the principal amino acid used for nutritional purposes in animal feedstuffs. Synthetic lysine is used as an additive in feedstuffs which contain insufficient natural lysine, for example cereals, which enables nutritionists to formulate protein-based diets which meet the dietary requirements of animals.

In 1995, following a secret investigation by the Federal Bureau of Investigation, searches were carried out in the United States at the premises of several companies operating in the lysine market. Following those investigations, Archer

Daniels Midland, Kyowa Hakko Kogyo, Sewon, Cheil Jedang and Ajinomoto were charged by the American authorities with having formed a cartel to fix lysine prices and to allocate sales of lysine between June 1992 and June 1995.

In July 1996 Ajinomoto offered to cooperate with the Commission in proving the existence of a cartel in the lysine market and its effects in the European Economic Area (EEA). The Commission sent to the undertakings requests for information concerning their conduct on the amino acids market and the meetings of the cartel.

By decision of 7 June 2000 the Commission found that there had been a series of agreements on prices, sales volumes and the exchange of individual information on sales volumes of synthetic lysine, covering the whole of the EEA, from July 1990 to June 1995.

In that decision, the Commission applied the method set out in the Guidelines for calculating fines imposed pursuant to Article 15(2) of Council Regulation No 17. The Commission found, first, that the undertakings had all committed a very serious infringement. However, it applied differential treatment to them, taking the view, on the basis of their total turnover during the last year of the period of the infringement, that there was a considerable disparity of size between the undertakings. After considering the gravity of the infringement, the Commission then took into account its duration and thus determined the basic amount of the fine for each of the undertakings. That amount was increased and/or reduced to take account of aggravating or mitigating circumstances, such as a role as ringleader or, conversely, a passive role played by an undertaking in the cartel.

In its decision, the Commission imposed total fines of around €110 million on the companies participating in the cartel.

*In their actions before the Court of First Instance, Archer Daniels Midland,* Kyowa Hakko Kogyo, Daesang-Sewon and Cheil Jedang complained of the procedure adopted in fixing the fine. In particular, two of them objected to the fact that they had already been fined in the United States for their participation in that same world-wide cartel, a fact which the Commission had not taken into account.

The Court of First Instance finds that the principle of non bis in idem, according to which a person who has already been tried may not be prosecuted or fined for the same conduct, cannot be applied in the present case, because the procedures initiated and fines imposed by the Commission, on the one hand, and by the authorities of a non-Member State, in this case the United States, on the other, do not pursue the same objectives. Furthermore, although fairness requires the Commission to take account, when fixing the amount of a fine, of penalties already imposed on the undertaking in question for infringements of the cartel law of a Member State, the Court considers that there is no such obligation on the Commission where the previous fines were imposed by authorities or courts of a non-Member State.

The Court finds, however, that the Commission did not apply the reductions granted on account of mitigating circumstances in the same way to all the undertakings concerned.

It finds that the percentage increases or reductions adopted on account of aggravating or mitigating circumstances must be applied to the basic amount of the fine, determined by reference to the gravity and duration of the infringement, and not to the amount of an increase previously applied in respect of the duration of the infringement or to the figure resulting from the first increase or reduction adopted to reflect an aggravating or a mitigating circumstance. That method of calculating the fines ensures equal treatment between the various undertakings participating in one and the same cartel.

| Number of the case | Name of the applicant | Amount of fine imposed by the Commission (€) | Judgment of the Court (€) |
|---|---|---|---|
| T-220/00 | Cheil Jedang Corp | 12,200,000 | Fine reduced to 10,080,000 |
| T-223/00 | Kyowa Hakka Kogyo Co Ltd; Kyowa Hakka Europe GmbH | 13,200,000 | Original fine upheld |
| T-224/00 | Archer Daniels Midland Company; Archer Daniels Midland Ingredients Ltd | 47,300,000 | Fine reduced to 43,875,000 |
| T-230/00 | Daesang Corporation Sewon Europe GmbH | 8,900,000 | Fine reduced to 7,128,240 |
| | Total | 81,600,000 | 74,283,240 |

Note: An appeal limited to questions of law may be brought before the Court of Justice of the EC against the decision of the Court of First Instance within two months of notification of the judgment.

## Extracts from the Judgment in the Archer Daniels Midland case

### Facts

1. The applicants, Archer Daniels Midland Company (hereinafter ADM Company) and its European subsidiary Archer Daniels Midland Ingredients Ltd (hereinafter ADM Ingredients), operate in the cereals and oil seed processing sector. They entered the lysine market in 1991.

2. Lysine is the principal amino acid used for nutritional purposes in animal feedstuffs. Synthetic lysine is used as an additive in feedstuffs, such as cereals, which contain insufficient natural lysine; this enables nutritionists to formulate protein-based diets which meet the dietary requirements of animals. Feedstuffs to which synthetic lysine is added may also substitute for feedstuffs which do contain a sufficient quantity of lysine in the natural state, such as soybean.

3. In 1995, following a secret investigation by the Federal Bureau of Investigation (FBI), searches were carried out in the United States at the premises of several companies operating in the lysine market. In August and October 1996 ADM Company, together with Kyowa Hakko Kogyo Co. Ltd (Kyowa Hakko Kogyo), Sewon Corp. Ltd, Cheil Jedang Corp. (Cheil) and Ajinomoto Co. Inc., were charged by the American authorities with having formed a cartel to fix lysine prices and to allocate sales of lysine between June 1992 and June 1995. Pursuant to agreements concluded with the American Department of Justice, the companies were fined by the judge in charge of the case. Kyowa Hakko Kogyo and Ajinomoto Co. Inc. were each fined $10 million, ADM Company was fined $70 million and Cheil $1.25 million. The fine imposed on Sewon Corporation Ltd was, it says, $328 000. In addition, three executives of ADM Company were sentenced to terms of imprisonment and fined for their part in the cartel.

4. In July 1996, on the basis of Commission Notice 96/C 207/04 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4, the Leniency Notice), Ajinomoto Co. Inc. offered to cooperate with the Commission in proving the existence of a cartel in the lysine market and its effects in the European Economic Area (EEA).

5. On 11 and 12 June 1997 the Commission carried out investigations at the European premises of ADM Company and Kyowa Hakko Europe GmbH (Kyowa Europe) pursuant to Article 14(3) of Council Regulation No 17 of 6 February 1962. Following those investigations, Kyowa Hakko Kogyo and Kyowa Europe informed the Commission of their wish to cooperate and gave it certain information concerning, in particular, a chronology of the meetings which had taken place between lysine producers.

6. On 28 July 1997 the Commission sent requests for information, pursuant to Article 11 of Regulation No 17, to ADM Company and ADM Ingredients, to Sewon Corp. Ltd and its European subsidiary Sewon Europe GmbH (hereinafter together referred to as Sewon) and to Cheil concerning their conduct in the amino acids market and certain cartel meetings specified in the requests for information.

Following a letter from the Commission dated 14 October 1997, reminding them they had not answered, ADM Ingredients replied to the Commission's request for information concerning the lysine market. ADM Company offered no reply.

7. On 30 October 1998, on the basis of the information that it had received, the Commission sent a statement of objections to ADM Company and ADM Ingredients (hereinafter together referred to as ADM) and the other companies concerned... In its statement of objections the Commission charged the companies in question with fixing lysine prices and sales quotas in the EEA and with exchanging information on their sales volumes from September 1990 (in the case of Ajinomoto, Kyowa and Sewon), March 1991 (Cheil) and June 1992 (ADM) to June 1995. On receiving the statement of objections, the applicants informed the Commission that they did not substantially contest the facts.

8. On 17 August 1999, after a hearing of the companies held on 1 March 1999, the Commission sent them a supplementary statement of objections concerning the duration of the cartel, in which it alleged that Ajinomoto, Kyowa and Sewon had taken part in the cartel since at least June 1990, Cheil since at least the beginning of 1991 and the applicants since 23 June 1992. The applicants replied to this supplementary statement of objections on 6 October 1999, confirming that they did not substantially contest the facts.

## Commission Decision

9. On completion of this administrative procedure, the Commission adopted Decision 2001/418/EC of 7 June 2000...

10. The Decision includes the following provisions:

*Article 1*

[ADM Company] and its European subsidiary [ADM Ingredients], Ajinomoto Company Incorporated and its European subsidiary Eurolysine SA, Kyowa Hakko Kogyo Company Limited and its European subsidiary Kyowa Hakko Kogyo Europe GmbH, Daesang Corporation and its European subsidiary Sewon Europe GmbH, as well as [Cheil] have infringed Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement by participating in agreements on prices, sales volumes and the exchange of individual information on sales volumes of synthetic lysine, covering the whole of the EEA. The duration of the infringement was as follows: (a) in the case of [ADM Company] and [ADM Ingredients] from 23 June 1992 to 27 June 1995; (b) in the case of Ajinomoto Company Incorporated and Eurolysine SA from at least July 1990 to 27 June 1995; (c) in the case of Kyowa Hakko Kogyo Company Limited and Kyowa Hakko Europe GmbH from at least July 1990 to 27 June 1995; (d) in the case of Daesang Corporation and Sewon Europe GmbH from at least July 1990 to 27 June 1995; and (e) in the case of [Cheil] from 27 August 1992 to 27 June 1995.

*Article 2*

[This concerns the level of fines and is indicated in the Table above.]

## The actual effect of the cartel on the market

142. First of all, in paragraphs 228 to 230 of the Decision, the Commission concluded that the agreements in issue infringed Article 81(1) EC and found that, because they fixed prices, established sales quotas and instituted a system for the exchange of information, they had an anticompetitive object. The Commission did not, in the context of this assessment, go on to examine any restriction on competition that might have been brought about by the agreements, as was its right (see, for example, Case C-49/92 P, *Commission* v *Anic Partecipazioni*, paragraph 99).

143. Nevertheless, in assessing the gravity of the infringement, the Commission did rely on the actual impact of the cartel on the lysine market in the EEA (paragraphs 261 to 296 of the Decision), as it is required to do by the first paragraph of Section 1.A of the Guidelines, in cases where it appears that this can be measured.

144. Thus, in paragraph 261 of the Decision, the Commission expressed its view that the infringement, committed by undertakings that were practically the only lysine producers in the world, had the effect of raising prices higher than they would otherwise have been and restricting sales quantities, and therefore had an actual impact on the lysine market in the EEA.

145. As regards the effect the cartel is alleged to have had on sales volumes, the Commission observed, in paragraph 267 of the Decision, on the basis of a table illustrating the producers' market shares worldwide in 1994, that the shares actually achieved were almost identical to what had been allocated to each of them under their quota agreements. The applicants say that this is pure coincidence because the production quota agreements were expressed in terms of volume; they emphasise that in 1994 ADM's total sales exceeded the quota allotted to it.

146. That argument is not sufficient to rebut the Commission's evidence that the quotas allotted were complied with, evidence which is corroborated in paragraph 269 of the Decision by the fact that, at their meeting in Atlanta on 18 January 1995, the producers concluded that the difference between allocated quotas and actual sales of each company was not excessive and therefore the price level could be maintained (see also paragraphs 153 to 156 of the Decision).

147. That being so, it must be held that the Commission has proved to the requisite legal standard that the quotas agreement had the effect of limiting sales and preserving market shares.

## The effect of the cartel on prices

148. Nevertheless, in reviewing the Commission's appraisal of the actual impact of the cartel on the market, it is particularly important that the Court examine the Commission's assessment of the cartel's effect on prices (see, to that effect, Case T-308/94, *Cascades* v *Commission*, paragraph 173, and Case T-347/94, *Mayr-*

*Melnhof* v *Commission*, paragraph 225). As was emphasised in the judgments just mentioned, with regard to a cartel that had a similar purpose, and as is confirmed by the statements made by the producers at their meeting on 18 January 1995, the object of the collusion on market shares was to ensure the success of the concerted price initiatives.

149. In the present case, the Commission formed the view that the infringement constituted by the agreement on prices had the effect of raising prices higher than they would otherwise have been (paragraph 261 of the Decision).

150. In so far as concerns the particular effect of causing price increases, it should be recalled that, when determining the gravity of an infringement, particular account should be taken of the legislative background and economic context of the conduct complained of (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, *Suiker Unie and Others* v *Commission*, paragraph 612, and Case C-219/95 P, *Ferriere Nord* v *Commission*, paragraph 38). It is clear from case-law that, in order to assess the actual effect of an infringement on the market, the Commission must take as a reference the competition that would normally exist if there were no infringement (see, to that effect, *Suiker Unie and Others* v *Commission*, cited above, paragraphs 619 and 620, *Mayr-Melnhof* v *Commission*, cited above, paragraph 235, and *Thyssen Stahl* v *Commission*, cited above, paragraph 645).

151. It follows, first, that in the case of price agreements, there must be a finding by the Commission that such agreements have in fact enabled the undertakings concerned to achieve a higher level of transaction price than that which would have prevailed had there been no cartel.

152. Secondly, it follows that, in making its assessment, the Commission must take into account all the objective conditions in the relevant market and have regard to the economic context and, if appropriate, also the legislative background. It is clear from the judgments of the Court of First Instance in the cartonboard cartel case that account should be taken of the existence of any objective economic factors which indicate that, had there been a free play of competition, prices would not have developed in the same way as the prices which were actually charged (*Cascades* v *Commission*, cited above, paragraphs 183 and 184, and *Mayr-Melnhof*, cited above, paragraphs 234 and 235).

153. It is clear from the Decision in the present case that the Commission took into account four factors in reaching its conclusion that the effect had in fact been to increase prices.

154. First of all, the Commission noted that ADM Company's entry into the market in 1991 initially put significant downward pressure on prices, causing them to fall by 50% during the summer of 1992 and that, following the conclusion of the agreements between the undertakings concerned, lysine prices in Europe rose significantly and within six months were brought back to approximately 80% of their price at the beginning of 1991 (paragraph 262 of the Decision). That factor, the relevance of which is clear, is not really in dispute. Nevertheless, the

applicants argue, in their second complaint, that ADM Company's entry into the market had a positive effect. However, as the Commission rightly points out, any positive effect that might have been expected to arise from this new competitor's entry into a previously closed lysine market was completely cancelled out by the cartel in which it then participated.

155. Secondly, the Commission pointed to the increase in lysine prices which occurred in July 1993 after ADM Company had lowered its prices and the lysine producers had concluded a new agreement in June of that year (paragraph 263 of the Decision).

156. Thirdly, the Commission observed that the price agreements concluded after the loss of American soybean crops in the Mississippi flood in the summer of 1993 (see the agreement signed in Paris on 5 October 1993, paragraph 112 et seq. of the Decision) enabled prices to be kept relatively high (approximately DEM 5 per kilogram) until the beginning of 1995, even though production capacity had doubled and demand had risen by only 60% (paragraph 264 of the Decision).

157. The applicants maintain that that conclusion is incorrect. On the contrary, it was the paucity of substitutes for synthetic lysine brought about by the Mississippi flood that caused prices to increase.

158. On this point it should be emphasised that the loss of a large proportion of American soybean crops, from which natural lysine - a substitute for synthetic lysine - is derived, could certainly have caused an increase in the price of the cereals to which, in the case of animal foodstuffs, synthetic lysine is added, but it could also have led to the creation of excess stocks of lysine. It was on the basis of those considerations, aired at their meeting in Paris on 5 October 1993, that the producers expressed their concern that prices could fall significantly and decided to reduce their supply by almost half (paragraph 114 of the Decision). The Commission was thus entitled to deduce from this circumstance, taken together with the doubling of production capacity between 1993 and 1995 and a lesser increase in demand, that prices were artificially high. The applicants' argument, mentioned in paragraph 157 of the present judgment, must therefore be rejected.

159. The fourth and last factor mentioned in the Decision is the Commission's assertion that "[i]t is inconceivable that the parties would have repeatedly agreed to meet in locations across the world to fix prices ... over such a long period without there being an impact on the lysine market" (paragraph 286 of the Decision). As the applicants maintain, this assertion has no probative force because it is based on pure conjecture rather than objective economic factors. It must therefore be rejected.

160. It must be observed that the applicants do not really dispute the correlation which the Commission finds between the price initiatives and the prices actually charged in the market by the cartel members (paragraphs 262 to 264 of the Decision). They merely say that the prices which ADM's clients were charged were on occasion lower than the agreed prices. In this connection, it should be observed that, since this was an agreement relating to price objectives, rather than

to fixed prices, it is clear that implementation of that agreement simply meant that the parties would endeavour to achieve those objectives. Moreover, the actual conduct which an undertaking claims to have adopted is irrelevant for the purposes of evaluating a cartel's effect on the market; account must only be taken of effects resulting from the infringement taken as a whole (*Commission* v *Anic Partecipazioni*, cited above, paragraphs 150 and 152).

161. On the other hand, the applicants maintain that the Commission omitted to take into account other relevant factors capable of countering those on which it based its conclusion that price increases were brought about, namely:
- the constraints on price-fixing arising from the existence of substitute products and the potential entry of new competitors in the market,
- the oligopolistic structure of the market, which, according to two economic studies, explains ADM's conduct (application of the game theory inspired by Cournot's oligopoly model).

## Constraints on price fixing as the result of substitutability

162. First of all, the Commission was, according to the applicants, wrong to take the view that the constraints just mentioned did not keep lysine prices at the level they would have been absent any collusion.

163. As far as the substitutability of products is concerned, it is clear from paragraphs 43 to 48 and 274 to 276 of the Decision that the Commission did indeed take account of that factor as a determinant of lysine prices. After observing that it is technically possible to substitute natural lysine for synthetic lysine, provided other substances are added to obtain the proper protein balance, the Commission acknowledged (in paragraph 275 of the Decision), in response to a similar argument put forward by Ajinomoto during the administrative procedure, that where the price of soybean meal (from which natural lysine is derived) is sufficiently low, natural lysine may then be substituted for synthetic lysine, the price of soybean meal providing a price ceiling for the producers in question. However, the Commission then went on to emphasise (in paragraph 276 of the Decision) that the price of soybean meal remained sufficiently high during the period of the infringement to enable the parties involved in the cartel to increase their prices.

164. The applicants do not explicitly contest this conclusion but merely call into question the probative value of the extract from an economic report set out in paragraph 276 of the Decision. In this connection, they maintain that the report related to the American market and that it was not disclosed to them during the administrative procedure. The content of the report may undoubtedly be regarded as irrelevant to the conclusion drawn in paragraph 276 of the Decision because it is not evidence as such but a theoretical explanation of the phenomenon observed using data gathered in the United States. Moreover, the Commission itself indicates that it has not relied on the report as evidence. It should be remembered in this connection that the Commission was here merely replying to an argument put forward during the administrative procedure by Ajinomoto, not ADM. The

question of non-disclosure of the studies in issue will be considered in paragraph 327 of the present judgment.

165. As regards the potential entry of new competitors in the market during the period of the infringement, the applicants offer no information, such as the names of undertakings that might have been inclined to enter the market, that might lend credence to its argument. It is not disputed that the production of synthetic lysine requires substantial investments to be made and relies on advanced technology (paragraphs 29 and 30 of the Decision) and this explains why the market remained particularly closed.

**Effects of oligopoly on the market**

166. Secondly, as regards specifically the oligopolistic nature of the market, the applicants complain that the Commission dismissed the two economic studies relied on by ADM during the administrative procedure, which in fact tend to show that ADM had behaved as a cheat within the cartel. On the basis of a model of a game theory inspired by Cournot's oligopoly model, which gave rise to the notion of oligopoly, they seek to show that the Commission has failed to prove that prices actually charged were higher than those which would have been charged in the context of a non-cooperative oligopoly.

167. It must be observed that, by this argument, the applicants seek only to allege that ADM's conduct within the cartel was that of a cheat. The argument must therefore be held to be inoperative. Indeed that also applies to the argument that the agreement for the exchange of information increased competition and the assertion that ADM provided incorrect information. In fact, as was stated in paragraph 160 of the present judgment, the actual conduct which an undertaking claims to have adopted is irrelevant for the purposes of evaluating a cartel's effect on the market; account must only be taken of effects resulting from the infringement taken as a whole (*Commission* v *Anic Partecipazioni*, cited above, paragraphs 150 and 152).

168. It must also be observed that a concerted increase in prices has an even more deleterious effect on a market that is already oligopolistic. Such a structure is an objective economic factor likely to attenuate the effects of competition between producers. Conduct on the part of undertakings like that of ADM definitively reduces competition even further, particularly where there is price-fixing. Consequently, the applicants cannot rely on the oligopolistic nature of the market to justify their assertion that the infringement had no actual effect on the market (see, to that effect, *Thyssen Stahl* v *Commission*, cited above, paragraph 302).

169. In addition to the fact that ADM itself admits that two of the meetings of lysine producers, those of 8 December 1993 and 10 March 1994, had a statistically significant positive effect in raising lysine prices (paragraph 284 of the Decision), the applicants have failed to produce any specific evidence capable of countering the evidence put forward by the Commission and the necessary conclusion is therefore that the Commission has proved to a sufficient legal standard that the cartel had an adverse effect on the market.

170. The Commission's argument that, by disputing the causal link between the cartel and the increase in prices, the applicants are calling into question the substantive truth of the facts and thus justifying its application for the fine to be increased should be examined in the context of the Commission's counterclaim for the fine to be increased.

171. It follows from all the foregoing considerations concerning the nature of the infringement and its actual effects that the Commission was entitled, particularly in view of the extent of the geographical market in question (the EEA), to conclude that the cartel constituted a very serious infringement within the meaning of the third indent of the second paragraph of Section 1.A of the Guidelines. ■

**Commission's new Chief Competition Economist**

The Commission has appointed Professor Lars-Hendrik Röller as the Chief Competition Economist in its Directorate-General for Competition. Mr Röller is currently Professor of Economics at Humboldt University in Berlin. He is also Director of the Institute for Competitiveness and Industrial Change in Berlin. Since 1996, he has been programme director of the industrial organisation group of the London-based Centre for Economic Policy Research (CEPR). He had previously held posts at a number of academic institutions, including the French-based European Institute of Business Management INSEAD, Stanford University, New York University and the Universitat Autonoma de Barcelona.

Professor Röller is expected to take up the post on 1st September. The Chief Economist will report directly to the Director General of Competition and have a dedicated staff of approximately 10 specialised economists. The appointment will be for a period of 3 years, non-renewable, as decided by the Commission in December 2002 as part of the Commission's merger control review package. His role, however, extends beyond mergers to include anti-trust and state aid control.

He will have three main tasks:
- guidance on economics and econometrics in the application of competition rules of the European Communities (which may include contributing to the development of general policy instruments);
- general guidance in individual competition cases from their early stages; and
- detailed guidance in the most important competition cases involving complex economic issues, in particular those requiring sophisticated quantitative analysis.

Source: Commission Statement IP/03/1027, dated 16 July 2003