II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 17 December 2002

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

(Case COMP/C.37.671 — Flood flavour enhancers)

(notified under document number (2002) 5091)

(Only the English text is authentic)

(Text with EEA relevance)

(2004/206/EC)

CONTENTS

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 No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by Regulation (EC) No 1/2003 [2], and in particular Articles 3 and 15 thereof,

Having regard to the Commission decision of 10 July 2002 to open a proceeding 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 Regulation No 17 and Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty [3],

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

Having regard to the report of the Hearing Officer in this case [4],

Whereas:

PART I — FACTS

A. SUMMARY OF THE INFRINGEMENT

(1) This Decision is addressed to the following undertakings:

— Ajinomoto Company Incorporated

— Takeda Chemical Industries Limited

— Daesang Corporation

— Cheil Jedang Corporation

(2) The infringement consists in the participation of those producers of nucleotides in a continuing agreement contrary to Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement covering the Community and the EEA, by which they fixed the prices of the product, implemented price increases, allocated customers and set up a scheme to monitor and enforce their agreements.

(3) The undertakings participated in the infringement between November 1988 and June 1998 [5].

B. THE NUCLEOTIDE INDUSTRY

1. *THE PRODUCT*

(4) Nucleic acid or nucleotide is made from glucose through a process of fermentation, separation, crystallisation and filtration.

(5) There are two nucleotides, which are used for food flavour enhancement, namely disodium 5'-inosinate (IMP) and disodium 5'-guanylate (GMP). Both nucleotides are also sold in mixtures of these two products, such as I & G, a 50/50 mixture of the two nucleotides.

(6) IMP was the first nucleotide to be discovered with the ability to sharpen flavours in some foods. It was later discovered that GMP had the same properties. Both products are only used in small quantities. They function as a food flavour enhancer only in the presence of a glutamate, whether added, like monosodium glutamate (MSG), or naturally occurring, like the glutamate contained in tomatoes. Among other applications IMP and GMP are effective in low-sodium formulations. Nucleotide flavour enhancers are used by major food manufacturers to add flavour to foods either on their own (with naturally occurring glutamate) or, most often, in combination with MSG.

(7) As such, they are mainly used to replace beef extracts, to enhance sweet and meaty flavours, to mask 'off' flavours in various food formulations and to overcome bitterness.

2. *THE PRODUCERS*

(a) AJINOMOTO COMPANY, INC. (JAPAN)

(8) Ajinomoto Company, Inc. (Ajinomoto) is the ultimate parent company of a group of companies manufacturing chemicals, including nucleotides and food products. Backed by capabilities in amino acid technology, the group of companies is also engaged in the development and manufacture of pharmaceuticals. Ajinomoto's operations encompass manufacturing and marketing bases in 21 countries.

(9) Ajinomoto operates nucleotide production plants in Japan.

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[1] OJ 13, 21.2.1962, p. 204/62.
[2] OJ L 1, 4.1.2003, p. 1.
[3] OJ L 354, 30.12.1998, p. 18.
[4] OJ C 64, 12.3.2004.

[5] See under the heading 'Duration' for individualised dates per undertaking.

(10) Its European affiliates are Ajinomoto Europe Sales GmbH (Hamburg, Germany), Ajinomoto Eurolysine (Paris, France), OmniChem (Louvain-la-neuve, Belgium) and Forum Holdings Ltd (United Kingdom).

(11) In 2001, all companies belonging to the Ajinomoto group had a total worldwide turnover of EUR 8 680 million.

(b) TAKEDA CHEMICAL INDUSTRIES LIMITED (JAPAN)

(12) Takeda Chemical Industries Ltd (Takeda) is the ultimate parent company of a group of companies manufacturing pharmaceuticals, chemicals, bulk vitamins, plant protection products and food additives such as nucleotides.

(13) The distribution of nucleotides into the EEA markets is organised through Mitsui & Co. (Japan). There are however several local sales subsidiaries in Europe: Mitsui & Co. Deutschland GmbH (for sales to western Europe (including Germany, the Netherlands, Portugal and Switzerland), northern Europe, eastern Europe and Turkey), Mitsui & Co. UK Plc (for sales in the United Kingdom and Ireland) and Mitsui & Co. France SA (for sales in France).

(14) For the financial year running from 1 April 2001 to 31 March 2002, Takeda had a total worldwide turnover of EUR 9 247 million ([6]).

(c) DAESANG CORPORATION (SOUTH KOREA)

(15) Daesang Corporation (Daesang) is the ultimate parent company of a group operating worldwide, the activities of which include the manufacture of seasonings, animal feeds and amino acids. It was created in November 1997 through a merger of Daesang Industrial Limited and Miwon Corporation Limited. Daesang Industrial Limited was formerly known as Sewon Corporation Limited and Miwon Foods Corporation Limited ('Daesang' or 'Miwon').

(16) Since September 1994, Daesang Europe BV is Daesang Corporation's European sales company for nucleotides. Daesang Europe mainly sells nucleotides to independent distributors in the EEA.

(17) Daesang's worldwide turnover in 2001 was EUR 1 382 million ([7]).

([6]) The following exchange rate was used: EUR 1 = 108,682 JPY (Eurostat's reference database — 2001 exchange rate).

([7]) EUR 1 = 1 154,83 won (Eurostat's reference database 2001 exchange rate).

(d) CHEIL JEDANG CORPORATION (SOUTH KOREA)

(18) Cheil Jedang Corporation (Cheil) is the ultimate parent company of a group of companies established and operating worldwide. It was established as the South Korean Samsung Group's first manufacturing affiliate back in 1953. In 1993, Cheil Jedang Corporation became independent. Cheil is a diversified company focusing among other things on pharmaceuticals and foodstuffs. Cheil entered the nucleotide market in 1977.

(19) Cheil operates in the EEA through its wholly owned subsidiary, CJ Europe GmbH, and various independent distributors.

(20) In 2001, the companies belonging to the Cheil group had a total turnover of EUR 1 976 million ([8]).

3. *THE MARKET*

(a) SUPPLY SIDE

1. ***Production***

(21) The main four producers of nucleotides are Ajinomoto, Takeda, Cheil and Daesang. At the time of the infringement, other producers were Kyowa Hakko Kogyo Co. Ltd (Kyowa) (Japan) ([9]) and Yamasa Corporation (Yamasa) (Japan) ([10]).

(22) The total worldwide nucleotide production capacity in 1997 was approximately 10 700 metric tonnes. In 1992, the total worldwide nucleotide production capacity was around 6 660 metric tonnes.

(23) None of the Japanese or Korean manufacturers of nucleotides have production facilities in the Community. Cheil has a production plant in Indonesia and Kyowa has recently constructed a production plant in the USA.

2. ***Distribution***

(24) The abovementioned Japanese and South Korean producers of nucleotides sell the product on the EEA market through sales subsidiaries and independent distributors established in different Member States.

(25) Since September 1994, Daesang sells nucleotides in Europe through its wholly owned subsidiary Daesang Europe BV. Daesang Europe BV imports nucleotides from Asia and sells them mainly to independent distributors in the EEA.

([8]) EUR 1 = 1,13404 USD (Eurostat's reference database 2001 exchange rate).

([9]) In 1992 Kyowa ceased exporting nucleotides to Europe.

([10]) Yamasa Corporation ceased supplying food flavour enhancer to Europe in 1994.

(26) Ajinomoto sells nucleotides in the EEA through its sales subsidiary Ajinomoto Europe Sales GmbH established in Hamburg, Germany, as well as through independent distributors.

(27) Cheil sells nucleotides in the EEA through its wholly owned subsidiary, CJ Europe GmbH, and through independent distributors.

(28) Takeda sells nucleotides on the EEA through an independent distributor, which distributes the product to customers through its subsidiaries established in Germany, France and the United Kingdom.

(b) DEMAND SIDE

(29) The demand for nucleotides is directly linked to the food industry. As mentioned before, nucleotides are mainly used by major food manufacturers to add flavour to foods.

(30) Between 1992 and 1999, the nucleotides market grew rapidly: whereas worldwide consumption in 1992 was still at approximately 4 465 metric tonnes, it was well over 9 000 metric tonnes in 1999. Over the same period, it is estimated that the Community consumption of nucleotides has risen from approximately 200 metric tonnes to over 500 metric tonnes in 1999.

(31) According to the Commission's best estimates, the total EEA market was worth in the region of EUR 12 million in 1997. In 2000, the EEA market for nucleotides was worth around EUR 7,5 million.

(32) It is estimated that the three main customers in Europe, [ ]* (*), [ ]* (including [ ]*, which was acquired by [ ]* during the 1990s) and [ ]* represent between 45 % and 55 % each year of all nucleotides sold in Europe. On an individual basis, [ ]* purchases approximately 20 % and [ ]* 15 % of all nucleotides imported into Europe.

(c) MARKET INFORMATION

(33) The nucleotides business is essentially a global one. The major producers of nucleotides are large, multinational corporations established in Japan and South Korea. Although production is essentially based in Asia, sales are global (essentially to three major geographical areas — North America, Europe and Asia). The relevant geographic market for nucleotides should therefore be described as worldwide.

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

(34) All nucleotides sold in the EEA are imported from outside the EEA.

(35) South Korean producers benefited from a Community preferential custom tariff regime until 30 April 1998 ([11]).

(36) The strain on which the production of commercial nucleotides is essentially based (as well as the production process itself) has been patented. Among other factors that may influence the customer's choice of supplier, parties have mentioned the quality of the product, price, delivery and technical support.

(37) From the beginning of 1988 until the end of 1997, the average monthly nucleotide prices in the EEA remained fairly stable (approximately between EUR 22 and EUR 27 per kilogram). After this period, nucleotides prices started to fall considerably (prices estimated approximately between EUR 12 and EUR 16 in 1999 and between EUR 8 and EUR 12 in 2000).

(d) INTER-STATE TRADE

(38) Over the period considered in this Decision, the nucleotides market was characterised by important flows between the current Member States as well as between the Contracting Parties to the EEA Agreement.

(39) All undertakings marketed the product in almost every Member State, either through sales subsidiaries or through distributors established in the Community.

(40) Daesang, for instance, sells nucleotides in the whole of the Community through Daesang Europe BV, established in the Netherlands. Cheil and Ajinomoto operate in a similar way. Takeda, on the other hand, markets its nucleotides through an independent distributor who has sales subsidiaries in Germany, the United Kingdom and France. The German outlet is responsible for virtually all of the Community territory with the exception of France, the United Kingdom and Ireland, where other subsidiaries are established.

([11]) 1.1.1989 to 31.12.1989: 0 % (GSP) Council Regulation (EEC) No 4257/88 of 19 December 1988 applying generalised tariff preferences for 1989 in respect of certain industrial products originating in developing countries (OJ L 375, 31.12.1988, p. 1.); 1.1.1990 to 31.12.1990: 0 % (GSP) Council Regulation (EEC) No 3896/89 of 18 December 1989 applying generalised tariff preferences for 1990 in respect of certain industrial products originating in developing countries (OJ L 383, 30.12.1989, p. 1); 1.1.1991 to 31.12.1994: 0 % (GSP) Council Regulation (EEC) No 3831/90 of 20 December 1990 applying generalised tariff preferences for 1991 in respect of certain industrial products originating in developing countries (OJ L 370, 31.12.1990, p. 1); 1.1.1995 to 30.4.1998: 0 % (GSP) Council Regulation (EC) No 3281/1994 of 19 December 1994 applying a four-year scheme of generalised tariff preferences (1995 to 1998) in respect of certain industrial products originating in developing countries (OJ L 348, 31.12.1994, p. 1).

(41) Accordingly, a significant part of the nucleotide sales in the Community represented inter-State trade.

(42) During the period of the infringement and since the creation of the EEA, there were also sales to nucleotide users established in the EEA, mainly through the sales subsidiaries and distributors already established in the Community.

C. **PROCEDURE**

(a) COMMISSION PROCEEDINGS

(43) On 9 September 1999, the Japanese company Takeda filed an application pursuant to the Commission Notice on the non-imposition or reduction of fines in cartel cases ([12]) (the Leniency Notice) by informing the Commission of a cartel existing with regard to nucleotides, expressing its intention to cooperate fully with the Commission. On 14 September 1999, Takeda handed a file to the Commission containing certain documents relating to the case.

(44) On 1 February 2000, Daesang approached the Commission, confirming the existence of a cartel with regard to nucleotides and expressing its intention to cooperate fully with the Commission's investigation.

(45) On 21 February 2000, the Commission addressed requests for information to Ajinomoto, Cheil, Daesang and Kyowa requiring detailed explanations concerning contacts with competitors between 1992 and 1999.

(46) On the basis of the information received during 2000, it became clear that the cartel had operated prior to 1992 and the Commission sent additional requests for information on 11 June 2001 to Takeda, Ajinomoto, Daesang and Cheil concerning the period between 1988 and 1992.

(47) In its response to the Commission's first request for information (dated 3 April 2000 and 21 April 2000), Daesang admitted participating in meetings with competitors and provided the Commission with certain documents specifying the purpose, dates and participants of various meetings. Daesang submitted a supplementary submission on 10 May 2001.

(48) Ajinomoto responded to the Commission's request for information on 3 April 2000 and 5 May 2000 handing over certain documents relating to the meetings and expressing its intention to extend its full cooperation in the Commission's proceedings. In its reply to the Commission's request for information, which was received on 17 April 2000, Cheil admitted participating in meetings between competitors and provided the Commission with more details and documents relating to these meetings. Cheil also expressed its intention to fully cooperate with the investigation. Kyowa submitted a statement in response to the Commission's request for information on 4 May 2000, admitting its participation in meetings between competitors until the end of 1993, and equally expressing its intention to cooperate fully with the investigation. Kyowa also demonstrated that it had ceased supplying nucleotides used as food flavour enhancers in Europe since 1992.

(49) On 20 October 2000, Takeda issued to the Commission a corporate statement relating to certain anti-competitive activities involving Takeda in the Community, complementing the documents submitted on 14 September 1999. In its corporate statement, Takeda submitted detailed information on the cartel, its structure, basic rules and the meetings between competitors.

(50) As stated, the Commission issued a second request for information concerning the period 1988 to 1992 on 11 June 2001. In its response of 20 July 2001, Takeda provided additional information with regard to the operation of the cartel before 1992.

(51) Ajinomoto, on the other hand, submitted in its reply of 30 July 2001 that it was unable to find any references to meetings with nucleotide competitors during the period 1988 to 1991. However, it admitted that from time to time such meetings must have taken place.

(52) Daesang replied on 23 July 2001 and confirmed its participation in the cartel as from October 1988.

(53) Cheil submitted its reply on 14 August 2001, stating that it believed that the meetings between 1988 and 1991 did not discuss the European market.

(54) On 24 October 2001 and 20 December 2001, the Commission addressed a request for information to Yamasa. In its response of 17 January 2002, Yamasa demonstrated that it had ceased supplying nucleotides used as food flavour enhancers in Europe since July 1994.

(55) On 24 October 2001 and 31 January 2002, representatives of Ajinomoto met with the Commission to discuss their cooperation and submitted additional memoranda on 17 December 2001 and 31 January 2002.

(56) On 10 July 2002, the Commission issued a statement of objections addressed to Ajinomoto, Takeda, Daesang and Cheil.

([12]) OJ C 207, 18.7.1996, p. 4.

D. **DESCRIPTION OF EVENTS**

1. *PARTICIPANTS AND ORGANISATION*

(57) The meetings were generally held at top level (general manager and manager level), as is demonstrated by the evidence in the file concerning the dates, locations and attendance for most of the cartel meetings ([13]).

(58) Kyowa Yamasa withdrew from selling outside Japan respectively in 1992 and 1994, leaving only Ajinomoto, Takeda, Cheil and Daesang as players on the worldwide markets (outside Japan). Consequently, and as shown by the evidence in the Commission's file, the meetings would be restricted to Takeda, Ajinomoto, Cheil and Daesang as from October 1994 ([14]).

(59) The participants would usually meet in the last half of August/September, prior to the annual quotations that were to be sent to the three (initially four) big European commercial users of nucleotides, [ ]*, [ ]*, [ ]* (and [ ]*, which was acquired by [ ]* during the 1990s). These prices would then be used as a benchmark for determining the prices for sales to other customers ([15]) and to allocate these customers between them.

(60) Usually between the following January and March, the manufacturers would then hold a meeting to review the results of the annual contract negotiations with the big three customers and discuss prices generally applicable on the market ([16]).

(61) The participants would also hold bilateral meetings during which they would prepare the multilateral meetings or review the implementation of the agreements, such as in relation to specific customers.

2. *THE ESSENTIAL FEATURES OF THE CARTEL*

BASIC PRINCIPLES

(62) The structure, organisation and operation of the cartel was based upon a shared assessment of the market. As mentioned above, the producers recognised that in Europe, the market was largely made up by three large industrial users of nucleotides: [ ]*, [ ]* (who acquired [ ]* during the 1990s) and [ ]*. Between them, they purchased around 45 to 55 % of all nucleotides sold in Europe each year.

(63) The purpose of the cartel meetings was to discuss the general trends on the nucleotides market, to share information on prices and to discuss allocation between the manufacturers of the annual nucleotides sales contracts concluded with the three large industrial users of nucleotides in the Community. The meetings included discussions to the effect that the prices at which nucleotides were sold to these three companies were to be used as the benchmark for determining the prices for sales to other customers ([17]).

(64) As part of the agreement, the Japanese producers would purchase product from the Korean producers in exchange for which the Korean producers agreed to limit their sales to certain markets as well as to certain customers ('counterpurchasing agreements'). In fact, Takeda would be in charge of the counterpurchases from Cheil, whilst Ajinomoto would have similar arrangements with Daesang ([18]).

(65) The basic principles of the cartel are very clearly explained in Takeda's minutes of a meeting held on 25 July 1997 between Takeda and Ajinomoto ([19]), where Ajinomoto's new [...] was introduced. In Takeda's own words, it was explained to him that the regular meetings between competitors aimed at '(a) maintaining and reforming international market prices, (b) respecting each other's markets and (c) allocating large clients in Europe'.

(a) ***Price fixing***

(66) The cartel members agreed on 'minimum' and 'target' prices to be implemented. Prices would be set for the sale of nucleotides to the big three European customers and these prices would then be used as a benchmark for determining the sales to other customers. Every year, a target price for the next year in relation to the big three customers would also be discussed ([20]) (see, for instance, recitals 80, 87, 92, 94, 98, 108, 112, 113, 118 to 120, 124, 127 to 129, 139 to 141).

(67) Prices were mainly established both in USD and DEM. In the European market the DEM would be usually used as the benchmark currency and converted into the appropriate national currency when quoting and charging prices to the national customers.

([13]) See pages 1931 to 1947 and 1961 to 1974 of the Commission's file; see also pages 316 to 319, 1995 and 2174 to 2175 of the Commission's file.
([14]) See pages 2170 to 2171 of the Commission's file.
([15]) Ajinomoto refers to these other customers (other than [ ]*, [ ]* and [ ]*) as 'the general market'.
([16]) See pages 2170 to 2171 of the Commission's file.
([17]) See Takeda's corporate statement, page 2170 of the Commission's file.
([18]) See pages 303 and 1962 of the Commission's file.
([19]) See pages 2158 to 2161 of the Commission's file.
([20]) See Takeda's corporate statement, pages 2170 to 2171 of the Commission's file; see also Daesang's statement, page 1933 of the Commission's file; see also Daesang's supplementary submission, page 1963 of the Commission's file; see also Kyowa's statement, pages 870 and 871 of the Commission's file; see also Cheil's statement, page 304 of the Commission's file; see also Ajinomoto's memorandum, page 2, paragraph 3, page 2445 of the Commission's file.

(b) ***Customer allocation (and market sharing)***

(68) [ ]* and [ ]* were historically supplied by Takeda whereas [ ]* was historically supplied by Ajinomoto ([21]). According to Daesang, an agreement existed between Takeda and Ajinomoto not to sell to each other's respective European customers ([22]).

(69) In order to protect their sales to these major European nucleotides users, Takeda and Ajinomoto also entered into agreements with their main competitors whereby Takeda and Ajinomoto purchased product from their competitors in exchange for which the respective competitors would limit their sales to the main European nucleotides users ([23]). As Cheil puts it ([24]), 'The Japanese companies (Takeda and Ajinomoto) were to buy nucleotides from Cheil and Miwon (Daesang) respectively. In exchange, the Korean producers were supposed not to sell to the European "big three" and were to restrict quantity to Japan'. (see, for instance, recitals 78, 81, 84, 86, 100 to 102, 108, 111, 112, 114, 116, 117, 122, 123).

(70) This compensation scheme, which was a corollary to the customer allocation scheme, also lead to the allocation of markets on a worldwide basis, as confirmed by Cheil ([25]). In exchange for not selling to certain customers, the Japanese undertakings purchased product from their Korean counterparts ([26]). Given that these customers were situated in different markets from where the compensation sales occured, this effectively lead to the allocation of markets (see, for instance, recitals 81, 82, 85, 94, 95, 100 to 102, 110, 112, 122, 124, 134).

(71) Takeda confirms that an integral part of the cartel arrangements concerned 'the allocation between the manufacturers of the annual nucleotides sales contracts concluded with the three large commercial users of nucleotides in the Community: namely [ ]*, [ ]* and [ ]*'.

IMPLEMENTATION

(72) The holding of regular and frequent meetings between the addressees of this Decision was a key feature of the cartel's organisation. From 1989 to 1998, more than 20 multilateral meetings (including all cartel members) have been identified. In addition, the parties held regular bilateral meetings during this period (more than 35 of such contacts have been identified). These meetings were for example used to prepare the respective positions of the undertakings in the multilateral meetings. There were also occasional contacts by telephone (approximately 10 telephone conversations have been identified).

(73) The timing of the cartel meetings was usually set shortly prior to the annual contract negotiations with the three 'big European customers' in order to agree on the target prices to be quoted as well as on the allocation of those contracts ([27]). The parties also held meetings to review the implementation of the target prices during the sales negotiations ([28]), although the review of past target prices as well as the discussions on new target prices to be applied were often combined in one and the same meeting (see, for instance, recitals 93, 94, 96, 103, 109, 118, 125, 126, 130, 131, 141).

(74) The participants also exchanged their sales prices and volumes, which were used as a basis in their discussions to determine the target prices to be fixed ([29]) (see, for instance, recitals 80, 96, 98, 103, 115, 133).

3. *INITIAL CONTACTS*

(75) Cheil admits that certain meetings took place between competitors as from July 1988, although it first stated that the meetings between 1988 and 1991 did not appear to pertain to the EEA, focusing on the Japanese and Asian markets instead ([30]).

(76) A business trip report submitted by Cheil dated 16 to 28 July 1988 and attached as Annex 5 to Cheil's 2001 statement, mentions that 'Takeda said they were making P-meeting ([31]) for nucleotides to avert severe competition which would be occurred by Miwon's [Daesang] entry and asked us to support and join into the P-meeting'.

([21]) See Takeda's corporate statement, page 2170 of the Commission's file.
([22]) See Daesang's supplementary submission, page 4, or page 1963 of the Commission's file.
([23]) See Cheil's statement, page 2, paragraph 2 (page 301 of the Commission's file); Kyowa, page 5, paragraph 1 (page 870 of the Commission's file); Daesang's supplementary statement, pages 1963 and 1964.
([24]) Page 5 of Cheil's statement, page 304 of the Commission's file.
([25]) See Cheil's statement, page 4, page 303 of the Commission's file.
([26]) See Cheil's statement, page 5 (page 304 of the Commission's file); see also pages 1963 to 1964 of the Commission's file.
([27]) See Takeda's corporate statement, pages 2170 and 2171 of the Commission's file.
([28]) See Takeda's corporate statement, page 2171 of the Commission's file.
([29]) See Takeda's corporate statement, page 2170 of the Commission's file.
([30]) See pages 1181 to 1182 of the Commission's file.
([31]) Referring to the meetings between producers or price-fixing meetings.

(77) Takeda, for its part, situates the initiation of the meetings between competitors around 1989 ([32]).

(78) Kyowa, on the other hand, has submitted that the meetings between Japanese nucleotides producers started at least in 1986, but '[...] there may have been even earlier meetings' ([33]). Kyowa further submits that in its view, 'the main players behind the meetings were Takeda and Ajinomoto. Takeda was in charge of dealing with Cheil, and Ajinomoto was in charge of dealing with [Daesang]. Takeda was also the coordinator of the group.' ([34]).

(79) Ajinomoto admits that representatives of Ajinomoto did from time to time meet with Cheil, Takeda, Kyowa and Yamasa from 1988 onwards. Whereas it first claimed that it had not been able to collect any information on the subject matter of these meetings for the period 1988 to 1991 ([35]), it subsequently submitted various internal documents on contacts during that period in its additional memorandum of 17 December 2001 ([36]).

(80) An internal memorandum submitted by Ajinomoto shows that representatives of the Japanese nucleotides producers (Takeda, Ajinomoto, Kyowa and Yamasa) held meetings on 8 and 10 November 1988 where, as regards the European market, they exchanged information on, and discussed and/or agreed upon the prices that were offered or to be offered by each company to the three big end-users in Europe, i.e. [ ]*, [ ]* and [ ]* as well as the target prices in the general market in Europe other than the 'Big three customers' for the 1989 calendar year ([37]).

(81) Daesang submits ([38]) that it was first contacted by the Japanese producers shortly after it started to produce nucleotides in 1987: a meeting was organised between the Japanese producers (Daesang speaks of the 'Association' of Japanese producers), and representatives of Miwon (now Daesang) in Tokyo on 5 October 1988. The purpose of this meeting was to limit Miwon's penetration into the Japanese market and to discuss possible cooperation with the Korean producers. The discussions at this meeting led to the conclusion, on 19 December 1988, of a 'counterpurchasing agreement' between Ajinomoto and Miwon. Although presented as a 'supply contract', Daesang admits that the verbally agreed condition for this contract was that Miwon was not to increase its sales to Japan and not to obstruct the Japanese producers' cooperation on world prices ([39]).

(82) This is corroborated by an internal fax of Miwon dated 9 November 1988 where reference is made to the negotiations for the supply contract with Ajinomoto, stating that 'the contract contains a clause on the prohibition of new sales'. Daesang submits that this meant that Ajinomoto was only willing to buy product from Miwon if Miwon did not increase its sales to Japan ([40]).

(83) In addition, Daesang submits that at this meeting on 5 October 1988, Ajinomoto made it clear that counterpurchases from Miwon would be made by Ajinomoto whilst counterpurchases from Cheil would be made by Takeda. Ajinomoto purchased Miwon products through Takeda's distributor, which it used as a cover ([41]).

(84) In this respect, Daesang indicates that the initiative for the agreement came from the Japanese producers ([42]), thus confirming Kyowa's statements as mentioned above ('the main players behind the meetings were Takeda and Ajinomoto. [...] Takeda was also the coordinator of the group.' ([43])). The view that the cartel was lead by the Japanese producers is also shared by Cheil, stating that 'the broad commercial background to the events set out is one of dominant players seeking to protect an effective duopoly from emerging competition' ([44]).

(85) Ajinomoto submits ([45]) in this respect that its role should be considered as subordinate to Takeda's which is said to have initiated and orchestrated the cartel activities: 'Faced with the fact that it lacked a well-organised sales network in the EEA [...] and the entry of additional competition from Korean companies, it was Takeda that was keen to protect its leading position vis-à-vis [ ]* and [ ]* through customer allocation and price fixing. Meetings among the competitors were initiated by [a Takeda representative]*[...].[a Takeda representative]* chaired the meetings and made the opening and concluding speeches. During the meetings, he would lead the discussion and write grid-charts on a whiteboard. Takeda would complain vigorously whenever it came to its attention that other companies had undercut the predetermined price to [ ]* and [ ]*.' ([46])

([32]) See page 2170 of the Commission's file.
([33]) See page 869 of the Commission's file.
([34]) See page 869 of the Commission's file.
([35]) See page 2030 of the Commission's file.
([36]) See pages 2256 to 2299 of the Commission's file.
([37]) See pages 2264 to 2269 of the Commission's file.
([38]) Supplementary submission, see p. 2, point 1.
([39]) See page 1962 of the Commission's file; see also pages 986 to 989 of the Commission's file.
([40]) See pages 1962 and 990 to 992 of the Commission's file.
([41]) Daesang's supplementary statement, p. 3; see also Annexes K and L attached thereto.
([42]) See pages 1961 to 1962 of the Commission's file.
([43]) See page 4 of Kyowa's statement; page 869 of the Commission's file.
([44]) See Cheil's statement, page 2, paragraph 2; page 301 of the Commission's file.
([45]) See pages 2557 to 2558 in the Commission's file.
([46]) This is contradicted by the facts in the Commission's file. In an internal note of Ajinomoto (see Annex 11 to Ajinomoto's Memorandum of 30 June 2000 or pages 2496 to 2499 of the Commission's file, it is stated that 'we [Ajinomoto] as leading manufacturer as well as Takeda, have to take the lead in the price increase race, and therefore it is most likely to run against a head wind. However, it is inevitable that we have to take risks'; see also Annexes 7 and 8 to Ajinomoto's memorandum, pages 2483 to 2488 of the Commission's file).

(86) According to Daesang, another counterpurchasing contract was concluded between Takeda and Miwon in early March 1989. According to Daesang, this contract was negotiated on behalf of Miwon by Ajinomoto. The Commission notes that, in its reply to the statement of objections, Ajinomoto contests that it negotiated a contract with Takeda on behalf of Miwon. The conditions of the contract with Takeda were that Miwon (now Daesang) was not to increase its sales to Japan, that Miwon was to cooperate with the Japanese producers in raising the world price for nucleotides and that Miwon was to cooperate with (i.e. refrain from selling to) the 'Big three' customers ([ ]*, [ ]*, [ ]*).

4. *OPERATION OF THE CARTEL AGREEMENT*

(87) According to a business trip report ([47]), a meeting among the manufacturer(s) of nucleotides (in which Cheil participated) was held between 7 and 23 March 1989. The same business report indicates that attendants agreed to meet again in Kyung Ju, Korea on 7 June 1989 (according to Daesang, this is the meeting where the target prices for 1989 were agreed upon).

(88) An internal fax from Miwon Japan to Mitra ([48]) dated 30 May 1989 ([49]), mentions, in addition to the supply of product to Ajinomoto, an upcoming nucleotide meeting with competitors on 6 and 7 June 1989 in Kyung Ju, Korea, which was to be attended by representatives of Takeda, Ajinomoto, Miwon as well as representatives of two other producers.

(89) Daesang states that it believes that the target prices for 1989 were set at this producers' meeting of 6 and 7 June 1989 ([50]).

(90) An internal fax of Ajinomoto dated 9 June 1989 confirms this meeting, stating that 'at a meeting which took place the day before yesterday in Korea, Takeda told the Koreans that a request was received by [...] to reduce the USD 27,50 cif price to the prevailing market price' ([51]).

(91) An internal fax from Ajinomoto dated 13 July 1989 indicates that Ajinomoto's European sales office was requested to research and confirm their information relating to Takeda's selling price of nucleotides to [ ]* and [ ]* and certain information on low selling price and sales quantities of Takeda and other manufacturers in West-Germany, France, the United Kingdom, Switzerland and Spain in preparation for an upcoming meeting between four Japanese and two Korean nucleotides manufacturers in Taiwan on 7 August 1989. No further information is available on whether or not this meeting of 7 August 1989 took place.

(92) On 5 October 1989, representatives from Takeda, Ajinomoto, Cheil, Miwon and two other producers met in the ANA hotel in Tokyo in order to discuss prices for the forthcoming negotiations with the big customers, including the European market for 1990, and to review the implementation of the 1989 price-fixing agreement ([52]).

(93) However, it should be noted that according to Daesang, the meeting of 5 October 1989 consisted in fact of several meetings. The discussion on prices for European customers for 1989 and 1990 were discussed bilaterally between Takeda and Miwon and Takeda and Cheil respectively. Miwon was informed by Takeda that 'Cheil is basically cooperating, which indicates that Takeda had previously met with Cheil' ([53]). A final meeting was held at 17.00 the same day, but essentially dealing with issues relating to the [ ]* market.

(94) It was concluded that there was a huge gap between the target price and the actual price of nucleotides. The target prices (including Europe) for 1990 were discussed on the basis of the 'guidelines for pricing in the European market in 1990', submitted by Takeda and indicating three different target prices based on the volume ordered by a customer (large, middle or small customer). In addition, Daesang submits that in view of an expected visit to Korea by a purchaser from [...], Takeda instructed Miwon to offer [...] a price in accordance with the guidelines (for a reproduction of these guidelines, see below).

(A) Europe market — suggested guidelines for 1990

Price (CIF)	Target Customer	Remarks
USD 30/Kg	More than 1 000 kg (large)	One lot quantity
USD 31/Kg	500 — 1 000 kg (middle)	One lot quantity
USD 32/Kg	Less than 500 kg (small)	One lot quantity

Source: Annexes J and L to Daesang's supplementary submission ([54]).

(95) During the meeting on 5 October 1989, Takeda also stated that 'Europe is Takeda territory' ([55]).

([47]) See Annex 5 of Cheil's 2001 statement, pages 2616 to 2619 of the Commission's file.
([48]) Miwon Trading and Shipping Company, a subsidiary of Miwon.
([49]) See pages 1963 to 1965 of the Commission's file.
([50]) See page 1965 of the Commission's file.
([51]) See pages 2259 and 2270 to 2272 of the Commission's file (page 3 and exhibit 2 of Ajinomoto's supplementary statement of 17 December 2001).
([52]) See pages 2174, 1009 to 1015, 1016 to 1024 and 1025 to 1032 of the Commission's file, respectively.
([53]) See page 1965 of the Commission's file.
([54]) See Ajinomoto's supplementary Submission of 17 December 2001, page 4, or page 2260 of the Commission's file.
([55]) See page 1009 of the Commission's file.

(96) Annex M to Daesang's supplementary submission ([56]) is an internal fax from Miwon in follow-up of the meeting of 5 October 1989 which states that the basic position of the (Miwon) headquarters is to try to follow the basic cooperative framework of the Japanese companies. It is further stated that the 'Japanese producers have been selling (in 1989) at a much lower price than the target price in the European market [...]. Therefore it is questionable, whether the above price guideline will be followed by the Japanese companies during the 1990 contract period'.

(97) The abovementioned guidelines are confirmed by an internal fax of Ajinomoto dated 6 October 1989, which specifies that the guidelines were handed over to the Korean producers. However, for the purpose of the Japanese producers, a separate set of guidelines were also exchanged on 'guidelines prices' to be quoted for 1990: USD 28/kg (DEM 52,20/kg) for the big users and USD 30/kg (DEM) 55,80/kg for the other customers (general market big accounts) ([57]).

(98) An internal fax from Ajinomoto of 19 December 1989 reports on a meeting held between the Japanese producers regarding nucleotides prices in Europe for 1990 on that same day. According to the fax, Takeda said that they commenced negotiations with [ ]* and [ ]* during their two recent European trips, but they did not agree. Takeda made an offer to [ ]* at USD 27,50/kg but Takeda wished to make a revised offer price at USD 26/kg. Takeda's negotiations with [ ]* were still pending ([58]).

(99) As stated before, the parties to the cartel would also occasionally contact each other on a bilateral basis. The documents contained in Annexes N and O to Daesang's supplementary submission are good examples of this.

(100) Annex N to Daesang's supplementary submission ([59]) contains an internal fax from Mitra to Miwon Japan dated 22 November 1989, which expressly indicated that Takeda had proposed that, if Miwon would agree to limit its sales to [...] and [...], Takeda would accept a lower standard of product from Miwon as part of its counterpurchasing arrangement.

(101) Annex O to Daesang's supplementary submission ([60]) concerns a telex dated 28 November 1989 from Takeda, which was only received a few days later by Miwon, listing the terms of its purchases from Miwon in 1990, and also containing the request from Takeda to Miwon to offer a certain price to [...] and [...] and to subsequently confirm its compliance with this request.

(102) According to Daesang, it would no longer agree to cooperate on pricing to [...] and [...] in 1991 unless Takeda agreed to buy at least 20 tonnes of nucleotides from it and it would not cooperate with regard to [...] unless Takeda would purchase a total of 40 tonnes. Its fax of 10 November 1990 ([61]) stated that this matter was discussed with [ ]* from Takeda when he visited Mitra on 7 November 1990. It is mentioned that 'Mitra fully agrees to cooperate in order to increase the [worldwide] market price. However, in the future, exports to Europe freely with some customers accounts, so would like to cooperate, in regard to '91, only with respect to [...] and [...]. In addition, currently [...] and other customers are continuously requesting offers and if possible looking to confirm contracts. If we [continue] to follow Takeda's request and offer at a higher price, then it is certain that we will not be able to have [any] contracts'. An internal fax dated 19 November 1990 ([62]) concerns the same issue. The precise terms of the counterpurchasing arrangements were also the main topic discussed at a meeting between Ajinomoto, Takeda's distributor and Miwon in Tokyo on 1 May 1991 ([63]).

(103) According to Kyowa's statement ([64]), [ ]* of Takeda announced Takeda's prices to [...] and [...] to Kyowa at a meeting in January 1991, following a telephone call that he made to his counterpart at Kyowa, reporting that Takeda wanted to increase these prices up to a particular level as from October 1991.

(104) Ajinomoto submitted an internal memorandum on Takeda's nucleotides negotiation status for 1992, which was presumably written on 21 November 1991. According to this memorandum, Takeda informed Ajinomoto regarding the 1992 contract that 'Takeda was trying to raise the price by two dollars on USD basis (to USD 28,50) but the negotiation was very difficult because the price increase would be very significant on a local currency basis due to the exchange rate'. Furthermore, Takeda complained that [ ]* was receiving lower offers from Ajinomoto (USD 17,20 instead of Takeda's USD 17,70) and requested Ajinomoto to offer to sell at USD 18 for 1992, which would be higher than Takeda's price ([65]).

([56]) See pages 1033 to 1036 of the Commission's file.
([57]) See page 2260 of the Commission's file.
([58]) See Ajinomoto's supplementary submission of 17 December 2001, page 4, or page 2260 of the Commission's file.
([59]) See pages 1037 to 1038 of the Commission's file.
([60]) See pages 1039 to 1040 of the Commission's file.
([61]) See pages 1041 to 1044 of the Commission's file.
([62]) See pages 1045 to 1050 of the Commission's file.
([63]) See pages 1051 to 1054 of the Commission's file.
([64]) See page 871 of the Commission's file.
([65]) See exhibit 7 attached to Ajinomoto's supplementary submission of 17 December 2001 or pages 2285 to 2287 of the Commission's file; see also exhibit 8, or pages 2288 to 2290. The first price quote (USD 28,50) concerns I & G product (mixture of IMP and GMP), whereas second price quote (USD 17,20 to 18) concerns IMP.

(105) Sometimes, in order to limit the risk of detection, the meetings between competitors were limited to just a few undertakings who would then act on behalf of certain other competitors. For instance, Daesang submits ([66]) that a high level two-day meeting was organised on 27 and 28 April 1992 between the presidents of Daesang, Cheil and Ajinomoto who acted on behalf of the other Japanese producers as well because, as Ajinomoto stated, 'it would look suspicious if the Japanese producers all went to a Korean resort together'.

(106) During this meeting, the cooperation on nucleotides was discussed. Daesang believes that Ajinomoto also attended the meeting on behalf of the other Japanese producers including, among others, Takeda ([67]).

(107) Daesang submits that representatives of Miwon attended a meeting in Korea on 30 June 1992 with representatives from Takeda. No information is given, however, as to the subject of the meeting ([68]).

(108) The target prices for 1993 were discussed at a meeting organised in Tokyo on 20 August 1992. According to Daesang's statement, the agenda for the meeting concerned cooperation in setting the international market price for nucleotides, 'counterpurchasing' and restrictions on sales to the [ ]* market. The final goal, as expressed by Takeda, was to have one world price, including the Japanese market and for the Japanese producers to buy a significant amount of the Korean producers' production. The world target price ([...]) presented at the meeting was between USD 30 and USD 32. After a meeting recess, an agreement was reached on the world target price. According to Daesang, 'it was clear that the Japanese companies had discussed all the issues amongst themselves before the meeting and had agreed upon a unified presentation' ([69]). In support of its statement, Daesang has provided a copy of a target price list prepared by Takeda for the purpose of the meeting of 20 August 1992. The list states that for Europe, the target prices would be at DEM 48/kg and DEM 45/kg for the big three customers ([70]). According to Cheil, the Japanese producers requested during this meeting that prices for Europe be offered only in local currencies ([71]).

(109) On 28 January 1993, the participants met again in Tokyo in order to review the implementation efforts to achieve the target price set on 20 August 1992. During this meeting, the parties decided whether the target price set in 1992 should be adjusted and considered ways to achieve it. Daesang submits that the two Korean producers considered it too difficult to raise prices and asked their Japanese counterparts for permission to sell below target price. The Japanese producers refused. The Japanese argued, among other things, that the Koreans could sell into Europe at a lower price because they were not subject to any duty due to the Community preferential custom tariff regime (GSP). Even though the parties apparently did not reach a consensus as to how to achieve the target price, everyone reaffirmed the target price ([72]).

(110) Furthermore, regional prices were discussed to see if the companies were adhering to the worldwide target price agreed to at the meeting of 20 August 1992. Specifically, prices in the [ ]*, [ ]* and Europe were discussed. There also was a discussion in general about cooperation with regard to the European big three customers ([73]).

(111) Ajinomoto, Takeda, Miwon and Cheil met again in Fukuoka (Japan) on 2 March 1993. During this meeting an adjustment was made to the target prices for the various regions for 1993. Furthermore, discussions were held to clarify the terms of the counterpurchasing agreements, since the cooperation did not always go as smoothly as the Japanese producers would have liked. Cheil states that the attempt that was made during this meeting to set the price in the Community area failed because the Korean producers wanted to quote a different price as they benefited from the GSP. Cheil concludes that 'in fact, it was the conduct of the Korean companies which prevented the arrangements from working more effectively' ([74]).

(112) Daesang's minutes of that meeting ([75]) provide, however, a more detailed version of the events. According to Daesang, the meeting was initially conducted by Ajinomoto's Deputy General Manager, who threatened to end the counterpurchasing agreements if the Korean companies continued to fall behind in their cooperation with regard to the big three customers, maintaining the agreed world price and restricting their sales to Japan. Cheil and Daesang agreed that the counterpurchasing practice had to be maintained and, consequently, they agreed with the Japanese producers to improve their cooperation efforts. Daesang states that it agreed to cooperate with respect to the 'big three' customers but wanted Ajinomoto and Takeda to increase the quantity of nucleotides that they purchased from Daesang. Finally, a discussion was held on how the cooperation could be implemented, regulated and enforced.

([66]) See pages 1970 to 1971 of the Commission's file.
([67]) See pages 1061 to 1066 of the Commission's file.
([68]) See pages 1067 to 1068 of the Commission's file.
([69]) See pages 1069 and 1070 to 1071 and 392 to 393 of the Commission's file.
([70]) Daesang explains that these figures are related to I & G. A converting rate for prices for IMP and GMP separately is inserted on the bottom of the same target price table.
([71]) See Cheil's statement, page 4, No 2.
([72]) See pages 1072 to 1073 of the Commission's file.
([73]) See pages 1072 to 1073 of the Commission's file.
([74]) See Cheil's statement, page 5, No 5.
([75]) See pages 395 to 396 of the Commission's file.

(113) During the remainder of 1993, Miwon received several more visits by Takeda and Ajinomoto representatives. During these visits, the same topics were discussed, i.e. cooperation on the 'big three' customers and the world market prices ([76]).

(114) Further meetings were organised in Seoul and Tokyo and regular contacts by telephone were held between the parties (i.e. meetings between Takeda and Cheil on 7 and 26 May 1993 and 30 August 1993, meeting between Ajinomoto, Takeda, Cheil and Miwon on 7 July 1993). Most of these contacts related to the execution of either the counterpurchasing arrangements (i.e. prices and quantities), or complaints about non-compliance with the target prices by one of the (Korean) participants.

(115) Prices to particular customers were also discussed: on 13 September 1993, for example, Takeda phoned Cheil to inform Cheil of the prices that were to be quoted to the European big three customers ([ ]*, [ ]* and [ ]*). In addition, the relationship between IMP, GMP and I & G prices was discussed (see Cheil's statement).

(116) On 25 January 1994, a meeting was organised between Cheil and Takeda to discuss the continuation of the counterpurchasing contract. It was agreed that the quantity and price would be kept the same as in 1993. According to Cheil, Takeda complained that Cheil did not comply with the existing arrangements for Europe, [ ]* and the [ ]*. For example, Takeda is said to have complained to Cheil about the fact that [ ]* had asked Takeda to reduce its price for IMP to USD 16,5/kg after Cheil had offered a quote at this level to [ ]*.

(117) Cheil submits that the minutes it kept of this meeting indicate clearly that the incumbent Japanese producers played the leading role. Following discussions between Cheil and Takeda concerning the 'counter procurement' by the Japanese industry, Takeda is reported to have stated that a final decision in this respect would be taken in a meeting between Ajinomoto and Takeda ([77]).

(118) On 25 August 1994 ([78]), a meeting took place in Tokyo. The records of the meeting of Cheil and Miwon show that at this meeting, the international market prices and sales prices of nucleotides were discussed. The parties exchanged their opinions on the new target prices to be quoted. The Japanese wished to increase the international prices. According to Cheil's business report of that meeting ([79]), Takeda suggested that the parties raise the price up to USD 30/kg at a stroke, whereas the others suggested that they raise the prices by USD 1 to 2/kg step by step. Cheil submits that the Japanese complained about the lack of compliance by the Korean companies.

(119) Finally, the parties discussed their cooperation on the European big three customers. In particular, Ajinomoto asked Cheil and Daesang to refrain from selling to [ ]*. As a conclusion to the meeting, it was agreed to hold another meeting in Seoul in the middle of September 1994 where the main issues would be the following: '(a) price raise: setting target price at USD 30/kg; (b) Cheil and Miwon would define their attitude to big 3 (especially [ ]*)' ([80]).

(120) Earlier, on 7 and 8 July 1994, there had been a meeting between the Japanese and the Korean producers concerning the 1995 price offer for Europe. It follows from Cheil's minutes of this meeting that the Japanese producers insisted strongly on raising prices in 1995. The Korean producers were requested to offer a price lower than that of the Japanese products by USD 2/kg. The minutes continue with an internal memo with one clear message: 'Please, try to raise the price based on the shortage of Korean makers and yen appreciation' ([81]).

(121) According to Cheil, another meeting was held on 6 October 1994 between Ajinomoto, Takeda and Cheil at the Hotel Lotte in Seoul where the Korean cooperation in Europe regarding the 'big three' customers was discussed. Other items on the agenda were the Korean cooperation on the [ ]* market and an overview of the [ ]* market (including Cheil's sales to a [ ]* client, which already formed the object of disputes between Cheil and the Japanese producers). Cheil submits that it did not make any commitments during this meeting, using the absence of Miwon as an excuse ([82]).

(122) An internal fax from Ajinomoto dated 17 October 1994 reports on a telephone conversation between Miwon, Cheil and Ajinomoto showing that Ajinomoto asked Cheil to make an offer to [ ]* Europe one week earlier than Ajinomoto's offer to the same company. Cheil replied that they would accept if Miwon accepted first. Regarding the price offer, Cheil said that they would instruct their people to offer to sell at DEM 49,50/kg but refused to make an offer at DEM 50/kg. Miwon demanded that Ajinomoto purchase an additional amount of product from Miwon as a condition for accepting Ajinomoto's request to offer to [ ]* at a high price.

(123) Takeda and Miwon met in Seoul on 6 February 1995 ([83]) to discuss world prices for nucleotides as well as the counterpurchasing conditions.

([76]) See page 1935 of the Commission's file.
([77]) See page 306 of the Commission's file.
([78]) Daesang submits that the Japanese producers had a premeeting on 24 August 1994 in preparation of the meeting of 25 August 1994 with the two Korean producers (see page 5 of its statement, page 1935 of the Commission's file).
([79]) See pages 392 to 393 of the Commission's file.
([80]) See pages 397 to 404 of the Commission's file.
([81]) See Cheil's statement, page 6 and Annex 5.
([82]) See page 307 of the Commission's file.
([83]) See pages 1937 and 405 to 410 in the Commission's file.

(124) On 16 and 17 October 1995, a meeting was held in Takeda's head office in Tokyo. Ajinomoto, Takeda, Cheil and Daesang attended. According to Daesang, during this meeting the nucleotide world markets and the situation concerning the 'big three' were discussed. Current prices in various countries and regions (including Europe) were discussed to see if the target prices were met or should be adjusted. Ajinomoto gave prices that other producers should offer to [ ]* and the other producers agreed. Takeda is said to have done the same with respect to [ ]* and [ ]* and the others, including Ajinomoto, agreed ([84]).

(125) Prior to this meeting, several other meetings took place between the parties bilaterally and between the four producers. Daesang submits that between April 1995 and 16 October 1995, it attended approximately three or four meetings with Ajinomoto at Mitra's head office in Seoul and approximately one or two meetings with Takeda at the same offices. There were approximately two or three meetings at a conference room in the Lotte Hotel which all four producers attended. At each of these meetings, the parties would review prices in various regions to see if target prices previously agreed to were being met or should be maintained, lowered or raised. Some of the target prices were increased (i.e. the [ ]* target price was maintained even though it was converted into a price per pound rather than a price per kilo). The parties also discussed and agreed to the concept of raising the market prices in various regions as a basis for raising the price to the European big three customers ([85]).

(126) The participants of the cartel met in Seoul during the month of December in order to review the 1995 cooperation. According to the report of the meeting ([86]), Ajinomoto led the meeting and thanked everyone for their cooperation during 1995 which resulted in the effective implementation of nucleotide price increases and asked everyone to continue their cooperation in 1996 so as to further increase the nucleotide prices. Mr C.H. Kim of Daesang is said to have said that he would and the other participants 'showed their agreement by nodding or saying words to that effect'.

(127) According to Daesang's statement ([87]), the four producers (Takeda, Ajinomoto, Daesang and Cheil) met on 7 March 1996 in Seoul in order to fix the 1996 target price for sales to the 'big three customers'. Ajinomoto proposed an international target price of USD 35/kg. With regard to the European market in general, Takeda suggested that a new price should be applied in Europe by the end of August 1996. Ajinomoto suggested that this price should be set at DEM 51/kg. Takeda submitted a copy of its report of that meeting to the Commission ([88]).

(128) According to this meeting memo, there was a common understanding between the participants regarding a price improvement to be realised in 1996. Each company confirmed that it would not change the current supply amount and agreed that price improvement would be the priority. According to the meeting memo, the participants discussed the policy of improvement of the 1996 prices, with the 1997 price plan for the big three (European) customers in mind. It was agreed that the target price for the three big companies should be USD 35/kg (about 10 % up) on a USD basis. In order to achieve this price, the nucleotide producers would prepare a price improvement schedule for the general market prices, which should reach the level of USD 35/kg by September/October (1996).

(129) On 21 May 1996, Ajinomoto requested and obtained a meeting with Miwon about the low price sales of Miwon in Europe. Concerning Europe, Ajinomoto informed Miwon that it was negotiating the price for the second half of 1996 with European customers, but that a price increase in Germany and Spain would be very difficult. Ajinomoto noted that in Spain the price level was DEM 44 to 45/kg, but that it should have been DEM 49/kg based on the price in 1995. A European target price of DEM 50/kg was agreed as of June 1996, with the exception of sales to the 'big three customers' ([89]).

(130) The same day, Ajinomoto also met with Cheil in order to discuss the implementation of the agreed price increases. Cheil is said to have stated that such price increases would not be possible in Europe before July 1996. Ajinomoto insisted that the agreed prices be implemented by the end of August 1996 ([90]).

(131) According to Daesang's supplementary submission ([91]), discussions on the prices to be charged to the big three customers for 1997 started during a meeting held on 3 July 1996. A new European target price was proposed by Takeda and the other parties commented on that proposal during the meeting.

([84]) See page 1075 of the Commission's file.
([85]) See pages 1937 to 1939 and 405 to 423 of the Commission's file.
([86]) See page 1076 of the Commission's file.
([87]) See page 10 of its statement or page 1940 of the Commission's file; see also Annex 12 to its statement, pages 426 to 427 of the Commission's file.
([88]) Takeda rightly observed in its reply to the statement of objections that it had confirmed that although the memo refers to 17 March 1996, rather than 7 March, reference is actually made to the meeting held on 7 March. (In fact, the memo also states the conclusions drawn at the meeting, whilst having been drafted on 12 March 1996).
([89]) See page 1941 of the Commission's file.
([90]) See Annex 5 attached to Cheil's statement, pages 2610 to 2612 of the Commission's file.
([91]) See pages 12 and 13 of Daesang's statement, pages 1942 to 1943 of the Commission's file.

(132) Miwon and Takeda met again on 9 July 1996 in New Jersey, USA and discussed the market price of nucleotides in the world. Takeda asked Daesang for its cooperation in pricing ([92]).

(133) Somewhere in the summer of 1996, Ajinomoto, Takeda, Miwon and Cheil met again in order to discuss the current situation of nucleotides markets, including Europe, and exchange information on sales prices ([93]).

(134) At a meeting on 29 August 1996 in Seoul, Takeda informed the others ([94]) of the price that it planned to offer to [...] for 1997 and asked the others to offer at a higher price (DEM 54/kg). Takeda also asked the others to inform it in case [...] requested a price offer from them. Takeda also suggested different reasons that could be given to customers to justify a price increase ([95]).

(135) It should also be noted that bilateral meetings were also used to influence the outcome of the 'general' competitors meetings. For example, Ajinomoto and Miwon held a meeting on 28 August 1996, one day before the actual competitors meeting, where Ajinomoto advocated a price increase for the customer [...] for 1997. According to Daesang, Ajinomoto wanted to secure the support of Miwon before the actual meeting between competitors took place ([96]).

(136) Takeda submits in this respect that following the US investigations into Ajinomoto's involvement in a worldwide cartel on lysine, Ajinomoto avoided attending the four-party meetings with other nucleotides producers (as from August 1996) although it continued to participate in the nucleotides arrangements. Instead, it continued to hold direct bilateral contacts with Takeda, usually before or after those meetings. According to Takeda, Ajinomoto expected Takeda to use the information given by Ajinomoto as a basis for the talks with the Korean producers ([97]). In reply to the statement of objections, Ajinomoto submits that these allegations are incorrect and are not corroborated by evidence. The exact duration of Ajinomoto's participation in the cartel arrangements is discussed in more detail under 'Duration'.

(137) According to Daesang, it was informed by Takeda that all parties had reached an agreement on the prices for the big three customers during a round of golf organised between representatives of Miwon and Takeda in New Jersey on 10 September 1996.

([92]) See Daesang's statement, page 1943 of the Commission's file.
([93]) See Daesang's statement, page 1944 of the Commission's file.
([94]) Cheil, Daesang and Ajinomoto.
([95]) See page 1945 of the Commission's file.
([96]) See page 1944 of the Commission's file.
([97]) See pages 2171 to 2172 of the Commission's file.

(138) According to a report submitted by Takeda, a meeting was held in March 1997 between Takeda, Cheil and Daesang and an agreement was reached on target prices of USD 30 ([98]).

(139) The target prices that were set for 1997 appeared to be difficult to maintain. A meeting was organised in Seoul between 26 to 28 May 1997. According to Takeda's report of this meeting ([99]), an agreement was reached to set the current overseas price at USD 25/kg for 1997, 'a level falling short of USD 30 agreed upon in the March 1997 meeting'. The report continues that 'proceeding from the judgment that price improvements are necessary before the next year's contracts are negotiated with the different major European companies scheduled for autumn, we exchanged views with the two companies (Cheil and Daesang) on the range of price improvement and the timing (schedules)'.

(140) Finally, they agreed on an improvement up to USD 29 to 31/kg for the following year. A price-fixing agreement was equally reached for [ ]*, one of the European customers. According to Takeda's report of that meeting ([100]), the contract price to [ ]* that was agreed upon for 1997 stood at DEM 48/kg USD 32/kg. An increase would be sought of around 6 % (DEM 51/kg), but Takeda acknowledged that attaining such an increase would be difficult.

(141) Takeda visited Miwon in Amsterdam on 3 June 1997. The items discussed at this meeting were the nucleotide market in Europe, sales by Miwon to [...], [...] and [...] and the exchange of information on prices in Europe and possibilities for price improvements. A similar meeting was held between Takeda and Cheil in Frankfurt on 9 June 1997 where information was also exchanged on prices in Europe and the possibility of improving these prices ([101]).

(142) Takeda met again with Miwon in New Jersey, USA on 10 July 1997 and 16 September 1997 in order to discuss the nucleotides market in general ([102]).

(143) According to Takeda's corporate statement, Takeda's [ ]* met for the first time with his new counterpart at Ajinomoto on 25 July 1997. At this meeting, which took place at a restaurant in Tokyo, they discussed how the nucleotides market had been organised between the manufacturers in recent years and they exchanged their companies' views in relation to price strategy. Ajinomoto, on the other hand, states that during this and later meetings, to the best of Ajinomoto's knowledge, 'European target prices or customers were not discussed'.

([98]) See page 2146 of the Commission's file.
([99]) See page 2146 of the Commission's file.
([100]) See page 1946 of the Commission's file.
([101]) See pages 2217 to 2220 of the Commission's file.
([102]) See Daesang's statement, page 1947 of the Commission's file.

(144) The information provided by Takeda with regard to this meeting, as well as to the meeting held in September 1997, provides a somewhat different picture. Takeda's report of that meeting ([103]) clearly mentions that, among other things, Ajinomoto informed Takeda 'that Ajinomoto had already suggested a 10 % increase on a DEM basis (to around DEM 51?) to their distributors for next year [...]'. Takeda mentioned to Ajinomoto that 'they understood their increase in DEM pricing with a change to dollar pricing in mind, but that [this] depend[s] on how this was passed on the other companies, Takeda, Cheil and Miwon'. Takeda also informed Ajinomoto that it would decide on pricing towards [ ]* and [ ]* based upon the European market research planned for early October ([104]).

(145) About a month later, Takeda met with representatives of Cheil and Miwon separately in bilateral meetings on 27 to 29 August 1997. According to Takeda, the main subject of the meetings were the counterpurchasing agreements, but it is possible that the companies also mentioned the forthcoming annual contract negotiations with the three big customers at this meeting. Daesang submits that it also met with Takeda in the USA on 10 July 1997 and 16 September 1997 and discussed the nucleotides market in general ([105]).

(146) In September 1997, Takeda met again with Ajinomoto. According to Takeda, Ajinomoto communicated that it sought a 15 % price increase for 1998 and a minimum of 10 % ([106]). In a contemporaneous document submitted by Takeda related to this meeting ([107]), it is stated that 'the head office of each company seems to have decided [upon] the offered price from A[jinomoto], C[heil] and MW (Miwon/Daesang) to [...]* and the offered price from T[akeda] to [...]*, [...]* for contract negotiations for the next year. We assumed that in Europe, the products of C[heil] and MW (Miwon) would get GSP treatment' ([108]).

([103]) See page 2223 of the Commission's file.
([104]) In its reply to the Commission's statement of objections, Ajinomoto contests Takeda's description of these events, as further discussed in detail under 'Duration'.
([105]) See pages 1947 and 1974 of the Commission's file.
([106]) See page 2176 of the Commission's file; Ajinomoto contests this description of events, as further discussed in relation to the duration of Ajinomoto's participation in the infringement.
([107]) See page 2224 of the Commission's file.
([108]) The translation provided by Ajinomoto in its statement of 29 November 2002 reads as follows: 'Seems that the head office of each company has studied and tentatively decided on the price to be proposed at the negotiation for the next year contract scheduled for October and November by A, C, MW with [ ]* and by T with [ ]* and [ ]* groups. On the premise that C's and MW's product will continue to enjoy GSP in Europe next year'.

(147) According to Daesang, Miwon held a meeting with Takeda in Seoul in October 1997 where they had a general discussion about the declining price for nucleotides in the world market ([109]).

(148) Cheil submits that it held meetings with Takeda on 24 and 26 March 1998 in Seoul and that on these occasions ([110]), the worldwide nucleotide market and production was discussed. Another meeting between Cheil and Takeda has been identified on 2 June 1998 and Cheil submits that the items discussed concerned the price decline for nucleotides and Cheil's low-priced sales on the Japanese market.

(149) No other cartel related meetings have been identified.

PART II — LEGAL ASSESSMENT

A. JURISDICTION (APPLICATION OF THE TREATY AND THE EEA AGREEMENT)

1. *RELATIONSHIP BETWEEN THE TREATY AND THE EEA AGREEMENT*

(150) The arrangements set out above applied to most of the Member States and to the EEA (Norway and, prior to its accession to the Community, Austria).

(151) The EEA Agreement, which contains provisions on competition analogous to the Treaty, came into force on 1 January 1994. This Decision therefore includes the application as from that date of those rules (primarily Article 53(1) of the EEA Agreement) to the arrangements to which objection is taken.

(152) In so far as the arrangements affected competition and trade between Member States, Article 81 of the Treaty is applicable. In so far as the cartel operations had an effect on trade between the Community and the EFTA countries or between EFTA countries which were part of the EEA, Article 53 of the EEA Agreement is applicable.

(153) If an agreement or practice affects only trade between Member States, the Commission retains competence and applies Article 81(1) of the Treaty. If an agreement affects only trade between EFTA/EEA States, then the EFTA Surveillance Authority (ESA) is alone competent and applies the EEA competition rules, in particular Article 53(1) of the EEA Agreement ([111]).

([109]) See Daesang's statement, pages 1947 to 1948 of the Commission's file.
([110]) See page 309 of the Commission's file.
([111]) Pursuant to Article 56(1)(b) of the EEA Agreement, and without prejudice to the competence of the Commission where trade between Member States is affected, the ESA is also competent in cases where the turnover of the undertakings concerned in the territory of the EFTA States equals 33 % or more of their turnover in the territory of the EEA.

(154) In this case, the Commission is the competent authority to apply both Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement on the basis of Article 56 of that Agreement, since the cartel had an appreciable effect on trade between the Member States ([112]).

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

1. *ARTICLE 81(1) OF THE TREATY AND ARTICLE 53(1) OF THE EEA AGREEMENT*

(155) 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 trade conditions, limit or control production and markets, or share markets or sources of supply.

(156) Article 53(1) of the EEA Agreement (which is modelled on Article 81(1) of the Treaty) contains an identical prohibition of agreements, decisions and concerted practices but substitutes the conditions of effect on trade between Member States with 'between contracting parties' (in this context 'contracting parties' means the Community and the individual (then) EFTA States), and the prevention, restriction or distortion of competition within the common market with 'within the territory covered by ...[the EEA] Agreement'.

2. *AGREEMENTS AND CONCERTED PRACTICES*

(157) Article 81(1) of the Treaty and Article 53 of the EEA Agreement prohibit agreements, decisions of associations and concerted practices.

(158) An agreement can be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing, no formalities are necessary, and no contractual sanctions or enforcement measures are required. The fact of agreement may be express or implicit in the behaviour of the parties.

(159) In its judgment in Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij NV and others* v *Commission* (PVC II) ([113]), the Court of First Instance stated (in paragraph 715) that 'it is well established in the case-law that for there to be an agreement within the meaning of Article [81(1)] of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way'.

(160) An 'agreement' for the purpose 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.

(161) As the Court of Justice (upholding the judgment of the Court of First Instance) pointed out in Case C-49/92P *Commission* v *Anic Partecipazioni SpA* ([114]), in paragraph 81, it follows from the express terms of Article 81(1) of the Treaty that that agreement may consist not only in an isolated act but also in a series of acts or course of conduct.

(162) A complex cartel may thus properly be viewed as a single continuing infringement for the time frame in which it existed. The agreement may well be varied from time to time, or its mechanisms adapted or 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.

(163) Although a cartel is a joint enterprise, each participant in the agreement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries or even cheating may occur, but will not however 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.

(164) 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 also 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 risk (Judgment of the Court of Justice in *Commission* v *Anic*, paragraph 83.)

([112]) See Chapter 5 'Effect upon trade between the Members States and between EEA contracting parties'.

([113]) [1999] ECR II-931.

([114]) [1999] ECR I-4125.

(165) Article 81 of the Treaty ([115]) draws a distinction between the concept of 'concerted practice' and that of 'agreements between undertakings' or of 'decisions by associations of undertakings' in order to bring within the prohibition of that Article any form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition. 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 coordination of their commercial behaviour, the conduct may still fall under Article 81(1) of the Treaty as a 'concerted practice' ([116]).

(166) It is not necessary, however, particularly in the case of a complex infringement of long duration, for the Commission to characterise it as exclusively one or other of these forms of illegal behaviour ([117]). The concepts of agreement and concerted practice are fluid and may overlap. Indeed, it may not even be possible realistically to make any such distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct while, considered in isolation, some of its manifestations could accurately be described as one rather than the other. It would however be artificial analytically to subdivide what is clearly a continuing common enterprise having one and the same overall objective into several different forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time. Article 81 lays down no specific category for a complex infringement of the present type ([118]).

([115]) The case-law of the Court of Justice and the Court of First Instance analysed under this heading in relation to the interpretation of the terms 'agreements' and 'concerted practices' in Article 81 of the Treaty expresses principles well established before the signature of the EEA Agreement. It therefore also applies to these terms in so far as they are used in Article 53 of the EEA Agreement. References to Article 81 of the Treaty therefore also apply to Article 53 of the EEA Agreement.

([116]) See judgment of the Court of First Instance in Case T-7/89 *Hercules* v *Commission* [1991] ECR II-1711, paragraph 256. See also Case 48/69, *Imperial Chemical Industries* v *Commission* [1972] ECR 619, paragraph 64 and Joined Cases 40-48/73, etc. *Suiker Unie and others* v *Commission* [1975] ECR 1663.

([117]) See also the judgment in PVC II, where it is stated 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 forms of infringement are covered by Article [81] of the Treaty'.

([118]) Judgment of the Court of First Instance in Case T-7/89 *Hercules* v *Commission*, paragraph 264.

3. *SINGLE CONTINUOUS INFRINGEMENT*

(167) In this case, the manufacturers of nucleotides adhered, over a long period of time, to a common scheme which laid down the lines of their action in the market and restricted their individual commercial conduct. As such, the arrangements present the characteristics of an agreement in the sense of Article 81(1) of the Treaty, although some factual elements of the illicit conduct could aptly be described as a concerted practice were it appropriate to do so.

(168) From the end of 1988 to June 1998, there is ample evidence to show the existence of this single and continuous collusion in the EEA market for nucleotides between Takeda ([119]), Ajinomoto ([120]), Daesang ([121]) and Cheil ([122]) which together account for virtually the entire market. Indeed, the parties expressed to each other their joint intention to behave on the market in a certain way and adhered to a common plan to limit their individual commercial conduct. The agreement to enter into this plan with a view to restrict competition can therefore be dated back at least to 1988. This collusion was in pursuit of a single anti-competitive economic aim: preventing price competition by agreeing on target prices and price increases.

(169) Given the common design and common objective which the producers steadily pursued of eliminating competition in the nucleotides market, the Commission considers that the conduct in question constituted a single continuing infringement of Article 81(1) of the Treaty in which each participant must bear its responsibility for the duration of its adherence to the common scheme. These arrangements are described in detail in the factual part of this Decision. This description is supported by widespread and clear evidence, systematically referred to throughout the text.

4. *RESTRICTION OF COMPETITION*

(170) The complex of agreements in this case had the object and effect of restricting competition in the Community and EEA.

([119]) With regard to Takeda, from 8 November 1988 until 2 June 1998.

([120]) With regard to Ajinomoto, from 8 November 1988 until September 1997.

([121]) With regard to Daesang, from 19 December 1988 until 31 December 1997.

([122]) With regard to Cheil, from (end of) March 1989 until 2 June 1998.

(171) Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement expressly mention as restrictive of competition agreements which:

> 'directly or indirectly fix selling prices or any other trading conditions; (b) limit or control production, markets or technical development or, (c) share markets or sources of supply'.
>
> The list is not exhaustive.

(172) In the complex of agreements and arrangements considered in this case, the following elements can be identified as relevant in order to find a breach of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement:

— allocating customers,

— allocating markets,

— agreeing target and minimum prices,

— agreeing concerted price increases,

— exchanging information on sales figures so as to monitor the implementation of the target prices,

— participating in regular meetings and other contacts in order to agree the above restrictions and to implement and/or modify them as required.

(173) These kinds of arrangements have as their object the restriction of competition within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement. Price being the main instrument of competition, the various collusive arrangements and mechanisms adopted by the producers were all ultimately aimed at an inflation of the price to their benefit and above the level which would be determined by conditions of free competition.

(174) In order to conclude that Article 81(1) of the Treaty and 53(1) of the EEA Agreement apply, there is no need to consider the actual effects upon competition of an agreement once it is established that the agreements had the object of restricting competition ([123]).

(175) However, the cartel also had a restrictive effect on competition. In fact, the cartel arrangements involved the major worldwide nucleotides producers and were conceived, directed and encouraged at high levels in each participating company ([124]). The target prices, price rises and customer allocation, which were the primary objective of the cartel, were agreed, announced to customers and implemented throughout the EEA.

(176) In their replies to the statement of objections, Cheil and Ajinomoto claim that the restrictive impact on competition was very limited. Ajinomoto further argues that the Commission's conclusion is based on inconclusive evidence, having failed to demonstrate sufficiently the impact of the arrangements on the market. The restrictive effect of the arrangements in questions is established in more detail in recitals 224 to 238.

5. *EFFECT UPON TRADE BETWEEN MEMBER STATES AND BETWEEN EEA CONTRACTING PARTIES*

(177) The continuing agreement between the producers had an appreciable effect upon trade between Member States and between contracting parties of the EEA.

(178) Article 81(1) of the Treaty is aimed at agreements which might harm the attainment of a single market between the Member States, whether by partitioning national markets or by affecting the structure of competition within the common market. Similarly, Article 53(1) of the EEA Agreement is directed at agreements which undermine the realisation of a homogeneous European Economic Area.

(179) According to the case-law of the Court, 'in order that an agreement may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law that it may have an influence, direct or indirect, actual or potential, on the pattern between Member States' ([125]). In any event, Article 81(1) of the Treaty 'does not require that agreements referred to in that provision have actually affected trade between Member States, it does require that it be established that the agreements are capable of having that effect' ([126]).

([123]) Judgment of the Court of First Instance, in Joined Cases T-25/95 etc *Cimenteries CBR and others* v *Commission* [2000] ECR II-491, paragraph 3927. See also judgment in Cases T-374/94, T-375/94, T-384/94 and T-388/94, *European Night Services and others* v *Commission* [1998] ECR II-3141, paragraph 136, where the Court has confirmed this in specific relation to price-fixing agreements.

([124]) See above, under 'Participants'.

([125]) Judgment in Joined Cases C-215/96 and C-216/96 *Bagnasco* v *Banca popolare di Novale and others* [1999] ECR I-135, paragraphs 47 and 48.

([126]) Judgment in Case C-306/96 *Javico* v *Yves Saint Laurent* [1998] ECR I-1983, paragraphs 16 and 17; see also Joined Cases T-374/94 etc *European Night Services and others* v *Commission* [1998] ECR II-3141, paragraph 136.

(180) As demonstrated in the section 'inter-State trade', the nucleotides market is characterised by an important volume of trade between the Member States. Although none of the nucleotide producers had any production capacity based in the EEA during the relevant period, nucleotide was marketed in virtually all States of the EEA territory, either through wholly owned sales subsidiaries, or through distributors established in only a few of the Member States. There was also a considerable volume of trade between the Community and the EFTA countries that are members of the EEA. Norway imports 100 % of its requirements, primarily from the Community, and prior to the accession of Austria, Finland and Sweden, these countries imported the totality of their requirements of nucleotides.

(181) The application of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement to a cartel is not, however, limited to that part of the members' sales which actually involve the transfer of goods from one State to another. Nor is it necessary, in order for these provisions to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States ([127]).

(182) In this case, the cartel arrangements covered virtually all trade throughout the world, including the Community and EEA. The existence of price-fixing and customer allocation mechanisms must have resulted, or have been likely to result, in the automatic diversion of trade patterns from the course they would otherwise have followed ([128]).

6. *PROVISIONS OF COMPETITION RULES APPLICABLE TO AUSTRIA, FINLAND, ICELAND, LIECHTENSTEIN, NORWAY AND SWEDEN*

(183) The EEA Agreement entered into force on 1 January 1994. For the period prior to that date during which the cartel operated, the only provision applicable to these proceedings is Article 81 of the Treaty; in so far as the cartel arrangements within that period restricted competition in Austria, Finland, Iceland, Liechtenstein, Norway and Sweden (then EFTA Member States) they were not caught by that provision.

(184) In the period 1 January to 31 December 1994, the provisions of the EEA Agreement applied to Austria, Finland, Iceland, Liechtenstein, Norway and Sweden; the cartel thus constituted a violation of Article 53(1) of the EEA Agreement as well as of Article 81(1) of the Treaty, and the Commission is competent to apply both provisions. The restriction of competition in those six EFTA States during that one year period falls under Article 53(1) of the EEA Agreement.

(185) After the accession of Austria, Finland and Sweden to the Community on 1 January 1995, Article 81(1) of the Treaty became applicable to the cartel in so far as it affected competition in those markets. The operation of the cartel in Norway, Iceland and Liechtenstein remained in violation of Article 53(1) of the EEA Agreement.

(186) In practice, it follows from the above that in so far as the cartel operated in Austria, Finland, Iceland, Liechtenstein, Norway and Sweden, it constituted a violation of the EEA and/or Community competition rules as from 1 January 1994.

C. **ADDRESSEES**

1. *PRINCIPLES APPLICABLE*

(187) In order to identify the addressees of this Decision, it is necessary to determine the legal entities to which the responsibility for the infringement should be imputed.

(188) 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 company or fiscal law. The term 'undertaking' is not defined in the Treaty. It may however refer to any entity engaged in a commercial activity.

(189) When an infringement of Article 81(1) of the Treaty and/or Article 53(1) of the EEA Agreement is found to have been committed over a given period of time, it is necessary to identify the natural or legal person who was responsible for the operation of the undertaking at the time when the infringement was committed, so that it can answer for it.

(190) A change in legal form or corporate identity does not however relieve an undertaking of liability to penalties for the anti-competitive behaviour. Liability for a fine may thus pass to a successor where the corporate identity which committed the violation has ceased to exist in law.

2. *ADDRESSEES OF THE DECISION*

(191) In this procedure no issue arises regarding the appropriate addressee of the Decision and it will be sent to those legal entities directly involved in the infringement.

([127]) See judgment in Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 304.

([128]) Judgment in Joined Cases 209 to 215 and 218/78, *Van Landewyck and others* v *Commission* [1980] ECR 3125, paragraph 170.

(192) In the case of Miwon Corporation ([129]), which changed legal form in November 1997, this assessment is in conformity with the Commission's normal practice and current case-law ([130]). Miwon Corporation Limited's full merger with Sewon Co. Ltd to form Daesang Corporation ([131]) means that responsibility passes to the new entity. There is an obvious continuity between Miwon and the new entity into which it has been subsumed. Miwon ceased to exist in law and its legal personality as well as all its assets and staff were transferred to Daesang Corporation.

D. **DURATION OF THE INFRINGEMENT**

(193) Although certain evidence submitted to the Commission (see recital 77) indicates that the initial contacts between the Japanese producers go back as far as 1986, the Commission will, for the purpose of these proceedings, limit its assessment under the competition rules and the application of any fines to the period from 8 November 1988, this being the date of the first known meeting between the Japanese producers where prices for the forthcoming negotiations with the big three customers were discussed and agreed upon (see recital 79). The starting date of the infringement taken into account with regard to Takeda and Ajinomoto will therefore be 8 November 1988.

(194) As far as Daesang is concerned, it admits having concluded a counterpurchasing agreement with Ajinomoto on 19 December 1988, when it was verbally agreed that the condition for this contract was that Miwon was not to increase its sales to [ ]* and not to obstruct the [ ]* producers' cooperation on world prices ([132]). The Commission will therefore take 19 December 1988 as the starting date of the infringement with regard to Daesang.

(195) According to a business trip report ([133]), the first meeting of the manufacturer(s) of nucleotide in which Cheil participated was held between 7 and 23 March 1989. The same business report indicates that attendants agreed to meet again in Kyung Ju, Korea on 7 June 1989 (according to Daesang, this is the meeting where the target prices for 1989 were agreed upon).

(196) With regard to the same 'P-meetings', a third business trip report dated 3 to 10 October 1989 ([134]) explains that the purpose of the meeting was to 'discuss the way to prevent the price decline in the global market' and to have a 'preliminary meeting with Takeda to discuss nucleotides supply to Takeda in 1990'.

(197) Cheil's participation in the infringement prior to 1991 is also confirmed by the minutes of a meeting held on 5 October 1989 between Ajinomoto, Takeda, Daesang and Cheil where target prices for 1990 had been discussed and where the implementation of the 1989 target prices had been reviewed ([135]).

(198) Cheil confirms that this meeting took place even though it first claimed that it had found little evidence as to the content of that meeting ([136]).

(199) In its reply to the statement of objections, Cheil confirms, however, that certain meetings between competitors took place from July 1988 and admits its participation in the infringement from March 1989, although it adds that prior to 1992 the main focus was on markets other than the EEA and that, in any case, Cheil only had minor activities on the European market between 1989 and the end of 1991 ([137]).

(200) On the basis of the abovementioned evidence, the Commission considers Cheil to have participated in the infringement from March 1989.

(201) It should of course be noted that in so far as the cartel covered Austria, Finland, Norway and Sweden, this does not constitute an infringement of the EEA Agreement before 1 January 1994, when the Agreement came into effect.

(202) In its reply to the statement of objections, Ajinomoto argues that it ceased its participation in the cartel after August 1996. In support thereof, Ajinomoto submits that it not only stopped attending producers' meetings after August, but that it also ceased counterpurchases from Daesang. Ajinomoto argues that the evidence in the Commission's file itself indicates that its withdrawal from the nucleotides arrangements was complete, genuine and permanent: there is no evidence that Ajinomoto attended any of the producers' meetings after August 1996 and contacts with Takeda were limited to unsuccessful attempts by Takeda to re-involve Ajinomoto in the arrangements.

([129]) Miwon Corporation Limited participated in the infringement through its subsidiaries Miwon Japan Inc. and Mitra (Miwon Trading & Shipping Company) as well as directly (see for example Annexes T and U of Daesang's supplementary submission).

([130]) Case C-49/92 P, *Commission* v *Anic Partecipazioni SpA*, paragraph 145.

([131]) See above under 'The producers'.

([132]) See pages 1962 and 986 to 989 of the Commission's file.

([133]) See Annex 5 of Cheil's 2001 statement, page 2617 of the Commission's file.

([134]) See Annex 5 to Cheil's 2001 statement, page 2618 of the Commission's file.

([135]) See Annexes I, J, K, L and M attached to Daesang's supplementary submission; see also Daesang's supplementary submission, page 6 and Takeda's corporate statement, page 7.

([136]) See Annex 5 to Cheil's 2001 statement, page 2618 of the Commission's file.

([137]) See pages 5 and 6, last paragraph of Cheil's 2001 statement, and pages 9 and 10 of its response to the Commission's statement of objections.

(203) Takeda, for its part, argues that the Commission should consider the date of the last known meeting where target prices were agreed to constitute the end of the infringement.

(204) Daesang and Cheil do not contest the duration of the infringement as established in this Decision.

(205) As far as Ajinomoto is concerned, the Commission agrees that there is not sufficient evidence to demonstrate that it participated in the agreement on the target prices for 1997. Nevertheless, the Commission can not accept Ajinomoto's claim that it ceased participating in the infringement after the meeting of August 1996.

(206) As a matter of fact, the contemporaneous evidence submitted by Takeda concerning the bilateral meetings it held with Ajinomoto clearly demonstrates that both undertakings discussed the nucleotides market and prices during these contacts. In the notes relating to the July 1997 meeting, for instance, Takeda states that it was told by Ajinomoto that they would travel to Europe in August and September and suggest a 10 % price increase to their distributors, for which they expected the distributors to protest strongly. In the following note concerning the September meeting, Takeda states for example that '[A]jinomoto's basic policy is 15 % (minimum 10 %) up. In August at a meeting with Europe branches, they received strong resistance as expected, but they decided that they would start at DEM 53 and would achieve at least DEM 51 (10 % up)' ([138]). The combination of these two notes clearly shows that Ajinomoto had not only indicated the price increase it would seek in Europe, but also gave feedback as to how the discussions had gone and how they would proceed from there. This clearly goes beyond mere unsuccessful attempts made by Takeda to re-involve Ajinomoto in the arrangements ([139]).

(207) The Commission therefore considers that Ajinomoto continued to take part in the infringement beyond the meeting of August 1996 by continuing to meet with Takeda and discussing nucleotides prices.

(208) Even if Ajinomoto ceased counterpurchases after August 1996 and did not participate in any multilateral meeting after August 1996, Ajinomoto continued to participate in the illegal scheme, actively contributing by exchanging price information. Although the form may have changed from participating in the multilateral meetings into holding bilateral contacts with Takeda, it must be concluded that Ajinomoto participated in the infringement until at least the last known meeting in which it discussed nucleotides prices, namely the September 1997 meeting it held with Takeda.

(209) With regard to the other parties, given that they participated in the agreement on the target prices for 1997, the Commission will consider the infringement to have lasted until the end of 1997, except where any illicit contacts between participants have been identified beyond the end of 1997. In the case of Takeda and Cheil, the last known meeting between them where nucleotides prices were discussed is 2 June 1998 ([140]). Consequently, the Commission considers that as far as Takeda and Cheil are concerned, the infringement lasted until 2 June 1998.

(210) The Commission therefore considers the infringement to have lasted until September 1997 as far as Ajinomoto is concerned, until the end of 1997 as far as Daesang is concerned and until 2 June 1998 as far as Cheil and Takeda are concerned.

E. **REMEDIES**

1. *ARTICLE 3 OF REGULATION No 17*

(211) Where the Commission finds there is an infringement of Article 81(1) of the Treaty or 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 17.

(212) In this case, the Commission indicated in its statement of objections that the participants went to considerable lengths to conceal their activities and that they had also given contradictory information regarding the period during which the infringement took place. In their reply to the statement of objections, all undertakings submit that they terminated their participation before the Commission initiated its investigation. Ajinomoto submits that it ended its participation in August 1996.

(213) Notwithstanding these observations, and for the avoidance of doubt, the undertakings which remain active in the nucleotides market and to which this Decision is addressed should be required 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 similar object or effect.

(214) The prohibition applies to all secret meetings and multilateral or bilateral contacts between competitors in view of restricting competition between them or enabling them to concert their market behaviour, in particular their pricing.

([138]) The translation provided by Ajinomoto in its letter of 29 November 2002 reads as follows: 'A's head office's basic policy about DEM price is 15 % (minimum 10 %) up adjustment. Met with strong opposition, as expected, at the meeting with European branches in August, but for the time being will start with DEM 53 and attempt to achieve minimum DEM 51 (10 % up)'

([139]) In its letter of 29 November 2002, Ajinomoto confirms contesting the facts as established in Takeda's notes and calls into question the probative value of the two Takeda notes as evidence for Takeda's continued participation in the infringement.

([140]) See page 309 of the Commission's file.

2. *ARTICLE 15(2) OF REGULATION No 17*

(a) GENERAL CONSIDERATIONS

(215) Pursuant to Article 15(2) of Regulation No 17, the Commission may by decision impose upon undertakings fines from one thousand to one million euro, or a sum in excess thereof not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 81(1) of the Treaty and/or Article 53(1) of the EEA Agreement.

(216) In fixing the amount of any fine the Commission must have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in Article 15(2) of Regulation 17.

(217) 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 fine imposed any aggravating or attenuating circumstances and will apply, as appropriate, the Leniency Notice.

(218) In assessing the gravity of the infringement, the Commission will take account of its nature, its actual impact on the market, where this can be measured, and the size of the relevant market. The role played by each undertaking party to the infringement will be assessed on an individual basis.

(b) THE AMOUNT OF THE FINE

(219) The cartel constituted a deliberate infringement of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement: with full knowledge of the restrictive character of their actions and, moreover, of their illegality, leading producers of nucleotides combined to set up a secret and continuous system designed to restrict competition.

1. ***The basic amount***

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

Gravity

(221) In its assessment of 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.

Nature of the infringement

(222) It follows from the facts set out above that this infringement consisted of market-sharing and price-fixing practices, which are by their very nature the worst kind of violations of Article 81(1) of the Treaty and 53(1) of the EEA Agreement.

(223) The cartel arrangements involved major worldwide operators and were conceived, directed and encouraged at high levels in each participating undertaking ([141]). By its very nature, the implementation of a cartel agreement of the type described above leads to an important distortion of competition, which is of exclusive benefit to producers participating in the cartel and is detrimental to customers and, ultimately, to the general public.

(224) The Commission therefore considers that this infringement constituted by its nature a very serious infringement of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

(225) Ajinomoto argues that in this case, a number of elements show not only that the infringement had a limited impact on the market, but also that the infringement was not as serious as suggested by the Commission. These elements include the fact that the European nucleotide sector is of limited size, the fact that the infringement was not fully implemented, the fact that nucleotides represent only a very small proportion of the cost of the end products and that thus any harm to consumers was limited and the fact that the ability to play off suppliers against each other limited any harm to direct customers.

(226) The Commission must reject these arguments. It is clear that price and market-sharing cartels by their very nature jeopardise the proper functioning of the single market. It would be erroneous to conclude on the basis of the small size of the market that this infringement was not very serious. What matters is that the normal competitive pattern that would have governed the single market for nucleotides was replaced by a system of collusion concerning the price of the product, the essential component of competition. As demonstrated in the recitals below, the arrangements were actually implemented and had an actual impact on the EEA nucleotides market ([142]). As such, the infringement of Article 81(1) of the Treaty and 53(1) of the EEA Agreement is considered very serious. The Commission considers the argument on the limited size of the market in recitals 241 to 242.

([141]) See recitals 57 and following.

([142]) The remaining elements adduced by Ajinomoto are also dealt with under the heading 'impact on the market'.

The actual impact of the infringement on the nucleotides market in the EEA

(227) The infringement was committed by undertakings which, during the material period, held the lion's share of the world and European markets for nucleotides. Moreover, the arrangements were specifically aimed at raising prices higher than they would otherwise have been and restricting the quantities sold. Given that these arrangements were implemented, they had a material impact on the market.

(228) There is no need to quantify in detail the extent to which prices differed from those which might have been applied in the absence of these arrangements. Indeed, this cannot always be measured in a reliable manner, since a number of external factors may simultaneously have affected trends in the price of the product, so making it extremely difficult to draw conclusions on the relative importance of all possible causal effects.

(229) The cartel agreements were, however, implemented. Throughout the duration of the cartel, the parties exchanged information on their sales prices and volumes and, on the basis of those figures, the parties agreed on target prices (see, for instance, recitals 80, 89, 91, 92 to 94, 97 to 98, 104, 108 to 111, 115 to 116, 118 to 131, 133, 135, 138 to 141). As demonstrated throughout the factual part of this Decision, the target prices and price rises were agreed, announced to customers and implemented throughout the EEA (see, for instance, recitals 86, 104, 118 to 120, 122, 124, 126, 128, 134, 139 to 141, 144). The parties closely monitored the implementation of their agreements by organising regular multilateral and bilateral meetings among them. At these meetings, the parties exchanged their sales figures, discussed market prices (thus enabling the parties to monitor whether the agreed target prices were being met) and, where necessary, agreed to adjust the target prices (see, for instance, recitals 92, 109, 111, 124, 128 to 130.

(230) In view of the above and the effort invested by each participant in the complex organisation of the cartel, there is no doubt that the anti-competitive agreement was implemented throughout the material period of the infringement. Such continuous implementation over a period of nine years must have had an impact on the market.

(231) Ajinomoto argues that the Commission bases itself on inconclusive evidence in demonstrating that the infringement had a significant impact on the market. According to Ajinomoto, the impact of the infringement on the market was only limited. In fact, Ajinomoto submits that it not only proved very difficult to reach agreements on target prices, but that even where agreements were reached, these agreements were never fully complied with: deviation from the arrangements was frequent and not punished and no effective monitoring system was established. Consequently, according to Ajinomoto, the infringement was not fully implemented.

(232) In addition, Ajinomoto submits that nucleotide costs account on average for less than 0,1 % of the price of the final product and the ability to play suppliers off against each other limited harm to direct consumers. Finally, Ajinomoto argues that an analysis of the economic conditions during the period under review confirms that price evolution was consistent with competitive behaviour. In support thereof, Ajinomoto has submitted a report prepared by RBB Economics which states that there is no basis for concluding that prices in the 1988 to 1997 period were unusually stable or that the price drop at the end of 1998/beginning of 1999 reflected the termination of the infringement. According to the report, it is doubtful that any customer allocation arrangements between nucleotides manufacturers were efficient and, secondly, the price drop at the end of 1998/beginning of 1999 is the result of important changes in external market factors which fundamentally changed pricing conditions in Europe rather than caused by the end of the cartel: a substantial increase in capacity caused by the opening of Cheil's plant in Indonesia combined with a stagnation of demand from 1997 onwards led to a high excess in capacity. Devaluation of Korean and Indonesian currencies created additional pressure on European prices. In a supplement to its reply to the statement of objections, Ajinomoto submits that the average estimates of the capacity data provided to the Commission by the undertakings (and made accessible) confirm that price development throughout the relevant period was consistent with competitive conditions and the infringement had a limited impact on the market.

(233) In its reply to the statement of objections, Cheil draws the same conclusions, emphasising that it was Cheil's decision to increase its capacity that caused prices to fall significantly at the end of 1998/beginning of 1990. Cheil also argues that the small size of the market means that the real economic impact of the illegal conduct is smaller, justifying setting the basic amount of the fine at a lower level. Furthermore, Cheil, supported by Daesang ([143]), argues that the Commission should take into account when determining the gravity of the infringement the fact that the impact of the infringement on consumers is negligible as well as the fact that the Koreans were drawn into a pre-existing scheme.

(234) Similarly, Takeda submits that even the maximum potential impact on ultimate consumers is very limited in view of the small size of the European market, the fact that nucleotides are purchased by large food manufacturers rather than end consumers and in view of the small cost factor nucleotides constitute in the end product. Takeda further reserves its rights as to the fact that the Commission has not sought to quantify precisely any increase of price caused by the infringement above the level which would have been obtained.

([143]) See both Daesang's response of 20 September 2002 as well as the summary sent by letter of 27 November 2002.

(235) None of the arguments used by the parties to minimise the Commission's finding that the cartel had an actual effect on the market is conclusive. The explanations concerning the price stability between 1988 and 1997 and the price drop at the end of 1998/beginning of 1999 may have some validity (in particular regarding the capacity increase caused by the opening of Cheil's new plant in Indonesia towards the end of the cartel), but they do not demonstrate in a convincing manner that the implementation of the cartel agreement could not have played a role in the setting and fluctuation of prices on the nucleotides market. Indeed, given that the parties had replaced the uncertain situation of free competition with continuous collusion, prices were necessarily established at a level different to that which would have prevailed in a competitive market.

(236) The fact, highlighted by Ajinomoto and Cheil, that, towards the end of the cartel, the production capacity was significantly increased at a time when demand was diminishing, leading to a drop in prices (and a reduction in the capacity utilisation rates of the respective producers), certainly illustrates the difficulties encountered by the parties towards the end of the cartel to influence prices in a difficult market situation, and perhaps even the reasons for the collapse of the cartel itself. It does not, however, demonstrate that the illegal practice had no effect on the market during the nine-year existence of the cartel, nor does it demonstrate that prices were not kept above a competitive level.

(237) On the contrary, when examining the combined efforts of the cartel members (see recitals 75 to 149, it can reasonably be concluded that during the entire period of the cartel, the cartel members managed to maintain prices at a level higher than they would have been without the illicit arrangements.

(238) Even if the results sought by the cartel participants were not entirely achieved, this would not prove that the cartel did not affect the market. Moreover, it is inconceivable, given, *inter alia*, the risks involved, that the parties would repeatedly have agreed to meet in locations across the world to set target prices over the period of the infringement, if they had perceived the cartel as having little or no impact on the nucleotides market. In this respect, one can as an example make reference to the specific congratulations expressed by Ajinomoto to all cartel members during one of the cartel meetings for the successful implementation of the 1995 target prices (see recital 126 or Annex Z attached to Daesang's supplementary submission ([144])).

(239) In their replies to the statement of objections, Ajinomoto, Cheil and Daesang have also argued that the Commission's own evidence shows that they have often disregarded the arrangements and often acted autonomously on the market. This argument cannot, however, be followed. Not only does the Commission have ample evidence showing that Ajinomoto, Daesang and Cheil actually continued to take part in the infringement throughout the entire duration of the infringement (which is also not contested by the parties, except for Ajinomoto as far as its participation beyond August 1996 is concerned), but the fact that any of the parties may well have had 'hidden agendas' causing them to disregard to some extent the commitments made towards the other cartel participants does not imply that they did not implement the cartel agreement. As the Court of First Instance held in *Cascades* v *Commission*, 'an undertaking which, despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit' ([145]).

The size of the relevant geographic market

(240) The cartel covered the whole of the common market and, following its creation, the whole of the EEA. Every part of the common market and the EEA was under the influence of the collusion. For the purposes of determining gravity, the Commission therefore considers the entirety of the Community and, following its creation, the EEA to have been affected by the cartel.

Conclusion of the Commission on the gravity of the infringement

(241) Taking into account the nature of the behaviour under scrutiny, its actual impact on the nucleotides market and the fact that it covered the whole of the Common market and, following its creation, the whole EEA, the Commission considers that the undertakings concerned by this Decision have committed a very serious infringement of Article 81(1) of the Treaty and 53(1) of the EEA Agreement.

(242) A clear distinction must be made between the question of the size of the product market and that of the actual impact of the infringement on this product market. It is not the practice of the Commission to consider the size of the product market as a relevant factor to assess gravity.

(243) Nevertheless, without prejudice to the very serious nature of an infringement, the Commission will in this case take into consideration the limited size of the product market.

([144]) See page 1076 of the Commission's file.

([145]) Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 230.

Classification of cartel participants

(244) Within the category of very serious infringements, the proposed scale of likely fines makes it possible to apply differential treatment to undertakings in order to take account of the effective economic capacity of the offenders to cause significant damage to competition and to set the fine at a level which ensures it has sufficient deterrent effect. This seems particularly necessary where, as in this case, there is considerable disparity in the market share of the undertakings participating in the infringement.

(245) In the circumstances of this case, which involves several undertakings, it will be necessary, when setting the basic amount of the fines, to take account of the specific weight, and therefore the real impact on competition, of each undertaking's offending conduct.

(246) For this purpose the undertakings concerned can be divided into different categories according to their relative importance in the market concerned, subject to adjustment where appropriate to take account of other factors, such as in particular, the need to ensure effective deterrence.

(247) As a basis for comparison of the relative importance of the undertakings in the market concerned, the Commission considers it appropriate in this case to take their respective shares of the world market for the product. Given the global character of the market, these figures provide the most suitable picture of the participating undertakings' capacity to cause significant damage to other operators in the common market and/or the EEA. Moreover, the world market share of any given party to the cartel also gives an indication of its contribution to the effectiveness of the cartel as a whole or, conversely, of the instability which would have affected the cartel had it not participated. The comparison is based on shares of the world market for the product in the last full calendar year of the infringement (1997).

(248) Ajinomoto was at all times the largest producer of nucleotides in the relevant geographic market. In 1997 its estimated share of the world market was between 40 % and 50 %.

(249) Takeda, Cheil and Daesang were smaller players on the world nucleotides market. In 1997 their respective estimated market share was between 10 % and 20 %, more than two times' smaller than that of Ajinomoto, the largest player.

(250) Ajinomoto will therefore constitute a first category. Takeda, Cheil and Daesang will constitute a second category.

(251) On the basis of the above, the basic amounts of the fines determined for gravity should be as follows:

— Ajinomoto: EUR 6 million,

— Takeda, Daesang and Cheil: EUR 2,4 million.

Sufficient deterrence

(252) In order to ensure that the fine has a sufficient deterrent effect and takes account of the fact that large undertakings have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law, the Commission will further determine whether any further adjustment of the basic amount is needed for any undertaking.

(253) With respective worldwide turnovers of EUR 8,7 billion and EUR 9,2 billion in 2001, Ajinomoto and Takeda are much larger players than Daesang (worldwide turnover of EUR 1,4 billion (2001)) and Cheil (worldwide turnover of EUR 1,9 billion in 2001). In this respect, the Commission considers that the appropriate starting point for the fines based on the criterion of the relative importance in the market concerned requires further upward adjustment to take account of the size and the overall resources of Ajinomoto and Takeda respectively.

(254) On the basis of the above, the Commission considers that the need for deterrence requires the starting point for the fines determined in recital 251 to be increased by 100 % to EUR 12 million as regards Ajinomoto and by 100 % to EUR 4,8 million as regards Takeda.

Duration of the infringement

(255) The Commission considers that Daesang has infringed Article 81(1) of the Treaty from 19 December 1988 until the end of 1997 and Article 53(1) of the EEA Agreement from 1 January 1994 until the end of 1997.

(256) The Commission considers that Cheil has infringed Article 81(1) of the Treaty from March 1989 until 2 June 1998 and Article 53(1) of the EEA Agreement from 1 January 1994 until 2 June 1998.

(257) Takeda submitted that the Commission should take the date of the last known cartel meeting as the final date for the infringement. As demonstrated above under 'Duration', the evidence in the file shows that 2 June 1998 was, in fact, the last known illicit contact between Takeda and a cartel member. Consequently, the Commission considers that Takeda infringed Article 81(1) of the Treaty from 8 November 1988 until 2 June 1998 and Article 53(1) of the EEA Agreement from 1 January 1994 until 2 June 1998.

(258) Lastly, Ajinomoto contests the duration of the infringement, only admitting its participation in the infringement until August 1996. The duration of Ajinomoto's participation in the cartel is discussed in recitals 202 to 210). The Commission considers that Ajinomoto has infringed Article 81(1) of the Treaty from 8 November 1988 until at least September 1997 and Article 53(1) of the EEA Agreement from 1 January 1994 until at least September 1997.

(259) The Commission therefore concludes that Takeda, Ajinomoto, Daesang and Cheil have committed the infringement for respectively nine years and six months (Takeda), eight years and nine months (Ajinomoto), nine years (Daesang) and nine years and two months (Cheil), which corresponds to a long duration (more than five years). The starting amounts of the fines determined for gravity (see recitals 251 and 254) are therefore increased by 10 % per year and 5 % per six months, i.e. by 95 % as far as Takeda is concerned, 90 % as far as Cheil and Daesang are concerned and 85 % as far as Ajinomoto is concerned.

(260) Cheil submits however in its reply to the statement of objections that, although the 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 [146] indicate that an infringement of 'long duration' may merit an increase of 10 % per annum, this does not mean that every infringement should be subject to such a 'per year' increase. In particular, Cheil submits that the Commission should consider applying a lower increase on account of duration than the standard 10 % per year for the period from March 1989 to the start of 1992 in the light of the small participation of Cheil in the infringement during that period (and the resulting small impact on the market). Similarly, Cheil submits that regarding the post-1996 events, such an approach would be equally justified in view of the fact that the intensity of these events was much lower and in view of Cheil's 1996 decision to increase capacity (effective towards the end of the 1990s).

(261) The Commission must reject this argument. Cheil's participation in the infringement during the entire duration of the infringement has been established in the factual part of this Decision. It is also established that the infringement had an impact on the EEA market. The mere fact that a 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. 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 objective [147]. The Commission therefore considers that Cheil participated in the infringement in the same manner throughout the entire duration of the infringement.

[146] OJ C 9, 14.1.1998, p. 3.

[147] Judgment of the Court of Justice in *Commission* v *Anic*, paragraph 83.

Conclusion on the basic amounts

(262) The basic amounts of the fines should therefore be as follows:

— Takeda: EUR 9 360 000,

— Ajinomoto: EUR 22 200 000,

— Daesang: EUR 4 560 000,

— Cheil: EUR 4 560 000.

2. ***Aggravating circumstances***

(263) The Commission has not identified any aggravating circumstances to be taken into account in this Decision.

3. ***Attenuating circumstances***

Exclusively passive role in the infringement

(264) Cheil and Daesang state in their reply [148] that they always played a passive or 'follow-my-leader' role in the infringement. They were drawn into a pre-existing cartel which was lead by Takeda and, to a minor extent, Ajinomoto who wished to protect their own markets and limit competition through counterpurchases. Ajinomoto states in this respect that it played a subordinate role to Takeda, who should be considered as the real leader of the cartel. Moreover, the Korean producers argue that they are much smaller than their Japanese counterparts, which also demonstrates the limited impact of their behaviour on the market.

(265) The effective economic capacity of the undertakings to influence the EEA market on the basis of their economic size has been taken into account in the calculation of the basic amount of the fine (see recitals 244 to 251).

(266) Even if, on the basis of these statements, there might be certain elements indicating that the Japanese undertakings started the cartel and took the initiative to organise certain meetings, the Commission has no reason to consider that either of the Korean producers played a purely passive role or 'follow-my-leader role' in the infringement. Both undertakings participated in the vast majority of the cartel meetings identified and took part directly and actively in the infringement. Indeed, Cheil and Daesang took part in the meetings and exchanged sales information throughout their participation. They cannot therefore claim to have played a purely 'passive role' [149].

[148] See also Daesang's summary statement of 27 November 2002.

[149] See, for instance, paragraph 365 of Commission Decision 2001/418/EC in Case COMP/36.545/F3 *Amino Acids* (OJ L 152, 7.6.2001, p. 24).

(267) For example, Daesang's own report of the meeting that took place in December 1995 in review of the 1995 cooperation ([150]) shows clearly that all parties had cooperated in implementing the 1995 price increases and all parties agreed to continue the cooperation for 1996. As shown by the facts, Cheil and Daesang would in turn also make proposals on target prices and hold meetings among them to prepare a common position for the producers meetings.

(268) In view of the totality of the evidence in this case, as described under the factual part of this Decision, the picture is that of a cartel in which all parties participated actively and directly in the infringement, exchanging their sales figures and reviewing and discussing the target prices. All participants held a shared interest in the arrangements. All cartel members have been identified as participating in most of the cartel meetings and taking turns organising the meetings concerned. As such, there is also no undertaking which can be considered as a leader in the sense of the Guidelines.

Non-implementation in practice of the offending agreements

(269) As discussed in recital 229, the Commission considers that the anti-competitive agreements were implemented. This attenuating circumstance is not therefore applicable to any of the addressees of this Decision. The Commission notes that in principle, an agreement restricting competition is implemented where the cartel members determine their conduct on the market according the joint intentions expressed. In case of repeated agreements, concluded over a long period, it can be presumed that the agreements have been implemented by each of the participants as they would otherwise not have repeatedly agreed to meet in locations worldwide to fix prices and allocate customers over such a long period of time. None of the arguments put forward by the parties, can validly overthrow the proof adduced by the Commission.

(270) As already stated in recital 239, an undertaking which despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit ([151]). The fact, as is claimed by the parties, that they regularly did not comply with the agreed arrangements, can therefore not be regarded as sufficient evidence demonstrating the non-implementation of the agreements.

Other attenuating circumstances

(271) In its reply to the statement of objections, Ajinomoto submits that the Commission should regard its unilateral and voluntary termination of its participation, in particular prior to any Commission intervention, in the infringement as a mitigating circumstance as well as the fact that this unilateral withdrawal would have contributed to the unravelling of the infringement.

(272) In support thereof, Ajinomoto refers to Takeda's internal memoranda of 28 May 1997 and 9 June 1997 ([152]), and Takeda's corporate statement ([153]), where reference is made to the concerns of the cartel members with regard to Ajinomoto's decision no longer to participate in the multilateral meetings after August 1996 and the effects this would have on these meetings.

(273) This argument must be rejected. It has been demonstrated under 'Duration' that Ajinomoto's decision no longer to participate in the multilateral meetings after August 1996 can not be considered as demonstrating its unilateral termination of its participation in the infringement as from that date. On the contrary, the Commission considers that it continued to participate in the infringement by maintaining bilateral contacts with Takeda, discussing the nucleotides market and prices. In these circumstances, the Commission considers that Ajinomoto's lack of participation in the multilateral meetings can only have played a minor role, if indeed any at all, in the 'unravelling' of the cartel.

(274) Cheil submits that the Commission should take into account the fact that it has already been fined for this infringement in the USA, claiming that undertakings should not be exposed to 'double jeopardy' and that the Commission should solely base the level of the fine on the effects that the infringement had in the relatively small Community market.

(275) This argument should be rejected. Fines imposed in other jurisdictions, including the USA, do not have any bearing on the fines to be imposed for infringing Community competition rules. The exercise by the United States (or any other third country) of its jurisdiction over cartel behaviour can in no way limit or exclude the Commission's jurisdiction under Community competition law. It is noted that by virtue of the principle of territoriality, Article 81 of the Treaty is limited to restrictions of competition in the common market and Article 53 of the EEA Agreement is limited to restrictions of competition in the EEA market. In the same way, the US antitrust authorities only exercise jurisdiction to the extent that the conduct has a direct and intended effect on the United States.

([150]) See Annex Z attached to Daesang's supplementary submission, page 1076 of the Commission's file.
([151]) Case T-308/94 *Cascades SA* v *Commission*, paragraph 230.
([152]) Respectively, pages 2147 and 2151 of the Commission's file.
([153]) Takeda's statement, page 2173 of the Commission's file.

(276) Takeda submits that the Commission should take into account the fact that it already paid a substantial fine in the *Vitamins* case ([154]). Ajinomoto puts forward a similar argument in relation to the fine it paid in the *Lysine* case ([155]). The Commission rejects that argument. The *Vitamins* case and the *Lysine* case did not deal with Takeda's and Ajinomoto's infringement on the nucleotides market and can therefore not be taken into account for the purpose of this Decision.

(277) Cheil and Daesang further submit that they regularly did not comply with the arrangements and even acted against them, such as by increasing production capacity or undercutting the target prices.

(278) The Commission stresses once again that the fact that an undertaking which has been proved to have participated in collusion on prices with its competitors did not behave at all times on the market in the manner agreed with its competitors is not necessarily a matter which must be taken into account as an attenuating circumstance when determining the amount of the fine to be imposed. As stated earlier, an undertaking which despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit ([156]).

(279) Ajinomoto, Cheil and Takeda also point out that they have taken measures to prevent any future infringement of anti-trust rules. In this context, they have adopted or strengthened compliance programmes. The Commission welcomes the fact that these undertakings have set up an anti-trust law compliance policy. It nevertheless considers that this initiative came too late and cannot, as an instrument of prevention, dispense the Commission from its duty to penalise an infringement of the competition rules committed by these undertakings in the past. In the light of the above, the adoption of a compliance programme should not be considered as an attenuating circumstance justifying a reduction in the fine.

(280) There are therefore no attenuating circumstances applicable to the participants in this infringement affecting the nucleotides market.

4. ***Application of the leniency notice***

(281) The addressees of this Decision have cooperated with the Commission at different stages of the investigation into the infringement for the purpose of obtaining the favourable treatment set out in the Leniency Notice. In order to meet the legitimate expectations of the undertakings concerned as to the non-imposition or reduction of the fines on the basis of their cooperation, the Commission examines in the following section whether the parties concerned satisfied the conditions set out in the Leniency Notice.

Non-imposition of a fine or a very substantial reduction of its amount (Section B)

(282) Takeda has requested the benefit of maximum leniency. In this respect, Takeda claims that it should benefit from changes in the leniency policy introduced by the Commission Notice on immunity from fines and reduction of fines in cartel cases ([157]) published in 2002 (the 2002 Leniency Notice), arguing that it did not take any steps to coerce any other undertaking to participate in the infringement. Consequently, Takeda submits that it could qualify for maximum leniency under the new rules. Takeda argues that Community law recognises the principle that in certain circumstances, retroactive effect should be given to changes in the treatment of penalties having a deterrent effect, and that principle can apply more generally in relation to administrative decisions, as is applied in a number of Member States.

(283) The 2002 Leniency Notice clearly states that it is not applicable to cases in which undertakings have already contacted the Commission to take advantage of the favourable treatment set out in the previous notice. Consequently, all leniency applications should be treated in the light of the provisions of the Leniency Notice published in 1996, which remains applicable for the purpose of this Decision.

(284) The Commission acknowledges that Takeda was the first to come forward adducing decisive evidence of the existence of the cartel and maintaining continuing and complete cooperation throughout the investigation. Takeda first informed the Commission of the existence of the cartel on 9 September 1999, handing over a file with contemporaneous evidence on 14 September 1999. At that time, the Commission had not received any information of the cartel from any other source.

(285) In assessing Takeda's cooperation, the Commission notes that the documentary evidence it first produced did not relate to the activities of the cartel prior to 1992. Nevertheless, in its corporate statement, Takeda indicated that the cartel did in fact originate in 1989. There is no indication that Takeda has any other information or documents available concerning the cartel. Therefore, it must be concluded that Takeda's cooperation with the Commission has been complete.

([154]) Case 37.512, not published yet.
([155]) Case 36.545 (OJ L 152 7.6.2001, p. 24-72).
([156]) Case T-308/94 *Cascades SA* v *Commission*, paragraph 230.
([157]) OJ C 45, 19.2.2002, p. 3.

(286) Despite there being elements in the file indicating that Takeda may have played, on certain occasions, a coordinating role in the cartel, Takeda did not compel any other enterprise to take part in the cartel and did not act as an instigator in the cartel nor did it play a determining role in the illegal activity in the sense of the Leniency Notice. It has also been established that Takeda had put an end to its involvement in the infringement before coming forward to the Commission.

(287) In the light of its overall cooperation in the investigation, Takeda fulfils the conditions set out in Section B of the Leniency Notice and should be granted a 100 % reduction in the fine that would have been imposed had it not cooperated with the Commission.

Substantial reduction in a fine (Section C)

(288) Daesang, Cheil and Ajinomoto request the benefit of a reduction in fine in accordance with Section C of the Leniency Notice. At the time when Daesang, Cheil and Ajinomoto started to cooperate with the Commission, Takeda had already submitted sufficient information to establish the existence of the cartel. Consequently, it is concluded that Daesang, Cheil and Ajinomoto were not the first to provide the Commission with decisive evidence on the existence of the nucleotides cartel, as required under point (b) of Section B of the Leniency Notice. Accordingly, none of those undertakings meets the conditions as set out in Section C.

Significant reduction of a fine (Section D)

(289) Daesang submits that it not only offered to cooperate with the Commission's investigation before the Commission issued the first request for information but also provided the Commission with its complete and continuous cooperation throughout the investigation. It also argues that it has enabled the Commission to establish the entire duration of the infringement as from October 1988 and was thus the first to adduce decisive evidence of the entire infringement set out in the statement of objections.

(290) Although Daesang only contacted the Commission after Takeda had already come forward, it nevertheless contacted the Commission on its own initiative prior to receiving any request for information. In addition, Daesang fully cooperated with the Commission's investigation throughout the entire investigation. Daesang also provided information that contributed materially to establishing the facts relating to the existence of the cartel arrangements prior to 1992.

(291) The information provided by Daesang, prior to the Commission sending it a request for information, was detailed and extensively used by the Commission in the pursuit of its investigation. In particular, but not exclusively, Daesang provided valuable information on the operation of the cartel prior to 1992. After receiving the statement of objections, Daesang did not substantially contest the facts on which the Commission bases its findings. Daesang therefore fulfils the conditions set out in the first and second indent of paragraph 2 of Section D of the Leniency Notice and should consequently be granted a reduction of the fine of 50 %.

(292) Cheil provided many contemporaneous reports of meetings and contacts thus materially contributing to establishing the existence of the cartel. The information provided by Cheil was extensively used by the Commission. Furthermore, Cheil does not contest the facts of the infringement as set out by in the statement of objections. It must therefore be concluded that Cheil fulfils the conditions as set out in the first and second indent of paragraph 2 of Section D of the Leniency Notice, as argued by Cheil. Consequently, in view of the overall cooperation provided by Cheil to the Commission's investigation, it should be granted a 40 % reduction in the fine that would have been imposed had it not cooperated with the Commission.

(293) Ajinomoto has fully cooperated with the Commission during the entire duration of the investigation, assisting the Commission in materially establishing the existence of the infringement, providing contemporaneous documents which were extensively used by the Commission as well as clarifications given on the operation of the arrangements. Consequently, Ajinomoto fulfils the conditions laid down under the first indent of paragraph 2 of Section D of the Leniency Notice.

(294) However, Ajinomoto contests the facts as set out in the statement of objections as far as the duration of the cartel is concerned. Ajinomoto therefore does not qualify for a reduction of the fine pursuant to the second indent of paragraph 2 of Section D of the Leniency Notice. On the basis of the foregoing, it is concluded that Ajinomoto fulfils the conditions set out in the first indent of paragraph 2 of Section D of the Leniency Notice and should accordingly be granted a reduction of 30 %.

Conclusion on the application of the Leniency Notice

(295) In conclusion, with regard to the nature of their cooperation and in the light of the Leniency Notice, the addressees of this Decision should be granted the following reductions of their respective fines:

— to Takeda: a reduction of 100 %,

— to Ajinomoto: a reduction of 30 %,

— to Daesang: a reduction of 50 %,

— to Cheil: a reduction of 40 %.

5. *The final amounts of the fines imposed in these proceedings*

(296) In conclusion, the fines to be imposed, pursuant to Article 15(2)(a) of Regulation No 17, should be as follows:

— Takeda: EUR 0,

— Ajinomoto: EUR 15 540 000,

— Daesang: EUR 2 280 000,

— Cheil: EUR 2 736 000,

HAS ADOPTED THIS DECISION:

Article 1

Ajinomoto Company Incorporated, Takeda Chemical Industries Limited, Daesang Corporation and Cheil Jedang Corporation have infringed Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement by participating, in the manner and to the extent set out in the reasoning, in a complex of agreements and concerted practices in the nucleotides sector.

The duration of the infringement was as follows:

(a) Ajinomoto Company Incorporated, from 8 November 1988 until September 1997;

(b) Takeda Chemical Industries Limited, from 8 November 1988 until June 1998;

(c) Daesang Corporation, from 19 December 1988 until the end of 1997;

(d) Cheil Jedang Corporation, from March 1989 until June 1998.

Article 2

The undertakings listed in Article 1 shall immediately bring to an end the infringement referred to therein, in so far as they have not already done so.

They shall refrain from any agreements or concerted practices in relation to their activities in nucleotides that may have the same or similar object or effect as the infringement.

Article 3

The following fines are hereby imposed on the undertakings listed in Article 1 in respect of the infringement referred to therein:

— Ajinomoto Company Incorporated, a fine of EUR 15 540 000,

— Daesang Corporation, a fine of EUR 2 280 000,

— Cheil Jedang Corporation, a fine of EUR 2 736 000.

The fines shall be paid within three months of the date of the notification of this Decision to the following account of the European Commission:

Account No 642-0029000-95
IBAN code: BE76 6420 0290 0095
SWIFT code: BBVABEBB
Banco Bilbao Vizcaya Argentaria (BBVA) SA
Avenue des Arts/Kunstlaan, 43
B-1040 Bruxelles/Brussel

After expiry of that period, interests 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 3,5 percentage points, namely 6,75 %.

Article 4

This Decision is addressed to:

Takeda Chemical Industries Limited
12-10, Nihonbashi 2-chome
Chuo-ku
Tokyo 103-8668
Japan

Ajinomoto Company Incorporated
15-1, Kyobashi itchome
Chuo-ku
Tokyo 104-8315
Japan

Cheil Jedang Corporation
6F, Cheiljedang Bldg
Namdaemoon-Ro
Chung-Ku, 100-095 Seoul
Korea

Daesang Corporation
Daesang Building
96-48 Shinsul-Dong
Dongdaemoon-Ku, Seoul
Korea

This Decision shall be enforceable pursuant to Article 256 of the Treaty.

Done at Brussels, 17 December 2002.

For the Commission

Mario MONTI

Member of the Commission