

# COMMISSION

## COMMISSION DECISION

of 9 June 1976

relating to a proceeding under Article 86 of the Treaty establishing the European Economic Community (IV/29.020 — Vitamins)

(Only the German text is authentic)

(76/642/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 86 thereof,

Having regard to Regulation No 17 of 6 February 1962 <sup>(1)</sup>, and in particular Articles 1, 3, 15 and 16 thereof,

Having regard to the Commission Decision of 16 July 1975 to commence proceedings on its own initiative under Article 3 (1) of Regulation No 17 against the Hoffmann-La Roche group, Basle, Switzerland (hereinafter called 'Roche'),

Having heard the undertakings concerned in accordance with Article 19 (1) of Regulation No 17 and with Regulation No 99/63/EEC, of 25 July 1963 <sup>(2)</sup>,

Having regard to the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions obtained pursuant to Article 10 of Regulation No 17 on 17 December 1975,

WHEREAS:

### I. The facts

1. This Decision concerns certain agreements concluded by Roche with the following undertakings which are all engaged in production and sale in the common market:

Afico (Société d'Assistance Technique pour produits Nestlé), (on behalf of the Nestlé Group)  
La Tour de Peilz, Switzerland,

American Cyanamid Company,  
Wayne, New Jersey, USA,

Animedica International GmbH,  
Frankfurt on Main, Federal Republic of Germany,

Beecham Group Ltd,  
Brentford, United Kingdom,

Capsugel SA, (On behalf of the Parke Davis Group),  
Basle, Switzerland,

Dawe's Laboratories,  
Saint-Nicolas, Belgium,

Guyomarc'h,  
Paris, France,

Isaac Spencer & Co, Ltd,  
Aberdeen, United Kingdom,

Merck,  
Darmstadt, Federal Republic of Germany,

Nitrovit Ltd,  
Dalton, United Kingdom,

Organon NV,  
Oss, Netherlands,

Pauls and Whites Foods Ltd,  
Ipswich, United Kingdom,

Protector SA,  
Anderlecht, Belgium,

Provimi (Bonda's Veevoederfabriek Provimi BV),  
Rotterdam, Netherlands,

Radar NV,  
Astene, Belgium,

<sup>(1)</sup> OJ No 13, 21. 2. 1962, p. 204/62.

<sup>(2)</sup> OJ No 127, 20. 8. 1963, p. 2268/63.

Ralston Purina Europe,  
Brussels, Belgium,

Ramikal Werk,  
Hamburg, Federal Republic of Germany,

Sandoz AG,  
Basle, Switzerland,

Trouw & Co. NV International,  
Putten, Netherlands,

Unilever Inkoop Mij NV,  
Rotterdam, Netherlands,

Upjohn International Inc.,  
Kalamazoo, Michigan, USA,

Wyeth International Limited,  
Philadelphia, USA.

#### A. VITAMINS

2. The products with which this proceeding is concerned are those bulk synthetic substances which belong to thirteen groups of vitamins: A, B1, B2, B6, B12, C, D, E, K, PP, pantothenic acid (B3), biotin (H) and folic acid (M).

Each group of vitamins includes those interrelated substances which have the same properties in their own biological field. Each has specific metabolic functions and is therefore not interchangeable with the other groups. In addition, the various groups of vitamins when combined have a complementary synergistic effect.

A deficiency in vitamins of a particular group can give rise to certain illnesses or disorders well known to medical science.

Vitamins are used primarily for the following purposes:

##### (a) *Therapeutic use:* (the oldest use):

vitamins are used either separately or in multivitamin preparations or in conjunction with other medicines (e.g. anti-bacterials and antibiotics with added vitamins).

##### (b) *Food:*

vitamins are used in the manufacture of foods, particularly those which have lost all or part of their original vitamin content as a result of industrial processing (e.g. margarine, milk, butter, chocolate).

##### (c) *Animal feed:*

vitamins are used to provide a balanced diet for animals, particularly in intensive livestock production.

The use of vitamins for these three purposes is approximately in the following proportion:

- pharmaceuticals, 25%
- food, 15%
- animal feed, 60%

Each group of vitamins, given its peculiar metabolic properties, is appropriate to meet the constant requirements of the three markets, requirements which cannot be satisfied by other products and certainly not by vitamins of any other group.

#### *Structure of production and supply*

3. The synthesis of vitamins, first undertaken between 1930 and 1940, presents no major scientific problem. Mass production of synthetic vitamins however requires heavy investment, since the synthesizing process is in large measure unique to each group of vitamins and highly specialized equipment is necessary. Plant used for manufacturing vitamins of one group cannot therefore be used for producing vitamins of another group, nor is the conversion of plant for such production a simple matter. Since a high level of investment is required, productive capacity is normally geared to the estimated growth in demand over 10 years. (Cf. Minutes of the meeting between Unilever and Roche in London on 11 December 1972).

At present there is surplus capacity throughout the world for the production of vitamins because of the construction of new plant to meet long-term requirements. There was, however, some shortage of vitamins B2 and C in 1971 and 1972.

The market in vitamins is expanding vigorously, and the volume of sales has increased five-fold over the last 15 years.

Vitamin sales in the Community in 1974 amounted to approximately 110 245 000 units of account. More than half of this figure is accounted for by trade within the Community as can be seen from the table below:

## Imports from other Member States

1974	Metric tons	Units of account (000's)
France	1 975	16 131
Belgium/Luxembourg	875	4 462
Netherlands	787	5 540
Federal Republic of Germany	599	7 808
Italy	1 663	17 195
United Kingdom	825	6 489
Ireland	1 058	1 481
Denmark	849	7 777
<b>Total</b>	<b>8 631</b>	<b>66 883</b>

4. Only large pharmaceutical groups can undertake investment on the scale required for the manufacture of vitamins; distribution, if it is to be effective, must be entrusted to a very extensive sales network which only such groups possess. These groups normally sell directly to customers in each of the three markets mentioned above.

The leading manufacturers of bulk vitamins in the common market are listed in the following table. An indication is also given of the groups of vitamins actually produced by them and of those groups of vitamins which they only handle by way of resale.

Manufacturer <sup>(1)</sup>	Group of vitamins												
	A	B1	B2	B6	B12	C	D	E	PP	K	Panto- thenic acid	Biotin	Folic acid
Roche	M	M	M	M	S	M	S <sup>(2)</sup>	M	S	S	M	M	S
Merck (Federal Republic of Germany)	S	S	S	M+S	S	M	S	S	S	—	S	M	S
BASF (Federal Republic of Germany)	M	S	S	S	S	S	S	M	S	—	S	—	—
Rhône Poulenc (France) (including its subsidiary Société de Chimie Organique et Biologique (AEC), France)	M	M	—	S	M	M	M	M	—	—	S	—	—
Philips-Duphar (Netherlands) (including its French subsidiary Prochimex)	M	M	M	S	S	S	M	M	M	M	M	—	M
Glaxo (United Kingdom)	—	S	—	—	M	—	—	—	—	—	—	—	—
Grindstedværket (Denmark)	—	M	M	M	—	M	—	—	M	—	—	—	—
Takeda (Japan)	—	M	—	M	—	M	—	—	—	—	M	—	M
Lonza (Switzerland)	—	—	—	—	—	—	—	—	M	—	—	—	—

<sup>(1)</sup> M = Manufacturer.  
S = Resale only.

<sup>(2)</sup> Roche resells vitamin D3. It also manufactures a small quantity of D2.

As can be seen from the table, the production of Roche includes by far the widest range of vitamin groups, except for Philips-Duphar whose production of certain vitamin groups is not significant.

If those vitamins which Roche does not itself manufacture but only resells are taken into account, Roche is the only supplier offering the full range of vitamins.

5. Roche is the world's largest vitamin manufacturer. Its approximate share of the market, based on

the turnover of the various manufacturers within the common market for the various groups of vitamins, is as follows:

#### *Vitamins manufactured by Roche*

#### **Vitamin A:**

47 %; the next largest manufacturer accounts for slightly more than half this percentage.

Vitamin B1:	50 %; the rest of the market is almost entirely taken up by the next largest manufacturer.
Vitamin B2:	86 %; the rest of the market is divided among several manufacturers.
Vitamin B6:	95 %.
Vitamin C:	68 %; the next largest manufacturer has a market share less than one-quarter of that of Roche.
Vitamin E:	70 %; the next largest manufacturer has a market share less than one-third of that of Roche.

Biotin (H): 95 %.

Pantothenic acid: 64 %.

*Vitamins resold but not manufactured by Roche*

Vitamin B12:	13 %.
Vitamin D:	10 %.
Vitamin PP:	68 %.
Folic acid:	47 %.
Vitamin K:	10 %.

The turnover achieved by Roche in 1974 in the common market represented, as a proportion of the total sales of vitamin there, 65 % in respect of all its manufactured vitamins and 60% in respect of all the vitamins which it sold.

6. Hoffmann-La Roche, Basle is at the head of a multinational group which, in terms of sales, is the world's leading pharmaceuticals producer (Sfrs 5 050 million in 1974). Within the common market the group owns the following subsidiaries in the vitamins industry:

*Belgium*

Produits Roche SA, Brussels: distribution;

*Netherlands*

Hoffmann-La Roche, Rotterdam: distribution;

*Federal Republic of Germany*

Hoffmann-La Roche, Grenzach (the most important subsidiary in the EEC in terms of turnover, ranking second to Basle itself): manufacture and sales;

*Italy*

Produits Roche: sales of pharmaceuticals;

Instituto delle vitamine: premixing of vitamins and proprietary veterinary products;

*France*

Produits Roche, Neuilly: distribution and production of biotin (H);

*United Kingdom*

Roche Products Ltd: distribution and production of vitamins B1, B2 and pantothenic acid;

*Denmark*

Roche A/S: distribution.

Roche thus has a large number of production centres in various countries.

7. In the years after 1930, Roche, which had begun by buying a process for the manufacture of vitamin C, pioneered the synthesis of a number of vitamins by developing new manufacturing processes (particularly for vitamins A, B1, B2, B6, E, biotin (H) and pantothenic acid), and obtained licences to produce other vitamins. Roche also played a leading role in introducing the use of vitamins into the food industry (by adding vitamin A to margarine) in conjunction with one of its customers, Unilever, and to meet these requirements of Unilever, Roche in fact built a plant specifically for the manufacture of vitamin A.

8. Although the patents for the manufacture of vitamins have expired, Roche still maintains a certain technological lead over its competitors, for example recent developments in the industrial use of vitamin C (antioxidant, fermentation agent for brewers, etc.), in the incorporation of vitamins into proprietary veterinary products and in the preparation of new compounds for animal feed. This lead is also evident in Roche's highly developed technical service; customers may obtain information and technical assistance in solving problems raised by the use of products, in particular the 'time-sharing service', involving the use of a computer (hardware and software) to provide customers in the animal feed industry with programs for the use of the products.

Roche also has a very extensive and highly specialized sales network and considerable local stocks, enabling the regular and rapid supply of products which are always fresh.

The vitamin catalogues produced by Roche claim that 'in the development of the industrial production of synthetic vitamins, Roche has been playing a leading role and is the largest manufacturer in this field, and also that 'constant improvement of manufacturing methods and strict analytical control justify that Roche is known throughout the world for quality and service'.

### *Structure of demand*

9. The main buyers of bulk vitamins are firms in the pharmaceuticals, food and animal feed industries, which incorporate vitamins in their products. The pattern of demand is highly varied and, in addition to large-scale users or multinational groups operating in the three industries, vitamins are also sold in very small quantities to small and medium-sized firms (e.g. bread, biscuit and cake manufacturers, all types of laboratory) and also to small traders (e.g. bakers).

Roche has about 5 000 customers in the three industries in the common market.

However, the main area of competition involves the large-scale users and multinational groups. From the Commission's inquiries and Roche's publications it emerges that bulk users tend to place large orders with at least two or three suppliers to cover their requirements.

10. Almost all the undertakings which have concluded fidelity agreements (as described below) with Roche are important customers, being among the principal users of vitamins. These firms, with very few exceptions, purchase the entire range of vitamins produced by Roche and obtain all or most of their requirements through such fidelity agreements. These undertakings are set out by industry as follows:

#### *Pharmaceuticals*

Beecham, Capsugel (Parke-Davis), American Cyanamid Company, Merck, Sandoz, Upjohn, Wyeth.

#### *Food*

Afico (Nestlé), Nitrovit (Imperial Food Ltd), Pauls and Whites Foods Ltd, Isaac Spencer, Unilever.

#### *Animal feed*

Animedica, Dawe's, Guyomarc'h, Organon (Akzo), Protector, Provimi (Central Soya), Radar, Ralston Purina, Ramikal Werk, Trouw.

The following table indicates the quantities of vitamins produced and sold by Roche to these firms in 1974.

(in u.a.)

Firms	Quantities
1. Merck	.....
2. Animedica International	.....
3. Unilever	.....
4. Trouw	.....
5. Beecham	.....
6. Ramikal	.....
7. Radar	.....
8. Provimi	.....
9. Nitrovit	.....
10. Nestlé	.....
11. Protector	.....
12. Organon	.....
13. Dawe's	.....
14. Ralston Purina	.....
15. Sandoz	.....
16. Guyomarc'h	.....
17. American Cyanamid	.....
18. Pauls and Whites	.....
19. Capsugel (Parke Davis)	.....
20. Isaac Spencer	.....
21. Wyeth	.....
22. Upjohn	.....

In 1974 these customers accounted for 26% of Roche's sales and 16 % of total vitamin sales in the common market.

### **B. THE CONDUCT IN QUESTION**

11. The sales strategy of Roche for bulk synthetic vitamins since 1964 has been to secure either exclusive or preferential agreements with customers, most of whom are important.

These agreements, known as 'fidelity agreements', have the following main features:

- purchasers obtain from Roche all or most of their vitamin requirements in the form of vitamins manufactured by Roche;

- Roche provides purchasers with all or most of their vitamin requirements at the most favourable price obtaining on the customer's domestic market;
- each year, (or in certain cases every six months), Roche pays a rebate to those customers who have obtained all or most of their requirements from Roche calculated on total purchases (the formula for calculating the rebate aggregates all the different groups of vitamins purchased from Roche);
- the amount of the rebate differs from customer to customer and varies between 1% and 5%, although there is one customer who receives rebates of from 12.5% to 20%;

the so-called 'English' clause provides that customers are to inform Roche if any 'reputable' manufacturer charges a price lower than that charged by Roche (this does not apply to dealers and brokers), and if Roche does not lower its price to that level customers are free to obtain supplies from the other manufacturer without losing the fidelity rebate on their purchases from Roche.

12. A number of circulars from the parent company of the Roche group to its subsidiaries and minutes of a meeting of the officers of the company confirm the main features of the 'fidelity' system and clearly show the benefits accruing to Roche. In a circular issued in December 1970, for instance, the following statement appears:

#### *'Fidelity contracts'*

According to the experience of various Roche companies, fidelity contracts provide a very efficient protection against competition, especially as far as BASF are concerned. In our today's Management Information we have therefore made a special provision for such contracts and would like to give you a brief definition of their contents and short description of their advantages. A fidelity contract should cover the following points:

- The customer undertakes to purchase at least 90% of his total requirements of vitamins from Roche.
- Roche applies automatically to all purchases of customers their best price for the quantity involved. Should the customer receive a lower

quotation from another vitamin manufacturer, he will give Roche the possibility to meet this quotation before he places the order with the competitor in question. Should Roche not be willing to meet the price submitted to them, the customer is free with regard to this particular purchase without losing his fidelity status. The same principle applies if Roche are unable to cover the entire requirements of the customer due to a shortage.

- At the end of the year the customer receives a fidelity rebate on his overall purchases during the year. This rebate will be cancelled entirely if the customer has not complied with the above principle for any single vitamin required by him and manufactured by Roche.

Since the fidelity rebate is being paid at the end of the year, there is no need for a written contract in cases where customers are not favourable to such a formal way of negotiating.

The fidelity rebate can also be substituted by a turnover contract if the turnover target represents about 90% of the customer's total requirements and is being revised at the end of each year in order to reflect the customer's increased purchasing power.

The advantages of such agreements are obvious. If a feed mill for instance is purchasing vitamin A, E, B2, Carophyll, etc., even the most tempting offer from a competitor like BASF for vitamin A and E alone cannot induce the customer to change its supplier, because they would otherwise lose the fidelity rebate for Carophyll and for the vitamins BASF are not manufacturing. For the same reason it is in many cases possible to make the customer accept somewhat higher prices for individual items than the one offered by the competition, because the overall deal is still favourable for him'.

A circular issued in May 1971 explained the importance to Roche of the loyalty of certain types of customer, stressed the effectiveness of fidelity contracts in protecting the market and examined the possibility of establishing even closer links with such customers.

'One rather serious factor which constantly endangers our market share in the vitamin business is that customers, especially in Europe, tend to purchase their raw materials from at least two different manufacturers. However, if we want to retain a 65% market share it is of cardinal importance that we build up a large circle of entirely faithful customers. In many countries we

are in fact already successfully operating fidelity contracts. However, the question was raised whether we should now go one step further by creating an even more far-reaching relationship based on mutual confidence which resembles a genuine partnership'. <sup>(1)</sup>

A circular issued in August 1971 on vitamin C contains the following passage on fidelity contracts in general.

*'Fidelity contracts'*

We believe that most customers have realized during the past years with its frequent shortages in the field of fine chemicals, that in the long run it is more important to have a reliable supplier than to shop around for the lowest price. The precarious vitamin C situation, of which customers will soon become aware, provides an excellent opportunity — and possibly the last one for a long time — to convince even the most reluctant firm of the advantage of such a "partnership" between manufacturers and users of the goods.

Fidelity contracts, which are in the first place designed to give security to the customer, may therefore help you to penetrate the market with the mentioned three vitamins without a collapse of the present price levels.'

In a circular issued in September 1970 on biotin (H), Roche told its subsidiaries to take the following steps to cope with increased competition in the market for this vitamin:

'In the third place, you should protect your market through fidelity contracts or other arrangements, such as giving confidential end-year rebates to premixers and feedmills who are willing to use and promote Biotin.

We hope that you will make positive use of these inevitable developments, and we shall be glad to inform you regularly about experience gained on sales progress in other markets.'

The minutes of a meeting of the managers of Roche and its subsidiaries (European Bulk Managers meeting 12 and 13 October 1971) contain the following statement:

<sup>(1)</sup> The main features of this partnership include automatic entitlement to Roche's lowest prices for similar quantities, the supply of all the requirements of the customer with preferential treatment during shortages and a free technical service.

*'Biotin marketing policy'*

We trust that in the meantime you have been able to study the mentioned documents and to decide on the best course to be followed in your market, particularly concerning the expansion of biotin sales through special arrangements coupled with confidential end-year rebates to selected customers who are prepared to use and promote Roche biotin'.

The Dutch subsidiary expressed the following opinion:

'As far as the threat of competition intruding into our market is concerned we believe to be able to protect our present and possibly future interests in the same way as we presently do with the other vitamins, e.g. in supply agreements with customers for their total or part of their year requirements'.

A number of other subsidiaries advocated greater use of fidelity contracts.

In the same minutes Roche stressed the importance which it attached to agreements with multinational customers in order to obtain 'price quietness'.

'Most Roche companies abroad have already realized the importance of the multi-national customers and have written to Basle about it. Roche Holland says e.g. "We believe it of utmost importance to further tie customers, not on a national but preferably on an international level to Roche. Instead of having to fight each time a customer wants to buy, which in most cases means an open fight on prices between three or more suppliers, international agreements might result in price quietness over a longer period internationally".'

13. The system described above works through direct agreements between the Roche parent company and companies belonging to a group and acting on its behalf. The agreements apply to subsidiaries of these groups in business in vitamins in the various countries involved (which in some cases include some or all of the Member States of the common market). These agreements (hereinafter called 'multinational contracts') are generally the most important in that they are concluded with large firms belonging to multinational groups, whose requirements vary according to the location of their plants.

This system is also applied, following general instructions from the parent company, through direct agreements between Roche subsidiaries and customers in countries where they are in business (hereinafter called 'national contracts').

The proportions of the requirements covered by these contracts and their apportionment between multinational and national contracts are set out below:

#### Multinational contracts

Requirements covered	Multinational contracts	Commencement of fidelity relationship
100 %	Dawe's	1971
	(Afico) Nestlé	1968
	Merck	1971 (B6), 1972 (A, E)
	Organon	1970
	(Capsugel) Parke Davis	1967
	R. Purina	1970
	Sandoz	1965
	Unilever	1974
	Upjohn	1967
	Wyeth	1963
90 %	Provimi	1972
	American Cyanamid	1971
	Animedica	1973
	Protector	1968
Major proportion	Trouw	1971

#### National contracts

Requirements covered	National contracts	Commencement of fidelity relationship
100 %	Unilever	1974
80 %	Animedica	1972
70 %	Guyomarc'h	1972
Major proportion	Beecham	1972
	Nitrovit	1973
	Pauls and Whites	1972
	Radar	1971
	Ramikal	1972
	I. Spencer	1973

The fidelity relationship lasted until at least the end of 1974.

14. The various features described are incorporated in the 26 contracts in question as follows:

A number of contracts (Dawe's, Organon, Provimi, Ralston Purina, American Cyanamid, Radar, Animedica (national contract), Guyomarc'h, Beecham (1973), Nitrovit, Pauls and Whites, Isaac Spencer) expressly specify that the customer undertakes to obtain a certain proportion of his requirements from Roche, in return for which Roche grants a rebate and the benefits of the 'English clause' (except for Guyomarc'h).

On 27 November 1974 the Provimi contract was amended: the rebate was reduced from 5% to 2.5% and changed to a 'del credere commission' (see next paragraph).

15. Other contracts (Afico (Nestlé), Capsugel (Parke Davis), Upjohn) provide for a 'del credere commission' to be paid by Roche-Basle to the other party in return for its guarantee to pay the bills of the subsidiaries in the group of which it is a member (in the case of Afico (Nestlé), payment by the companies which are 'linked' with it).

The fidelity commitment takes different forms in the various agreements. Nestlé and Upjohn expressly undertake to cover all their requirements from Roche. In the Capsugel (Parke Davis) contract a number of Parke Davis subsidiaries express their 'intention' to buy all the vitamins they require from Roche.

The English clause is clearly set out in the Afico (Nestlé) and Capsugel (Parke Davis) contracts.

The Upjohn contract requires Roche to sell to Upjohn at the lowest price for the country in question and 'on comparable terms'.

16. In other contracts (Animedica multinational basic contract, Protector, Ramikal, Sandoz, Trouw, Wyeth), the rebate is granted on the 'assumption' of 80% fidelity (Animedica), on the 'expectation' of a similar degree of fidelity (Protector), 'on condition that' most requirements are supplied by Roche (Ramikal), in return for an undertaking to 'recommend' to its subsidiaries that they obtain all their supplies from Roche (Sandoz), having regard to the close link created between Roche and its customer who expresses his intention of obtaining most of his supplies from Roche (Trouw), in return for an undertaking to give Roche preference for all of its requirements (Wyeth).

The English clause expressly appears in the Animedica, Ramikal, Sandoz, Trouw and Wyeth contracts.

17. The Unilever group has concluded one multinational agreement with Roche and one national agreement for vitamin A for the United Kingdom.

The multinational agreement was concluded between Roche-Basle and Unilever Inkoop (Netherlands), which acts as buyer and coordinating agent for the group's European subsidiaries.

This contract provides for supplies by Roche to the Unilever group and indicates the approximate quantities which are fixed in relation to requirements. It also includes the English clause. While there is no express provision for a rebate, Roche-Basle and Unilever Inkoop agree on a special price lower than that charged by Roche subsidiaries; the difference between the price charged by Roche subsidiaries to Unilever subsidiaries and the agreed special price is reimbursed by Roche-Basle to Unilever Inkoop every six months.

18. The contracts between Roche and Merck relating to vitamins A, E and B6 contained the following main features:

#### *Vitamin A*

Roche undertook to supply all of Merck's requirements, and Merck promised to place all its orders with Roche. Roche also undertook to offer Merck its lowest price and best terms. The minimum rebate was to be 12.5%, with a ceiling of 20%. The English clause was also included and the agreement was concluded for five years.

#### *Vitamin E*

Roche, being obliged substantially to increase its vitamin E production capacity, undertook to supply all of Merck's requirements, while Merck undertook to obtain its supplies exclusively from Roche. The minimum rebate was fixed at 15%, with a ceiling of 20%, and the English clause was also included. Roche would in any event offer Merck its lowest price and best terms. The contract was concluded for five years.

#### *Vitamin B6*

Roche, being obliged to double its capacity for the annual production of vitamin B6 (from 500 to 1 000 metric tons), undertook to meet all of Merck's requirements in excess of the latter's own production; Merck undertook in turn to buy exclusively from Roche. A 20% rebate and the English clause were included. It was also agreed that Roche would refrain from any action which might affect Merck's position as a 'co-producer'. The contract was concluded for five years.

## II. Infringement of Article 86

19. Under Article 86 of the EEC Treaty any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

### *The relevant market*

20. Each group of vitamins constitutes a distinct market because each group is particularly suited to satisfy stable requirements and is not, or at least not to any significant extent, interchangeable with any other group or with any other products.

The relevant product markets for the purposes of this Decision are the following groups of vitamins; A, B2, B6, C, E, Biotin (H), and pantothenic acid (B3).

The relevant geographical market for the purposes of this Decision is the whole of the common market.

### *The dominant position*

21. Roche enjoys such a complete freedom of action in the relevant markets enabling it to impede effective competition within the common market that it has a dominant position in such markets.

The dominant position results from the following:

- The market share held by Roche for each of the abovementioned vitamins is very considerable since it ranges from 95% for vitamins B6 and H to 47% (the second producer having only about half this share) for vitamin A.
- Roche produces a far wider range of vitamins than its competitors. Since the requirements of many users extend to several groups of vitamins, Roche is able to employ a sales and pricing strategy which is far less dependent than that of other manufacturers on the conditions of competition in each market.

In assessing the dominant position of Roche account should be taken of the following. Roche is the world's largest producer of all vitamins; its turnover exceeds that of all other producers and it has technological and commercial advantages not possessed by its competitors. Furthermore, since any entry into the vitamins market requires large and specialized investment and the programming of capacities over long periods in order to be profitable, it is unlikely that the possibility of entry by new competitors to the market would at present have any appreciable effect on the position of Roche.

*The abuse*

22. The conduct of Roche described above (paragraphs 10 to 18) constitutes an abuse of a dominant position, because by its nature it hampers the freedom of choice and equality of treatment of purchasers and restricts competition between bulk vitamin manufacturers in the common market and furthermore it is likely to affect trade between Member States.

The abusive nature of this conduct appears from the following:

- (a) The fact that customers are bound by an exclusive or preferential purchasing commitment in favour of Roche for all or for a very large proportion of their requirements either as a result of an express obligation of exclusivity, or fidelity rebates, or other means.
- (b) The fact that the price advantages granted are based not on the differences in costs borne by Roche in relation to the quantities supplied, but on the supply of all or a very large proportion of a customer's requirements.
- (c) The fact that in certain cases the rebate is based on all purchases, so that purchases of vitamins of one group are aggregated with purchases of vitamins of other groups ('across-the-board' rebates).
- (d) The fact that the agreements generally contain a provision known as the 'English clause', the significance of which is as follows; purchasers are obliged to inform Roche of offers from other manufacturers more favourable than those of Roche; should Roche not match such offers, purchasers are free to purchase from such manufacturers without losing the rebate in respect of purchases made from Roche. In some agreements Roche stipulate that the offers should emanate from 'reputable' manufacturers (thereby excluding dealers and brokers).

23. The agreements in question are not identical in so far as the obligations of the purchaser are concerned. Nevertheless, all the agreements are of a type suitable to achieve the desired object, namely that the customer should confine the purchase of all or a large proportion of his requirements of vitamins to Roche. Some agreements contain an express obligation by the purchaser to buy all or almost all of his requirements from Roche. Other agreements provide for fidelity rebates. In yet other agreements it is evident from their context that price advantages are offered in return for an obligation of exclusivity undertaken by the purchaser. The latter

element is present even in those cases where the rebate is described as being in return for a *del credere* guarantee, since such a guarantee is not given here in favour of independent third parties but for associated or subsidiary companies within well-known multinational groups with a sound financial base and whose commercial transactions call for no guarantee.

24. The exclusivity agreed by Roche with its customers in these agreements amounts to an abuse within the meaning of Article 86 because of its incompatibility with the objective of Article 3 (f) of the Treaty, that competition in the common market is not distorted, and more particularly because of its incompatibility with paragraph (c) of Article 86.

The fact of agreeing with purchasers that they will buy all or a very large proportion of their requirements from only one source by its very nature removes all freedom of choice from purchasers in their selection of sources of supply, and ties them to one supplier. The special price offered by Roche is the consideration for the abandonment by its purchasers of their opportunities to obtain substantial proportions of their requirements from competitors. Should a purchaser not observe his obligation of exclusivity — by purchasing some of his requirements from another vitamin manufacturer — the fidelity rebate is forfeited not only in respect of the amount of such purchase, but in respect of all his purchases from Roche. This restrictive effect is aggravated by the fact that the rebate — and hence the exclusivity — is calculated on the basis of all purchases from Roche so that purchases of vitamins of one group are aggregated with purchases of vitamins of other groups ('across-the-board' rebates).

The agreements in question have the further effect of interfering with competition between vitamin manufacturers. The exclusivity established by Roche with its customers denies any access to these customers by other vitamin manufacturers. For quantities of any importance the rate of the rebate given by Roche is such that it is made practically impossible or at the least very onerous for other producers to sell to the customers of Roche.

25. The provision known as the 'English clause' is but a very limited relaxation of the system applied by Roche. The argument that this provision in fact leaves the customer free to purchase from the competitors of Roche is belied by the function of the clause. This provision, whilst enabling Roche to learn of the prices offered by its competitors, leaves to Roche the decision whether the customer in question is free to purchase from the competitor offering vitamins at lower prices; the customer is free to

purchase from the competitor only where Roche decides not to match the price offered. This opportunity is further restricted by the requirement that the offer be from a 'reputable' manufacturer in the customer's territory — thereby excluding offers from other territories or other Member States. It is clear that should the sale in question be of interest to Roche, by reason either of the quantity or the type of vitamin involved or the fact that the offer is from a reputable manufacturer, then Roche with its strength in the vitamins market is put in a position to adjust its price and so preserve exclusivity of supply to the customer in question. It is therefore the decision of Roche in each case, depending on the circumstances, whether to admit partially, or to deny access to, a competitor to the market which Roche has reserved for itself.

26. Moreover, in so far as the agreements in question provide for fidelity rebates in return for the reservation by the purchaser of exclusivity towards Roche, the conditions for the application of Article 86 (c) are met. The rebates in question lead to discrimination and to the disadvantage both of those customers of Roche who do not benefit thereby and of those who do not benefit to the same extent. The system operated by Roche leads to the fixing of quite different prices for two customers who have bought the same quantities from Roche where one of them has made additional purchases from another manufacturer.

By this means dissimilar conditions are applied to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

27. The conduct in question is likely to affect trade between Member States in that it restricts the trading opportunities of users and suppliers of bulk vitamins in different Member States and this has a direct influence on the patterns of trade between Member States so as to impede the attainment of the objectives of a single market. Furthermore, an examination of the statistics for the import of bulk vitamins in the various Member States indicates that nearly half the turnover in bulk vitamins in the Community is taken up by imports within the Community. In this case it is largely a trade within the Community which is impeded by the agreements in question.

#### *The fine*

28. Pursuant to Article 15 (2) of Regulation No 17 the Commission may impose fines on undertakings

where either intentionally or negligently they infringe Article 86. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

It is necessary to impose a fine upon Roche.

Roche has intentionally, or at least negligently, committed the infringement described above. The Roche circulars referred to above provide evidence that the object desired and the effects expected by Roche were the substantial restriction of competition. Roche could not have been unaware that behaviour restricting competition to such an extent was incompatible with Article 86.

In assessing the gravity of the infringement account should be taken of the fact that the conduct in question is of a type which forms a major obstacle to competition, that it is evidenced by a large number of agreements relating to large quantities of vitamins and that these agreements were concluded with major purchasers established in several Member States and whose operations extend to most if not all of the common market.

With respect to the duration of the infringement, it may be concluded that the conduct in question began in 1964, that it was evident in an increasing number of agreements, that only at the end of 1974, following intervention by the Commission, were some of the agreements terminated, and that the infringement cannot yet be considered to be at an end since some agreements are still in force.

For the purposes of determining the amount of the fine, however, the Commission only takes into account the period of about five years between 1970, by which date there can be no doubt that Roche was formulating and applying its systematic policy of fidelity agreements, and the end of 1974 when the first terminations of the agreements took place.

29. Although Roche has its registered office outside the common market, it has numerous subsidiaries within the common market, particularly in the Federal Republic of Germany.

In these circumstances, for the payment of the fine, the amount shall be converted from units of account to Deutsche Mark,

HAS ADOPTED THIS DECISION:

*Article 1*

The Hoffmann-La Roche company has committed an infringement of Article 86 by concluding agreements which contain an obligation upon purchasers, or by the grant of fidelity rebates offer them an incentive, to buy all or most of their requirements exclusively, or in preference, from Hoffmann-La Roche.

*Article 2*

Hoffmann-La Roche is hereby enjoined to terminate the above infringement forthwith.

*Article 3*

A fine of 300 000 units of account (three hundred thousand) being 1 098 000 Deutsche Mark (one million ninety-eight thousand) is hereby imposed on

Hoffmann-La Roche. This sum shall be paid within three months of the date of notification of this Decision.

This Decision shall be enforceable in accordance with Article 192 of the Treaty establishing the European Economic Community.

*Article 4*

This Decision is addressed to Hoffmann-La Roche & Company AG Basle (Switzerland).

Done at Brussels, 9 June 1976.

*For the Commission*

Patrick J. HILLERY

*Vice-President*

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