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([1]) Text with EEA relevance

EN

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other acts are printed in bold type and preceded by an asterisk.

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 30 January 2002

setting out measures in order to restore conditions of effective competition pursuant to Article 8(4) of Council Regulation (EEC) No 4064/89

(Case COMP/M. 2416 — Tetra Laval/Sidel)

(notified under document number C(2002) 359)

(Only the English text is authentic)

(Text with EEA relevance)

(2004/103/EC)

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, and in particular Article 57 thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1], as last amended by Regulation (EC) No 1310/97 [2], and in particular Article 8(4) thereof,

Having regard to the Commission's decision of 30 October 2001 pursuant to Article 8(3) of Regulation (EEC) No 4064/89 declaring the concentration between Sidel SA and Tetra Laval BV incompatible with the common market and the functioning of the EEA Agreement,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations [3],

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

Whereas:

I. THE FACTS

The implemented concentration

(1) On 18 May 2001, the Commission received a notification pursuant to Article 4 of Regulation (EEC) No 4064/89 (the Merger Regulation) of a proposed concentration whereby Tetra Laval SA, France, belonging to Tetra Laval BV (Tetra), the Netherlands, a holding company within the Tetra Laval Group which is a privately held group of companies, proposed to acquire within the meaning of Article 3(1)(b) of the Merger Regulation control of the French company Sidel SA (Sidel) by way of a public bid announced on 27 March 2001. In accordance with French law, the bid was unconditional.

(2) Article 7(3) of the Merger Regulation allows the implementation of a public bid which has been notified to the Commission in accordance with Article 4(1) of that Regulation provided that the acquirer does not exercise the voting rights attached to the securities in question. Pursuant to the bid, approximately 27,1

[1] OJ L 395, 30.12.1989, p. 1; corrected version OJ L 257, 21.9.1990, p. 13.
[2] OJ L 180, 9.7.1997, p. 1.
[3] OJ C 36, 10.2.2004.
[4] OJ C 36, 10.2.2004.

million shares, representing 81,3 % of outstanding Sidel shares were tendered to Tetra Laval SA. In addition to those shares, Tetra Laval SA has also acquired approximately 3.5 million shares in Sidel either on the open market or in individual purchases from major shareholders. As a result Tetra currently holds just over 95 % ([5]) of Sidel's shares and has implemented the proposed concentration.

The Decision pursuant to Article 8(3) of the Merger Regulation

(3) On 30 October 2001 the Commission adopted a decision pursuant to Article 8(3) of the Merger Regulation declaring the concentration between Sidel and Tetra incompatible with the common market and the functioning of the EEA Agreement (the Prohibition Decision).

(4) For the reasons set out in the Prohibition Decision, the Commission concluded that the notified concentration would have created a dominant position in the market for PET (polyethylene terephthalate) packaging equipment, in particular SBM (Stretch Blow Moulding) machines used for the sensitive product segments (liquid dairy products, juices and nectars, fruit flavoured still drinks and tea/coffee drinks, together the sensitive products), and would have strengthened a dominant position in aseptic carton packaging equipment and aseptic cartons in the EEA as a result of which effective competition would have been significantly impeded in the common market and in the EEA.

The procedure under Article 8(4) of the Merger Regulation

(5) Since the concentration was effected by virtue of a public bid, Tetra has already acquired just over 95 % of Sidel's shares. This concentration has been declared incompatible with the common market and the functioning of the EEA Agreement pursuant to Article 8(3) of the Merger Regulation. As a result, Tetra has already implemented a concentration which has been declared incompatible with the common market and the functioning of the EEA Agreement.

(6) Consequently, the Commission on 19 November 2001 sent Tetra a Statement of Objections pursuant to Article 18 of the Merger Regulation and Article 13(2) of Commission Regulation (EC) No 3384/94 of 21 December 1994 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings ([6]). In the Statement of Objections, the Commission considered it appropriate by virtue of Article 8(4) of the Merger Regulation to order the separation of the two undertakings through the divestiture of Tetra's shareholding in Sidel, and to adopt measures necessary to restore conditions of effective competition pending the full separation of the two undertakings.

(7) Tetra replied to the Statement of Objections in writing on 3 December 2001. Both Tetra and Sidel presented their views at an Oral Hearing which was held on 14 December 2001.

II. ANALYSIS UNDER ARTICLE 8(4) OF THE MERGER REGULATION

(8) Pursuant to the exception provided for in Article 7(3) of the Merger Regulation from the suspensory obligation provided for in Article 7(1), Tetra has already acquired just over 95 % of Sidel's shares through the public bid launched on 27 March 2001 and subsequent share purchases. Tetra has therefore already implemented the concentration. This concentration has been declared incompatible with the common market and the functioning of the EEA Agreement by the Commission's Decision of 30 October 2001 pursuant to Article 8(3) of the Merger Regulation.

(9) Tetra has thus already implemented a concentration which has been declared incompatible with the common market and the functioning of the EEA Agreement.

(10) This Decision is a consequence of and gives effect to the Prohibition Decision which found that the notified concentration would create and strengthen dominant positions as a result of which effective competition would be significantly impeded in the common market and declared the concentration incompatible with the common market. Where concentrations prohibited by the Commission have already been implemented, the Commission may, pursuant to Article 8(4) of the Merger Regulation, 'require the undertakings or assets brought together to be separated (…) or any other action that may be appropriate in order to restore conditions of effective competition'.

(11) Restoration of conditions of effective competition is the primary concern in proceedings pursuant to Article 8(4) of the Merger Regulation. Both the text and the scheme of the Merger Regulation indicate that this requires the removal of any residual structural impediments to effective competition on the relevant markets arising from the prohibited concentration ([7]). Article 8(4) envisages that, in situations where concentrations prohibited by the Commission have already been implemented, the restoration of effective competition must, in principle, be effected by means of a separation of the undertakings or assets brought together through the prohibited transaction.

([5]) […]*.
([6]) OJ L 377, 31.12.1994, p. 1.
([7]) See the seventh and ninth recitals in the preamble to the Merger Regulation.

(12) In applying Article 8(4) of the Merger Regulation the Commission has regard to the principle of proportionality. This principle dictates that, when the Commission is faced with different possible options, such as divestiture structures, which could restore conditions of effective competition as required by Article 8(4), the Commission should allow a choice or should adopt the least restrictive option.

(13) Having regard to proportionality, the Commission considers the legitimate interests of the undertakings concerned, when pursuing the primary Community interest of restoring conditions of effective competition by giving effect to its prohibition decision. This should include not only the interests of the acquiring undertaking, Tetra, which naturally wants to preserve as much of the value of its investment as possible, but also of the acquired undertaking, Sidel, which wants to minimise the period of uncertainty it faces and to continue its operations as an independent entity without the imposition of unduly disruptive or onerous measures ([8]).

(14) In the light of the above and in order to restore conditions of effective competition pursuant to Article 8(4) of the Merger Regulation, under the particular circumstances of the present case, it is necessary to order the separation of Tetra and Sidel on the basis of the following principles: 1. the separation should be by means of an effective and final divestiture of such part of Tetra's shareholding in Sidel as will ensure that conditions of effective competition are restored by retaining Sidel as an independent and viable competitor; 2. the divestiture should result in Sidel regaining its full independence from Tetra and Tetra not retaining any minority stake or interest in Sidel which could impede the restoration of conditions of effective competition; 3. the divestiture should take place promptly within a period of not more than […] (*) in order to safeguard Sidel's viability and effectiveness and thus to ensure the restoration of conditions of effective competition; 4. during the transitional period pending divestiture Tetra should appoint a Trustee to monitor the divestiture process and minimise Tetra's influence in Sidel.

([8]) It is important to note in this respect that not only Tetra but also Sidel is an undertaking concerned by these proceedings with specific rights granted under the Merger Regulation and Regulation (EC) No 447/98 (the Implementing Regulation). For example, Sidel is an 'involved party' within the meaning of Article 13 of the Implementing Regulation. This imposes an obligation on the Commission to inform Sidel of the content of these proceedings and to allow Sidel to express its views in writing and orally. In this respect, the management of Sidel has a specific right to be heard by the Commission pursuant to Article 18(4) of the Merger Regulation.

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

1. **Need to separate Tetra from Sidel through an effective and final divestiture of Tetra's shareholding in Sidel**

(15) In the Prohibition Decision the Commission found that the notified concentration would create and strengthen dominant positions as a result of which effective competition would be significantly impeded in the common market and the EEA and therefore declared that the concentration was incompatible with the common market and the EEA Agreement.

(16) As the concentration has already been implemented, the Commission has concluded that it is necessary to order the separation of the two undertakings brought together through the prohibited transaction in order to restore conditions of effective competition pursuant to Article 8(4) of the Merger Regulation.

Harm to conditions of competition

(17) Participation by Tetra in Sidel would impede the restoration of conditions of effective competition. The divestiture of Tetra's shareholding in Sidel would ensure that conditions of effective competition were restored by removing the direct structural/financial link between Tetra and Sidel. If Tetra maintained a shareholding in Sidel, its competitive behaviour would be influenced; conditions of competition between the two undertakings and on the markets on which they are active would not be effective. Moreover, any presence of Tetra in Sidel's capital would hinder the development of Sidel on the markets in question. Tetra's decisions as a shareholder with a participation in Sidel would be influenced by its own competitive position on the markets in question.

(18) Tetra does not dispute the need for the separation of the two undertakings. However, Tetra disputes the need for a prompt divestiture, *inter alia*, on the basis that, in Tetra's view, there is no immediate competitive harm. Tetra argues that 'there is virtually no competition at present between the two businesses' as there are very few horizontal overlaps between the parties. In Tetra's view, there are therefore no concerns justifying a prompt divestiture. Tetra claims that most of the Commission's concerns were of a 'conglomerate' nature and that hence there must be a direct link between the two companies to lead to anti-competitive results. According to Tetra, such a link could be effectively removed through the imposition of a hold-separate trustee. This would ensure there was no harm to competition.

(19) The Commission cannot share Tetra's view. The Prohibition Decision found serious and immediate competitive concerns. As set out in the Prohibition

Decision, there are three core areas of horizontal overlap between the parties: low-capacity SBM machines; barrier technology; and aseptic PET filling machines. In these areas the parties are direct competitors. The Prohibition Decision also found significant vertical links between the parties as Sidel is a supplier of SBM machines and other PET equipment and, as considered in recital 38, Tetra is potentially a buyer of such equipment which it can use in its downstream converter activities. Tetra has not yet divested its SBM machine business or preforms business and, although it has expressed its desire to divest these businesses, there is no formally binding commitment to do so. In any event, even if such a divestiture took place, Tetra would retain significant activities in barrier technologies and PET aseptic filling equipment, key areas for the penetration of PET in the sensitive product markets where Sidel is a direct competitor. Despite Tetra's contention, there are therefore both horizontal and, potentially, vertical competitive relations between the two companies.

(20) Moreover, the Commission's concerns relating to the interplay between the carton and PET packaging equipment markets which have been set out in detail in the Prohibition Decision were serious and immediate. The Commission's analysis in this respect was based on events that are taking place today. It is now that both Tetra and Sidel are investing heavily in barrier technologies and PET aseptic technologies to promote the growth of PET in the future. Because of strategic decisions taken today, Tetra's carton business already faces and will continue to face increasing competitive pressure from Sidel's activities in a neighbouring, closely related antagonistic market. Indeed, Sidel's strategy as stated in the company's press releases is to contribute significantly to the rapid growth of PET in aseptic packaging for fruit juices and liquid dairy products and to erode the lead of the still predominant carton packaging in this market segment.

(21) Those competition concerns are serious and immediate and as such require the effective, final and prompt separation of Tetra and Sidel as necessary remedial action pursuant to Article 8(4) of the Merger Regulation in order to restore conditions of effective competition. The existence of a hold-separate trustee is, as Tetra suggests in its Reply to the Statement of Objections, appropriate for a short transitional period but it cannot be regarded as a structural measure designed to guarantee the restoration of conditions of effective competition in a final manner in the long term.

Need to sell Sidel as a going concern

(22) An effective and final divestiture should consist of the sale of Sidel as a going concern without any change in its status, or in the scope or current range of its activities, which might weaken its viability and effectiveness as a competitor on the markets in question.

(23) Supervision of the manner in which Sidel is disposed of is necessary to ensure restoration of conditions of effective competition. If Sidel's core activities could be split and sold separately or retained by Tetra, Sidel would not be restored as an independent, viable and effective competitor in the market place. Thus, non-core activities should not be split, sold separately or retained by Tetra without the Commission's prior approval. Such activities and assets may be necessary for Sidel's viability and effectiveness ([9]).

Method of divestiture and suitable buyer(s)

(24) With regard to the principle of proportionality and Tetra's request for flexibility, the Commission considers that Tetra should be allowed to choose in principle how and to whom to divest its shareholding in Sidel as long as the divestiture ensures, in a permanent manner, that conditions of effective competition are restored. The method of divestiture chosen should therefore ensure that Tetra and Sidel are separated in a permanent and final manner and should not impede the restoration of conditions of effective competition. This could arise, in particular, through the maintenance or creation of direct or indirect structural or financial links between the two companies.

(25) Therefore, as long as the restoration of conditions of effective competition is not impeded, Tetra may choose any method of divestiture. Thus, Tetra may wish to refloat Sidel's shares, to sell the shares to an industrial buyer, most likely a company active in the packaging sector, or buyers or to a financial institution. Tetra may decide to sell the shares in a different way subject to the Commission's prior assessment and approval. In order to maximise the chances for a successful outcome of the divestiture process in the shortest period of time, Tetra should ensure that the divestiture process, structures

([9]) This principle is established in the Commission's Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98 (the Remedies Notice), OJ C 68, 2.3.2001, page 3, paragraph 17.

and methods chosen remain open to all types of buyers, for example industrial buyers and financial institutions, and that no preconditions are set limiting the potential number of buyers.

(26) The divestiture of Tetra's shareholding in Sidel should be made to an independent and viable buyer or buyers subject to the Commission's approval unless the sale is by way of a stock exchange flotation to third parties independent of and unconnected to Tetra or any directly or indirectly affiliated member of its group resulting in each of these third parties holding no more than 5 % of Sidel's shares. The buyer or buyers should fulfil the 'purchaser standards' set out in the Remedies Notice (paragraph 49). In particular, the buyer should be a viable entity independent of and unconnected to Tetra, possessing all the financial resources, proven expertise and having the incentive to maintain and develop Sidel as an active competitive force.

Need for the divestiture to be final

(27) In principle, a divestiture has to restore conditions of effective competition in a final and permanent manner ([10]). Thus, an appropriate divestiture mechanism should not contain artificial legal structures enabling Tetra to buy back the shares at a later point in time dependent on the eventual outcome of litigation. No company could function effectively with such uncertainty as to the eventual owner of 95 % of its shares. A non-final divestiture structure enabling Tetra to regain control of Sidel at a later point in time, would distort Sidel's competitive behaviour during the transitional period. Sidel would be unable to make strategic decisions such as major investments or significant acquisitions without taking into account the fact that, at a later point in time, Tetra might regain control of the company. Sidel would, in effect, be removed from the market place as an independent player for the duration of the transitional period. Sidel would be managed with a view to maximising value in the short term rather than taking long-term views which only a buyer with unfettered freedom of action could take. Sidel would also, in effect, be removed from the market as a target of acquisitions. For instance, no industrial buyer could buy the Sidel shares during the transitional period with restrictions allowing Tetra to regain control. This was confirmed by Tetra at the Oral Hearing.

Conclusion

(28) In the light of the foregoing, the Commission has concluded that it should order the separation of the two undertakings and that this separation should take place by means of an effective and final divestiture of Tetra's shareholding in Sidel which will ensure that conditions of effective competition are restored by maintaining Sidel as an independent and viable competitor.

(29) The divestiture should consist of a sale of the whole of Sidel as a going concern without any change in the status, scope or current range of activities of the company, which might weaken its viability and effectiveness as a competitor in the markets in question.

(30) Tetra should be allowed to choose in principle how and to whom to divest its shareholding in Sidel as long as the divestiture ensures, in a final and permanent manner, that conditions of effective competition are restored ([11]). Thus, an appropriate divestiture mechanism should not contain mechanisms, legal or other, enabling Tetra to buy back the shares.

2. **Need to ensure that Tetra does not retain a minority shareholding or other financial interest in Sidel which would impede the restoration of conditions of effective competition**

(31) Tetra maintains that it should be allowed to retain a minority shareholding in Sidel as this would not confer on it decisive influence over Sidel nor would it lead to a co-ordination of competitive behaviour between the two undertakings. Tetra believes that it would be disproportionate to prevent it from retaining a minority shareholding since normally it could do so without any need to notify the transaction under the Merger Regulation and as such the Commission does not have jurisdiction under Article 8(4) to prevent Tetra from retaining a minority stake in Sidel. In Tetra's view, the retention of a minority stake would not lead to any anti-competitive effects given that the concerns of the Commission were not of a horizontal nature. The retention of a minority shareholding would, according to Tetra, allow it to maintain the value of some of its investment.

(32) The Commission considers that Tetra's view has to be assessed in the light of the primary concern of Article 8(4) of the Merger Regulation, which is to restore conditions of effective competition. The Commission considers, in the particular circumstances of the present case and on the basis of the information currently available to it, that the retention of a minority

([10]) See Remedies Notice, paragraph 6.

([11]) See Remedies Notice, paragraph 6.

shareholding would impede the restoration of conditions of effective competition and would have disproportionate effects on the target company.

Minority shareholding would hinder prospect of sale and would impede the restoration of conditions of effective competition

(33) The objective of restoring conditions of effective competition dictates that Tetra should not be allowed to retain any level of shareholding that might hinder Sidel's saleability, independence, effectiveness or viability in the market and hence impede the restoration of conditions of effective competition.

(34) The existence of a minority shareholding would allow Tetra to enjoy minority protection rights. According to French law, any shareholding above 33 % would give Tetra the right to influence the management of the company directly. Even a stake above 5 % would give Tetra legal rights, for example to prevent a change in the status of Sidel as a public company. A minority 'squeeze-out' (the forced purchase of the remaining 5 % of the shares which under French law is possible, if the majority shareholder has at the end of the public bid obtained 95 % of both capital and voting rights) would be beneficial for the smooth management and further sale of Sidel. This has been confirmed by Sidel. The benefits which could be derived from a squeeze-out are mainly that the shares could be de-listed and placed outside the influence of the stock market, the owner would be able to restructure Sidel without reporting and justifying its strategy to the financial market and to raise finance as it sees fit. If Tetra retains more than 5 % such a squeeze-out would not be possible. Given the fact that there is already a minority shareholding of 5 % belonging to a dispersed number of buyers which are apparently unwilling to sell their shares, the retention of any minority stake by Tetra would rule out the possibility of a squeeze-out for the eventual owner of Sidel.

(35) Therefore, the existence of any minority shareholding by Tetra could make Sidel less attractive as an acquisition target and may thus hinder the prospects of the divestiture or of further resale. Indeed, Sidel emphasised this at the Hearing. In the view of Sidel, the retention by Tetra of a minority stake may make a sale of the remaining shares held by Tetra more difficult. A potential buyer, and in particular a trade buyer, may understandably not want to acquire the shares with Tetra present as a minority shareholder. A sale of 95 % or more of Sidel's shares, that is to say the full shareholding of Tetra in Sidel, would be more attractive than a sale of less than 95 % of the shares as it would enable the buyer of the shares to 'squeeze-out' the remaining dispersed minority shareholders if it so wishes. If Tetra was allowed to retain a minority stake, the potential number of buyers could be limited by excluding a number of buyers. Therefore, the Commission would, at this stage, require Tetra to refrain from setting any precondition for the sale of Sidel's shares, which could deter any potential buyers, by limiting the post-sale options of a squeeze-out.

(36) Moreover, it is important to recognise that, if the divestiture results in a situation where there is no majority shareholder, larger minority shareholders such as Tetra might have disproportionate influence as a result of superior ability to form voting coalitions that could jointly control the outcome at General Assemblies. In particular if Tetra were to float the shares whilst keeping a minority shareholding it is possible that it would hold the largest proportion of shares and would thus influence the company disproportionately to its shareholding. In addition, if Tetra were to sell its shares to a financial buyer or several financial buyers, who were buying purely for investment purposes, Tetra would be the only shareholder with in-depth market knowledge. Again the potential influence of Tetra could be greater than its actual shareholding.

(37) The incentives of Tetra as a minority shareholder would change as a result of Tetra's financial interests in Sidel. Such financial interest would give Tetra the right to receive a proportion of the profit stream generated by Sidel from its operations and investment. In the absence of any shareholding in Sidel, Tetra would seek a profit maximising outcome solely on the basis of the expected profit stream generated by its own operations. By retaining a stake in Sidel, Tetra would be likely to take into account its expected revenue stream generated by its financial interests in Sidel and would therefore be likely to consider how its actions would affect Sidel's profit stream. The incentives of Tetra to compete would therefore be changed as a result of the minority shareholding. For example, it might be in Tetra's interest to increase/not to decrease its carton prices although this might induce increased switching to PET by customers, if Tetra could capture both the increased carton profits from retained customers and compensate the loss of carton profits from switching customers by benefiting from a proportion of the increase in Sidel's profits resulting from increased demand for PET, whereas such a strategy would not be attractive in the absence of a shareholding in Sidel. The high levels of concentration in the closely related markets for carton and PET equipment, with Tetra and Sidel enjoying,

respectively, dominance and a very strong position, facilitates such a strategy.

(38) A minority holding may also give rise to vertical concerns. Tetra is already a converter of HDPE bottles through 'hole-through-the-wall' arrangements, whereby Tetra supplies customers with bottles produced in an adjacent location directly into the customers' production line and using its experience in carton and HDPE, could provide similar services producing PET bottles. Tetra is therefore a potential client of Sidel SBM high capacity machinery. This would enable Tetra to supply customers for sensitive products through a hole-through-the-wall arrangement. If Tetra were to hold a minority shareholding in Sidel it would have an incentive to favour the purchase of Sidel machines for its hole-through-the-wall activities. Given Tetra's position with carton customers, and thus potential PET customers for sensitive products, it is likely that it could also become a major player as a converter in the provision of PET bottles through hole-through-the-wall arrangements to producers of sensitive products. If it were to purchase only from Sidel, it could significantly boost Sidel's sales whilst at the same time foreclosing Sidel's competitors from supplying Tetra with SBM machines. This would increase Sidel's already strong position substantially and could raise its market position to the point of dominance. SBM competitors would therefore be foreclosed from supplying Tetra, in particular, and if Tetra were successful in capturing a significant number of its original carton customers for hole-through-the-wall operations a substantial part of the market could become foreclosed.

(39) In this context, Tetra's contention that there are no possible horizontal or vertical competitive relations between the two companies and hence no possible anti-competitive effects arising from minority shareholdings is not correct. In addition to the horizontal concerns and leveraging concerns arising from the interplay between carton and PET, Tetra continues to retain PET and HDPE activities which make it a direct horizontal competitor of Sidel and provide possibilities for a vertical relationship with Sidel. Tetra still retains its low capacity SBM machine business and preforms business (even though it is apparently ready to commit to a divestiture no such divestiture has been effected). In addition, Tetra will retain other plastics activities such as aseptic PET filling machines, PET barrier technologies, and HDPE activities.

Conclusion

(40) On the basis of factual information currently available, it is concluded that Tetra should not be allowed to retain a minority shareholding in Sidel. Such a retention would be likely to impede the restoration of effective competition as it could hinder the prospect of a successful divestiture and would allow Tetra to retain economic incentives to refrain from competition with Sidel and to engage in exclusive vertical relations with Sidel.

3. **Need for prompt divestiture within a period of […]***

(41) The Commission considers that Tetra should divest its shareholding in Sidel in a prompt and final manner which ensures the restoration of effective competition. In setting a time period for the divestiture the Commission has particular regard to the primary Community interest of restoring effective competition pursuant to Article 8(4) of the Merger Regulation. The Commission has regard also to Tetra's interest in minimising a potential financial loss which could arise from a speedy divestiture of Sidel's shares given the current market conditions and to Sidel's interest in avoiding unduly disruptive and onerous measures.

(42) In its Statement of Objections, the Commission considered that a period of six months was necessary given the negative effects on competition and the fact that prolonged periods of uncertainty might cause irreparable harm to Sidel as an effective and viable competitor.

(43) Tetra contests the need for a prompt divestiture within a period of six months as set out in the Statement of Objections. Tetra argues that: (a) the Commission's proposal is disproportionate and goes against precedent; (b) the Commission should have regard to Tetra's investment and should not penalise Tetra for complying with French law; (c) the Commission should also have regard to Tetra's right of appeal against the Prohibition Decision which, in Tetra's view, prevents the Commission from imposing a final divestiture before Tetra's appeal has been decided; and, finally, (d) Tetra's proposed alternative divestiture structures restore competition effectively and are more proportionate than the Commission's proposal and should therefore be preferred.

(a) *Commission's proposal for a prompt divestiture within a period of […]* is appropriate, proportionate and in accordance with relevant precedents*

(44) The harm to conditions of effective competition and hence the need for a prompt restoration of conditions of effective competition has been discussed above. The Commission considers that a prompt divestiture is necessary to prevent irreparable damage to conditions of effective competition.

(45) Long-term interim structures, such as the ones proposed by Tetra, would not be sufficient to guarantee Sidel's effectiveness and viability and would hence result in a significant weakening of competition. Under long transitional structures such as the ones proposed by Tetra, and in addition to the anti-competitive effects arising out of the structural/financial link existing between Tetra and Side, Sidel would have to function with 95 % of its shares in the hands of a trustee. It would face uncertainty as to its eventual owner. It would have to operate under tight controls under the supervision of a trustee and the Commission. It would be unable to have access to the capital market in an unfettered way, to make significant acquisitions or to become a target of acquisitions. Sidel would be tied in an artificial long-term legal structure which could not inspire confidence and would distort the company's future decisions and behaviour. Structures with hold-separate trustees and constant monitoring are inherently suitable only for short transitional periods pending a clear and final divestiture.

(46) The Commission therefore considers that there are strong reasons why a divestiture should take place in a final and prompt manner in order to prevent irreparable damage to conditions of effective competition. Having considered Tetra's request for a longer period which would allow it to preserve better the value of its investment and having considered Sidel's position as to the need to minimise a transitional period of uncertainty, it is concluded that a period of divestiture of not more than […]* is necessary to ensure restoration of conditions of effective competition.

(47) Despite this, Tetra maintains that it should be allowed at least a [more than three years]* period for the divestiture ([12]). Tetra bases its argument on proportionality and the need to preserve Tetra's investment. According to Tetra, the Commission should take into account the current market conditions which would result in a destruction of Tetra's investment if a quick sale was ordered. As noted, the primary concern under Article 8(4) of the Merger Regulation is restoration of competition following an incompatibility decision. Minimising Tetra's losses which arise from factors beyond the Commission's control is an important but secondary consideration.

(48) Tetra maintains that the Commission should not confuse divestitures under the Remedies Notice which are voluntary and orders for divestiture under Article 8(4) of the Merger Regulation. The principles established over the years through the Commission's experience in assessing proposed remedies which have been encapsulated in the Remedies Notice are, to a certain extent, relevant in the context of proceedings under Article 8(4) of the Merger Regulation. Established principles such as the viability of the proposed purchaser, the preference for structural rather than behavioural remediesand for remedies that restore competition in a final and permanent manner are evidently relevant. In any event, it is clear that the Commission has not less but more extensive powers under Article 8(4) of the Merger Regulation than in the context of Article 8(3) proceedings where its role is limited to discussing the acceptability of remedies with the parties. The fact that, as Tetra claims, remedies divestitures cover secondary assets is an argument in favour of more not less decisive measures under Article 8(4) decisions. By definition, in Article 8(4) decisions there is a greater urgency to restore conditions of effective competition which have already been impeded because of the prohibited transaction.

(49) Tetra further claims that a [more than three years]* divestiture period is in line with Commission practice. Tetra refers to three cases which were cleared by the Commission with commitments: Guinness/Grand Metropolitan (M.938) ([13]), Alcan/Alusuisse (M.1663) ([14]) and KNP/Buhrmann (M.291) ([15]). In Guinness/Grand Metropolitan, the Commission allowed 15 months for the divestiture of two whisky brands. In Alcan/Alusuisse, the Commission allowed nine months (with two possible extensions of three months each) and in KNP/Buhrmann eight months (with two possible extensions of six months each). In Tetra's view, the

([12]) Tetra's Reply at paragraphs 103—116.

([13]) Commission Decision of 15 October 1997, OJ L 288, 27.10.1998, p. 24.

([14]) Commission Decision of 14 March 2000, not yet published in the OJ.

([15]) Commission Decision of 4 May 1993, OJ L 217, 27.8.1993, p. 35.

closest precedent is Volvo/RVI (M.1980) ([16]) where the Commission allowed Volvo […]* to divest a minority shareholding in Scania. Tetra maintains that in Volvo/RVI the competitive concerns were horizontal whereas the current case is based on looser conglomerate concerns.

(50) It is evident that none of the above precedents, which concern minority shareholdings in clearance decisions sanctioned a divestiture period of [more than three years]* as proposed by Tetra. Furthermore, in the special circumstances of an Article 8(4) decision following the prohibition of an implemented public bid, there should be no special obstacles to speedy disposal of the acquired undertaking as a going concern as it is a free-standing entity and, by virtue of Article 7(3) of the Merger Regulation has normally not been integrated into the business operations of the acquiring undertaking. The closest precedents, which Tetra has not discussed in its Reply are other divestiture orders pursuant to Article 8(4). There are only two such cases, Blokker/Toys 'r' us (M.890) ([17]) and Kesko/Tuko (M.784) ([18]). In these cases divestiture periods ranged from six to nine months. Tetra has not provided any exceptional reasons as to why the Commission should depart from this practice in this case. Periods of the length proposed by Tetra would deprive the Commission's Prohibition Decision from its *effet utile* and cause harm to Sidel and competition. Tetra's assertion that the Commission's initial proposal for a six month period for divestiture is not in conformity with precedents is therefore not correct.

(b) *Preservation of the value of Tetra's EUR 1,7 billion investment in Sidel*

(51) Tetra maintains that the Commission's proposal in the Statement of Objections for a divestiture of Tetra's entire shareholding in Sidel within six months, would destroy Tetra's investment in Sidel. According to Tetra, this is due to the current unfavourable markets conditions and Sidel's weak economic performance. In Tetra's view, if the Commission ordered a quick divestiture destroying most of Tetra's investment, the Commission would in essence 'penalise' Tetra for complying with the French rules which obliged it to launch an unconditional bid. Tetra maintains that the French rules which do not allow the possibility of a conditional bid create a conflict with the requirements of the Merger Regulation for which Tetra should not be penalised. In Tetra's view, even though the Merger Regulation does not explicitly deal with such situations in Article 8(4), there is an analogy to be drawn with Article 7(3) of that Regulation which recognises that a party to a transaction should be able to maintain the full value of its investments while that transaction is being reviewed. Under Article 8(4) of the Merger Regulation the Commission should also take into account this objective and avoid causing unnecessary and unreasonable losses to the affected party.

(52) In order to show the extent of the potential loss it may face, Tetra has used the firm of auditors Ernst & Young to calculate Sidel's current value. Ernst & Young made a presentation at the Oral Hearing which was kept confidential from Sidel. Ernst & Young calculated, on the basis of publicly available information, Sidel's present value at around […]* per share giving a total value for Tetra's shareholding of less than […]*. Tetra's bid was for EUR 50 per share and cost in total in excess of EUR 1,7 billion. As a result, Tetra claims that a forced sale within a period of six months would destroy most of its investment in Sidel. However, Tetra acknowledged at the Hearing that Ernst & Young's valuation was a worst case scenario and that it was probable that Tetra would be able to obtain a higher price for Sidel in a private sale.

(53) The Commission has examined the valuation provided by Ernst & Young and has concluded that it appears to be overly pessimistic. Considering the valuation, in the light of the more appropriate discounted cash flow calculation carried out by Tetra's financial advisers' prior to the public bid, and with all the customary prudence associated with the interpretation of the outcome of a forward-looking exercise such as a financial valuation, the Commission has concluded that, in the absence of dramatic changes in the industry over the interim period of less than a year, the fair value of Sidel on a stand-alone basis for an investor could reasonably be estimated at around […]* per share, within a value range of […]* per share.

(54) The Commission has however paid particular attention to Tetra's arguments regarding the preservation of the value of Tetra's investment in Sidel. The Commission, however, considers that the primary concern under Article 8(4) of the Merger Regulation is the Community interest in restoring conditions of effective competition. Tetra's interest in avoiding financial loss is also of great importance but cannot override the primary objective of Article 8(4).

([16]) Commission Decision of 1 September 2000.
([17]) Commission Decision of 26 June 1997, OJ L 316, 25.11.1998, p. 1.
([18]) Commission Decision of 19 February 1997, OJ L 174, 2.7.1997, p. 47.

(55) The flexibility provided for in Article 7(3) of the Merger Regulation recognises that in the short period of time pending the Commission's investigation and in exceptional circumstances, an exception from the general rule of suspensory effect for all merger transactions may be necessary to preserve the value of the acquirer's investment. These considerations cannot be applied automatically to the period following the Commission's decision declaring a concentration incompatible with the common market. Article 8(4) simply envisages that a separation of the merged undertakings or other appropriate action may be required when a merger has been implemented and has not been declared compatible with the common market in order to restore conditions of effective competition.

(56) The fact that, in circumstances such as those faced by Tetra, some financial loss may be suffered is inherent to the natural uncertainty that affects all merger transactions. Such natural uncertainty is part of any preventive merger control system. Before launching its bid, Tetra was aware of the French rules and of the Community rules and was thus aware of the risk that a prohibition decision might expose it to financial loss. This is made clear in Tetra's internal documentation which discussed the possibility of a prohibition decision by the Commission. In addition, Tetra was not obliged to enter into the transaction in the precise way it decided to follow, that is to say, by launching an unconditional public bid. Article 7(3) of the Merger Regulation allows for this possibility by providing an exception to the general suspensory rule in Article 7(1). However, the responsibility for the consequences, including financial ones, of such transactions remains entirely with the undertaking concerned. In essence, Article 7(3) merely gives companies wishing to acquire listed targets the possibility of launching an unconditional public bid. It does not oblige companies to follow this route. Whilst the French rules may be seen by Tetra as unnecessarily rigid in not allowing the launching of a conditional public bid, Tetra could have explored other legal structures in order to minimise potential risks.

(57) In addition, Tetra entered into the transaction in full awareness of the uncertainty and risks and, on its own independent calculations decided to pay a substantial premium for Sidel's shares. Member States at the Hearing pointed out that there has been a general slow-down in the economy which has impacted on Sidel's valuation as well as that of other companies. It was also not clear why Tetra has paid such a substantial premium (Sidel shares were trading at EUR 30 prior to the public bid and Tetra offered EUR 50) for Sidel's shares. In any event, it was Tetra's own decision to pay a substantial premium for Sidel's shares when it launched its public bid in March 2001.

(58) The fact that Tetra decided to enter into the transaction with the uncertainty and risks that this entailed should not therefore prevent the Commission from carrying out its duties under the Merger Regulation to review transactions as to their compatibility with the common market and, in cases where they are found to be incompatible, to take the necessary remedial action pursuant to Article 8(4).

(59) Furthermore, it is not clear that Tetra would suffer a financial loss of the magnitude it is claiming. The Commission has conducted its own valuation of Sidel and is of the view that Tetra could achieve a much higher price for Sidel within the next […]* than that presented to the Commission at the Oral Hearing.

(60) Nonetheless, the Commission has been particularly careful to allow Tetra to preserve as much of its investment as possible. The Commission considers that a period of divestiture of […]* will allow Tetra to find a suitable buyer for Sidel at a reasonable price.

(c) *An action for annulment should not prevent the Commission from seeking an effective remedy under Article 8(4) of the Merger Regulation*

(61) In principle, a divestiture has to restore conditions of effective competition in a final and permanent manner ([19]). However, Tetra maintains that the Commission does not have the power to impose a final and prompt divestiture because this would pre-empt Tetra's right to seek the annulment of the Prohibition Decision and would prejudge the outcome of the annulment action. If the action were successful, Tetra would have divested the shares, would have lost most of the value it invested and would be unable to buy back the shares. This would cause Tetra irreparable harm. As a result, Tetra is suggesting that the Commission should be prevented from ordering Tetra to divest the shares in a final manner.

(62) The Commission does not share Tetra's view. A decision pursuant to Article 8(4) of the Merger Regulation ordering a prompt divestiture would not affect Tetra's right to seek the annulment of the Prohibition Decision in any way. Tetra could still attack the decision and the judgement would be rendered regardless of the Commission's decision pursuant to Article 8(4). If Tetra believed that the Commission's Article 8(4) decision would cause it irreparable harm and would pre-empt the outcome of its action against the 8(3) decision, Tetra would have the right to seek the annulment of the Article 8(4) decision as well and ask the Court of Justice

([19]) See Remedies Notice, paragraph 6.

to suspend its effects. The arguments that Tetra makes are therefore arguments urging the Court to suspend a forthcoming Article 8(4) decision and not valid arguments against the Commission's right and duty to adopt an Article 8(4) decision in the first place in order to restore conditions of effective competition. In this context, it must be observed that the damage, which will allegedly be suffered by Tetra is largely or exclusively financial and does not threaten the solvency of Tetra. Pure financial damage, not likely to lead to insolvency, is not considered as constituting irreparable harm.

(63) Moreover, if Tetra's position was accepted, this would result in a situation where appeals against incompatibility decisions of implemented concentrations would deprive incompatibility decisions of their *effet utile* by preventing the Commission from taking actions necessary to restore conditions of effective competition pursuant to Article 8(4) of the Merger Regulation. In this way, all actions for annulment of decisions declaring implemented concentrations to be incompatible would automatically have a suspensory effect. This, however, is contrary to the general principle of Article 242 of the Treaty which clearly states that, generally, 'actions brought before the Court of Justice shall not have suspensory effect'.

(64) In addition, Tetra's position would result in an unjustified discrimination between implemented public bids and other concentrations. In implemented public bids the acquiring companies would benefit by being allowed to preserve the shares pending an appeal.

(65) Finally, if Tetra's view were accepted, the interests of target companies would be penalised by having to face a long period of uncertainty pending an appeal. Indeed, if Tetra's view were accepted, it would distort competition and cause Sidel irreversible harm by extending the uncertainty Sidel faces over a long period of time. Such harm to Sidel would also cause irreparable distortion of competition and would circumvent the Commission's Prohibition Decision.

(66) It is therefore concluded that Tetra's right to appeal against the Prohibition Decision should not prevent the Commission from adopting the necessary measures in order to restore conditions of effective competition pursuant to Article 8(4) of the Merger Regulation and in particular the order of a final divestiture of Tetra's shareholding in Sidel.

(d) *Tetra's proposals will not restore conditions of effective competition and cannot be accepted*

(67) In its Reply, Tetra argues that the Commission's proposal for a speedy divestiture is not justified as Tetra's own 'divestiture' proposals restore conditions of effective competition and are more proportionate ([20]).

(68) Tetra essentially proposes the following:

(a) Tetra should be allowed to divest its shareholding in Sidel in [more than three years]* so that its appeal can be decided and in order for the value of its investment to be preserved. Tetra should, in any event, be allowed to retain a minority shareholding.

(b) Tetra should be allowed a first transitional period of […]* during which it can still hold on to the shares in order to put into place the four proposed structures which will result in a second transitional period of [more than three years]*. During this time a hold-separate trustee would ensure Sidel's independence.

(c) In the long transitional period of [more than three years]* pending final divestiture, Tetra proposes four structures designed, according to Tetra, to ensure Sidel's viability and independence and hence the restoration of conditions of effective competition in accordance with Article 8(4) of the Merger Regulation.

(d) After [more than three years]*, Tetra will either divest the shares to an independent third party or will exercise call options to recover the shares in case its appeal is successful.

Initial […]* transitional period — appointment of a hold separate trustee

(69) Immediately following, or even prior to the Commission's Article 8(4) decision, Tetra proposes to appoint a 'hold-separate' trustee. The hold separate trustee would ensure Sidel is run effectively and

([20]) Reply, paragraphs 64 to 102.

independently from Tetra. Tetra would not have the right to exercise voting rights and to interfere with Sidel's operations in any way. In Tetra's view, Sidel already has a strong and independent management team which will ensure Sidel functions effectively pending divestiture. During this initial […]* period Tetra would be allowed to legally hold the shares with no need to transfer them to a trustee.

Subsequent [more than three years]* transitional period — the four 'divestiture' options

(70) Tetra proposes to enter into one of four 'divestiture' options within […]*. These structures would be transitional and would last for [more than three years]* pending final divestiture to an independent third party. Tetra would retain the right to buy back the shares under call options if its appeal is successful. These structures were presented to the Commission in further detail at the Oral Hearing by Tetra's financial advisers, Rothschild ([21]).

(i) […]*

(71) […]*.

(ii) […]*

(72) […]*.

(iii) […]*

(73) […]*.

(iv) […]*

(74) […]*.

Tetra's proposal does not restore conditions of effective competition

(75) Tetra maintains that any of the four 'divestiture' structures would meet in full the requirements of Article 8(4) of the Merger Regulation and would be more proportionate than the Commission's proposal for a prompt and final divestiture. According to Tetra, all four 'divestiture' structures would legally remove the ability to control Sidel from Tetra. Tetra would not control or own the Sidel shares during the transitional period. Sidel would still have the same amount of capital as before for its operations or its expansion and the structures would not interfere with Sidel's ability to raise funds. Tetra's investment in Sidel would thus be better preserved. The structures, in particular […]*, would offer sufficient incentives for Sidel to grow. The Commission would have the right to approve the final purchaser after [more than three years]*. The 'divestiture' structures would be compatible with Commission precedents which show that parties can control the divestiture process and that structures such as […]* are acceptable in principle.

(76) In addition, Tetra argues that Sidel could remain independent through the appointment of a hold-separate trustee or other similar structures and could function effectively on the market place without influence or interference by Tetra. Tetra maintains that Sidel has an independent management, which will ensure Sidel's effectiveness in the market. Finally, Sidel has sufficient resources to fund its business. As a result, even a long transitional period would not result in uncertainty and would not hinder Sidel's development.

(77) Sidel does not share Tetra's view. Sidel has confirmed in writing and at the Oral Hearing that a long transitional period necessarily entails uncertainty and would hinder its proper development. Sidel's customers have already voiced concerns over the company's future. According to Sidel uncertainty is the single greatest cause of damage to Sidel's ability to compete effectively. Sidel also confirmed that transitional arrangements involving trustees and uncertainty as to the eventual owner of 95 % of the company are complex and would damage Sidel if allowed for too long. Sidel stated that complexity carries increased risk of unforeseen problems, lends itself to misunderstanding by Sidel's customers and provides greater scope for competitors to disseminate damaging rumours about Sidel's stability. Sidel urged the Commission to avoid interim arrangements that are invasive, impede restoration of Sidel's position or impair Sidel's flexibility in financing or ability to dispose of non-core assets. Sidel also urged the Commission to allow the shortest possible period within which an appropriate buyer could be found. In Sidel's view six months may not be sufficient to find an

([21]) It is to be noted that, at a meeting between the Commission services and representatives of Tetra held on 24 January 2002, i.e. following the discussion of the Decision at the Advisory Committee of 22 January 2002, Tetra proposed orally and subsequently in writing that it was willing to remove the 'call option' element from the four proposed structures.

appropriate buyer. Sidel thinks that 12 months would be appropriate and that it could not consider any period of more than 18 months as being appropriate.

(78) The Commission has paid particular attention to and has studied carefully the four 'divestiture' structures proposed by Tetra especially in the light of Tetra's argument that these structures would enable Tetra to preserve the value of its investment. However, the Commission considers that these structures, as proposed ([22]), cannot restore conditions of effective competition.

(79) It is evident that the 'divestiture' structures are not real divestitures but merely transitional arrangements akin to a trustee arrangement including a legal transfer of shares to the trustee. The main purpose of all four structures is the preservation of Tetra's investment and the preservation of Tetra's right to regain control of Sidel at an unspecified point in time should its appeal be successful. Indeed, under all four structures, Tetra would retain the right to buy back Sidel's shares under 'call options' should its appeal be successful. Tetra would be the beneficial owner of the shares and/or would have a stake in Sidel's future financial performance. In addition, the call-option would enable Tetra to have a continued presence in Sidel by having the right to become Sidel's eventual owner at an indeterminate point in the future. Tetra confirmed at the Hearing that the only purpose of the call-options was to enable it to buy back the shares in case its appeal is successful.

(80) During the proposed long transitional periods the 'owners' of Sidel's shares, for example, a financial institution, would not have unfettered freedom of action. They would not be able to on-sell the shares due to Tetra's call option and complex financial mechanisms preventing a free sale. Rothschilds, Tetra's financial [statement relating to the likelihood of divestiture to industrial buyers during the transitional period]*.

(81) Other than the anti-competitive effects outlined above, the transitional structures would create precisely the kind of uncertainty that Sidel has confirmed would cause it irreparable harm. Sidel would have to operate for a long transitional period [more than three years]* without knowing who the ultimate shareholder of 95 % of its shares would be. Sidel would have to operate under tight controls under the supervision of a trustee and the Commission. Sidel would be tied to an artificial legal structure which cannot inspire confidence and would distort the company's future decisions and behaviour. Such structures with hold-separate trustees and constant monitoring are inherently suitable only for short transitional periods pending a clear and final divestiture. In addition, the fact that Tetra would still retain an important financial interest in Sidel's performance would have distortive effects on Tetra's competitive behaviour.

(82) Moreover, the precedents that Tetra uses to support its argument that the above transitional divestiture structures are in accordance with Commission practice, are not relevant. The precedent in Vivendi/Seagram/Canal+ (M.2050) ([23]) that Tetra relies on is not relevant except that a similar structure to Tetra's proposed […]* structure was used. In that case, however, there had not been an incompatibility decision and the interest to be divested was a minority shareholding. Tetra has not referred to any precedent supporting its view for a long [more than three years]* transitional period involving call options giving the 'divesting' company the right to buy back the shares. Indeed, Tetra acknowledges that 'it is clear that there is no real precedent in the Commission's practice for the type of divestment proposals that Tetra Laval has outlined' ([24]).

Conclusion

(83) The four 'divestiture' proposals as put forward by Tetra do not adequately restore conditions of effective competition. They entail great uncertainty and complexity and would hinder Sidel's development and functioning as a viable competitor. In addition, the proposals are not in accordance with relevant Commission precedents. There is therefore no justification for Tetra's proposed [more than three years]* period for the transitional structures. The Commission also considers that Tetra's arguments regarding its right of appeal and preservation of the value of its investment do not override the primary concern of restoring conditions of effective competition. Such restoration must in principle take place promptly.

(84) Having considered Tetra's request for a longer period which would allow it to preserve better the value of its

([22]) At a meeting between the Commission services and representatives of Tetra held on 24 January 2002, i.e. following the discussion of the Decision at the Advisory Committee of 22 January 2002, Tetra proposed orally and subsequently in writing that it was willing to remove the 'call option' element from the four proposed structures. The Commission considers that the removal of the call option from the structures is desirable as it removes one of the Commission's objections to the proposals as set out in the following paragraphs of this Decision. However, the Commission's concerns such as the uncertainty and limitations which Sidel might face under some of the structures and the fact that Tetra would, under most of the options, retain an indirect legal or beneficial interest in Sidel remain valid.

([23]) Commission Decision of 13 October 2000.

([24]) Reply at paragraph 91.

investment and having considered Sidel's position as to the necessity to minimise a transitional period of uncertainty, the Commission considers that a period of […]* would in the circumstances be appropriate.

(85) The Commission would also be prepared to allow, subject to its prior approval, structures enabling Tetra to preserve the value of its investment to the extent that such structures do not impede the restoration of conditions of effective competition. Such structures could include for example some form of limited credit or financial arrangements or other payment structures which would enable Tetra to preserve as far as possible the value of its investment provided that such structures would not impede the restoration of conditions of effective competition by jeopardising Sidel's viability and effectiveness or through the maintenance or creation of direct or indirect structural or financial links between the two companies. Such structures should, in principle be of a limited duration.

4. **Need to appoint independent trustee during the transitional period**

(86) The Commission considers that the separation of the two undertakings should take place in a way that ensures that conditions of effective competition are restored in the long term and that any disruption of conditions of effective competition is minimised during the […]* transitional period pending the divestiture.

No further implementation of the prohibited concentration during the transitional period

(87) During the transitional period which precedes the restoration of conditions of effective competition following an Article 8(4) decision, no measure should be taken to implement the concentration such as for example exercising the voting rights attached to the shares or acquiring additional shares without prior approval of the Commission. Pending the divestiture, Tetra should refrain from any action or omission that would not preserve the full economic viability, marketability and competitiveness of Sidel. In particular, Tetra should not carry out any act which may be of such a nature as to alter the legal status, nature, scope or range of activities, the industrial or commercial strategy or the investment policy of Sidel.

Appointment of independent Trustee

(88) In order to restore conditions of effective competition during the transitional period following the Article 8(4) decision and pending the divestiture, during which period Tetra will continue to maintain a shareholding in Sidel, Tetra should appoint an independent trustee, such as an investment bank, management consultant or auditor, subject to the prior approval of the Commission. The Trustee should be appointed promptly and in any event within 10 days following the adoption of this Decision. The Trustee should be independent of Tetra or any directly or indirectly affiliated member of its group, possess the necessary qualifications to carry out the task and should not be, or become, exposed to a conflict of interest. The Trustee should also be remunerated in such a way as not to impede its independence and effectiveness in fulfilling its mandate.

(89) The Trustee's mandate should be subject to the Commission's approval to ensure the independence and effectiveness of the Trustee. The mandate should include all provisions necessary to enable the Trustee to fulfil its duties.

(90) Essentially, the mandate should provide the Trustee with all the necessary powers and independence to monitor the divestiture of Tetra's shareholding in Sidel to an independent and viable buyer or buyers subject to the Commission's approval unless the sale is by way of a stock exchange flotation to third parties independent of and unconnected to Tetra or any directly or indirectly affiliated member of its group resulting to each of these third parties holding no more than 5 % of the Sidel's shares. The Trustee's mandate should include a power for the Trustee to sell the shares at no minimum price after the period of divestiture […]* has expired.

(91) The Trustee should be able to exercise the voting rights attached to Tetra's shareholding in Sidel subject to the prior approval of the Commission. The Trustee should also have the power to manage effectively Tetra's shareholding in Sidel and to ensure that Sidel operates as an effective competitor on the relevant markets. The Trustee should ensure in particular that the status and range of activities of Sidel is not altered in a way that weakens Sidel's competitive position on the markets in question. The Trustee should provide written reports to the Commission informing the Commission on progress in the divestiture process as well as the monitoring of the operation and management of Sidel.

Transfer of shares to the Trustee

(92) Tetra does not contest the Commission's proposal to appoint an independent trustee with powers to monitor

Sidel's independence and viability and exercise the voting rights attached to the shares. Tetra acknowledges that a Trustee should be appointed as soon as possible and proposes to appoint a hold-separate Trustee immediately following this Decision or even prior to the decision ([25]).

(93) However, Tetra maintains that an immediate transfer of the shares to a Trustee is not necessary. It considers that a sale constituting a final divestiture will have taken place after the passing of the time limit set out in its proposal ([26]). Tetra refers to the Article 8(4) decisions in Blokker and Kesko/Tuko and the Remedies Notice to support the argument that the party required to divest can perform the divestiture itself. In both Blokker and Kesko/Tuko the transitional divestiture periods were limited to six or nine months. A divestiture trustee was not appointed but a monitoring trustee was appointed in Kesko/Tuko. The Remedies Notice does not envisage divestiture trustees in the first divestiture period but does envisage them after the initial period expires.

(94) A transfer of shares to a Trustee is likely to contribute to the restoration of conditions of effective competition by minimising Tetra's influence during the transitional period. A transfer of shares would result in better monitoring during the transitional period, in more fluid and independent management in Sidel and possibly in more flexibility with issues such as voting of the shares and exercising other rights attached to the shares.

(95) A transfer of shares to a Trustee does not appear to entail harm to Tetra or Sidel and Tetra has not provided any arguments as to why such a transfer would be problematic. There is no reason why Tetra should not be able to enter into a suitable agreement to transfer the shares to a trustee pending final divestiture. In addition, most of the four 'divestiture' proposals suggested by Tetra include a transfer of shares.

(96) The Commission therefore considers that it would be preferable for Tetra to transfer the shares to the Trustee as soon as practically possible.

Conclusion

(97) In the light of the foregoing, the Commission considers it necessary for Tetra to appoint an independent trustee such as an investment bank, management consultant or auditor, subject to the prior approval of the Commission. It is also concluded that it would be preferable for Tetra to transfer the shares to the Trustee as soon as practically possible. The Trustee's mandate should be subject to the Commission's approval to ensure the independence and effectiveness of the Trustee. The mandate should include all provisions necessary to enable the Trustee to fulfil its duties of monitoring Sidel's independence, managing effectively Tetra's shareholding in Sidel, ensuring that Sidel operates as an effective competitor on the relevant markets and conducting the divestiture of Tetra's shareholding in Sidel.

III. **CONCLUSION**

(98) In the light of the fact that the concentration between Sidel and Tetra, which was declared incompatible with the common market and the functioning of the EEA Agreement on 30 October 2001, has already been implemented and in the light of the reasons set out above, it is concluded that it is necessary to order Tetra to separate itself from Sidel by divesting its shareholding in Sidel and to take additional appropriate measures in order to restore conditions of effective competition pursuant to Article 8(4) of the Merger Regulation as set out in the Annex to this Decision.

(99) In particular, it is necessary to order the separation of Tetra and Sidel on the basis of the following principles: 1. the separation should be by means of an effective and final divestiture of Tetra's shareholding in Sidel ensuring that conditions of effective competition are restored by retaining Sidel as an independent and viable competitor; 2. the divestiture should result in Sidel regaining its full independence from Tetra and Tetra not retaining any minority stake in Sidel or any interest in Sidel which could impede the restoration of conditions of effective competition; 3. the divestiture should take place promptly within a period of not more than nine months in order to safeguard Sidel's viability and effectiveness and thus to ensure the restoration of conditions of effective competition; 4. during the transitional period pending divestiture Tetra should appoint a Trustee to monitor Sidel's independence, ensure Sidel's viability and effectiveness and conduct the divestiture process.

([25]) Reply, paragraph 47.
([26]) Reply, paragraph 52.

(100) In ordering the measures set out in this Decision the Commission has paid particular regard to the principle of proportionality, to Tetra's request for flexibility and for measures allowing the preservation of as much of the value of Tetra's investment as possible as well as to Sidel's request for measures, such as the appointment of Trustees, that are not unduly onerous or disruptive to the extent that such measures achieve effectively the objective sought pursuant to Article 8(4) of the Merger Regulation, namely the restoration of conditions of effective competition,

HAS ADOPTED THIS DECISION:

Article 1

In order to restore conditions of effective competition, Tetra Laval BV is hereby ordered to separate itself from Sidel SA in accordance with the provisions of the Annex to this Decision.

Article 2

This decision is addressed to:

Tetra Laval BV
Amsteldijk 166
1071 LH Amsterdam
The Netherlands

Done at Brussels, 30 January 2002.

For the Commission
Mario MONTI
Member of the Commission

ANNEX I

The full original text of the conditions and obligations referred to in Article 1 may be consulted on the following Commission website:

http://europa.eu.int/comm/competition/index_en.html

COMMISSION DECISION

of 27 November 2002

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

(Case COMP/E-2/37.978/Methylglucamine)

(notified under document number C(2002) 4557)

(Only the German and French texts are authentic)

(Text with EEA relevance)

(2004/104/EC)

CONTENTS

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets.

SUMMARY

Addressees

This Decision is addressed to the following undertakings:

— Rhône-Poulenc Biochimie SA

— Aventis Pharma SA

— Merck KgaA

Articles infringed

Article 81(1) of the EC Treaty and Article 53 of the EEA Agreement prohibiting all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and the contracting parties to the EEA Agreement and which have as their object or effect the prevention, restriction or distortion of competition within the common market and within the territory covered by the EEA Agreement.

Relevant product

Methylglucamine of pharmaceutical quality used as an intermediate chemical product for the synthesis of x-ray media, pharmaceuticals and colourings.

Community market value

Approximately EUR 3,1 million annually ([1]).

Specification of the infringement

Beginning in November 1990 and continuing until December 1999 the main producers of methylglucamine formed a clandestine cartel contrary to Article 81(1) of the Treaty and Article 53(1) EEA covering the Community and the EEA, by which they fixed market shares for the product; agreed on price targets for the product; agreed on price lists for the product and agreed on how to share the largest customers.

Duration of the participation

— Merck KgaA from 22 November 1990 to 31 December 1999

— Rhône-Poulenc Biochimie SA from 22 November 1990 to 31 December 1999

— Aventis Pharma SA from 22 November 1990 to 31 December 1999.

([1]) Commission estimate based on sales figures from the companies. For the sales figures, see Doc. 00200 and Doc. 908-921 in the Commission's file.

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the treaty establishing the European Community,

Having regard to the Agreement of 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 ([2]), as last amended by Regulation (EC) No 1/2003 ([3]), and in particular Articles 3 and 15 thereof,

Having regard to the Commission decisions of 1 October 2001 and 17 December 2001 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 ([4]),

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the report of the hearing officer in this case ([5]),

Whereas:

PART I — FACTS

1. THE METHYLGLUCAMINE INDUSTRY

1.1. The product

(1) Methylglucamine (MG) (sometimes designated as 'meglumine') is an intermediate chemical product for the synthesis of x-ray media, pharmaceuticals and colorings. It is not a by-product; on the contrary the capacity for producing MG is determined by the configuration of the production facility.

(2) MG is delivered in crystalline form to the producers of x-ray media, who combine the substance with a further chemical agent. This combined substance is primarily demanded by hospitals that inject it into x-ray patients. The function of MG consists of preventing the expulsion of x-ray media too quickly from the body.

(3) MG is a mature product, having been on the market for a long time. The methylglucamine market is stable, with some regions even displaying declining demand. It is possible that the product will disappear from the market in the medium term, as a new and cheaper product might be available soon.

(4) However, as confirmed by both parties, at all material time during the period considered in this decision, there was no substitute for methylglucamine as regards X-ray applications. Moreover only high quality methylglucamine referred to as pharmaceutical grade methylglucamine can be used for these applications. Consequently it is concluded that there is a relevant product market for pharmaceutical grade methylglucamine. This Decision only covers pharmaceutical grade methylglucamine, which can be used in the applications outlined in paragraph 1. A Chinese producer is producing a type of lower quality methylglucamine, which is used in other contexts such as watertreatment. When the term methylglucamine or MG is used in this Decision only MG of pharmaceutical quality is referred to.

1.2. The market for methylglucamine

(a) *Supply*

(5) As shown above, the relevant product market can be characterised as the market for pharmaceutical grade methylglucamine (hereafter referred to as methylglucamine), as this grade is not substitutable from the demand point of view to other grades. This market is of a worldwide dimension.

(6) The world market for methylglucamine in 1999 can estimated to be around 375 tonnes, worth some EUR 5,7 million ([6]), of which around EUR 3,1 million ([7]) were for the Community.

(7) On the basis of sales data provided by the parties in 1999, Merck had a share of [around 60 %] of the world market and a respective share of [around 75 %] in the EEA measured in volume. The estimated shares of Aventis were [around 40 %] of the world market and a respective share of [around 25 %] in the EEA ([8]).

(8) On the same basis and measured in value in 1999, Merck had a share of [around 55 %] of the world market and a respective share of [around 70 %] in the

([2]) OJ 13, 21.2.1962, p. 204/62.
([3]) OJ L 1, 4.1.2003, p. 1.
([4]) OJ L 354, 30.12.1998, p. 18.
([5]) OJ C 36, 10.2.2004.

([6]) Commission estimate based on sales figures from the companies. It is not known whether minor amounts are being sold by Chinese producers. For the sales figures see Doc. 00200 and Doc. 908-921.
([7]) Commission estimate based on sales figures of the companies. For the sales figures see Doc. 00202 and Doc. 908-921.
([8]) Commission estimate based on sales figures of the companies: For the sales figures see Doc. 00200—00202 and Doc. 908—921.

Community. The estimated shares of Aventis were [around 45 %] of the world market and [around 30 %] in the EEA market ([9]).

(9) In its response to the statement of objections, Merck argues that its market share should be assessed as an average over several years, as the figure for 1999 does not adequately reflect the parties' position for the duration of the cartel ([10]). The Commission has looked into this matter. In its response to the statement of objections, Merck overestimates the value of the methylglucamine sales of Aventis. The average market shares for the period 1995 to 1999 are not significantly different from the 1999 market shares.

(10) Merck argued in both its written answer to the statement of objections and oral presentation that deliveries to [customer 1] should not be included within the calculation of Merck's market share, as it was a captive customer of Merck who would have been the only supplier able to supply with the requested quality product.

(11) This argument should be rejected as Aventis made it clear during the oral hearing that it was able to supply [customer 1] quality-wise, and that Merck ultimately admitted it. It follows that in the absence of the anti-competitive agreement among the parties, Aventis would have had the means, incentive and interest in actively competing for [customer 1]'s supplies.

(12) The two producers of MG are both multinational corporations with considerable turnovers. The business is essentially a global one, and the worldwide market can be described as a duopoly.

(13) Both producers of MG are situated within the Community.

(14) In the year 2000, pharmaceutical grade MG was produced worldwide in only two locations both situated in the Community. The two producers of MG are of about similar size in terms of production capacity. Merck had a production capacity of [around 300] tonnes at its Darmstadt plant ([11]). It is not known exactly how large a capacity Aventis has at its Elbeuf plant. The volume of methylglucamine sold by Aventis varies a lot from year to year, but the highest amount sold since 1990 was [around 250] tonnes in 1991 ([12]). Sales in recent years have been considerably lower. Worldwide production capacity for methylglucamine can therefore be estimated to be around 500 tonnes a year in 1999.

([9]) Commission estimate based on figures provided by the companies. [Exact figure not mentioned. Confidential information of the parties].
([10]) Merck response to the statement of objections pp. 5 and 6, paragraphs 13 to 16.
([11]) Doc. 00021.
([12]) Doc. 00197.

(b) *Demand*

(15) The customers for methylglucamine are producers of x-ray media, who combine the substance with a further chemical agent. This combined substance is primarily demanded by hospitals. The leading purchasers of methylglucamine include [customer 1] of Germany, [customer 2] of France and [customer 3] and [customer 4] of the United States of America. [Customer 1] and [customer 3] are former producers of methylglucamine (see section 3.3).

(c) *Trade between Member States*

(16) Methylglucamine is produced in two Member States and marketed throughout the world.

(17) In 1999, Merck sold methylglucamine to eight Member States.

(18) In 1999, Aventis sold methylglucamine to five Member States.

(19) Sales to EFTA countries seem to be very small. The Commission is aware that a Norwegian company made modest purchases from Rhône-Poulenc in 1995.

1.3. **The producers**

(a) *Rhône-Poulenc Biochimie SA and Aventis Pharma SA*

(20) Rhône-Poulenc Biochimie (RPB) has its headquarters in Antony near Paris. RPB is a fully owned subsidiary of Aventis Pharma, which is itself a fully owned subsidiary of Aventis SA. RPB's total turnover in 1999 was [around EUR 110 million] ([13]).

(21) In its response to the statement of objections, Aventis states 'The infringement has been committed by RPB and by no other affiliated company. Indeed, the activities covered by the statement of objections relate exclusively to RPB' ([14]). On the basis of this statement the Commission accepts that the entire production of methylglucamine in Aventis took place in RPB.

(22) Aventis Pharma SA also has its headquarters in Antony near Paris. The company focuses on the discovery, development, manufacture and sales of pharmaceutical

([13]) Doc. 8935.
([14]) Aventis response to the statement of objections, page 28, paragraph 71.

products. Aventis Pharma is a fully owned subsidiary of Aventis SA. Its total turnover in 1999 was [around EUR 2 billion] ([15]).

(23) Aventis SA has its headquarters in Strasbourg, France. It is an international company involved in the research, development, production and marketing of organic and inorganic intermediate chemicals, speciality chemicals, fibres, plastics, pharmaceuticals and agricultural chemicals.

(24) Its three core businesses were pharmaceuticals, plant and animal health and speciality chemicals.

(25) The total turnover of the company in 2000 was EUR 22,304 billion ([16]).

(26) In 1998 Rhône-Poulenc and Hoechst AG, the German chemical producer, announced their agreement on a plan to merge their life science activities in a new entity 'Aventis' (to be owned 50:50 by the two parent companies) and to divest their chemical operations over a three-year period. The completion of the merger was announced on 15 December 1999.

(27) Following the merger Aventis has increasingly focused on its pharmaceutical activitities. Other parts of the business have been sold off. Of particular importance was the sale of Aventis Crop Sciences to Bayer in 2002.

(28) During the procedure Aventis Pharma has been handling the contacts with the Commission on behalf of both Aventis Pharma SA and Rhône-Poulenc Biochimie SA. When 'Aventis' is referred to in this Decision it is to be understood as Aventis Pharma acting on behalf of both themselves and RPB.

(b) *Merck*

(29) Merck KgaA, which has its headquarters in Darmstadt, Germany, is a pharmaceutical and health product manufacturer. It is established as the operating subsidiary of E. Merck oHG, a general partnership dating from 1827.

(30) Merck's total turnover in 1999 was EUR 5 347 million ([17]).

([15]) Combined turnover of Rhône-Poulenc Rorer and Hoechst Marion Roussel. Fax from Jones, Day, Reavis & Pogue of 31 October 2002.
([16]) Doc. 00203.
([17]) Doc. 6901.

(31) Methylglucamine is produced by the division 'Cosmetics, Health, Nutrition' within the company ([18]).

(c) *Other producers*

(32) From 1991 to about 1998, Aventis and Merck appear to have been the only producers of methylglucamine in the world. In 1998, a Chinese low-cost producer entered the market. However it seems that this producer has concentrated on the market for alternative uses of methylglucamine where the lower pharma-grade is required ([19]). There is no information that the Chinese producer has made any inroads in the market for pharmaceutical grade methylglucamine used as a contrast agent for x-rays in medical application, which is the relevant product for the purposes of this Decision.

2. **PROCEDURE**

2.1. **Investigations in the Community**

(33) On 27 September 2000, representatives from Merck visited the Commission. During the meeting the company expressed its wish to cooperate with the Commission pursuant to the Commission Notice on the non-imposition or reduction of fines in cartel cases ([20]) (the Leniency Notice), and gave an oral description of the cartel activity in which it had been involved. The Commission received a more detailed written account on 20 October 2000.

(34) On 15 January 2001, the Commission undertook a verification pursuant to Article 14(3) of Regulation 17 at the premises of Aventis in Romainville.

(35) On 19 October 2001, the Commission sent a request for information pursuant to Article 11 of Regulation 17 to Aventis. On the same day a request for additional information was sent to Merck.

(36) The final responses to the letters were received from Merck in late January 2002 and from Aventis in early February 2002.

(37) On 17 June 2002, the Commission initiated proceedings in the present case and adopted a statement of objections against three addressees. The statement of objections was addressed to Rhône-Poulenc Biochimie SA, Aventis Pharma SA and Merck KgaA.

(38) Responses to the statement of objections were received from the addressees on 2 September 2002.

([18]) Doc. 00023
([19]) Doc. 9075.
([20]) OJ C 207, 18.7.1996, p. 4.

(39) An oral hearing was held on 3 October 2002, during which all parties had the opportunity to be heard.

2.2. **Investigations and proceedings in other jurisdictions**

(40) The US and Canadian authorities are also investigating the cartel. As with the case in the Community, Merck is cooperating with the authorities.

3. **THE CARTEL**

3.1. **The documentary evidence**

(41) This Decision is based on the documentary evidence provided by Merck, the documentary evidence found at the inspection of the premises of Aventis and the answers to the Commission's requests for information.

(42) The facts set out in this section are primarily based on the following evidence:

1. Merck's statement dated 19 October 2000, further to an oral statement of 27 September 2000.
2. Documents seized by the Commission during the inspection at the premises of Aventis on 15 January 2001.
3. Replies from Merck to a request for information from the Commission, dated 17 December 2001 and 31 January 2002.
4. Replies from Aventis to a request for information from the Commission, dated 21 December 2001 and 1 February 2002.
5. Reply from Merck to the Commission's statements of objections, dated 2 September 2002.
6. Reply from Aventis to the Commission's statements of objections, dated 2 September 2002.

3.2. **Summary of the infringement objected to by the Commission**

(43) The cartel of the two producers of methylglucamine, Merck and Aventis, existed from at least November 1990 to at least December 1999. The aim pursued was the elimination of competition in the worldwide methylglucamine market. This was to be obtained by means of a market-sharing agreement and by the fixing of prices.

(44) Company officials responsible for distribution and marketing for methylglucamine on the part of Merck and Aventis met annually from 1990, and shared their sales data and turnover figures of the previous year.

(45) During these annual meetings a price increase was typically negotiated. It was agreed to increase by agreed percentage points the list prices for methylglucamine, which applied at least in Europe to smaller customers.

(46) During the meetings, information about specific customers was exchanged, and steps were taken to ensure that the customers did not change supplier. The cartel included a market-sharing agreement.

(47) From 1990 until 1999, the cartel members held regular annual meetings, usually in the autumn. During this period, 11 such meetings have been identified.

(48) The known representatives of the companies in the cartel meetings were the following individuals:

Merck:

[Merck employee 1] (1990—1996) ([21])

[Merck employee 2] (1996—1999) ([22])

Aventis:

[Aventis employee 1] (1990—1999) ([23])

[Aventis employee 2] (1990 or 1993—1999) ([24])

3.3. **Background and initial contacts**

(49) Prior to 1990, Merck RPB were not the only producers of pharmaceutical grade methylglucamine in the market. [Customer 3] (USA) stopped production sometime in the mid-1980s. [Customer 1] most likely stopped producing methylglucamine in 1990. Both of these companies are now key customers for methylglucamine.

(50) According to Aventis there was a very good longstanding relationship between the producers of

([21]) Doc. 00011—00013, 00123—00124.
([22]) Doc. 00013—00017, 00115—00122.
([23]) Doc. 00011—00017, Doc. 9065—9067.
([24]) Doc. 00011—00017, Doc. 9071.

methylglucamine. If a producer ran into delivery difficulties it was usually possible to purchase the necessary products from its competitor at a very favourable rate. As far back as 1979 the predecessor to [Merck employee 1] as [senior position] at Merck recalls a meeting with Rhône-Poulenc about purchase on favorable terms because of delivery problems at Merck (Kollegenlieferung) ([25]). In 1989 RPB bought methylglucamine from [customer 1] ([26]). Merck bought from RPB in 1990/1991, 1994 and 1995 ([27]). [Merck employee 1] recalls that on at least one occasion RPB bought methylglucamine from Merck ([28]).

(51) Aventis further states that 'It was clear for both companies that sooner or later one of them would have to exit the market and would therefore buy its internal need of meglumine (methylglucamine) from the remaining producer at favourable terms' ([29]).

(52) In its response to the statement of objections, Merck expressed a different understanding and confirmed that for its part, it always rejected the proposals from Rhône-Poulenc/Aventis to cease its production and purchase methylglucamine from Aventis. Merck's most important client, [customer 1] AG, was generally not prepared to accept methylglucamine of Aventis quality. Finally, due to Merck's expertise in producing speciality chemicals, Merck could produce methylglucamine at a relatively low cost, so it would not make sense for Merck to cease its production ([30]).

(53) When [customer 1] stopped production […], it started buying its methylglucamine from Merck under special terms as a 'co-producer'. Merck explains that, in this particular context, 'A co-producer is a company which produces a specific product and therefore knows what costs are linked to the production of this product. If this company buys the product of a colleague-company due to its special knowledge it will try to obtain the product at a price as close as possible to its own production costs (co-producer price)' ([31]).

([25]) Doc. 6891.
([26]) Doc. 9073.
([27]) Doc. 6879, Doc. 9074.
([28]) Doc. 6879—688.
([29]) Doc. 9067.
([30]) Merck response to the statement of objections, pp. 13—14, paragraphs 31—34.
([31]) Doc. 794: 'Co-Produzent ist ein Unternehmen, das ein bestimmtes Produkt herstellt, und somit weiß, mit welchen Kosten die Produktion dieses Produktes verbunden ist. Wenn das Unternehmen im Rahmen von Kollegenlieferungen das Produkt von einem Wettbewerber bezieht, so hat es aufgrund seines Sonderwissens eine bessere Verhandlungsposition und wird versuchen, das Produkt zu einem Preis zu bekommen, der so nah wie möglich an die Kosten der Eigenproduktion herankommt (sog. Co-Produzentenpreis)'.

(54) Around the time when it became clear that Merck and RPB would be the only two producers left, contacts between Merck and RPB started to increase. Initially these contacts would have focused on informal exchange of information. [Merck employee 1] states that when he was first introduced in [the late 1980s], it was clear that for some time representatives from Merck and Rhône-Poulenc had been meeting to discuss the purchase of products by Merck from RP. During these meetings the representatives responsible for methylglucamine also met ([32]).

(55) Statements from employees at Merck substantiate that rumours about an arrangement concerning methylglucamine were circulating at Merck for a considerable time before 1990.

(56) [Merck employee 4] states in an interview of 9 October 2000 that:

(57) 'Although he has not worked directly with MG until the beginning of this year, he knew about the contacts with RP concerning this product. These contacts were a public secret in the distribution department of Merck. He had already heard about these contacts 10 to 20 years ago which was by the time when […] [1983—1989 — author's note] and before the "Spartenorganisation" was introduced at Merck [1978—1979 — author's note]. The particular relationship of RP to MG referred to prices as well as market shares' ([33]).

(58) In a second interview on 15 January 2002, [Merck employee 4] was asked to elaborate on where and how he had received the information.

(59) 'He was not able to recall when exactly he received this knowledge. However he believes that he must have known by the early to mid 1980s, and that the information had come from a reliable source. He recalls that a customer had complained that one received two identical answers from Merck and Rhône-Poulenc when

([32]) Doc. 00123.
([33]) Doc. 00129—130: 'Obwohl er bis Anfang diesen Jahres nicht direkt mit MG zu tun habe, habe er von den Kontakten mit Rhône-Poulenc (RP) im Hinblick auf dieses Produkt gewusst. Diese Kontakte seien ein offenes Geheimnis in der Vertriebsabteilung von Merck gewesen. Er habe von diesen Kontakten schon vor zehn bis zwanzig Jahren gehört und zwar in der Zeit, […] [1983—1989 — author's note] und bevor die Spatenorganisation bei Merck eingeführt wurde [1978—1979 — author's note]. Die besondere Beziehung zu RP hinsichtlich MG habe sich auf Preise sowie Marktanteile bezogen'.

one asked for the price of MG. He can no longer recall the exact date of this statement' ([34]).

(60) […] In an interview held on 15 January 2002 [Merck employee 5] made the following statement:

(61) 'He had returned from abroad to Darmstadt only in 1990. He had heard about the MG agreements during visits to Darmstadt at the time he was living abroad. According to his memory by the time he was first interviewed (in the year 2000) the cartel had existed for about 10 to 15 years. During a home visit he had heard rumours that for MG there was an "understanding about the price". At the time his impression had been that this was not a clean business. However he did not hear about a possible sharing of customers between Merck and Rhône-Poulenc' ([35]).

(62) Merck states that those responsible for distribution and marketing of methylglucamine met with representatives of Rhône-Poulenc (RP) in 1989, and shared their sales data and turnover figures of the previous year ([36]). The meeting is confirmed by [Merck employee 1] ([37]). No documentary evidence was found and Aventis did not confirm the meeting, nor did they confirm its purpose.

(63) In its response to the statement of objections, Merck confirms that this meeting was definitely linked to methylglucamine. Merck believes that it may even have been the starting point for the methylglucamine cartel, as RP tried to persuade Merck on this occasion to cease production of methylglucamine and purchase this product from RP at a favorable rate. As Merck rejected RP's proposal to close down its production, the cartel could have been an alternative solution to ensure stable prices and market shares ([38]).

([34]) Doc. 6882, 'Wann genau er diese Kenntnisse erhalten habe, ließe sich in Nachhinein nicht mehr zuordnen. Er meine jedoch, dass diese Kenntnis Anfang bis Mitte der 80er Jahre da gewesen und aus verlässlicher Quelle gekommen sei. In Erinnerung sei ihm geblieben, dass ein Kunde für MG sich geäußert habe, man erhalte zwei gleiche Antworten, wenn man Merck und Rhône Poulenc nach dem Preis für MG frage. Wann genau diese Äußerung gefallen sei, wisse er jedoch nicht mehr'.

([35]) Doc. 6885 '[Merck employee 5] erklärte, er sei erst 1990 wieder aus dem Ausland nach Darmstadt zurückgekommen. Er habe von den Absprachen zu MG im Rahmen von Besuchen in Darmstadt während seiner Auslandszeit gehört. Seiner Erinnerung nach habe das Kartell bei seiner ersten Befragung (im Jahr 2000) etwa 10—15 Jahre bestanden. Bei einem seiner Heimatbesuche habe er Gerüchte gehört, dass es bei MG "Verständigungen über den Preis" gebe. Sein Eindruck sei damals gewesen, dass diese Sache nicht sauber gewesen sei. Über ein mögliche Aufteilung von Kunden zwischen Merck und Rhône-Poulenc habe er jedoch nichts gehört'.

([36]) Doc. 00025.

([37]) Doc. 00125.

([38]) Merck response to the statement of objections, 2 September 2002, pp. 17—18, paragraph 49.

(64) According to [Merck employee 1] a meeting took place at an unknown date in 1989/1990. The participants were [Merck employee 3] and [Merck employee 1] from Merck, and [Aventis employee 1] from RP. Apparently a further person from RP was present. The person was not, however, [Aventis employee 2]. [Merck employee 3] introduced [Merck employee 1] as the new representative from Merck responsible for methylglucamine ([39]). [Merck employee 3] confirms the meeting but says it took place in 1990 in Paris, probably in the headquarters of RP. He believes several products, including methylglucamine, were discussed at the meeting ([40]).

(65) After the above meeting towards the end of the 1980s or at the beginning of the 1990s, a further meeting took place. [Merck employee 1]and [Merck employee 6] from Merck met with [Aventis employee 1] and [Aventis employee 2] of RP, upon the invitation of RP, in a Paris restaurant for dinner. The topic of discussion was not business related. However the representatives from Merck suspected that the invitation from RP was related to a proposal from RP that Merck cease production of methylglucamine and purchase this product from Aventis at a favourable rate ([41]).

(66) In its response to the statement of objections, Aventis argues that as regards methylglucamine, only legitimate contacts relating to occasional product shortages took place between the companies prior to 1990. The statements of [Merck employee 3] and [Merck employee 1] do not provide proof of illegitimate contacts prior to 1990 and the reliability of the rumours heard by [Merck employee 4] and [Merck employee 5] are highly questionable ([42]).

(67) Different versions of events prior to 1990 exist. The Commission does not have in its possession sufficient documentation to prove which version is the correct one. Consequently for the purpose of this Decision the infringement will be considered as having started in 1990.

3.4. **The beginning of a structured cartel — Meeting 22 November 1990, Antony, Paris**

(68) The meeting in autumn 1990 marks a clear change in the development of the contacts between Merck and RP as regards methylglucamine, into a formal and structured arrangement with clear agreement concerning prices and market shares allocation. This is

([39]) Doc. 00124.

([40]) Doc. 6890.

([41]) Doc. 00047, Doc. 00136—00137.

([42]) RPB response to statement of objections, 1 September 2002, pp. 4—6, paragraphs 9—12.

confirmed by corroborated statements from both Aventis and Merck (see section 3.5).

(69) The autumn 1990 meeting was for both [Merck employee 1] (Merck) and [Aventis employee 1] (RP/Aventis) their first meeting as company officials in [those positions]. According to information from [Merck employee 3], [Merck employee 1] had taken over from him on 1 September 1990 ([43]). According to a document seized at Aventis, [Aventis employee 1] was appointed [to that position] for Rhône-Poulenc Biochimie in January 1990 ([44]).

(70) There is agreement between the parties that [Merck employee 1] and [Aventis employee 1] were responsible for developing the modalities of the cartel. [Merck employee 1] states: '[Merck employee 3] introduced him to [Aventis employee 1]. The actual agreements with Rhône-Poulenc, though, were only developed by [Merck employee 1] together with [Aventis employee 1]' ([45]). Aventis states 'it appears that prior to 1990 meglumine (methylglucamine) related matters have not been discussed during the meetings held at Merck's premises and which were focused on [another product] sales. However, as indicated above, the situation evolved when, at the beginning of the 1990s, a yearly meeting was held between [Aventis employee 1] and his counterpart at Merck, [Merck employee 1] to discuss meglumine-related matters' ([46]).

(71) The fact that the meeting took place is not in dispute. It is confirmed that both [Merck employee 1] ([47]) and [Aventis employee 1] were present at the meeting. Aventis states, 'Based on the interviews conducted with employees of the respondent, a yearly meeting pertaining to meglumine was held in Germany between [Aventis employee 1], [senior position] for RPB from 1990 to 1999, and his counterpart at Merck, [Merck employee 1] or his successor [Merck employee 2]. This meeting was held at the end of the year. The first of such meetings was held in 1990 with [Merck employee 1] at Merck's premises in Darmstadt' ([48]).

(72) While Merck does not dispute that the meeting took place, it claims that Aventis confuses the meeting with a meeting relating to [another product], and that the first meeting actually took place at the Aventis premises in Antony near Paris.

([43]) Doc. 6890.
([44]) Doc. 00574.
([45]) Doc. 6878, '[Merck employee 3] habe ihn mit [Aventis employee 1] bekannt gemacht. Die konkreten Absprachen mit Rhône-Poulenc habe [Merck employee 1] jedoch erst zusammen mit [Aventis employee 1] entwickelt'.
([46]) Doc. 9070.
([47]) Doc. 00125.
([48]) Doc. 9065—9066.

(73) In its response to the statement of objections, Merck states 'It is true that yearly meetings relating to [another product] were held on Merck's premises at which members of Merck's central purchasing division held intensive talks with Aventis' employees in order to set conditions for sales of [another product] to Merck. Indeed, such a meeting relating to [another product] was held at Merck's premises (also) in 1990. As these meetings concerned purchases of Merck from Rhône-Poulenc, Merck's distribution/marketing division ([49]) was generally not involved. In contrast, the 1990 meeting relating to methylglucamine was held on 22 November between [Aventis employee 1] and [Merck employee 1] (just recently appointed [to a senior position]) at the Aventis premises in Paris, Antony. After this meeting, [Aventis employee 1] invited [Merck employee 1] to a restaurant on the Champs Elysees' ([50]).

(74) Although there is disagreement about the place of the first meeting, it is clear from the above that the parties agree that the first meeting of the cartel took place in the autumn of 1990. Based upon the more precise information from Merck, it is concluded that the first meeting of the cartel took place on 22 November 1990.

(75) The content of this first meeting and of the 10 subsequent meetings is described in section 3.5.

3.5. **Structure and content of the collusive arrangement**

3.5.1. *Exchange of information*

(76) Both parties agree that meetings normally started with an exchange of information and views on the worldwide demand for the product, referring to the volumes sold to the respective main clients during the previous year.

(77) Merck states, 'Those responsible for distribution and marketing for MG on the part of Merck and Aventis met once annually since 1989, and shared their sales data and turnover figures of the previous year. To this end, prior to such meetings the Merck representatives obtained print-outs of internal Merck sales statistics, which showed the results of the previous year, with reference to the respective country and customers, with volume and sales figures' ([51]).

([49]) This is the division which dealt, among other products, with methylglucamine.
([50]) Merck response to the statement of objections, page 15, paragraphs 38—39.
([51]) Doc. 00025.

(78) Aventis states, 'These meetings lasted around one and a half hours during which the companies would begin by exchanging views on the — generally declining — worldwide demand for this product referring to the volumes sold to their respective main clients during the preceding year' ([52]).

(79) Aventis argues in its response to the statement of objections that the exchange of sales information during the meetings was limited. It states:

(80) 'The statement of objections asserts that RPB and Merck routinely exchanged sales data. In seeming contradiction, the statement of objections also concludes, along with both RPB and Merck, that both producers had inaccurately assessed one another's position in the meglumine market. Merck mistakenly believed that both producers had a 50 % market share. The statement of objections and its file clearly demonstrate that Merck had a much higher market share than RPB, i.e., Merck had [around 65 %] of the world market and [around 75 %] of the EEA market. In turn, RPB had underestimated the worldwide meglumine market at "approximately 200 tonnes/year for various clients, and the rest for the internal needs of Merck and [customer 1]."'

(81) 'These inaccurate market assessments clearly demonstrate that while some informal oral exchange of sales figures occurred, the two producers never exchanged documents of any sort. While the statement of objections states that Merck and RPB met and "shared their sales data and turnover figures of the previous year", it must be emphasised there was never a full, systematic exchange of sales data. Interviews of [Merck employee 1] and [Merck employee 2] indicated that RPB and Merck never exchanged their turnover figures, contrary to Merck's own statement. Had the parties actually done so, Merck would have realised that its market share far exceeded RPB's' ([53]).

(82) The Commission accepts that oral exchange of sales figures did occur, but did not materialise into a full systematic exchange of sales data.

3.5.2. *Agreement on certain prices and on the annual price increases*

(83) Both Merck and Aventis agree that an important element of the annual meetings was to agree on price increases for the next year.

(84) Merck states, 'Moreover, a price increase for the coming year was typically negotiated. It was agreed to increase by agreed percentage points both the list price for MG (established anew annually), which applied at least in Europe to smaller customers (share of only approximately 10 % of turnover), as well as the individually-negotiated prices applicable to larger customers (key accounts). As a consequence, the list prices of Merck and Aventis were — aside from insubstantial deviations — in effect the same' ([54]).

(85) Aventis states, 'A discussion would follow on prices, in particular whether one of the parties had the intention of increasing its price and to what extent. None of the parties proposed significant price increases as it was understood that a product manufactured since 1956 could only support a gradual and slight increase' ([55]).

(86) In its response to the statement of objections, Aventis states, 'As noted in RPB's reply of 1 February, prices were discussed during the annual meetings between RPB and Merck. In particular, the participants would discuss whether to increase the list price, followed by agreement on a minimum percentage increase. However, Merck and RPB did not discuss prices with respect to individual customers. [Merck employee 1] confirmed this in his interview of 19 September 2000' ([56]).

(87) The Commission accepts Aventis's claim that only 'list prices' and annual price increase percentages were discussed at the meetings.

3.5.3. *Market sharing and customer allocation*

(88) Both parties agree that the arrangement included a market sharing agreement. However their statements differ somewhat as to the description of this agreement.

(89) Merck states, 'At least since the end of the 1980s, there were contacts between Merck and Aventis with respect to MG, whose primary goal was to maintain the status quo of the respective 50 % market shares of both companies on the worldwide MG market and to increase the price of MG. An additional goal strived for was to prevent, if possible, a switch by their respective customers from one to the other supplier' ([57]). In a different sentence Merck states, 'To prevent switches, it was agreed that each party would respond to a price

([52]) Doc. 9066.
([53]) Aventis response to the statement of objections, pp. 14—15, paragraphs 30—31.
([54]) Doc. 00025.
([55]) Doc. 9066.
([56]) Aventis response to the statement of objections, page 15, paragraph 32.
([57]) Doc. 00024.

query from a customer of the other by quoting the list price' ([58]).

(90) In his account of the 1996 annual meeting [Merck employee 2] states: 'It was agreed that Merck and RP, in case of a request from customers of the other party, should only offer list prices, even if they were big customers. As the list prices were at a higher level than the prices for big customers, it was assured that the big customers would stay with their current supplier. This subject was discussed in detail in the second meeting in autumn 1996' ([59]). In his account of the 1997 meeting [Merck employee 2] states, 'The participants discussed whether all customers had stayed with their suppliers in the past year, and determined that this was the case' ([60]).

(91) Aventis states, 'During one meeting, which is recalled to have been held either in 1990 or 1991, [Aventis employee 1] and [Merck employee 1] entered into an agreement on volumes supplied to [customer 2], RPB's main European client. According to this agreement, [customer 2]'s yearly needs of meglumine would be supplied by RPB up to a minimum of 25 tonnes. If requested by [customer 2], Merck could supply [customer 2] with its remaining needs. In other words, RPB was certain that it would at least supply [customer 2] every year with a minimum of 25 tonnes of meglumine. The agreement lasted until 1999. This agreement occurred at a time when [customer 2] was starting to complain or make reservations about the quality and/or packaging of RPB's meglumine. Thus, there was a risk that [customer 2] would buy its annual needs from Merck. Since [customer 2] had been a "institutional" RPB client for years it was very important for RPB to secure the supply of at least 25—30 tonnes of meglumine per year' ([61]). Later in its response to the Commission's Article 11 letter Aventis states 'During these meetings, no allocation of quantities among the respective meglumine customers or any kind of territorial allocation was ever fixed, with the exception of the [customer 2] agreement described above' ([62]).

(92) That there were pressure on RP for a market-sharing agreement concerning [customer 2] can be deduced from the note of [Aventis employee 3] of Rhône-Poulenc Rorer (see recitals 104 and 105).

([58]) Doc. 00024—00025.

([59]) Doc. 00119, 'Es war vereinbart, dass Merck bzw. RP bei einer Anfrage von Kunden des anderen, auch wenn dies große Kunden waren, nur Listenpreise anbieten sollte. Da diese Listenpreise höher lagen als die Preise für große Abnehmer, war so sichergestellt, dass die großen Kunden bei den jeweiligen Herstellern verblieben. Über diese Vorgehensweise wurde auf dem zweiten Treffen im Herbst 1996 ausführlich gesprochen'.

([60]) Doc. 00120 'Die Teilnehmer besprachen, ob auch im vergangenen Jahr alle Kunden bei den jeweiligen Unternehmen verblieben waren, und stellten fest, dass dies der Fall war'.

([61]) Doc. 9066.

([62]) Doc. 9067.

(93) The arrangement concerning [customer 2] is also confirmed by an internal Merck e-mail exchange from October 1999 (see recitals 159 to 161).

(94) In its response to the statement of objections, Merck argues that Aventis's statement that the territorial allocation at the meetings was limited to the [customer 2] agreement is incorrect. Merck states, 'In contrast to this characterisation by Aventis, the content of the market-sharing agreement was not limited to the "[customer 2]" agreement but related to the worldwide methylglucamine market. The intention behind the cartel was a "non-attack" agreement. There was an agreement to maintain the distribution of sales at their current levels, i.e. to maintain the 50/50 division of the market that existed in 1989/1990 (at least according to Merck's information at the time)' ([63]).

(95) Later, referring to Aventis's description of the [customer 2] agreement, Merck states, 'This explanation of the agreement from Aventis is consistent with Merck's explanation that the cartel was aimed at each party keeping its major customers; a possible agreement regarding [customer 2] is simply a specific example of this broader aim' ([64]).

(96) In its response to the statement of objections, Aventis states, 'Market sharing was achieved only through customer allocation. To prevent disruptive price wars in the meglumine market, the agreement between RPB and Merck sought to maintain a stable market. The crux of this agreement concerned customer allocation with respect to the producer's main customers. That is, they would endeavour not to compete for their respective major customers. No market quotas were fixed, as evidenced by the fact that Merck wrongly believed that RPB had a 50 % market share' ([65]).

(97) Aventis's statement in response to the statement of objections contradicts its earlier statement that no allocations were ever fixed except for the [customer 2] agreement, and confirms Merck's version of events. Consequently the Commission considers that it is established that the parties agreed to share the market through customer allocation.

3.5.4. *Conclusion on structure and content of the collusive agreement*

(98) From the above the structure and content of the collusive arrangements can be described as follows.

([63]) Merck response to the statement of objections, page 18, paragraph 53.

([64]) Merck response to the statement of objections, page 19, paragraph 55.

([65]) Aventis response to the statement of objections, page 17, paragraph 37.

— Each meeting started with an informal exchange of information about the state of the market. The parties only provided limited concrete sales information.

— The parties agreed on the percentage price increase for the coming year.

— The parties fixed 'list prices' for the coming year.

— The parties agreed not to compete for the other party's customers. The '[customer 2] agreement' should be seen as an integral part of this arrangement.

3.6. **The working and development of the collusive arrangement**

(99) Both parties agree that annual meetings took place each year between 1990 and 1998. In addition Merck claims that annual meetings also took place in 1989 and 1999.

(100) Merck states, 'Those responsible for distribution and marketing for MG on the part of Merck and Aventis met once annually at least since 1989, and shared their sales data and turnover figures of the previous year' ([66]). Merck also explains that the last meeting took place in 1999 ([67]).

(101) Aventis states, 'Based on interviews conducted with employees of the respondent, a yearly meeting pertaining to meglumine was held in Germany between [Aventis employee 1] […], and his counterpart at Merck, [Merck employee 1] or his successor [Merck employee 2]. This meeting was held at the end of the year. The first of such meetings was held in 1990 with [Merck employee 1] at Merck's premises in Darmstadt. The other meetings were also held either at Merck's premises or during an informal dinner at a restaurant in Frankfurt, or in Paris. The last was held in September or October 1998' ([68]).

(102) Both companies acknowledge that the basic cartel functions were developed through annual meetings throughout the 1990s. Indeed, company statements and documentary evidence has allowed the following cartel meetings to be identified:

— annual meeting 22 November 1990, probably in Antony near Paris (see section 3.4)

— annual meeting 1991

— annual meeting September or October 1992

— annual meeting(s) 5 October 1993, Paris, and/or 12 October 1993, Frankfurt

— annual meeting about 19 October 1994, Frankfurt

— annual meeting 4 October 1995, Frankfurt

— introduction of [Merck employee 2] 2 July 1996, Novotel La Defense, Paris

— annual meeting about 24 October 1996, Hotel Intercontinental, Frankfurt

— annual meeting 6 October 1997, Novotel La Defense, Paris

— annual meeting about 7 October 1998, Frankfurt

— final meeting between 1 and 4 November 1999, Frankfurt.

3.7. **Annual meeting, probably November or December 1991**

(103) Both parties confirm the meeting (see recitals 99 to 101).

(104) An internal RP note from [Aventis employee 3] of Rhône-Poulenc Rorer of 6 November 1991, which was copied to [Aventis employee 1], complains that [customer 2] has only ordered 13 700 kg of methylglucamine for 1992 instead of the usual amount of about 30 tonnes. He ends his note by writing 'This situation is unacceptable and I trust you to supply me with the arguments, which possibly will allow me to recover the volumes we had in the past' ([69]).

(105) Aventis states that the market-sharing agreement concerning [customer 2] was made in 1990 or 1991 ([70]). The note of [Aventis employee 3] confirms that the market-sharing agreement can be dated back to at least the annual cartel meeting of 1991, which probably took place in November or December.

([66]) Doc. 00025.
([67]) Doc. 00032—00033.
([68]) Doc. 9065—9066.
([69]) Doc. 00455, 'Cette situation est inadmissible et je compte sur vous pour me fournir les arguments qui me permettront, peut être, de retrouver les volumes que nous avions par le passé'.
([70]) Doc. 9066.

3.8. **Annual meeting September or October 1992**

(106) Both parties confirm the meeting (see recitals 99 to 101).

(107) RP issued its price list for methylglucamine on 2 November 1992 ([71]). This is very much in line with their behaviour following later and better-documented cartel meetings, and strongly indicates that the meeting took place in September or October 1992 ([72]).

3.9. **Annual meeting, Paris, 5 October 1993 and/or Frankfurt, 12 October 1993**

(108) Both parties confirm the meeting (see recitals 99 to 101).

(109) The travel documents of [Merck employee 1] show that he was in Paris on 5 and 6 October for a conference ([73]). The cartel meeting might well have taken place on this occasion. Travel documents of [Aventis employee 2] show that she was in Frankfurt on 12 and 13 October to meet Merck ([74]). It is also possible that the meeting took place on that occasion, or that an additional meeting was necessary to agree on prices and quotas for 1994.

(110) The RP price list was issued on 2 November 1993 ([75]). This is fully consistent with a meeting date in early October.

3.10. **Annual meeting 19 October 1994, Frankfurt**

(111) Both parties confirm the meeting (see recitals 99 to 101).

(112) [Merck employee 1] put in a claim for expenses in connection with a car journey to Frankfurt on 19 October 1994 ([76]). Moreover, in its response to the statement of objections, Merck confirms that the meeting took place on 19 October in Frankfurt ([77]).

(113) RP issued its price list on 2 November 1994 ([78]). This is fully in line with a meeting in mid October..

(114) From 1995 onwards it is possible to compare the 'list prices' ([79]) for methylglucamine. For 1995 Merck had a 'list price' of EUR 14,46 kg ([80]) for deliveries over two tonnes, while the corresponding price for Aventis was EUR 14,30 kg ([81]).

3.11. **Annual meeting, 4 October 1995, Frankfurt**

(115) Both parties confirm the meeting (see recitals 99 to 101).

(116) The Commission has in its possession a claim for expenses from [Merck employee 1] for a dinner held on the evening of 4 October 1995. The bill from the restaurant Casa Nova in Frankfurt has the names of [Merck employee 1], [Aventis employee 1] and [Aventis employee 2] written on it ([82]).

(117) RP issued its price list on 9 November 1995 ([83]), while Merck issued its price list two days before ([84]). The timing and coordination of the two announcements are a strong additional indicator that the cartel meeting was all important for determining the prices for 1996.

(118) For 1996 Merck had a 'list price' of EUR 15,36 kg ([85]) for deliveries over two tonnes, while the corresponding price for Aventis was EUR 16,24 kg ([86]).

3.12. **Introduction of [Merck employee 2], 2 July 1996, Novotel La Defense, Paris**

(119) According to [Merck employee 2], a meeting took place in Paris on 2 July 1996. The participants were [Merck

([71]) Doc. 00547.
([72]) Doc. 00547.
([73]) Doc. 02953.
([74]) Doc. 00752.
([75]) Doc. 00531.
([76]) Doc. 02862.
([77]) Merck response to the statement of objections, page 17, paragraph 46.
([78]) Doc. 00525.
([79]) The 'list prices' only account for about 20 % of the market. Most methylglucamine is sold to large customers according to special conditions. The prices may not be 100 % comparable (fluctuations of exchange rate, delivery conditions, packing).
([80]) Doc. 00055. Eurostat average exchange rate for January 1995 used in conversion.
([81]) Doc. 00525. Eurostat average exchange rate for January 1995 used in conversion.
([82]) Doc. 02781—02782.
([83]) Doc. 00500.
([84]) Doc. 00049—00050.
([85]) Doc. 00049. Eurostat average exchange rate for January 1996 used for conversion.
([86]) Doc. 00500. Eurostat average exchange rate for January 1996 used for conversion.

employee 1] and [Merck employee 2] from Merck and [Aventis employee 1] and [Aventis employee 2] from RP. The occasion of the meeting was the introduction of [Merck employee 2], who took over the responsibillity at Merck for marketing (among others of methylglucamine) from [Merck employee 1]. No discussion of prices or similar talks were held at this meeting. The participants agreed that they would get in touch during the course of the year ([87]).

(120) The meeting is also confirmed by travel expenses claims from [Merck employee 1] and [Merck employee 2] ([88]). Merck believes the meeting took place at Novotel La Defense where both men stayed ([89]).

(121) In its response to the statement of objections, Aventis argues that, as no discussions of prices or similar talks were held at the meeting, it should not be included among the list of cartel meetings ([90]):

(122) Although no specific discussions of prices or market sharing may have taken place at the meeting, it does play a role for the running of the cartel, as the purpose of the meeting was to introduce [Merck employee 2] as the new cartel contact point for Merck. The participants in the meeting were the same as in the other cartel meetings, the introduction procedure was the same as for [Merck employee 1] in 1989/1990 and, according to [Merck employee 2], the participants agreed that they would get in touch during the course of the year. From that moment on [Merck employee 2] attended cartel meetings. For those reasons the meeting will figure on the list of cartel meetings.

3.13. **Annual meeting, about 24 October 1996, Hotel Intercontinental, Frankfurt**

(123) Both parties confirm that an annual meeting took place in 1996 (see recitals 99 to 101).

(124) [Merck employee 2], who from then on replaced [Merck employee 1] at the annual meetings, provides a detailed account of the 1996 annual meeting ([91]). The following is a summary of that account.

(125) In autumn 1996, [Merck employee 2] received a telephone call from Aventis suggesting a meeting at the Hotel Intercontinental in Frankfurt. Probably in preparation for this meeting, [Merck employee 7] printed out on 23 October 1996 the marketing statistics for methylglucamine for the period January 1995 to September 1996 ([92]). [Aventis employee 1], [Aventis employee 2] and [Merck employee 2] participated in the meeting. They met in a hotel room which had been rented by Aventis. The participants agreed that a price increase of 2,5 % was to be aimed for. The participants proceeded here on the basis that the list prices should be raised by this margin, and that a price increase should also accordingly be aimed for with the larger customers who do not accept list prices. In addition it was agreed that Merck and Aventis should only offer list prices in relation to queries from customers of the other company, even for larger customers.

(126) On 24 October 1996, following the above meeting, [Merck employee 8] informed the sales department of Merck Darmstadt of the new prices for 1997 ([93]).

(127) The Merck pricelist is dated 24 October 1996 ([94]). The Commission does not have the corresponding RP price list.

(128) For 1997 Merck had a 'list price' of EUR 16,93 kg ([95]) for a delivery over two tonnes, while the corresponding price for Aventis was EUR 17,02 kg ([96]).

3.14. **Annual meeting 6 October 1997, Novotel La Defense, Paris**

(129) Both parties confirm the meeting (see recitals 99 to 101).

(130) The following is a summary of [Merck employee 2]'s account of the meeting ([97]).

(131) A further meeting took place on 6 October 1997. [Aventis employee 2] had telephoned [Merck employee 2] to arrange the meeting. The participants were the

([87]) Doc. 00029—00030, Doc. 00118.
([88]) Doc. 0057—0071.
([89]) Doc. 00029.
([90]) Aventis response to the statement of objections, pp. 20—21, paragraph 47.
([91]) Doc. 00030, Doc. 00118—00119.
([92]) Doc. 00072—00075.
([93]) Doc. 00076—00077.
([94]) Doc. 00076—00077.
([95]) Doc. 00076. Eurostat average exchange rate for January 1997 used in conversion.
([96]) Doc. 00490. Eurostat average exchange rate for January 1997 used in conversion.
([97]) Doc. 00031, Doc. 00120—00121.

same as in 1996. Like the year before [Merck employee 2] had asked for a print out of the sales statistics for methylglucamine. The participants first established that during the previous year, all customers had remained with their traditional suppliers. It was again agreed that the list price should increase by 2 to 3 %, and that a corresponding attempt should be made to increase the prices for the largest customers.

(132) As usual the information was passed by [Merck employee 2] to the [employee] responsible, and from the [employee] via the sales department to the companies of the Merck Group ([98]).

(133) [Merck employee 2] recalls that the meeting probably took place in the margins of the pharmaceutical ingredients conference (CphI) in Frankfurt. This recollection is mistaken as, according to the travel documents of [Merck employee 2], in which the reason for his journey to Paris is cited as 'meeting with Rhone-P' ([99]), the meeting did in fact take place in Paris, probably in Novotel La Defense where he was staying.

(134) In its response to the statement of objections, Aventis argues that it should be assumed that since the meeting took place in Paris, [Merck employee 2] would have contacted the representatives of RPB, not the contrary ([100]).

(135) The Commission fails to see any relationship between the two issues, and consequently sees no reason to question [Merck employee 2]'s statement that he was contacted by [Aventis employee 2], on the basis that he was mistaken about the venue of the meeting.

(136) Merck issued its price list of 13 October 1997 ([101]), while the RP price list is dated 1 December 1997 ([102]).

(137) For 1998 Merck had a 'list price' of EUR 17,21 kg ([103]) for deliveries over two tonnes; the corresponding price for Aventis was EUR 17,38 kg ([104]).

([98]) Doc. 00088—00089.
([99]) Doc. 00078—00087.
([100]) Aventis response to the statement of objections, page 21, paragraph 49.
([101]) Doc. 00088—00089.
([102]) Doc. 00485.
([103]) Doc. 00088. Eurostat average exchange rate for January 1998 used for conversion.
([104]) Doc. 00485. Eurostat average exchange rate for January 1998 used for conversion.

3.15. **Annual meeting, about 7 October 1998, Frankfurt**

(138) Both parties confirm the meeting (see recitals 99 to 101).

(139) The following is a summary of [Merck employee 2]'s account of the meeting ([105]).

(140) A meeting took place either in London or Frankfurt in autumn 1998. Once again [Aventis employee 2] telephoned [Merck employee 2] to arrange the meeting. The participants were the same as in previous years. Probably in preparation for this meeting, [Merck employee 10], printed out statistics for methylglucamine on 7 October 1998 ([106]). Prices were again discussed at this meeting.

(141) On 9 October 1998, [Merck employee 10] informed the sales department and some of the companies of the Merck Group of the new prices for 1999 ([107]).

(142) Aventis confirms explicitly that a meeting took place in September or October 1998. Aventis also claim that this was the last of the meetings of the cartel ([108]).

(143) A travel document of [Aventis employee 2] shows that she was in Frankfurt on 6 to 8 October 1998, and that her programme ([109]) included a meeting with Merck. This fits very well with the information from [Merck employee 2].

(144) The Merck pricelist is dated 9 October 1998 ([110]), while the RP pricelist is dated 1 December 1998 ([111]).

(145) For 1999, Merck had a 'list price' of EUR 17,90 kg ([112]) for deliveries above two tonnes; the corresponding price for Aventis was EUR 17,99 kg ([113]).

([105]) Doc. 00031—00032, Doc. 00121.
([106]) Doc. 00090—00098.
([107]) Doc. 00097—00100.
([108]) Doc. 9066.
([109]) Doc. 00743.
([110]) Doc. 00097—00098.
([111]) Doc. 00481.
([112]) Doc. 00097. Eurostat average exchange rate for January 1999 used for conversion.
([113]) Doc. 00481. Eurostat average exchange rate for January 1999 used for conversion.

3.16. **The end of the cartel**

(146) The two companies differ considerably in their descriptions of how the cartel ended.

(147) According to [Merck employee 2], the last meeting of the cartel took place at the Hotel Intercontinental in Frankfurt in autumn 1999 ([114]). The following is a summary of his account of the meeting.

(148) The same representatives from Merck and Aventis participated at this meeting, as at the previous meeting. A price increase was again agreed. In addition, at this meeting the representatives from Aventis mentioned to [Merck employee 2] that Aventis had been able to deliver significantly larger quantities to [Customer 4]. Aventis wished to know how this arose. The background to the loss of these deliveries of approximately 21 tonnes was that Aventis quoted its prices worldwide in French francs, whereas Merck fixed its prices for Europe in German marks, and for the rest of the world in US dollars. As a result, Merck was too expensive in the US in 1999. [Merck employee 2] had explained that Merck had later reduced prices, and also intended to compensate for currency fluctuations in this manner in the future. The representatives from Aventis agreed to this course of action.

(149) According to [Merck employee 2], the issue of how the participants of the meeting ought to react in case of investigations regarding the methylglucamine meetings by the authorities was also discussed. It was agreed that the participants should, if officially questioned about their contacts, admit to only occasional, coincidental contacts, as is common, for example, between competitors at fairs. [Merck employee 2]'s impression was that [Aventis employee 1] knew about the agreements in the vitamins sector. The new position of [Aventis employee 1] following the merger of between RP and Hoechst was discussed ([115]).

(150) At Merck, the new prices for 2000 were announced by [Merck employee 5] on 15 and 19 October 1999 ([116]). However, already on 4 October 1999, [Merck employee 2] instructed [Merck employee 5] by e-mail to announce a price increase for Brazil ([117]).

(151) As mentioned above, the Aventis version of events differs considerably from that of Merck. According to Aventis, the last formal meeting of the cartel took place in September or October 1998. A meeting did take place between the parties in November 1999, during which Aventis informed Merck about the termination of the agreement.

(152) Indeed, in its response to the statement of objections, Aventis makes the following statement 'Contrary to the assertion in the statement of objections that "Aventis disputes" that a meeting took place in 1999, RPB does not dispute that a meeting took place at that time. It does dispute that a cartel meeting took place. RPB's reply of 1 February 2002 states that the last meeting at which the parties discussed prices and customers in furtherance of their agreement took place in autumn 1998. In November 1999, a meeting did indeed take place between [Aventis employee 1], [Aventis employee 2] and [Merck employee 2], who were attending the Conference for Pharmaceutical Ingredients (CphI) in Frankfurt. During the CphI [Aventis employee 1] informed Merck of the termination of the meglumine agreement'.

(153) '[Aventis employee 1] addressed two issues with [Merck employee 2] that had prompted [Aventis employee 1]'s decision to terminate the agreement with Merck. The first issue concerned [Aventis employee 1]'s new position following the merger of Rhône-Poulenc SA and Hoechst AG. [Aventis employee 1] explained to [Merck employee 2] that the […] sales departments of RPB and Hoechst Marion Roussel SA (a subsidiary of Hoechst AG) would merge and be placed under the leadership of [Aventis employee 1]'s counterpart at Hoechst Marion Roussel. Consequently, [Aventis employee 1] explained that he would no longer have final authority for the pricing of products, including meglumine, and that he could not commit to any further understandings concerning meglumine as a result.'

(154) 'The second issue concerned investigations in the vitamins sector. It was common knowledge between the parties at the November 1999 meeting that government authorities had been investigating allegations of anti-competitive behaviour with respect to certain vitamins. At no time did the meeting participants discuss how to react in the event government authorities investigated sales activities with respect to meglumine. According to [Aventis employee 1], there was no reason to have such a discussion, as meglumine was a low-volume and unprofitable product, and neither party anticipated an investigation into their activities. [Aventis employee 1] also assumed that if government authorities conducted an investigation concerning the sales of meglumine, the truth would come to light from him or other sources' ([118]).

(155) The implication of Merck's version of events is that as new prices were agreed in the autumn 1999 meeting

([114]) Doc. 00032—00033, Doc. 00121—00122.
([115]) Doc. 00122.
([116]) Doc. 00105—00110.
([117]) Doc. 00112—00113.
([118]) Aventis response to the statement of objections, pp. 7—8, paragraphs 15—17.

and as no further contacts were undertaken between the participants, the infringement ended with the meeting between Merck and the Commission on 27 September 2000.

(156) The implication of Aventis version of events is that the infringement ended on 31 December 1999, the last day the prices agreed at the 1998 meeting were applicable.

(157) Travel documents seized from the office of [Aventis employee 2] show that she was in Frankfurt on 29 and 30 September to meet Merck ([119]). Such a date for a cartel meeting would tie in well with Merck's announcement dates for the new prices (see recital 150), and would seem to confirm the Merck version of events.

(158) In its response to the statement of objections, Merck provides an explanation by making the following statement '[Aventis employee 2] was in Frankfurt on 29 and 30 September 1999 for a [another product] customer meeting with Merck, not to discuss meglumine as assumed in the statement of objections. [Aventis employee 1] did not attend this meeting. [Aventis employee 2] attended the meeting alone in her [professional capacity]' ([120]).

(159) An internal Merck e-mail exchange of October 1999 has also been used to demonstrate the validity of the Merck version of events. On 19 October, after having been informed of the new prices for 2000, [Merck employee 9] sent an e-mail to [Merck employee 5] asking to decrease the price for [customer 2], as his target for the following year was not to increase the price but to get more market share. The e-mail was forwarded to [Merck employee 2] by [Merck employee 5], who asked whether a price reduction was sensible. In his answer to [Merck employee 5] dated 25 October, [Merck employee 2] made the following comment: 'no, that is not in our intention!!!! We do not want additional market share but want to keep our current market share with a higher price. [Customer 5] is ok but the price for [customer 2] is 108,– FF. Please inform [Merck employee 9] about this. If he has problems he should call me' ([121]).

([119]) Doc. 00736—00738.

([120]) Aventis response to the statement of objections, page 10, paragraph 21.

([121]) Doc. 00044—00045 'nein das ist nicht in unserem Sinn!!!! Wir wollen keinen zusätzlichen Marktanteil, sondern unseren bestehenden MA mit einem höheren Preis halten. [Customer 5] ist o.k., aber der Preis für [Customer 2] ist FF 108,–. Bitte teilen Sie dies [Merck employee 9] mit. Falls er Probleme hat, soll er mich anrufen'.

(160) The forceful statement from [Merck employee 2] indicates that both the cartel and the market-sharing agreement concerning [customer 2] mentioned by Aventis were in force at the time.

(161) In its response to the statement of objections, Aventis argues that 'legitimate business strategies, not the existence of a cartel, could have easily motivated the decision to increase prices rather than market share' ([122]).

(162) In any case the Merck e-mail exchange does not strictly speaking contradict the Aventis version of events, as according to Aventis it was only in early November 1999 that Aventis informed Merck of the termination of the agreement.

(163) For 2000, Merck had a 'list price' of EUR 18,15 kg ([123]) for deliveries over two tonnes; the corresponding price for Aventis was EUR 18,60 kg ([124]). The difference in 'list prices' is considerably larger than in previous years.

(164) The Commission is not in the possession of hard evidence, which would make it possible for it to decide which of the two versions of events is the correct one.

(165) Consequently, for the purpose of this Decision, the time period used as a basis for the assessment of any fine ends on 31 December 1999, which was the last day of validity for the prices agreed in the 1998 cartel meeting. None of the parties will be credited with having taken the initiative to end the infringement.

PART II — LEGAL ASSESSMENT

1. **JURISDICTION**

(166) The arrangements applied to the world market and therefore to the whole territory of the EEA, as the cartel members had sales worldwide, as well as in the majority of the Member States, and one of them to one of the EFTA countries party to the EEA Agreement ([125]).

([122]) Aventis response to the statement of objections, page 10, paragraph 20.

([123]) Doc. 00105. Eurostat average exchange rate of January 2000 used for conversion.

([124]) Doc. 00787. Eurostat average exchange rate of January 2000 used for conversion.

([125]) Doc. 00696.

(167) The EEA Agreement contains provisions analogous to the Treaty. This Decision includes the application of the EEA competition rules from 1 January 1994, the date on which the Agreement came into force ([126]).

(168) In so far as the arrangements appreciably affected competition and trade between EU Member States, Article 81 of the Treaty is applicable. In so far as the cartel operations had an appreciable effect on trade between EFTA countries party to the EEA Agreement and the Community, Article 53 of the EEA Agreement is applicable.

(169) Pursuant to Article 56(1)(c) of the EEA Agreement, the Commission is the competent authority regarding an infringement of Article 53(1) of the EEA Agreement when the infringement appreciably affects trade between the Member States. This applies to the present case.

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

2.1. Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement

(170) Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement, respectively, prohibit as incompatible with the common market and with the functioning of the EEA Agreement all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States/contracting parties and which have as their object or effect the prevention, restriction or distortion of competition within the common market/the territory covered by the EEA Agreement, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production and markets or share markets or sources of supply.

2.2. Agreements and concerted practices

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

(172) An agreement can be said to exist when the parties adhere to a common plan which limits or tends 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 behavior of the parties.

(173) In its judgment in Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij NV and others* v *Commission* (PVC II), the Court of First Instance of the European Communities ([127]) stated 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' ([128]). Thus, an agreement for the purposes of Article 81(1) of the Treaty and/or Article 53(1) of the EEA Agreement does not require the same certainty as would be necessary for the enforcement of a commercial contract at civil law.

(174) Case-law does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors. However, it strictly precludes any direct or indirect contact between such operators the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market ([129]).

(175) Thus conduct may fall under Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement as a 'concerted practice' even where the parties have not subscribed to a common plan defining their action in the market but adopt or adhere to collusive devices which facilitate the coordination of their commercial behaviour ([130]).

(176) The Commission is not required to characterise an infringement as exclusively an agreement or a concerted practice. The concepts are fluid and may overlap. It would be artificial analytically to subdivide what is clearly a continuing common enterprise having one and

([126]) See Final Act of the Agreement on the European Economic Area (OJ L 1, 3.1.1994, p. 3).

([127]) The case-law of the Court of Justice and the Court of First Instance in relation to the interpretation of Article 81 EC applies equally to Article 53 EEA.

([128]) [1999] ECR II-931, paragraph 715.

([129]) Joined Cases 40—48/73, etc. *Suiker Unie and others* v *Commission* [1975] ECR 1663.

([130]) See judgment in Case C-49/92 P *Commission* v *Anic Partecipazioni SpA* [1999] ECR I-4125, paragraph 81.

the same overall objective into several discrete forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time ([131]).

2.3. **Single, continuous infringement**

(177) From 22 November 1990 to the end of December 1999, there is ample evidence to show the existence of a single and continuous collusion in the world market for methylglucamine between Merck and Aventis which together account for close to 100 % of the market. Indeed the parties designed and adhered to a common global plan to limit their individual commercial conduct in virtually every area where they could have competed. The agreement to enter into this global plan with a view to restricting competition can be dated back to at least 22 November 1990. This collusion was in pursuit of a single anti-competitive economic aim: preventing any price competition by agreeing on most parameters of competition in the market for methylglucamine.

(178) Both Merck and Aventis subscribed to this plan. It was developed and implemented over a period of almost 10 years, through a complex of collusive arrangements, specific agreements and/or concerted practices, complementing the basic agreement on price fixing and market sharing by allocation of individual customers, pursuing the same common purpose of eliminating competition between them. The participants in these unlawful conducts knew or ought to have known that it was part of an overall plan in pursuit of that common unlawful object.

(179) Given the common design and common objective of eliminating competition in the EEA market for methylglucamine, the Commission considers that the complex of collusive arrangements arrangement mentioned above has as its object the restriction of competition within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement. These arrangements are described in detail in the factual part of the present Decision. The conduct in question therefore constituted a single continuing infringement of Article 81(1) of the Treaty and of Article 53(1) of the EEA Agreement.

2.4. **Restriction of competition**

(180) The agreement in the present case had the object and effect of restricting competition.

([131]) See judgment in Case T-7/89 *Hercules* v *Commission* [1991] ECR II-1711, paragraph 264.

(181) Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement expressly mention as restricting competition agreements which, *inter alia*:

— directly or indirectly fix selling prices or any other trading conditions,

— limit or control production, markets or technical development,

— share markets.

(182) These are the essential characteristics of the horizontal arrangements under consideration in this case, price being the main instrument of competition. The various collusive arrangements and mechanisms adopted by the producers were all ultimately aimed at fixing the price and removing any competition on price. Market sharing and price fixing by their very nature restrict competition within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

(183) In order to conclude that Articles 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 ([132]).

(184) The effect upon competition of the cartel has to be considered as a whole and in the light of the totality of the circumstances, but in the complex of agreements and arrangements, 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:

— exchanging price and and customer-related sensitive information (see recitals 76 to 78),

— market sharing by allocating customers (see recitals 90 to 97),

— agreeing concerted prices and price increases (see recitals 83 to 85),

— adapting individual conduct and pricing in order to ensure the maintenance of the agreed market sharing (see recitals 90 to 97),

([132]) Judgment, *Ciment* [2000] 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* [1998] ECR II-3196, paragraph 136, where the Court has stated this in specific relation to price-fixing agreements.

— participating in regular meetings and having other contacts in order to agree the above restrictions and to implement and/or modify them as required (see recitals 99 to 101).

2.5. **Effect upon trade between the Member States and between the EEA contracting parties**

(185) Article 81 of the Treaty prohibits all agreements 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.

(186) Article 53 of the EEA Agreement prohibits all agreements which may affect trade between EEA States and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement.

(187) Between them Merck and Aventis have 100 % of the Community and EEA market for methylglucamine.

(188) For both Merck and Aventis, export represents the large majority of income on methylglucamine.

(189) Therefore over the period considered, the continuing cartel agreement between the producers of methylglucamine had an appreciable effect upon trade between Member States. In the EEA, though the level of sales is rather low, the agreement had an appreciable effect, both directly, as the parties did some direct sales in particular in Norway, and indirectly, as the price of the end product was affected by the existence of the cartel in the EEA as in the rest of the relevant geographic market.

(190) In its response to the statement of objections, Aventis questions whether it is correct that the cartel covered the large majority of the EEA, and whether the agreement had any appreciable effect in EFTA.

(191) Documents provided by Merck and RPB indicate that in 1998 and 1999, both producers sold to only 10 Member States and no EFTA country. Whether 10 out of 18 countries constitutes a 'large majority of the EEA' is, in their opinion questionable ([133]).

(192) This argument must be rejected. Although the producers did not sell directly to all the countries in the EEA, the agreement had at least an indirect effect in all or nearly all of them. Furthermore, the countries which did buy methylglucamine directly included all the largest and most populous Member States of the EEA.

(193) As Merck and Aventis controlled 100 % of the world market for methylglucamine, the fact that little or no methylglucamine was exported directly to the EFTA countries only reflect that these countries were not producing products containing methylglucamine themselves. There can be no doubt that the EFTA countries had a considerable import of such products, and that the indirect effect was therefore considerable.

2.6. **Provisions of competition rules applicable to Austria, Finland, Norway and Sweden**

(194) 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 the present 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.

(195) In the period 1 January to 31 December 1994, the provisions of the EEA Agreement applied to the six EFTA Member States; 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 these six EFTA states during this one-year period falls under Article 53(1) of the EEA Agreement.

(196) 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 remained in violation of Article 53(1) of the EEA Agreement.

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

2.7. **Duration of the infringement**

(198) The Commission has information that the parties designed and adhered to a common agreement with a view to restricting competition at least as from the

([133]) Aventis response to the statement of objections, pp. 22—23, paragraph 54.

meeting held on 22 November 1990 (see recitals 73 to 74). As regards the Community, for the purpose of this Decision the infringement is therefore established with effect with the meeting on 22 November 1990. For EFTA the infringement starts with the entry into force of the EEA Agreement on 1 January 1994.

(199) As explained in recital 164, the Commission does not have enough hard evidence to determine which of the conflicting views on the exact finishing date for the cartel is correct.

(200) The prices agreed at the last mutually recognised cartel meeting in 1998 were valid until 31 December 1999. For this reason, for the purpose of this Decision the end of the infringement will be taken to be be 31 December 1999.

(201) For the purpose of the present proceedings, it is established that both producers committed an infringement of Article 81(1) of the Treaty and of Article 53(1) of the EEA Agreement from 22 November 1990 to 31 December 1999.

2.8. **Liability for the infringement**

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

2.8.1. *Principles applicable*

(203) The subject of Article 81 of the Treaty and Article 53 of the EEA Agreement is the 'undertaking', a concept that is not identical with the notion of corporate legal personality in national commercial company or fiscal law. The term 'undertaking' is not defined in the Treaty, nor in the EEA Agreement. It may refer to any entity engaged in a commercial activity. In the context of large corporate groups, the whole group or individual subgroups or subsidiary companies ([134]) may be treated as an 'undertaking' for purposes of Article 81 of the Treaty and/or Article 53 of the EEA Agreement.

([134]) The issue of who is the appropriate addressee of proceedings is entirely separate from the question of whether 'agreements' between companies in the same group can fall under Article 81 of the Treaty or Article 53 of the EEA Agreement.

(204) In order to determine whether a parent company should be held responsible for the unlawful conduct of a subsidiary, it is necessary to establish that the subsidiary 'does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company' ([135]).

(205) 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, 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.

(206) When an undertaking commits an infringement of Article 81(1) of the Treaty and/or Article 53(1) of the EEA Agreement and later disposes of the assets that were the vehicle of the infringement and withdraws from the market concerned, the undertaking in question will still be held responsible for the infringement if it is still in existence ([136]).

(207) If the undertaking which has acquired the assets carries on the violation of Article 81(1) of the Treaty and/or Article 53(1) of the EEA Agreement, liability for the infringement should be apportioned between the seller and the acquirer of the infringing assets ([137]).

2.8.2. *Addressees*

(208) Over the entire period of reference for the establishment of the infringement, Merck KgaA participated directly in the cartel. They will consequently be addressees of this Decision.

(209) Rhône-Poulenc Biochimie (RPB) produces methylglucamine and directly took part to the infringement as it was represented in the meeting where the original anticompetitive agreement was agreed as well as in all subsequent meetings described above. In its response to the statement of objections, Aventis states, 'The infringement has been committed by RPB and by no other affiliated company. Indeed the activities

([135]) Case 48/69 *Imperial Chemical Industries* [1972] ECR 619 paragraphs 132—133.

([136]) Case T-6/89 *Enichem Anic SpA* v *Commission* (Polypropylene) [1991] ECR II 1623, Case C-49/92 P *Commission* v *Anic Partecipazioni SpA* [1999] ECR I-4125, paragraph 81.

([137]) Commission Decision 89/190/EEC in Case IV/31.865 — PVC, paragraph 43 (OJ L 74, 17.3.1989, p. 1).

covered by the statement of objections relate exclusively to RPB' ([138]). They will consequently be the addressees of this Decision.

(210) In the statement of objections, the Commission included Aventis Pharma SA among the addressees, stating the following reasons for that decision.

(211) 'Notably, correspondence between the parties and the Commission shows that the defence of RPB is effectively being handled by Aventis Pharma. Correspondence from the lawyers is being copied to [Aventis employee 4] and [Aventis employee 5] ([139]). This connection shows that Aventis Pharma exercises effective influence over RPB'.

(212) 'RPB belongs 100 % to Aventis Pharma (previously RP Rorer), which again belongs 100 % to Aventis SA. While it does appear that that the day-to-day decisions concerning methylglucamine was taken by the commercial director of RPB ([Aventis employee 1]), the note of from [Aventis employee 3] from RP Rorer of 6 November 1991 shows clearly that RP Rorer (later Aventis Pharma) followed the commercial behaviour of RPB very closely ([140]). Such monitoring even went up to the point where RP Rorers representatives gave instructions vis-a-vis one client to representatives of RPB. Aventis claims that [Aventis employee 3] was working under the direction of [Aventis employee 1] ([141]). It remains to be explained however, why the note of 6 November 1991 was written on RP Rorer paper. On the basis of the above the Commission has decided to address the statement of objections to Aventis Pharma SA'.

(213) In its response to the statement of objections, Aventis argues that only RPB should be held responsible for the infringement. The only argument in support of this claim is the statement cited in recital 209 ([142]). Aventis does not attempt to explain the circumstances under which [Aventis employee 3] wrote the note of 6 November 1991, nor does it address the influence of Aventis Pharma on decision making in Rhône-Poulenc Biochimie.

(214) It follows that, in its response to the statement of objections, Aventis does not address any of the Commission's arguments brought forward in the statement of objections. Aventis Pharma SA will be an addressee of this Decision, and will be considered as jointly and severally liable for any fine imposed.

([138]) Aventis response to the statement of objections, page 3, paragraph 7, and page 28, paragraph 71.
([139]) Doc. 8929—8930.
([140]) Doc. 00455.
([141]) Doc. 8926.
([142]) Aventis response to the statement of objections, page 3, paragraph 7.

(215) On the basis of the considerations set out above, the Decision will be addressed to the following undertakings:

— Merck KgaA

— Rhône-Poulenc Biochimie SA

— Aventis Pharma SA.

3. **REMEDIES**

3.1. **Article 3 of Council Regulation No 17**

(216) Where the Commission finds that there is an infringement of Article 81 of the Treaty or of Article 53 of the EEA Agreement, it may require the undertakings concerned to bring such infringements to an end in accordance with Article 3 of Council Regulation No 17.

(217) The undertakings 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 or concerted practice which may have the same or similar object or effect, including any exchange of commercial information by which the participants are directly or indirectly informed of their mutual individual sales data.

3.2. **Article 15(2) of Regulation No 17**

(218) Pursuant to Article 15(2) of Regulation No 17, the Commission may by decision impose upon undertakings fines of from EUR 1 000 to EUR 1 million, 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.

(219) The Commission intends to impose fines in this case for the abovementioned infringements on the undertakings to which this Decision is addressed.

(220) In setting the amount of any fine the Commission must have regard to all relevant circumstances and particularly the gravity and the duration of the infringement.

(221) 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 geographic market. The role played by each undertaking party to the infringement will be assessed on an individual basis.

(222) In relation to each undertaking, the Commission will reflect in the fine imposed any aggravating or mitigating circumstances and will apply, as appropriate, the Leniency Notice. This assessment can only however be made at the end of this Decision.

(223) Any fines should be set at a level that ensures sufficient deterrence.

3.3. **The amount of the fine**

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

3.3.1. *The basic amount*

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

3.3.1.1. Gravity

(226) 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.

3.3.1.2. Nature of the infringement

(227) The present infringement consisted of market-sharing and price-fixing practices, which are by their very nature the worst kind of violation of Article 81(1) of the Treaty and 53(1) of the EEA Agreement.

(228) By its very nature, the implementation of a cartel agreement of the type described above leads automatically 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.

(229) The Commission therefore considers that the present infringement constituted a very serious infringement of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

3.3.1.3. The actual impact of the infringement on the methylglucamine market in the EEA

(230) The infringement was committed by undertakings which for the duration of the cartel covered the entire world market for methylglucamine. Given that the arrangement was specifically aimed at raising prices higher than they would otherwise have been, and that these arrangements were implemented, they had an actual impact on the market.

(231) 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 the price development of the product, thereby making it extremely difficult to draw conclusions on the relative importance of all possible causal effects.

(232) In its response to the statement of objections, Aventis argues that the infringement had few, if any, effects on prices paid by final customers for the contrast products, because the cost of methylglucamine is such a small part of the total cost. Aventis analyses the cost structure for nine products. The highest share for methylglucamine is 2,03 % of the retail price ([143]).

(233) The Commission must reject this argument, as not relevant to the issue at hand. The share of the total price of the end product that methylglucamine makes up is irrelevant to the impact of the infringement.

3.3.1.4. The size of the relevant geographic market

(234) Every part of the common market and the EEA was under the influence of the cartel, either directly or indirectly. For the purposes of calculating gravity, the Commission therefore considers the entirety of the Community and, following its creation, the EEA, to have been affected by the cartel.

([143]) Aventis response to the statement of objections, pp. 30—31, paragraphs 74—75.

3.3.1.5. Conclusion on the gravity of the infringement

(235) Taking into account the nature of the behaviour under scrutiny, its actual impact on the methylglucamine market and the fact that it influenced 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 Articles 81(1) of the Treaty and 53(1) of the EEA Agreement. Nevertheless, without prejudice to the very serious nature of the infringement, the Commission will, in this case, also take into consideration the limited size of the product market in terms of value.

3.3.2. *Classification of cartel participants*

(236) 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.

(237) In the present case, which involves only two undertakings, which by definition are both indispensable for the working of the cartel (being the only actors on the market in question), it will not be necessary to classify the cartel participants.

(238) On the basis of the above the basic amounts of the fines determined for gravity as follows:

— Merck KgaA: EUR 2,5 million

— Rhône-Poulenc Biochimie SA/Aventis Pharma SA: EUR 2,5 million.

3.3.2.1. Sufficient deterrence

(239) 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 starting amount is needed for any undertaking.

(240) In its response to the statement of objections, Aventis argues that because Aventis has cooperated with the Commission on previous cases and did try to uncover possible cartels in the company, the fine should not be increased to ensure a sufficient deterrent effect.

(241) Aventis states, 'It should be emphasised that Rhône-Poulenc SA (and subsequently its successor Aventis SA) and various of their affiliates undertook important internal investigations into potential violations of EC competition law. In this respect, it should be recalled that they disclosed to the Commission two of the largest cartels revealed until now, i.e, the vitamins and the methionine arrangements. In the same spirit, the Respondent questioned its employees with the goal of shedding light on the existence of any anti-competitive arrangements' ([144]).

(242) The Commission recognises that Aventis provided valuable information in the vitamins and methionine cases ([145]). However the Commission cannot subscribe to the principle that because the company has cooperated in one case, it should receive a lower fine in another. Aventis was rewarded for its cooperation with leniency in these previous cases, it would not be reasonable for this leniency to extend to other cases. Similarly, the efforts of Aventis did lead to the discovery of one or more cartels in the company, and Aventis was rewarded for its information with leniency. It would not be reasonable for the fines to be reduced just because Aventis tried to find information about a cartel.

(243) In its response to the statement of objections, Merck points out that it is a much smaller company than Aventis, and that its production capacity for methylglucamine is smaller than that of Aventis ([146]).

(244) The Commission accepts than Aventis as a whole is a much larger company than Merck. However, for the purpose of this Decision, the addressee is not Aventis SA, but its subsidiaries Aventis Pharma SA and Rhône-Poulenc Biochimie SA. The Commission further notes that both these companies are smaller than Merck.

(245) As described in recital 14, the Commission has not been able to determine with certainty which of the two parties has the largest production capacity. It is worth noting however that in the EEA Merck has had somewhat larger sales of methylglucamine than Aventis in recent years (see recitals 7 and 8).

([144]) Aventis response to the statement of objections, pp. 32—33, paragraphs 80—81.

([145]) Commission decisions of 21 November 2001 (case 37.512) and of 2 July 2002 (case 37.519).

([146]) Merck response to the statement of objections, pp. 10—11, paragraphs 23—24.

(246) In 2001 Merck had a total turnover of EUR 7 528 million ([147]). In the same year the turnover for RPB was EUR [around 110] million ([148]) and for Aventis Pharma SA [around EUR 2 billion] ([149]).

(247) On the basis of the above, the need for deterrence requires that the starting point of the fine determined in recital 238 should be increased by 100 % to EUR 5,0 million as regards Merck. No multiplying factor will be applied to Aventis Pharma/Rhône-Poulenc Biochimie.

3.3.3. *Duration of the infringement*

(248) Rhône-Poulenc Biochimie and Merck KgaA have infringed Article 81(1) of the Treaty from November 1990 to 31 December 1999 and Article 53(1) of the EEA Agreement from 1 January 1994 until 31 December 1999. It is therefore concluded that all parties infringed Article 81(1) of the Treaty for a period of nineyears, and Article 53(1) of the EEA Agreement for a period of six years. The starting amount of the fine should therefore be increased by 90 % for both.

3.3.4. *Conclusion on the basic amounts*

(249) Basic amounts of the fines should therefore be set as follows:

— Merck KgaA: EUR 9,5 million

— Rhône-Poulenc Biochimie SA/Aventis Pharma SA: EUR 4,75 million.

3.3.5. *Aggravating circumstances*

3.3.5.1. Role of leader in the infringement

(250) In their responses to the statement of objections both parties attempt to demonstrate that they did not act as a leader in the cartel. There are no indications in the file that either party played the role of ringleader.

(251) The Commission considers that no specific ringleader can therefore be identified.

([147]) Fax from Freshfields Bruckhaus Deringer of 21 October 2002.
([148]) Doc. 8935.
([149]) Fax from Jones, Day, Reavis & Pogue of 31 October 2002.

3.3.6. *Attenuating circumstances*

(252) In its response to the statement of objections, Aventis argues that the depressed state of the methylglucamine market should be seen as an attenuating circumstance ([150]).

(253) The Commission does not consider that it can be stated that the methylglucamine market as a whole can be characterised as a market in crisis because the market is stagnating or slowly declining. In general, the stagnating or declining state of a market does not constitute an attenuating circumstance in the fixing of a fine.

(254) In its response to the statement of objections, Aventis argues that the fact that it terminated the infringement prior to the Commission's inspection at RPB's premises on 15 January 2001 should be seen as an attenuating circumstance ([151]).

(255) The Commission notes firstly that in principle early termination is not taken into account as an attenuating circumstance in cartel cases which represent hard-core infringements, the continuation of which after the intervention of the Commission can even be seen as an aggravating circumstance.

(256) Secondly it makes no sense to speak of early termination for past infringements which lasted many years and could be terminated for different reasons.

(257) Thirdly, as discussed in recitals 146 to 164, the Commission has been unable, on the basis of the evidence submitted to it, to determine if the infringement terminated as a result of Aventis/RPB initiative in November 1999 or as a result of the meeting between the Commission services and Merck on 27 September 2000.

(258) Consequently, the simple fact that the infringement was terminated prior to the Commission's inspections at RPB's premises cannot be seen as an attenuating circumstance.

(259) In its response to the statement of objections, Aventis points out that it has initiated extensive compliance programmes, which resulted in the disclosure of other agreements. It was a mistake that the methylglucamine agreement was not identified and disclosed to the Commission ([152]).

(260) The Commission welcomes the fact that Aventis has set up an antitrust law compliance policy. It nevertheless considers that this initiative cannot, as a prevention

([150]) Aventis response to the statement of objections, pp. 34—35, paragraphs 86—87.
([151]) Aventis response to the statement of objections, page 35, paragraph 88.
([152]) Aventis response to the statement of objections, page 33, paragraph 83.

tool, dispense the Commission from its duty to sanction infringement of the competition rules. The Commission will not consider the adoption of the compliance programme by Aventis as a mitigating circumstance justifying a reduction in fine.

(261) It is therefore concluded that there are no mitigating circumstances applicable to the participants in the present infringement affecting the methylglucamine market.

3.3.7. *Application of the Leniency Notice*

(262) To various degrees the adressees of the this Decision have cooperated with the Commission at different stages of the investigation into the infringement for the purpose of receiving 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 following section examines whether the parties concerned satisfied the conditions set out in the Notice.

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

(263) Merck submits that it meets the conditions set out in both the 1996 and 2002 Leniency Notices in order to obtain an exemption from the fine that would otherwise have been imposed ([153]).

(264) Merck argues that based on legal principles in Community and Member State law, through technically the 1996 notice applies, it should benefit from the 2002 Leniency Notice in so far as it is more lenient.

(265) Merck points out that it met with the competent Commission officials on 27 September 2000 and expressed its wish to cooperate with the Commission. Merck gave an oral description of the cartel activity and sent the Commission a more detailed written account on 20 October 2000. Merck was thereby the first company to submit evidence which enabled the Commission to adopt a decision to carry out an investigation ([154]).

(266) Merck also points out that they cooperated fully, on a continuous basis and expeditiously throughout the Commission's administrative procedure and provided the Commission with all evidence in its possession or available to it ([155]).

(267) Merck also points out that it ended its involvement at the latest at the time when it submitted its evidence to the Commission. Furthermore it did not take any steps to coerce RPB to participate in the infringement ([156]).

(268) As to the applicable leniency regime, the Commission stated in paragraph 28 of the 2002 Commission notice on immunity from fines and reduction of fines in cartel cases ([157]) that 'From 14 February 2002, this notice replaces the 1996 notice for all cases in which no undertaking has contacted the Commission in order to take advantage of the favourable treatment set out in that notice'. Merck first contacted the Commission concerning this case in 2000. Consequently the 2002 notice is not applicable in the present case.

(269) The Commission accepts that Merck was the first undertaking to submit decisive information on the existence of a cartel affecting the EEA in the methylglucamine industry. That information was first provided in a meeting on 27 September 1999 in Brussels between Merck and the Commission after which the Commission carried out an investigation at the premises of Rhône-Poulenc Biochimie. Merck therefore fulfills the conditions as set out in Section B of the 1996 Leniency Notice.

(270) The Commission notes that it has been satisfied with the cooperation offered by Merck.

(271) The Commission finally notes that Merck did not substantially contest the facts described in the Commission's statement of objections.

(272) Merck should therefore be granted a 100 % reduction of the fine that would otherwise have been imposed had it not cooperated with the Commission.

3.3.7.2. Substantial reduction in a fine ('Section C')

(273) Aventis Pharma or Rhône-Poulenc Biochimie were not the first to provide the Commission with decisive

([153]) Merck response to the statement of objections, page 22, paragraph 59.
([154]) Merck response to the statement of objections, page 35, paragraph 97.
([155]) Merck response to the statement of objections, page 35, paragraph 99.
([156]) Merck response to the statement of objections, page 35, paragraph 100.
([157]) OJ C 45, 19.2.2002, p. 45.

information on the methylglucamine cartel, as required under point (a) of Section C of the Leniency Notice. Consequently none of the undertakings meet the conditions as set out in Section C.

3.3.7.3. Significant reduction of a fine ('Section D')

(274) Aventis argues that it meets and even exceeds all of the conditions necessary to benefit from a significant reduction of the fine ([158]).

(275) Concerning the level of cooperation offered, Aventis makes the following statements.

(276) 'Providing its fullest cooperation in response to the Commission's Article 11 request for information, the Respondent undertook substantial efforts to gather all existing materials relating to the methylglucamine business to shed light on the existence of an anti-competitive agreement with Merck' ([159]).

(277) 'The Respondent believes that this information materially contributed to establishing the existence of the infringement. Indeed as the file clearly shows, neither Merck nor RPB found any written documents evidencing the agreement. Thus, the Commission has relied solely upon acknowledgements by both Merck and RPB that they participated in an agreement contrary to Article 81(1) of the EC Treaty. Had RPB not identified and conveyed information about this agreement, the Commission would have been left with the words of one company against another as its only evidence. It is clear that the statement of objections relied on disclosures by both companies in order to establish the existence of the infringement' ([160]).

(278) Aventis also points out that it has not substantially contested the facts in its response to the statement of objections.

(279) The Commission accepts that the cooperation of Aventis has been satisfactory throughout the procedure and that the information provided by Aventis confirmed certain aspects of the infringement. The Commission does however not agree that the information provided by Aventis was essential to it proving the existence of the cartel, even though the case would have been more complicated had the information provided by Merck not been approved by Aventis.

([158]) Aventis response to the statement of objections, page 37, paragraph 94.

([159]) Aventis response to the statement of objections, page 36, paragraph 91.

([160]) Aventis response to the statement of objections, pp. 36—37, paragraph 92.

(280) The Commission accepts that Aventis did not substantially contest the facts in its response to the statement of objections.

(281) The Commission accordingly grants Aventis Pharma and Rhône-Poulenc Biochimie a 40 % reduction of the fine that would otherwise have been imposed had it not cooperated with the Commission.

3.3.7.4. Conclusion on the application of the Leniency Notice

(282) In conclusion, with regard to the nature of their cooperation and in the light of the conditions as set out in the Leniency Notice, the adressees of this Decision should be granted the following reduction of their respective fines:

— to Rhône-Poulenc Biochimie SA/Aventis Pharma SA, a reduction of 40 %

— to Merck KgaA a reduction of 100 %.

3.3.8. *The final amounts of the fines imposed in the present proceedings*

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

— Rhône-Poulenc Biochimie SA/Aventis Pharma SA: EUR 2,85 million

— Merck KgaA: EUR 0 million.

HAS ADOPTED THIS DECISION:

Article 1

Rhône-Poulenc Biochimie SA, Aventis Pharma SA and Merck KgaA have infringed Article 81(1) of the Treaty and, from 1 January 1994 onwards, Article 53(1) of the EEA Agreement by participating in a continuing agreement and/or concerted practice in the methylglucamine sector.

The duration of the infringement was for all three addressees 22 November 1990 until 31 December 1999.

Article 2

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

They shall refrain from repeating any act or conduct referred to in Article 1 and from any act or conduct having equivalent object or effect.

Article 3

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

(a) Rhone Poulenc Biochimie SA and Aventis Pharma SA, jointly and severally liable, a fine of EUR 2,85 million;

(b) Merck KgaA, a fine of EUR 0 million.

Article 4

The fines shall be paid, within three months of the date of notification of this Decision, into Bank Account No 642-0029000-95 of the European Commission with

Banco Bilbao Vizcaya Argentaria (BBVA) SA
Avenue des Arts/Kunstlaan 43B
B-1040 Bruxelles/Brussel

(SWIFT CODE: BBVABEBB)

(IBAN-CODE BE 76 6420 0290 0095).

After expiry of that period, interest 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….

Article 5

This Decision is addressed to:

(a) Rhône-Poulenc Biochimie SA
20, Avenue Raymond Aron
F-92165 Antony Cedex

(b) Aventis Pharma SA
20, Avenue Raymond Aron
F-92165 Antony Cedex

(c) Merck KgaA
Frankfurter Straße 250
D-64293 Darmstadt

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

Done at Brussels, 27 November 2002.

For the Commission
Mario MONTI
Member of the Commission

COMMISSION DECISION

of 11 June 2003

on the compatibility of a merger with the common market and the EEA Agreement

(Case COMP/M.3506 — Celanese/Degussa/JV (European Oxo-Chemicals))

(notified under document number C(2003) 1821)

(Only the German text is authentic)

(Text with EEA relevance)

(2004/105/EC)

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, and in particular Article 57(2)(a) thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1], as last amended by Regulation (EC) No 1310/97 [2], and in particular Article 8(2) thereof,

Having regard to the Commission decision to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

Having consulted the Advisory Committee on Concentrations [3],

Having regard to the final report of the Hearing Officer [4],

Whereas:

(1) On 18 December 2002 the Commission received notification of the planned merger in accordance with Article 4 of Council Regulation (EEC) No 4064/89 (hereinafter 'Merger Regulation'). According to the notification, Celanese Chemicals Europe GmbH (Celanese), a wholly owned subsidiary of Celanese AG, and Oxeno Olefinchemie GmbH (Oxeno), a wholly owned subsidiary of Degussa AG (Degussa), are establishing a joint venture (JV) in which they will merge their respective European Oxo-C3 business. The JV is to trade as European Oxo-Chemicals GmbH (EOC).

(2) Following examination of the notification, the Commission found that the notified operation falls within the scope of the Merger Regulation and raises serious doubts as to its compatibility with the common market. On 30 January 2003 the Commission, in accordance with Article 6(1)(c) of the Merger Regulation, decided to initiate proceedings. After detailed examination of the case, the Commission has come to the conclusion that the planned operation would not create a dominant position as a result of which competition would be significantly impeded in a substantial part of the common market.

I. THE PARTIES

(3) The German firm Celanese Chemicals Europe GmbH is a wholly owned subsidiary of the German firm Celanese AG, a chemicals firm operating worldwide with core business in basic chemicals, acetates, technical synthetic fibres, polypropylene foil and food additives. The oxo-chemicals to be merged in the JV are oxo-alcohols, plasticisers and solvents used as intermediate products in the production of synthetic fibres, petrol additives, polyethylene foil, paints and varnishes.

(4) The German firm Oxeno Olefinchemie GmbH, with headquarters in Marl, Germany, is a wholly owned subsidiary of Degussa AG, with headquarters in Düsseldorf. At the time of the notification, Degussa was controlled by E.ON AG but is now part of RAG Aktiengesellschaft, Essen, Germany. It is in business

[1] OJ L 395, 30.12.1989, p. 1; Corrigendum OJ L 257, 21.9.1990, p. 13.
[2] OJ L 180, 9.7.1997, p. 1.
[3] OJ C 36, 10.2.2004.
[4] OJ C 36, 10.2.2004.

worldwide in speciality chemicals. Oxeno produces C3 and C4 chemicals (including oxo-alcohols, plasticisers and solvents), used in processing synthetic fibres, in the varnish and paint industry and in cosmetics and pharmaceuticals.

II. **THE PLANNED OPERATION**

(5) The merger is for the establishment of a full-function JV by Celanese and Oxeno. The JV will produce and distribute mainly oxo-C3 chemicals, in particular butyric aldehyde, butanol, butyl acetate, 2-ethylhexanol (2-EH), dioctylphthalate (DOP) and carbon acids (trimethylhexane acid, 2-ethylhexane acid, butyric acid).

(6) The parties will merge their respective European oxo-C3 business in the JV. For technical reasons, Oxeno cannot transfer its butyric aldehyde facility in Marl to the JV. But Oxeno will produce butyric aldehyde there exclusively for the JV and deliver its entire butyric aldehyde production to the JV. As regards butyl acetate, only Oxeno is transferring its business to the JV; Celanese will retain its butyl acetate business as it is not conducted in the context of its oxo-chemicals but of its acetyl business. As regards 2-EH, Degussa will transfer only the existing 2-EH delivery contracts and the 2-EH customer base to the JV but will abandon 2-EH production once the JV is established and focus on the longer-chain substitute product INA. The same applies to the 2-EH downstream product DOP, where Degussa will likewise transfer only its customer base. Celanese will not transfer its carbon acid facilities to the JV.

(7) The JV will also acquire a number of ancillary services from Degussa (tank facility, fatty alcohol distillation, ethanol finishing, resin production, hydrogenation of cyclododecatriene into cyclododecane and processing of butylene glycol and acetic acid into butylene glycolacetates).

III. **MERGER**

(8) The JV will be a full-function joint venture within the meaning of Article 3(2) of the Merger Regulation. It will be jointly controlled by Celanese and Oxeno, will be established for a limited period and will exercise all the functions of an autonomous economic entity.

(9) Celanese and Oxeno will each have a 50 % holding in the JV. Strategic business decisions as to financial planning, management appointments, major investments and the business plan, which are to be taken by the General Meeting and the Meeting of Partners, require a unanimous vote. The JV will thus be jointly controlled by the two parties.

(10) Ultimately, the JV will exercise all the functions of an autonomous economic entity. It will be established for an unlimited period and production facilities will be transferred to it permanently. Moreover, it will exercise on the relevant markets the functions that are also exercised by other firms on those markets. It will have its own management dealing with day-to-day business and adequate financial resources to cover its business needs. It will produce the oxo-chemicals that it markets almost exclusively in its own production facilities and using its own staff transferred from Celanese and Oxeno. The JV will in addition have its own direct access to the market. It will be responsible for marketing its own production itself.

(11) The planned operation is accordingly a merger within the meaning of Article 3(2) of the Merger Regulation, read in conjunction with Article 3(1)(b).

IV. **COMMUNITY DIMENSION**

(12) The firms concerned have a worldwide turnover of more than EUR 5 billion (Celanese AG EUR 5 097 million, RAG Aktiengesellschaft approximately EUR 13 billion). Celanese and RAG each have a Community turnover of more than EUR 250 million ([…] (*)). Celanese achieves more than two thirds of its Community turnover in a single Member State. The notified merger accordingly has a Community dimension.

V. **ASSESSMENT IN TERMS OF COMPETITION**

(13) Following detailed scrutiny of the merger, it has been established that this merger would not create or strengthen a dominant position as a result of which competition would be significantly impeded in the common market or in a substantial part thereof.

SUPPLIERS ON THE RELEVANT MARKETS

(14) The basic material for the relevant products is butyric aldehyde, which is produced from propylene and

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

synthetic gas. Butanol, 2-ethylhexanol (2-EH), carbon acids, TMP and NPG are produced from this basic product at the first subsequent processing stage. At a further processing stage, butyl acetate can be produced from butanol, but other products such as the butyl aminate and butyl acrylate supplied by Celanese can also be produced. 2-EH acrylates and dioctylphthalate (DOP) among others are made from 2-EH. Suppliers tend to be vertically integrated and use their preliminary products primarily in their own processing facilities.

(15) Apart from the parties, BASF, Perstorp, Atofina and Zaklady Azotowe 'Kędzierzyn' SA are among the most important vertically integrated suppliers.

(16) BASF is the world's largest chemicals group. Following the closure of its works in Tarragona, Spain, its entire oxo-chemicals production is now concentrated in Ludwigshafen. BASF is the only competitor to be present on all six markets where the JV will be in business. By means of its integration strategy, which seeks to enhance synergies through integrated production systems, BASF is less dependent than other competitors on the oxo-chemicals market on sales to third parties upstream. BASF is not very strongly represented on many markets for oxo-intermediate products.

(17) Perstorp is a Swedish firm that is active in oxo-intermediates, engineering materials, coating intermediates, performance chemicals and formox and has a turnover of approximately SEK 670 million. It was born of the merger of Perstorp AB and Neste Oxo. Among other things, it produces butyric aldehyde, butanol, 2-EH and DOP.

(18) Atofina is a TotalFinaElf subsidiary consisting of Elf Atochem and the chemicals division of Petrofina. Atofina is in the oxo-chemicals business primarily through Oxochimie at Lavera, near Marseilles, France. Oxochimie is a joint venture founded in 1968 by Atofina and BP, making butyric aldehyde, butanol and 2-EH. The two companies each hold 50 % of the capital in Oxochimie and are entitled to supplies of butanol and 2-EH accordingly, while butyric aldehyde is reprocessed internally apart from some deliveries to a few customers. Atofina produces the most important 2-EH downstream product, DOP, but in 2001 BP dropped DOP production. Since then BP has been vertically integrated only in downstream products of butanol.

(19) Zaklady Azotowe 'Kędzierzyn' S.A. (Zaklady) is a Polish producer based in Kozle, Poland. The Oxo-division produces oxo-alcohols and semi-finished products (2-EH, n- and iso-butanol, n- and iso-butyric aldehyde). Among other things, the plasticisers division produces DOP but also dibutyl phthalate (DBP) and di-isobutyl phthalate (DIBP). When the firm was in business difficulties, it was renationalised; the Polish State publicly offered to enter into negotiations for the sale of the firm. According to one of Zaklady's customers, the firm is under bank supervision and can accept only business contracts that generate an immediate profit.

1. *BUTYRIC ALDEHYDE*

(20) Butyric aldehyde is the first chemical step in the oxo-C3 chemistry. It is produced from propylene through a reaction with a synthesis gas (syngas). This reaction leads to the production of two isomers of butyric aldehyde: iso-butyric aldehyde and n-butyric aldehyde in a ratio of 10 to 12 tonnes of n-butyric aldehyde for 1 tonne of iso-butyric aldehyde. From the two isomers are derived further products such as iso-butanol and neopentilglycol (NPG) from iso-butyric aldehyde and n-butanol, 2-ethylhexanol (2-EH), trimethilolpropane (TMP) and carboxylic acids from n-butyric aldehyde. Each producer of butyric aldehyde also produces some downstream products so that the merchant market for n- and iso-butyric aldehyde is more limited than their captive use. The merchant market represents 1/30 of total production.

(1) RELEVANT MARKET

(21) The parties submitted that butyric aldehyde could not be considered as a real market but was only an intermediate product. Nevertheless, even though the related merchant market is much smaller than the captive use, it still exists: more than 20 chemical firms throughout Europe buy these products and depend on this supply to produce downstream chemical products. Buying patterns range from spot purchases to long-term contracts.

(22) On the supply side, five firms produce butyric aldehyde in the EEA: Perstorp in Sweden, BASF, Celanese and Oxeno in Germany, Atofina in France. They all sell butyric aldehyde on the merchant market and also have captive uses. Imports are mainly due to a producer located in Poland: Zaklady. The latter and Atofina are smaller players in the merchant market for butyric aldehyde. Consequently, butyric aldehyde business exhibits all characteristics of a market. In addition, n-butyric aldehyde and iso-butyric aldehyde have to be regarded as two distinct product markets for the following reasons:

(a) ***No demand side substitutability between n-butyric aldehyde and iso-butyric aldehyde: the two isomers lead to different downstream products***

(23) The investigations carried out by the Commission revealed that the two isomers are used for different purposes and cannot be substituted for each other in most cases. This is especially true for the manufacture of the following downstream products: TMP, PVB and NPG, which represent more than 95 % of sales of butyric aldehyde on the merchant market. This is due mainly to the fact that the two molecules exhibit different chemical properties, so that a given downstream product can be derived from only one of the two isomers through a specific chemical reaction.

(24) Moreover, most customers buy only one specific isomer. The only ones which bought both isomers did so to produce two different products: TMP or PVB from n-butyric aldehyde and NPG from iso-butyric aldehyde only.

(25) Lastly, the average prices of the two isomers show significant differences, ranging from 15 to 40 % over the years, as shown in the table below. This can partly be explained by the fact that customers commonly buy much smaller volumes of iso-butyric aldehyde than in the case of the n-isomer. As a result, the market for iso-butyric aldehyde is much smaller than for n-butyric aldehyde [10 to 15]* kt compared with [50 to 55]* kt for n-butyric aldehyde in 2002).

Table 1

Celanese's average prices from 1999 to 2002

	n-butyric aldehyde	iso-butyric aldehyde
1999	EUR […]*/t	EUR […]*/t
2000	EUR […]*/t	EUR […]*/t
2001	EUR […]*/t	EUR […]*/t
2002	EUR […]*/t	EUR […]*/t

(b) ***Very little supplier flexibility for production switchover***

(26) The two isomers are produced at the same time and in the same reactor. Depending on the conditions of pressure and temperature and the modification of the characteristics of the catalyst, the ratio of production of the two isomers can be only slightly modified. The parties and the competitors confirmed that this ratio commonly remains in the range of 10:1 to 12:1. The ratio can be moved within this range but only slowly: several months may be needed to modify the ratio by a few percentage points. Therefore, it appears not to be possible to produce significant quantities of one isomer instead of the other, even though the same equipment is used for both.

(27) As a consequence, two distinct product markets will be distinguished in the following sections: n-butyric aldehyde and iso-butyric aldehyde. Oxeno is currently not active on the market for iso-butyric aldehyde, as opposed to the market for n-butyric aldehyde. Therefore, the following assessment will focus on the market for n-butyric aldehyde. In the following sections, each time the Commission does not specify one particular isomer, this means that the described characteristics apply to both isomers. The following observations relate to both isomers, except where specific reference is made to a particular isomer.

(2) GEOGRAPHIC MARKET FOR N-BUTYRIC ALDEHYDE

The markets for butyric aldehyde are at most European in scope

(28) The parties submitted that the markets for butyric aldehyde, if they can be considered as real markets, are EEA-wide in scope, mainly because a few producers supplied all customers throughout Europe.

(29) The investigation showed that these markets were at most EEA-wide: there have been no significant imports or exports of butyric aldehyde in recent years between the EEA and the rest of the world, with the exception of Zaklady's sales in Europe. Customers and competitors largely confirmed that the market was at most European in scope. On the one hand, butyric aldehyde is a raw material of low value and cannot economically be transported over long distances and, on the other, it is unstable in the presence of oxygen and therefore requires expensive storage infrastructures or special means of transport.

Northern Europe and Southern Europe constitute two distinct geographic markets for n-butyric aldehyde

(30) Before attempting a more precise delineation of the geographic markets, it must be noted that all main customers of butyric aldehyde and therefore more than 95 % of the European sales are concentrated in three countries: Belgium, Germany and Italy, where five main customers together account for over 90 % of demand. The breakdown between the Member States is shown in the table below.

Table 2

Total sales of n-butyric aldehyde by country in 2002

Country	Volume sold (t)	Turnover (EUR 1 000)	Proportion of EEA sales
Germany	[…]*	[…]*	[60 to 70 %]*
Belgium	[…]*	[…]*	[20 to 30 %]*
Italy	[…]*	[…]*	[10 to 20 %]*
United Kingdom	[…]*	[…]*	[0 to 10 %]*
France	[…]*	[…]*	[0 to 10 %]*
Spain	[…]*	[…]*	[0 to 10 %]*
The Netherlands	[…]*	[…]*	[0 to 10 %]*
Total EEA	[…]*	[23 000 to 26 000]*	100 %

(31) The investigations carried out by the Commission lead to the conclusion that two distinct geographic markets should be distinguished: northern continental Europe (in fact, mainly Germany and Belgium) and southern Europe (in fact, mainly Italy).

(32) First, it appears that the sales conditions in Italy and in Germany and Belgium differ significantly. The average price for n-butyric aldehyde in Germany and Belgium in 2002 was around EUR [450 to 500]* per tonne, while it was around EUR […] per tonne in Italy over the same period. This significant difference (EUR [100 to 150]*, i.e. […]* % of the price in Germany) cannot be explained by transport costs alone: the latter are only EUR [20 to 40]* higher on average in Italy than in Germany. As a result, the margins of the supplier are much higher in Italy than in Germany or in Belgium, as the table below shows.

Table 3

Average prices, variable costs, gross margin and the percentage, i.e. gross margin as a proportion of the total price of all suppliers, on the basis of their 2002 sales in the country of destination

Country	Average price (EUR/t)	Average variable cost (EUR/t)	Average gross margin (EUR/t)	Percentage
Germany	[…]*	[…]*	[…]*	[…]*
Belgium	[…]*	[…]*	[…]*	[…]*
Italy	[…]*	[…]*	[…]*	[…]*

(33) These differences cannot be explained only by smaller sales volumes: […]*. This pattern is possible because the producers can discriminate in prices between customers, depending on volumes and country of destination: the products are delivered direct to the customer's plant for an all-in price per tonne, including transport costs. The producer is responsible for the logistics. And so a producer, when pricing a product, knows exactly who is the buyer as well as the country in which the buyer is located and the volumes bought in the past […]*.

(34) The market shares of the various producers are also very different: in Germany and Belgium, Celanese, Oxeno and BASF control most of the market. The leading firm is Celanese. In Italy market shares are distributed in a very different way: Perstorp and BASF are the leading players and more competitors are active (five suppliers as compared with four main suppliers in Germany and Belgium). Some suppliers such as Perstorp and Zaklady enjoy significant market shares ([20 to 30 %]* and [10 to 20 %]* respectively) while they have very limited sales in Germany ([5 to 10 %]* and [0 to 5 %]* respectively). Atofina is not active in Germany but has sales in Italy ([0 to 5 %]*).

(35) In Italy the strong presence of competitors such as Perstorp, which has low market shares in Germany, can be explained mainly by transport costs. Perstorp faces

high transport costs in Germany (EUR […]* per tonne) and therefore cannot effectively compete against the three local producers, which face much lower transport costs (ranging from EUR […]* to EUR […]* per tonne). In Italy Perstorp and the German producers all face higher transport costs and are therefore on a more equal competitive footing.

(36) This situation is different from that of butanol or 2-EH, where Perstorp has intermediate storage tanks in Hamburg and Rotterdam to supply customers in northern Europe economically. In fact, butyric aldehyde is unstable in the presence of oxygen. It must be stored and transported in a nitrogen atmosphere and with special equipment for recycling the vapours of butyric aldehyde. Perstorp confirmed that such a tank would not make economic sense. Moreover, this tank would have to be carried by vessels transporting large quantities and having a vapour recycling system. Only a few vessels have such systems on board. Lastly, these vessels must be filled by pipe from the plant (like butanol and 2-EH), and Perstorp currently has no such pipe and does not plan to install one given the price of such a specific pipe. As a consequence, Perstorp has no choice but to fill iso-containers in Sweden (20 to 23 tonnes each) that can be transported by truck or by rail. These containers are shipped by ferry to Germany and then on to the final customers throughout Europe by truck or by rail.

(37) The investigation has shown that, beside price, the most important parameters are security of supply and timely deliveries: customers commonly have comparatively small storage capacities (like the producers) and have just-in-time production. Delays are not tolerated. Admittedly, the storage capacities of [customer A] in particular could be expanded at relatively low cost. As a result, the locational advantages of German suppliers when supplying customers in Germany and Belgium would be only partly offset. For this reason, it appears that penetrating an area where the three German producers are located and offer a high level of security of supply is difficult for outside competitors, i.e. mainly Perstorp (Sweden) and, more recently, Zaklady (Poland). The German producers can even deliver within a day by truck, if need be. This also explains Perstorp's very low market share in Germany and Belgium as regards n-butyric aldehyde ([<5]* % in 2002), even though Perstorp's transport costs are lower for deliveries of butyric aldehyde to Antwerp (around EUR […]*/tonne) compared with deliveries to southern Germany (around EUR […]*/tonne).

(38) The competition conditions are quite different in Italy where there is no local producer. In this area, the German, Swedish and Polish suppliers appear to compete on a more equal footing, both in terms of transport costs and supply conditions (security of supply, timely delivery). This is reflected in the market shares, which are more evenly distributed among the different suppliers (in 2001, BASF: [30 to 40 %]*, Perstorp: [20 to 30 %]*, Celanese: [20 to 30 %]*, Zaklady: [10 to 20 %]*).

(39) As a consequence, two distinct geographic markets for n-butyric aldehyde are distinguished in the following assessment: a northern European market, i.e. mainly Belgium and Germany, and a southern European market, i.e. Italy.

(3) COMPATIBILITY WITH THE COMMON MARKET

(40) Through the proposed operation, Celanese and Oxeno are to contribute their production of butyric aldehyde, located respectively in Oberhausen and Marl in Germany, to a newly created joint venture. Oxeno is currently not active in the market for iso-butyric aldehyde: all the iso-butyric aldehyde produced at the same time as n-butyric aldehyde is used internally. When demand is not high enough, it reportedly can be burnt. Therefore, the assessment focuses on the market for n-butyric aldehyde, where there is an addition of activities.

(a) ***Description of the conditions of competition on the markets prior to the proposed operation***

(41) The markets for butyric aldehyde are currently oligopolistic markets where competition is not very strong. These markets are, moreover, rather transparent, the producers face similar costs, the characteristics of the markets are stable and the aggregate demand on a stagnating and mature market is relatively small. This industry can be seen as mature.

The markets for butyric aldehyde are particularly transparent

(42) The characteristics of each isomer (n- and iso-butyric aldehyde) are standardised so that only one quality exists for each product. All customers confirmed that each isomer market is considered as a market for homogeneous products. The quality can differ in extreme cases where the product supplied does not respect the standard agreed upon or may contain by-products that are lethal for downstream reactions. In

this case, the product is reportedly not accepted and/or the commercial relations with the supplier terminated.

(43) There are only six suppliers in Europe, three of which are located in Germany. As regards producers, they have all been on the market for many years. There has been no new entrant in the market over the past 10 years. As a consequence, the characteristics of each plant (technology, capacity) is public knowledge. This is true particularly since those plants are classified under Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances ([5]) and are required by that Directive to publish their characteristics and the volumes of chemical substances that are used and/or stored. Furthermore, production capacities did not evolve dramatically in recent years (increase of less than 15 % over the past five years). Lastly, the other producers are also active in the downstream markets, which are also concentrated: the main players on the butyric aldehyde market are also the leading players in the downstream product markets, such as 2-EH, butanol, DOP and butyl bacetate. Their knowledge of the merchant markets for downstream products thus enables them to have a precise idea of the captive uses of butyric aldehyde and, consequently, the spare capacity in the other producers' plants.

Table 4

Capacities and total production of n-butyric aldehyde in the EEA over the last four years (in kt)

	2002		2001		2000		1999	
	Capacity	Production	Capacity	Production	Capacity	Production	Capacity	Production
Celanese	[450—500]*	[…]*	[450—500]*	[…]*	[450—500]*	[…]*	[350—400]*	[…]*
Degussa	[450—500]* ([6])	[…]*	[400—450]*	[…]*	[400—450]*	[…]*	[400—450]*	[…]*
JV	[900—1 000]*	[650—700]*	[900—1 000]*	[650—700]*	[900—1 000]*	[650—700)	[900—1 000]*	[650—700)
Atofina	[250—300]*	[250—300]*	[250—300]*	[250—300]*	[250—300]*	[250—300]*	[250—300]*	[250—300]*
BASF	[500—550]*	[450—500]*	[500—550]*	[450—500]*	[550—600]*	[500—550]*	[550—600]*	[500—550]*
Perstorp	[250—300]*	[200—225]*	[250—300]*	[200—250]*	[200—250]*	[200—250]*	[200—250]*	[200—250]*
Total	1 983	1 649	2 015	1 617	2 024	1 701	1 899	1 693

(44) Several technologies exist throughout the world to produce butyric aldehyde. All producers in Europe use the same technology based on rhodium catalyst. As a result, the quantity of energy, propylene and syngas (carbon monoxide and hydrogen) needed to manufacture one tonne of butyric aldehyde represents most of the variable costs and is significantly the same for all producers: variable costs = A* propylene price + B* syngas price + energy (a few percentage points), where A is around EUR […]*/tonne, B around EUR […]*/tonne and energy around EUR […]*/tonne. The syngas being much less expensive than propylene, it represents only 18 % of the final variable cost of producing butyric aldehyde.

(45) The table below provides the producers' average variable costs in 2002 and shows that the different producers' variable costs are very similar. The variation ranges up to EUR […]* per tonne, i.e. 10 %. This differences must not be overestimated: (i) they may result simply from variations in the price of propylene over the year and (ii) they must be assessed in comparison with the gross margins which are at least EUR […]* per tonne (cf. subsequent sections).

Table 5

Average variable costs in 2002 per tonne of butyric aldehyde produced, for each producer

Firm	Average variable costs
Celanese	EUR […]*/tonne
Degussa	EUR […]*/tonne
Perstorp	EUR […]*/tonne
BASF	EUR […]*/tonne
Atofina	EUR […]*/tonne
Zaklady	n.a.

([5]) OJ L 10, 14.1.1997, p. 13.

([6]) Oxeno reduced its capacity to […]*t per year in the course of 2002, following the launch of a new product, INA, which is produced using part of the butyric aldehyde plant.

(46) Consequently, one producer can easily work out the variable costs of its competitors since the bulk of variable costs is determined by the price of propylene, which is quoted daily on international markets (ICIS-LOR publishes propylene prices in Europe, for instance). The remaining variable costs comprise energy, which is similar (EUR […]*/tonne) for each producer, and syngas, which accounts for a much smaller fraction of variable costs than propylene: syngas accounts for 40 % in weight but for less than 20 % of cost of the final product). Its cost is much more stable than propylene since it is made of carbon monoxide and hydrogen, which are produced in the neighbourhood of the chemical plant (by refineries).

The characteristics of the markets are stable over time

— *Prices are much more stable than they appear*

(47) The price of butyric aldehyde fluctuates over time. This is due mainly to the fact that most of the cost of producing butyric aldehyde is dependent on the price of the main raw material, i.e. propylene, which fluctuates significantly over time. Nevertheless, most of n-butyric aldehyde sales, for instance, are sold under supply contracts, where the agreed price is based on a formula that takes into account the price of propylene and the quantity of propylene (0,65 to 0,70 t) needed to produce one tonne of butyric aldehyde. The formula for most contracts is:

butyric aldehyde price = C * propylene price ([7]) + charge, where C ranges from 0,65 to 0,70.

The charge comprises reworking costs, transport costs and the producers' margin. Therefore, price negotiations relate exclusively to the level of this charge and exclude all fluctuations in the price of propylene.

(48) The contracts that are not based on this formula are mainly short-term contracts, i.e. monthly or quarterly contracts. They are considered in this industry as fixed-price 'spot' purchases. Admittedly, this fixed price reflects both the cost of propylene (0,65*price of propylene at the time) and the reworking and transport costs plus the margin: the latter corresponds to the charge. The Commission's investigations showed that the only large customers which use spot contracts for significant volumes of butyric aldehyde are [firm A]* and [firm B]*.

([7]) This formula is based on the fact that 0,65 tonne to 0,70 tonne of propylene is needed to produce 1 tonne of butyric aldehyde.

— *No technological innovation, mature business*

(49) As mentioned above, the plants that produce butyric aldehyde in Europe are several decades old. The technology has not evolved significantly in recent decades. The only major modification relates to the catalyst: cadmium has been replaced by rhodium for all producers. All players in the market confirmed that this was a mature business.

(50) The market for n-butyric aldehyde is stable. As regards n-butyric aldehyde, even a slight decline may be expected in the coming years owing to the declining sales of 2EH (which is produced from n-butyric aldehyde). In fact, the plasticiser produced from 2EH, DOP, has recently been classified as toxic. Its use in certain applications may therefore be prohibited in the future (the phase relating to risk assessment based on the type of application has not been completed yet), and this will affect the volumes of 2EH produced and hence the production of n-butyric aldehyde.

— *No countervailing buying power*

(51) The number of customers in these markets is very limited. Five to ten customers commonly account for more than 90 % of a given producer's sales. Nevertheless, these customers do not appear to hold strong countervailing buying power because, firstly, the customers who buy butyric aldehyde are not vertically integrated, unlike most butyric aldehyde producers and, secondly, most of them value security of supply and timely delivery. The investigation showed that, for this reason, most customers regard only a very limited number of producers as serious alternatives ([8]) and maintain with them long-term commercial relationships involving close cooperation, in particular in terms of logistics. Switching to a new supplier would therefore entail higher risks and uncertainties, require setting up an efficient logistics chain and testing the compatibility of the product with the characteristics of the chemical reaction performed in the plant. Having one additional supplier may also make it necessary to use an additional tank in order to store separately the products supplied by the different producers. In case of production problem, this enables the customer to identify which product is responsible for it. Lastly, the merchant market for butyric aldehyde represents less than 5 % of the total production of butyric aldehyde. Therefore, the loss of one customer would have a very limited impact on the activity of the producer.

([8]) Only one large customer reported five suppliers. In all other cases, the number of suppliers was between one and three.

(52) In light of the market conditions described above, the markets for n- and iso-butyric aldehyde should be regarded as highly concentrated oligopolistic markets where competition is weak.

(b) ***The impact of the merger on the markets***

(53) The proposed joint venture does not lead to any overlap in Italy since Oxeno is not active there. Therefore, the following assessment focuses on the northern European market for n-butyric aldehyde, comprising mainly Germany and Belgium.

(54) In this market, the proposed operation will result in a combined market share of [60 to 70 %]* (Celanese: [50 to 60 %]* and Oxeno: [10 to 20 %]* in 2002). The remaining players are BASF, with a [20 to 30 %]* market share, Perstorp ([0 to 10 %]*) and Zaklady (less than [10 %]*). Such market shares are high enough to raise serious doubts as to whether the proposed operation may lead to the creation or the strengthening of dominant positions. As is analysed in detail below, the investigation carried out by the Commission showed that, firstly, the market shares were not very reliable indicators of market power in this case and, secondly, several competitors enjoyed enough spare capacities to challenge the notifying parties' position.

Table 6

Volumes sold in 2002 and related market shares for n-butyric aldehyde in Germany + Belgium

Germany + Belgium		
Firm	Volume sold (kt)	Market share
Celanese	[…]*	[50 to 60 %]*
Degussa	[…]*	[10 to 20 %]*
Joint venture	[…]*	[60 to 70 %]*
Germany + Belgium		
Firm	Volume sold (kt)	Market share
BASF	[…]*	[20 to 30 %]*
Perstorp	[…]*	[0 to 10 %]*
Atofina	[…]*	[>5 %]*
Zaklady	[…]*	[<5 %]*
Total	[…]*	100 %

Market shares

(55) The merchant market for n-butyric aldehyde is very small: it represents around 3 % of the total annual production of n-butyric aldehyde. Therefore, any producer could supply the whole merchant market either by using spare capacities or theoretically by switching a part of the butyric aldehyde used internally for downstream products into the merchant market. The latter is far more unlikely to occur than the former since it requires that the demand for downstream products decreases or that the margin generated by butyric aldehyde becomes significantly higher than the one generated by downstream products. However, as explained below, some competitors enjoy spare capacities.

(56) Further, the parties' market shares have been declining sharply over the past years, from [70 to 80 %]* in 1999 to [60 to 70 %]* in 2002 in the EEA. This pattern is the same when the German+Belgian market is considered since Degussa is not active in Italy and Celanese has only a small turnover there. Since the size of the total market shrank over the period, the loss in term of sales is even bigger: the parties' combined sales fell from […]* kt in 1999 down to […]* kt in 2002, a decrease of [more than 30 %]*.

Table 7

The parties' sales and market shares for butyric aldehyde in the EEA from 1999 to 2002

	1999		2000		2001		2002	
	Sales (kt)	Market share	Sales (kt)	Market share	Sales (kt)	Market share	Sales (kt)	Market share
Celanese	[…]*	[70 to 80 %]*	[…]*	[60 to 70 %]*	[…]*	[50 to 60 %]*	[…]*	[40 to 50 %]*
Degussa	0	0 %	0	0 %	[…]*	[0 to 10 %]*	[…]*	[0 to 10 %]*
Joint venture	[…]*	[70 to 80 %]*	[…]*	[60 to 70 %]*	[…]*	[50 to 60 %]*	[…]*	[50 to 60 %]*
Total market	[…]*	100 %	[…]*	100 %	[…]*	100 %	[…]*	100 %

(57) The main reason for this strong evolution relates to the characteristics of the market for butyric aldehyde. Even though more than twenty companies purchase butyric aldehyde, only a handful have significant sales. In the northern European market (Germany+Belgium), four companies purchase most of the butyric aldehyde sold on this market: Bayer (Germany, […]* kt per year), Solutia (Belgium, […]* kt per year), Kuraray (Germany, […]* kt per year), Wacker (Germany, […]* kt per year). As a consequence, as soon as one customer changes its purchase pattern, the impact on market shares can be significant.

Table 8

BASF sales of n-butyric aldehyde in kt and corresponding market share in the EEA from 1999 to 2002 ([9])

BASF	1999	2000	2001	2002
Sales (kt)	[…]*	[…]*	[…]*	[…]*
Market share	[…]*	[…]*	[…]*	[…]*
Total market	[…]*	[…]*	[…]*	[…]*

(58) This is demonstrated by the Oxeno and BASF cases: in 2001 [firm B]* chose Oxeno as an additional supplier for n-butyric aldehyde. As a result, Oxeno suddenly acquired a [10 to 20 %] market share. Similarly, BASF lost sales to Perstorp in 1999 but not in 2000 and 2001. As a result, BASF's market share jumped from [10 to 20 %]* in 1999 to [10 to 30 %]* in 2000-2001.

(59) Consequently, given the very limited number of customers and the small size of the merchant market compared with the level of production, the market shares of the various competitors fluctuate widely. This tends to minimise the role of market shares as an indicator of market power. Even so, market shares in the last four years show that there is competition on the market in n-butyric aldehyde.

Spare capacities

(60) Given the parties' leading position in this already highly concentrated market, the proposed operation could lead to detrimental effects if competitors faced capacity constraints and could not significantly increase the quantities that they put on the merchant market as a reaction to any output reduction or price increase by the parties.

Table 9

Capacity, production, captive use and merchant market for n-butyric aldehyde in 2002 in the EEA

	Capacity	Share	Production	Captive use	Non-captive EEA	Market share
Celanese		[…]*	[…]*	[…]*	[…]*	[40 to 50 %]*
Degussa		[…]*	[…]*	[…]*	[…]*	[5 to 15 %]*
Joint venture		[40 to 50 %]*	[…]*	[…]*	[…]*	[50 to 60 %]*
Atofina		[10 to 20 %]*	[…]*	[…]*	[…]*	[>5 %]*
BASF		[20 to 30 %]*	[…]*	[…]*	[…]*	[20 to 30 %]*
Perstorp		[10 to 20 %]*	[…]*	[…]*	[…]*	[5 to 10 %]*
Zaklady	n.a.	n.a.	n.a.	n.a.	[…]*	[5 to 10 %]*
Total	1 983	100 %	1 649	1 601	[…]*	100 %

([9]) Since BASF's turnover in Italy has not fluctuated, this situation reflects that in Germany in Belgium.

The parties

(61) The parties reported in their reply to the statement of objections that Oxeno's capacity has been dramatically reduced in 2002 as a consequence of launching the production of INA: part of the butyric aldehyde plant has been used to produce INA. As a result, Oxeno's butyric aldehyde capacity has been reduced to […]* kt per year, instead of […]* kt per year. From 2003 onwards, the joint venture's capacity will be […]* kt per year and its spare capacity (based on the 2002 production figures): […]* kt per year. The parties will therefore still enjoy the largest capacity and spare capacity on the market, but the difference with BASF ([…]* kt per year spare capacity) will be much smaller.

Atofina

(62) Atofina produces butyric aldehyde through its subsidiary Oxochimie, in Lavera. Oxochimie has no spare capacity: it confirmed (see transcription of their telephone call of 4 April 2003) that it has important internal needs to produce butanol and 2-EH, which it regards as its core business. It is able to sell on the merchant market little more than […]* kt of n-butyric aldehyde. According to Atofina, the price of n-butyric aldehyde would have to increase significantly before it considers diverting part of its internal use of butyric aldehyde to sell it on the merchant market. Atofina's strategy and its capacity constraints are confirmed by its level of production compared with its capacity over the last years: it remained at the high level of […]* %. Atofina considers the latter as an excellent ratio for the industry. In the past, it produced less only because of incidents or periodic maintenance: it had to stop production of butyric aldehyde for a month in 2001, for instance.

Perstorp

(63) Perstorp enjoys some spare capacities. Nevertheless, when asked about its margins of manoeuvre, it admitted that they were more limited than the raw figures may indicate: First, it puts its real capacity at lower than the nominal capacity by […]*kt. Second, it also produces [chemicals] using part of the butyric aldehyde capacity, namely around […]* kt. As a consequence, Perstorp has around […]* spare capacity. However, this represents more than 20 % of the northern European market and could be enough to offset any output reduction by the parties.

(64) Lastly, despite its spare capacity, Perstorp does not appear as a very competitive player in the northern European market for n-butyric aldehyde. Its only significant customer in this area is [customer C]*, which purchased […]* tonne in 2001 and […]* t in 2002. [Customer C]* decided to switch to [supplier A]* and [supplier B]*. As a result, Perstorp's sales in this area in 2003 are less than […]* %. When asked about the reasons for this switch, [customer C]* explained that Perstorp's prices (that is, the charge on top of the cost of propylene) are much higher than the prices usually proposed by the German producers: by around EUR […]* a tonne (compared with a charge of between EUR […]* and EUR […]*). According to [customer C]*, the cost of transporting butyric aldehyde from Sweden could be the main reason.

(65) Perstorp is competitive when the other producers raise their charges. This has been the case in 2001 and 2002: Perstorp's charge did not change but became attractive because the German producers proposed a much higher price to [customer C]*. In 2003 the prices proposed by BASF and Celanese returned to normal and [customer C]* switched back to them. [Customer C]* stated that Perstorp was really concerned by losing such a significant volume and came back several times with lower prices. The lowest price proposed by Perstorp nevertheless remained significantly higher than BASF's and Celanese's prices (which appear to be the prices usually proposed in this area).

(66) This analysis is confirmed by the data gathered during the in-depth investigation: in 2002, for instance, Perstorp's prices for butyric aldehyde were in the range of EUR […]* — EUR […]* a tonne (EUR […]* in Germany, EUR […]* in Italy), while BASF and Celanese sold their butyric aldehyde at prices ranging from EUR […]* to EUR […]* in Germany over the same period. When asking for a quote in the past months, [customer D]* also received a similar price level from Perstorp and discarded the proposal. [Customer E]* also confirmed Perstorp's non-competitive price level.

(67) As regards transport costs, data also confirm the difference between the local producers and Perstorp: Perstorp's transport costs range from EUR 90 to EUR 110 per tonne to deliver in Germany. As a comparison, Celanese's transport costs range from EUR 25 to EUR 39 per tonne to deliver in the same area.

(68) Consequently, Perstorp will restrict local producers' room for manoeuvre only if it increases prices by some EUR […]* per tonne, i.e. by [10 to 20]* %. The fact that Celanese and BASF lowered prices for [Customer C] after they lost sales to Perstorp shows that Perstorp already exerts some competitive control over BASF and the notifying parties.

Table 10

Volumes of n-butyric aldehyde sold on the merchant market and the related market share over the past four years in the EEA

		Celanese	Degussa	Joint venture	BASF	Perstorp	Atofina	Zaklady	Total
2002	Volume (kt)	[20 to 25]*	[0 to 10]*	[25 to30]*	[…]*	[…]*	[…]*	[…]* ([10])	[…]*
	Market share	[40 to 50 %]*	[0 to 10 %]*	[50 to 60 %]*	[20 to 30 %]*	[0 to 10 %]*	[0 to 10 %]*	[0 to 10 %]*	100 %
2001	Volume (kt)	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*
	Market share	[50 to 60 %]*	[0 to 10 %]*	[50 to 60 %]*	[20 to 30 %]*	[10 to 20 %]*	[0 to 10 %]*	[0 to 10 %]*	100 %
2000	Volume (kt)	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*
	Market share	[60 to 70 %]*	[0 to 10 %]*	[60 to 70 %]*	[20 to 30 %]*	[10 to 20 %]*	[0 to 10 %]*	[0 to 10 %]*	100 %
1999	Volume (kt)	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*
	Market share	[70 to 80 %]*	[0 to 10 %]*	[70 to 80 %]*	17 %	[0 to 10 %]*	[0 to 10 %]*	[0 to 10 %]*	100 %

BASF

(69) In light of the above, BASF appears to be a strong competitor which has spare capacities to sell additional n-butyric aldehyde on the German/Belgian market. BASF's spare capacity amounted in 2002 to […]* kt, i.e. […]* % of nominal capacity and [more than 100 %]* of the size of the merchant market in Germany and Belgium. Unlike Perstorp, BASF also faces low transport costs to supply German and Belgian customers. It could therefore very easily use its large spare capacities to gain additional market shares should the joint venture reduce sales volumes or raise prices.

(70) When asked about its strategy in the market for n-butyric aldehyde, BASF replied that it was definitely active in this market but had a conservative and long-run approach to this business: suddenly placing significant additional volumes on the market would not be profitable in the long term since prices would consequently remain low. In particular, the price at which it sells butyric aldehyde has to be compared with the price of the downstream products that can be produced from it internally to give ideal margins. Besides, it has to achieve certain targets, e.g. in connection with return on capital employed (ROCE). Therefore, it must manage its business in the long run in such a way that turnover covers fixed costs and their financial targets are met. This strategy is also being pursued by other suppliers of butyric aldehyde.

(71) Even so, BASF's market share in the EEA over the last five years has expanded from [15 to 25 %]* to [25 to 35 %]*. Only 1999 was a maverick year in this respect. BASF explained that it lost significant sales to Perstorp in 1999 and realised that it would have to reduce its dependence on this customer ([11]). As a result, it reorganised its portfolio of customers, won back a major customer and increased its sales up to [10 to 20]* kt, as shown in the table below. BASF was therefore able to increase its sales over the five-year period 1998 to 2002 by [considerably more than 35 %]*.

Table 11

BASF's sales of n-butyric aldehyde (in kt) from 1995 to 2002

1995	1996	1997	1998	1999	2000	2001	2002
[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*

([10]) No precise data have been received from Zaklady.

([11]) Perstorp was purchased by Neste in 2002. Before this acquisition, it used to buy butyric aldehyde from various suppliers, among which Neste. After the acquisition, the company producing butyric aldehyde took the name of 'Perstorp'. Sales previously made to Perstorp are now internal sales.

(72) Some customers reported that BASF was not always available on the market or proposed only limited volumes. This was the case, for instance, with supply contracts negotiated recently with two important customers in [country]*: [customer E and customer F]*. Each of them asked BASF for a quotation to be fully supplied by the latter. In both case, BASF agreed to supply them at market price (i.e., in line with Celanese's and Oxeno's prices) but for a limited volume (roughly half of the demand). However, it cannot be concluded from the historical trend of market shares that BASF will, in future, be a less active competitor.

(73) Given the spare capacities, BASF will also be able to counteract possible price increases by the joint venture. In the course of the investigation, the Commission found no evidence that BASF would alter its strategy and would not react to a reduction in supply and possible future price increases by the joint venture by expanding supply. BASF could thus improve its position in this market and exert effective competitive pressure on the JV. Its behaviour in recent years shows that it was in a position, and found it advantageous, to expand its market share significantly over the last five years.

New entrants and producers outside the EEA

(74) Strong competition cannot be expected from new entrants: no new entrant has been reported in the past 10 years and, given the size of the European market, which already exhibits substantial overcapacity, the cost of building a new plant and the strict regulations applying to Seveso sites, the construction of a new plant is highly unlikely in the near future.

(75) Several existing chemical plants outside the EEA produce butyric aldehyde, namely Zaklady in Poland and two other firms in Russia and Romania. However, no customer reported having been supplied by the Romanian or Russian firm. These appear to be too far away to offer the level of security of supply required by European customers and particular those in Germany and Belgium, where closer and more reliable suppliers are active.

(76) A few customers in Germany have been and may still be supplied by Zaklady (less than [5]* % market share). Besides, Zaklady is a significant player on the Italian market. Several German customers reported that they considered that Zaklady currently did not offer a level of security of supply high enough for them to take the risk of being supplied by it. Further, Zaklady declined several times to commit to long-term supply contracts (this has been the case, for instance, with Solutia and Kuraray) and proposed only spot contracts for a short period. The use of spot contracts may be a sign of short capacities or unsecured supply in propylene. Therefore, Zaklady can be seen as a fringe player in Germany and Belgium that does not seem to be currently in a position to exercise any counter pressure against the joint venture. However, Zaklady has been a significant player in Italy for several years ([10 to 20 %]* market share in 2002), where it has been apparently able to supply butyric aldehyde with a satisfactory logistics chain. Therefore, it cannot be ruled out that, being located close to Germany, Zaklady will in the years ahead develop an efficient sales organisation and increase its market share in Germany.

(c) ***Conclusion as regards n-butyric aldehyde***

(77) Accordingly, it appears that the proposed operation would, on the basis of 2002, give the joint venture a [60 to 70 %]* market share. Although this market share appears significant, it has fallen sharply in recent years following Celanese's losses of market share. In addition, the market share level does not seem to be a very reliable indicator of market power given the very small size of the merchant market and the very limited number of customers. Developments in market shares over the last five years (see recitals 58 and 71) have shown that competition exists on the n-butyric aldehyde market. Moreover, even though this market is already very highly concentrated, the parties' main competitor, BASF, and, to a lesser extent, Perstorp enjoy spare capacities that are sufficient for them to avert any output reduction or price increase by the merging parties. Besides, the Commission has not found any strong evidence that BASF would alter its strategy and is not using its spare capacity but would instead follow price increases effected by the parties. Lastly, Zaklady was in a position to develop a logistics chain on the highly priced southern European market. The possibility cannot, therefore, be ruled out that, in the event of a small, significant but not merely temporary price increase, Zaklady will also step up deliveries to the northern European market.

(78) In the present case, it is therefore to be noted that the merger would lead not only to the creation or the strengthening of a dominant position.

(d) ***Commitments given by the parties***

(79) The Commission takes note of the commitments given by the parties. These commitments are the following:

(a) The parties undertake to maintain durable secure supplies to their butyric aldehyde customers in accordance with their market activity hitherto. To this end, they declare their readiness to renew all existing supply contracts with customers currently purchasing from them, if so requested, as follows: […]*. In volume terms, at least the quantities of butyric aldehyde currently supplied must be made. Current sales prices or price formulas will be maintained, subject only to a cost- or inflation-related adjustment factor applying the usual parameters; […]*.

(b) […]*

(c) […]*

These commitments are not a condition of approval.

2. *BUTANOL*

(1) THE RELEVANT PRODUCT MARKET

(80) Butanol (BuOH) is a downstream product of butyric aldehyde. It is produced by catalytic hydration from butyric aldehyde. It is the precursor for a series of chemical intermediate products such as butyl acetate, butylamine, butylacrylate and phthalate plasticisers. There are no truly adequate substitute products for butanol. Only in varnish production can butanol, technically speaking, be replaced by a series of other products with comparable solvent and thinning capacities (such as, after adaptation of the formula, propanols, ketones, glycol ether and aromatics). In the absence of adequate substitutability, it can be assumed that the relevant product market consists only of butanol.

(81) Butanol comes in the form of two isomers: n- and iso-butanol, n-butanol being made from n-butyric aldehyde and iso-butanol from iso-butyric aldehyde. There are arguments for accepting separate product markets for the two types of butanol. On the demand side, for instance, there is only a low degree of substitutability. For most applications, only one type can be used; only in solvents can one be replaced by the other. On the supply side, there is again no substitutability (flexibility in organising production processes). Producers cannot basically switch production capacity from n-butanol to iso-butanol to any great extent. The reason for this is that in the production of the precursor, butyric aldehyde, the two types n- and iso-butyric aldehyde are used in a basically fixed ratio. If a butanol producer, for instance, wished to raise its production of iso-butanol, it would also have to boost production of iso-butyric aldehyde. If it did so, n-butyric aldehyde output would rise in the same proportion. The producer would then have to find a use for the excess n-BuH. In many cases n-butanol production would be the only option. So, at the end of the day, production of the two types of butanol would have risen by the same proportion.

(82) But the following situation is also conceivable. An integrated producer produces butyric aldehyde, of which it obtains both types. For its production of reprocessed products it needs mainly one of the two types, say iso-butyric aldehyde, so that only a small quantity of iso-butyric aldehyde is left over for hydration, in other words for iso-butanol production. The producer will then produce larger quantities of n-butanol but only small quantities of iso-butanol. In such a situation there is no possibility of offering to supply more iso-butanol except by renouncing the possibility of processing the iso-BuH and selling the products made from it.

(83) It follows that some suppliers, depending what products are made from the two butyric aldehyde isomers, obtain different market shares for n- and iso-butanol. But this does not apply to the parties, who have similar market shares for the two butanol isomers.

(84) An argument in favour of accepting separate markets is the fact that price trends for the two isomers are not parallel. In 1998, for instance, the price of n-butanol was around 15 % higher than the price for iso-butanol, but in 2002 average prices were virtually identical.

(85) But the question whether separate markets should be defined for n- and iso-butanol can be left unanswered for the moment, as the merger does not appear to be compatible with the common market, regardless of whether a single butanol market or separate markets for the two types are accepted.

(2) THE RELEVANT GEOGRAPHIC MARKET

(86) As the parties see it, the butanol market is (at least) EEA-wide. But some customers feel that demarcating national markets is more realistic.

(87) The investigation revealed that there are grounds for believing that German suppliers delivering butanol to

German customers enjoy a comparative advantage over foreign suppliers, with the result that the parties have a substantially higher market share in Germany, but that the impact of these advantages is not such as to warrant a conclusion that national markets are fragmented. Nor does there seem to be a defined regional market consisting of Germany and neighbouring countries.

(88) But the uneven distribution of market shares in the EEA countries does not point to the existence of separate markets. For one thing, there is no pattern whereby suppliers each have dominant positions on their home markets. It is true that the parties are particularly successful in Germany, but they also have sizeable market shares in Sweden and France, Perstorp's and Atofina's home markets. And BASF, on the other hand, has no above-average market share in Germany.

(89) Transport costs are not an argument for accepting narrower geographic markets than the EEA market. Data from DB Cargo show that the parties' main competitors are at a 3 % to 6 % transport cost disadvantage. This narrow gap has no significant negative effect on foreign suppliers selling butanol in Germany.

(90) Nor is there any evidence that foreign manufacturers cannot supply the German market for security-of-supplies considerations. It is true that security of supplies is an important competitive factor for butanol buyers, alongside price and quality. But there is no evidence that foreign suppliers cannot supply the German market simply because they cannot guarantee security of supplies on account of the distance from their facilities to the customer's works. This much is clear from the replies to the Commission's questions, according to which the distance from the supplier is not a significant factor. Not is there any reason to believe that the likelihood of supplies being unreliable rises with distance.

(91) Finally, a foreign supplier can erect or rent a tank in Germany. Recent examples are that of Perstorp, which acquired a tank in Hamburg and put it into operation in 2001, whereupon its butanol sales in Germany increased considerably, and the South African producer Sasol, currently erecting a tank in Marl.

(3) COMPATIBILITY OF THE MERGER WITH THE COMMON MARKET

(92) The merger generates significant market shares on the EEA-wide butanol markets. But the merger will not give the parties such a market share as to raise fears of a dominant position as a result of which competition would be significantly impeded in the common market or in a substantial part of it.

(93) The assessment is not affected by whether a single market for butanol or a specific market for each of the two butanol isomers is posited.

Assessment in competition terms on the basis of an EEA-wide market for butanol

(94) If a single EEA-wide market for butanol is posited, if in other words no distinction is made between n- and iso-butanol, the market structure after the merger will be as follows:

Table 12

Market share for butanol

	1999		2000		2001		2002		2002+	
	kt	Share	kt	Share	kt	Share	kt	Share	kt	Share
Celanese	[…]*	[20 to 30 %]*	[…]*	[20 to 30 %]*	[…]*	[20 to 30 %]*	[…]*	[20 to 30 %]*	[…]*	[20 to 30 %]*
Oxeno	[…]*	[10 to 20 %]*	[…]*	[10 to 20 %]*	[…]*	[30 to 40 %]*	[…]*	[20 to 30 %]*	[…]*	[20 to 30 %]*
O+C	[…]*	[40 to 50 %]*	[…]*	[40 to 50 %]*	[…]*	[50 to 60 %]*	[…]*	[50 to 60 %]*	[…]*	[40 to 50 %]*
Atofina	[…]*	[0 to 10 %]*	[…]*	[0 to 10 %]*	[…]*	[0 to 10 %]*	[…]*	[0 to 10 %]*	[…]*	[0 to 10 %]*
BASF	[…]*	[10 to 20 %]*	[…]*	[10 to 20 %]*	[…]*	[10 to 20 %]*	[…]*	[0 to 10 %]*	[…]*	[0 to 10 %]*
Perstorp	[…]*	[20 to 30 %]*	[…]*	[20 to 30 %]*	[…]*	[10 to 20 %]*	[…]*	[20 to 30 %]*	[…]*	[10 to 20 %]*
BP	[…]*	[0 to 10 %]*	[…]*	[0 to 10 %]*	[…]*	[0 to 10 %]*	[…]*	[0 to 10 %]*	[…]*	[10 to 20 %]*
Sasol	[…]*	[0 to 10 %]*	[…]*	[0 to 10 %]*	[…]*	[0 to 10 %]*	[…]*	[0 to 10 %]*	[…]*	[0 to 10 %]*
Imports	[…]*	9,2 %	[…]*	9,0 %	[…]*	7,6 %	[…]*	7,9 %	[…]*	6,5 %
Total	229		233		277		[…]*		[…]*	

(95) For 2002 the Commission has identified a volume on the free market of slightly more than 266 kt. Celanese accounts for [… kt]* ([20 to 30 %]*) and Oxeno for [… kt]* ([20 to 30 %]*). If the monthly sales figures given by the parties are added up, they have a market share of slightly over [50 to 60 %]*. Oxeno's share and, consequently, the combined share of the parties (and the volume of the market) are even greater than the table indicates since Oxeno's figures do not include deliveries to the joint venture with […]*, in which Degussa has a 50 % share. If this firm is regarded as independent of Oxeno, the relevant deliveries are not part of its internal group deliveries but part of the merchant market.

(96) The second largest supplier after the joint venture is the Swedish firm Perstorp, with sales of […]* kt and a market share just over 20 % […]*.

(97) All other suppliers have market shares below 10 %. 'Imports' include imports from non-EEA countries. The most important importer is the Polish firm Zaklady, and butanol from Russian and Czech producers is also sold through dealers in the EEA.

(98) The parties rightly point to a series of effects suggesting that the future market share of the joint venture will be significantly lower, at no more than [30 to 40 %]* or so. The corresponding corrections have been incorporated in table 12 in the 2002+ column.

(99) If supplies to the joint venture with […]* are added to the merchant market, this means that the figures both for Oxeno deliveries and for the volume of the market must be increased by [30 to 40 kt]*, which generates an increase in the combined market share by just under [… %]* (the […]* effect).

(100) The opposite is achieved by the 'Ineos effect', which stems from the fact that Ineos no longer belongs to BP so that what were internal deliveries within the BP group to its former butyric acetate plant in Antwerp are now part of the merchant market. This increases the volume of the market and BP's share by about […]* kt and substantially increases BP's market share, making it the joint venture's second largest competitor.

(101) Finally, the entry into operation of Sasol's new butanol plant in South Africa and its new n-butanol tank in Marl must be factored in. For one thing, Sasol will be able to meet its needs in Marl from its own butanol imported from South Africa. For that purpose, Sasol has already terminated its contract with Oxeno. This cuts Oxeno's sales on the market by […]* (the Sasol/1 effect). For another, Sasol will be able to supply customers in the EEA (Sasol/2 effect). Depending on how large Sasol's sales to third firms are and on what proportion is

accounted for by sales to the parties, its combined market share comes to slightly below or slightly above [30 to 40 %]*. The calculations underlying Table 12 assume that Sasol will succeed in selling not only the production of the Brunsbüttel facility but also a further […]* kt of butanol, of which […]* kt to the parties. The parties put both figures a little higher than that.

(102) The parties further argue that they have lost a significant customer […]* so that the joint venture's market share is likely to fall even further, although the loss of this customer makes only a minor dent in their combined market share.

(103) In assessing these effects, account must be taken of the following: […]*. For the purposes of assessing the future JV's market power, the 'Sasol effect' is therefore considerably less significant than the resulting reduction in market shares.

(104) Conversely, in assessing the impact of the […]* effect, it must be remembered that this is an equally owned joint venture of a firm in the Degussa Group and another firm. It must be assumed that the relevant customer is jointly controlled by Degussa and […]*. There is therefor no apparent reason for treating the relevant deliveries in the same way as other deliveries to the free market.

(105) Sales volumes were taken as the basis for calculating market shares. For one thing, fuller documentation is available on quantities sold than on turnover. For another, price differences here reflect fluctuating commodity prices rather than pricing based on market power. For the rest, market shares calculated from sales volumes or turnover do not differ widely.

(106) The parties admittedly have a relatively large combined market share at 40 %, twice as large as the next two competitors, Perstorp and BP. The joint venture will have the structural advantage of being the only European supplier with two production facilities. This is an advantage in the event of a planned or unplanned production stoppage.

(107) It can be assumed, however, that the parties will be subject to sufficient competitive pressure from other suppliers, primarily Perstorp and BASF. Both suppliers have market shares of [10 to 20 %]* respectively. This makes them substantially smaller than the joint venture but large enough that the joint venture cannot ignore them.

(108) Perstorp has a tank in Hamburg from which German customers can be supplied. This means that it is easier for Perstorp than for other non-German suppliers to deliver to customers in Germany.

(109) BP obtains its butanol from Oxochimie, the joint venture with Atofina. In the past, this firm used virtually all its butanol production from within the group. After BP sold its butyl acetate plant in Antwerp to Ineos, the corresponding deliveries must be regarded as being on the free market. BP does have a supply contract with Ineos for some time but, once that contract runs out, BP will be an alternative supplier for other potential customers. And it is already active with small but by no means negligible sales on the spot market.

(110) Other suppliers — BASF, Atofina, Zaklady and Sasol — will also exert competitive pressure. Admittedly, at each of these competitors there are circumstances suggesting that their competitive pressure will not be very great. BASF has a market share of around [0 to 10 %]*. But several customers have expressed the opinion that, as a result of its extensive internal demand and its policy of producing as many final products as possible from a limited number of input products, BASF is not always available to supply the market and cannot be seen as a full alternative. Atofina is also active on this market, especially in France and Italy. But Atofina's competitive pressure should also be limited, as it is already operating at full capacity. Zaklady is also on the EEA market, but most potential customers do not regard it as a serious alternative, if only because it is in business difficulties and does not enjoy full freedom of business action. Customers have, for example, reported that Zaklady has been reluctant to enter into long-term contracts. The most likely source of competitive pressure is Sasol. It produces in South Africa, using coal mined there rather than petroleum as the raw material to manufacture its precursor, propylene. Its cost structure is accordingly very different from that of the other suppliers. Sasol is

building a large tank at the Marl Chemsite, from which it can supply customers in Germany and the Benelux countries economically. Sasol has limited but not negligible quantities available from its Brunsbüttel facility, where it produces long-chain alcohols, with butanol coming out as a by-product. Lastly, the parties refer to imports from the Czech Republic and Russia, sold in the EEA via dealers. Here again there should be some competitive pressure, albeit not strong, when these firms operate on the spot market.

Countervailing power on the demand side

(111) Potential customers can also exert competitive pressure on the parties. Butanol customers include major firms that are perfectly familiar with market situations and pricing factors and are capable of exerting demand-side power. In 2002, for instance, Celanese had only […]* customers; the five largest accounted for just over [… %]* of turnover. The situation is similar for Oxeno: the five largest customers accounted for [… %]* of turnover, the ten largest for [… %]* and the 20 largest for [… %]*. These customers exert a degree of countervailing demand-side power. Some of them operate a multi-vendor strategy to avoid becoming dependent on one or other supplier. Since competitive pressure is also brought to bear by the fact that customers cover only part of their total demand from other suppliers, it can be assumed that buyers exert a degree of demand-side power that makes it difficult for the joint venture to exercise market power. Unlike the position for butyric aldehyde, substantial quantities of butanol are sold on the free market; Perstorp has no 'captive use' for butanol and sells its entire production on the merchant market. It cannot, therefore, be argued that the major potential customers do not exercise demand-side influence since suppliers are not dependent on sales on the free market.

Outcome if a single EEA-wide market for butanol is posited

(112) There is accordingly no reason to fear that a dominant position will be created as a result of the merger on the EEA market for butanol that would restrict effective competition in the common market.

Competitive assessment assuming separate markets for n- and iso-butanol

(113) If it is assumed that there are separate markets for n- and iso-butanol, the market structure and conditions of competition on the market for n-butanol broadly correspond to the foregoing analysis of the market for butanol generally. This is already clear from the fact that n-butanol accounts for five sixths of the merchant market for butanol. The parties' market shares for n-butanol are slightly higher than for butanol overall. The Commission's investigations reveal that the volume of the market was roughly 152 kt, 168 kt, 214 kt and 203 kt in the years from 1999 to 2002. For 2002 the parties' market share comes to rather more than 50 % [… %]*; the figure is even 3 % higher than for butanol generally. From 1999 to 2001 the parties' combined market share was always within 4 % of their market share for butanol generally. The market share for n-butanol was slightly lower in 1999 and slightly higher in 2000 and 2001 than the overall butanol market share [1999: … %; 2000: … %; 2001: … %]*.

(114) Apart from the fact that (except in 1999) the n-butanol market share was slightly higher than for butanol in general, the analysis given above for the butanol market applies likewise here. In particular, the parties' combined market share is still more than double the share of its nearest competitor, Perstorp.

(115) The Sasol effect is admittedly more powerful here than in the case of a single market for butanol generally. Bearing in mind the four effects mentioned above (R&H, Ineos, Sasol/1 and Sasol/2), on a market totalling 261 kt the parties have a combined market share of about [40 to 50 %]*. The main competitors are Perstorp, with [20 to 30 %]*, and BP, with [10 to 20 %]*. Even if the parties' market position is somewhat stronger than on the assumption of an aggregate market for butanol, the assessment in competition terms remains much the same.

(116) Assuming a single EEA-wide market for iso-butanol, there is likewise no reason to believe that the merger will create or strengthen a dominant position. The volume of the market will be around 62 kt or EUR 25 million. The parties' combined market share is still above that of their competitors. But factoring the above effects in brings the parties' market share below 40 % [… %]*. BASF has adequate free capacity and can exert real competitive pressure. The capacity of the second largest competitor, Atofina, is limited but, even so, represents a share of [10 to 20 %]*. If prices were to rise substantially, Atofina could divert some of the products it consumes internally to the merchant market. And the smaller suppliers — BP, Zaklady, Perstorp and, in future, Sasol — can exert a measure of competitive pressure.

(117) The Commission has therefore concluded that the merger is compatible with the common market in relation to the market or markets for butanol, however demarcated.

3. *2-ETHYL-HEXANOL (2-EH)*

(1) THE RELEVANT PRODUCT MARKET

(118) 2-EH is a downstream product of n-butyric aldehyde. It is produced through aldolisation of n-butyric aldehyde, downstream catalytic hydration and subsequent distillation. 2-EH is an oxo-alcohol that is used as an intermediate product in the produce of plasticisers such as dioctylphthalate (DOP) and dioctyladipate (DOA) applied in (PVC-) synthetic fabrics, solvents (2-ethylacrylate; application: paints and varnishes), diesel additives (2-ethylhexylnitrate) and lubricants.

(119) In the EEA the use of 2-EH for these purposes is distributed as follows:

— PVC plasticisers 66 %

— Diesel additives (Cetan improvers) 13 %

— Solvents 12 %

— Lubricant additives 5 %

— Other 4 %.

(120) In the application as alcohol-plasticiser for the produce of PVC plasticisers, 2-EH can technically be substituted by polyalcohols. According to Chemical Economics Handbook 2002, about 70 % of 2-EH applications as PVC plasticisers can be replaced by polyalcohols. For other 2-EH applications (diesel additives, solvents, lubricants, etc.) there are no substitute products. The outcome is that 2-EH is technically substitutable in approximately 46 % of all applications. Admittedly, as a result of differing process features, replacing 2-EH by polyalcohols requires a different formulation and reorganised production.

(121) The polyalcohols used as 2-EH substitutes in manufacturing plasticisers are iso-nonylalcohol (INA), iso-decylalcohol (IDA) and propylheptanol. The most important of these is INA, from which the plasticiser di-isononylphthalate (DINP) is produced. DINP is also the most important competing product for the plasticiser DOP made from 2-EH. Prices of the precursor INA, however, behave differently from those for 2-EH. The annual average prices of INA rose sharply from 1998 to 2001 and only slackened again in 2002, after Degussa's new capacity hit the market. According to ICIS-LOR, by contrast, 2-EH prices fell in 1998 and 1999 and rose again until 2002. Comparison of the prices charged by Degussa as the largest INA producer in the EEA and the larger of the only two suppliers in the EEA over that period shows that INA was between 20 % cheaper and 30 % more expensive than 2-EH.

(122) Given that 2-EH is only partly substitutable, that conversion costs are considerable and, above all, that INA prices behave so differently, it is assumed for the purposes of this Decision that 2-EH is a distinct relevant product market.

(2) THE RELEVANT GEOGRAPHIC MARKETS

(123) For all relevant product markets, the parties to the merger proceed on the basis of at least EEA-wide geographic markets. Since bulk products are concerned, all products are stated to be offered by all substantial suppliers on an EEA-wide basis.

(124) Some players on the market, however, were of the opinion that narrower national or regional markets should be used for 2-EH, primarily on account of transport costs. The market analysis also revealed that the market shares of Celanese and Degussa and the other competitors doing business throughout the EEA differed in individual EEA States, sometimes considerably. Unlike the position regarding butyric aldehyde, there is no clear demarcation of markets for 2-EH on the basis of the producer's home country or country of production. In Germany and in France, two countries in which 2-EH is produced, imports account for over 25 % and over 50 % respectively. The Swedish firm Perstorp Oxo is the only dominant 2-EH supplier in Sweden. But the main reason for this is that the level of demand in Sweden, at less than 1 000 tonnes, is minimal and there is no incentive for competitors to do business there.

(125) 2-EH can be and is carried by all means of transport — by road, sea or rail tankers or in barrels. To keep transport costs as low as possible and to be able to supply more distant customers, all EEA suppliers except Atofina have storage tanks in the EEA. Degussa has two, one in Rotterdam and one in West Thurrock. BASF has a 2-EH storage tank in Tarragona. The Swedish producer Perstorp has three 2-EH storage tanks in the EU: one in Hamburg, one in Rotterdam and one on Teesside (GB). These storage tanks mean that Perstorp can achieve market shares of over 15 % in the three regions. The Polish firm Zaklady also has a storage tank in Antwerp.

(126) The relevant geographic market for 2-EH is accordingly the EEA.

(3) COMPATIBILITY OF THE MERGER WITH THE COMMON MARKET

(127) As a result of the merger, the number of significant suppliers in the EEA will fall from five to four. In 2002 the JV would have had a market share of [30 to 40 %]* (Celanese [20 to 30 %]*, Degussa [10 to 20 %]*). The other competitors are Atofina ([10 to 20 %]*), BP ([10 to 20 %]*) and Perstorp ([10 to 20 %]*). BASF has a share of [0 to 5 %]* and Zaklady one of [0 to 10 %]*.

Table 13

Market shares for 2-EH

	1999		2000		2001		2002	
	Quantity kt	Market share	Quantity kt	Market share	Quantity kt	Market share	Quantity kt	Market share
Celanese		[20 to 30 %]*		[20 to 30 %]*		[20 to 30 %]*		[20 to 30 %]*
Degussa		[20 to 30 %]*		[20 to 30 %]*		[20 to 30 %]*		[10 to 20 %]*
JV		[40 to 50 %]*		[40 to 50 %]*		[40 to 50 %]*		[30 to 40 %]*
Atofina		[10 to 20 %]*		[10 to 20 %]*		[10 to 20 %]*		[10 to 20 %]*
BP		[10 to 20 %]*		[10 to 20 %]*		[10 to 20 %]*		[10 to 20 %]*
BASF		[10 to 20 %]*		[0 to 10 %]*		[0 to 10 %]*		[0 to 10 %]*
Perstorp		[10 to 20 %]*		[10 to 20 %]*		[10 to 20 %]*		[10 to 20 %]*
Zaklady		[0 to 10 %]*		[0 to 10 %]*		[0 to 10 %]*		[0 to 10 %]*
Others	5	2	5	2	5	2	5	3
Total	[…]*	100	[…]*	100	[…]*	100	[…]*	100

(128) According to the information provided by the parties, there are 'Other' suppliers that account for about 10 % of the market. In addition to sales by BP, not listed by the parties as an independent supplier, these are mainly imports by firms in Russia and from Romania by Oltchim via dealers in the EEA. The Commission has not been able to verify the figures. But the answers to questions put to dealers and customers reveal that the figure quoted by the parties is too high. In recent years, imports from Russia and Romania probably ran at no more than 5 kt annually.

(129) The parties' market share was constantly well above 40 % between 1999 and 2001 and fell below 40 % only in 2002. The JV would be twice as large as its two nearest competitors, Atofina and Perstorp. BASF's market share has shrunk in recent years and for the last two years has been below [5]* %. A few players on the market even believe that BASF is about to withdraw altogether. However, BASF itself denies this. But both BASF and the Polish firm Zaklady must be classified, if anything, as 'also-rans'.

Table 14

Capacity and production of 2-EH

	1999		2000		2001		2002	
	Capacity (kt)	Production	Capacity (kt)	Production	Capacity (kt)	Production	Capacity (kt)	Production
Celanese		[200 to 300]*		[200 to 300]*		[200 to 300]*		[200 to 300]*
Degussa		[<100]*		[<100]*		[<100]*		[<100]*
JV		[300 to 400]*		[300 to 400]*		[300 to 400]*		[300 to 400]*
Atofina		[<100]*		[<100]*		[<100]*		[<100]*
BP		[<100]*		[<100]*		[<100]*		[<100]*
BASF		[<200]*		[<200]*		[<200]*		[<200]*
Perstorp		[<100]*		[<100]*		[<100]*		[<100]*
Total EEA	1 040	[…]*	1 040	[…]*	1 020	[…]*	1 000	[…]*

(130) Moreover, the JV also had the largest capacity on the market. With [50 to 60 %]* in 2002, it accounted for more than half of aggregate EEA capacity of a good 1 000 kt. Its free capacity is also by far the largest on the market and would be enough to serve the entire merchant market. But the parties are of the opinion that, despite high market shares and capacities, there is no threat to competition.

(131) The two parent companies' market share slipped steadily from [nearly 50 %]* in 1999 to [30 to 40 %]* in 2002. While, in a generally contracting market Celanese was able to maintain its market share at around [20 to 30 %]*, Degussa's market share fell from [20 to 30 %]* in 1999 to [10 to 20 %]* now. In recent years Degussa has steadily cut its 2-EH production. The reason for this lies in the strategic decision it took two years ago to withdraw from the downstream market for DOP, for which the bulk of the 2-EH it produced was needed, and to produce DINP instead. DOP production has fallen in recent years from […]* kt in 1998 to just […]* kt in 2002. There was a corresponding decline in internal consumption of 2-EH from […]* kt in 1998 to just […]* kt in 2002.

(132) Degussa has declared that it is abandoning 2-EH production in Marl whether or not the notified joint venture is set up. This decision was taken back in 1999. The number of significant suppliers in the EEA would then fall from five to four even without the joint venture.

(133) Parts of the 2-EH production facility, such as the hydration plant, are to be refitted for butanol production that is to be transferred to the JV. All 2-EH production is to be concentrated in Oberhausen. As a result, […]* kt of 2-EH production capacity would be taken off the market. This corresponds to a quarter of aggregate capacity available in the EEA. The JV would even then still have the largest capacity in the EEA, though with sharply reduced free capacity.

(134) For the above reasons, the Commission is of the opinion that the proposed merger will not create a dominant position for the joint venture in the supply of 2-EH in the EEA.

4. *DOP*

(1) THE RELEVANT MARKETS

(135) Dioctyl phthalate (DOP), also known as diethyl hexylphthalate (DEHP), is derived from 2-EH. It is a chemical in the phtalates group that is produced by esterisation of an alcohol, in this case 2-EH, with phthalic anhydride (PSA). It is the standard plasticiser for synthetic materials, in particular PVC. In addition to its use as a plasticiser, DOP is used on a small scale as a bonding agent in varnishes and glues and to dilute pigments.

(136) DOP is a bulk product. All producers have comparable quantities. But a distinction is made between technical quality and food quality. To manufacture food quality, a further distillation stage is needed.

(137) In recent years DOP has attracted attention since it is toxic to reproduction. The skull symbol must therefore be placed on it. Demand has accordingly fallen, particularly in its application as a PVC plasticiser. DOP is now hardly ever used as a plasticiser in the manufacture of toys.

(138) In this primary use as a PVC plasticiser, DOP can be replaced by plasticisers made from polyalcohols. These include the C_9-phtalate di-isononylphthalate (DINP), the polyalcohol derivative isononylalcohol, the C_{10}-phtalate di-isodecylphthalate (DIDP), isodecylalcohol derivatives and dibutylphthalate (DBP) or di-isobutylphthalate (DIBP), which are butanol derivatives. The most important substitute product is DINP.

(139) DINP is both technically and economically a very close substitute for the standard plasticiser DOP. Price trends for the two products between 1998 and 2002, without being actually parallel, are very close to each other. In some years DOP is more expensive than DINP, in other years the opposite applies. The trend is influenced primarily by the trend in prices for the precursor INA. But the margin of fluctuation is generally narrower and usually is below 5 %.

(140) In Case COMP/M.2314 — BASF/Eurodiol/Pantochim, a distinction was made between short-chain phtalates (C1 to C4) and standard phtalates on the basis of C4-or polyalcohols ([12]). But in the present case there is no need to consider whether there is objectively a distinct market (only) for DOP, as the parties argue, for DOP and DINP or for all PVC plasticisers, as the JV will not have a dominant position in any event.

(2) THE RELEVANT GEOGRAPHIC MARKET

(141) In Case BASF/Eurodiol/Pantochim ([13]) the Commission made its competition assessment on the basis of an EEA market but left open the question whether the relevant geographic market for phthalates, to which DOP belongs, was the EEA alone or included eastern Europe.

(142) The investigations in the present case have shown that there is an EEA market. All competitors represented with production facilities on the European market supply the EEA. The Polish firm Zaklady has a tank in Antwerp and also delivers via dealers. For the purposes of this decision, an EEA market is assumed.

(3) ASSESSMENT IN COMPETITION TERMS

(143) In 2002 the JV had a market share of [20 to 30 %]* (Celanese [10 to 20 %]*, Degussa [below 10 %]*). The other competitors are BASF ([20 to 30 %]*), Atofina ([10 to 20 %]*), Perstorp ([10 to 20 %]*), Lonza ([below 10 %]*), Zaklady ([below 10 %]*) and Cepsa ([below 10 %]*). BP abandoned DOP production in 2001.

([12]) Case COMP/M.2314 BASF/Eurodiol/Pantochim, 11 July 2001, point 11.

([13]) Case COMP/M.2314 BASF/Eurodiol/Pantochim, 11 July 2001, point 42.

Table 15

Market shares for DOP

	2000		2001		2002	
	Quantity kt	Market share %	Quantity kt	Market share %	Quantity kt	Market share %
Celanese		[10 to 20 %]*		[10 to 20 %]*		[10 to 20 %]*
Degussa		[0 to 10 %]*		[0 to 10 %]*		[0 to 10 %]*
JV		[20 to 30 %]*		[20 to 30 %]*		[20 to 30 %]*
Atofina		[10 to 20 %]*		[10 to 20 %]*		[10 to 20 %]*
BP		[0 to 10 %]*		[0 to 10 %]*		—
BASF		[10 to 20 %]*		[20 to 30 %]*		[20 to 30 %]*
Perstorp		[10 to 20 %]*		[10 to 20 %]*		[10 to 20 %]*
Lonza		[0 to 10 %]*		[0 to 10 %]*		[0 to 10 %]*
Zaklady		[0 to 10 %]*		[0 to 10 %]*		[0 to 10 %]*
Cepsa		[0 to 10 %]*		[0 to 10 %]*		[0 to 10 %]*
Others		6		7		7
Total	409	100	401	100	[…]*	100

(144) The size of the market shares is such that there appears to be no risk of a dominant position being created. Moreover, after abandoning production of the precursor 2-EH, Degussa will abandon production of DOP whether or not the JV is formed. Degussa will transfer only its residual clientele to the JV.

(145) Celanese produces no other high-grade plasticisers. Degussa produces minimum amounts of DBP and DIBP but has a dominant position for DINP. DOP can be replaced in virtually all PVC plasticiser applications by DINP. Unlike DOP, DINP is not classified as toxic to reproduction and sales have been expanding steadily in recent years. In the EEA there are three producers of DINP: Degussa, BASF and Exxon Mobil. On this growth market Degussa raised its market share to about [35 to 45 %]* in the last three years, while BASF and ExxonMobil have taken roughly equal shares of the rest. If DOP and DINP were assumed to be part of the same product market, Degussa and the JV would have a combined market share of [30 to 40 %]*, followed by BASF with [20 to 30 %]*.

(146) Against this background, there are no objections on competition grounds to the planned joint venture between Celanese and Degussa in relation to the EEA market for DOP or the combined DOP/DINP plasticisers market.

5. *BUTYL ACETATE*

(1) THE RELEVANT PRODUCT MARKET

(147) Butyl acetate is derived from butanol by esterifying acetic acid with butanol. It is used mainly as a solvent. It can be used in varnish kits, as a cosolvent in low-solvent varnishes with high solid concentrations. It dissolves substances such as fats, oils, cellulose nitrate and both natural and synthetic resins. There are no substitute products that can replace butyl acetate in all circumstances. In view of its specific applications, the parties consider that the relevant product market does not extend beyond the product butyl acetate.

(148) Butyl acetate also occurs in the two isomers n-butyl acetate and iso-butyl acetate. Unlike in the case of

butyric aldehyde, the Commission is inclined to accept the idea of a single market as the same reactors can be used to produce either n- or iso-butyl acetate. It can also be produced in batches, where the plant is used for a specific period to produce one of the isomers and then cleaned before being used for the other. From the producer's point of view, therefore, there is a degree of flexibility. Here too, however, it is unclear whether both isomers have their own product markets or are part of a single product market, as the competition assessment makes no significant distinction. N-butanol has the lion's share of the free market, with iso-butyl acetate accounting for only about 10 %. Accordingly, it makes little or no difference to the assessment whether a single market for butyl acetate is assumed or whether n-butyl acetate alone is taken into consideration. However, the merger has no competition implications as regards a possible market for iso-butyl acetate.

(2) THE RELEVANT GEOGRAPHIC MARKET

(149) The parties believe that the market for butyl acetate covers the whole of the EEA. Operators questioned have also endorsed this view. Some have even said that butyl acetate was also obtained from overseas; Celanese also sells products produced in its US plant in Europe. It must therefore be assumed that the market covers the whole of the EEA; but, for the purposes of the assessment in competition terms, it must be remembered that imports from non-EEA countries are not without significance.

(3) COMPATIBILITY WITH THE COMMON MARKET

One-sided contribution

(150) The only party to assign its trade in butyl acetate to the JV is Oxeno. The parties take the view that, where the contribution to a JV is one-sided in this way, the competitive assessment should not add together the market shares. This follows from the established practice of the Commission under Article 81 of the EC Treaty, which applies this provision to the competitive relationship between a full-function cooperative joint venture and one of its parent companies. They also refer to Article 2(4) of the Merger Regulation and the (new) Commission Notice of 4 July 2001 on restrictions directly related and necessary to concentrations. It follows from recital 35 and following that the Commission assumes that competition between a full-function cooperative joint venture and its parent companies is protected under Article 81. If it were assumed that the JV and its parent companies formed a competitive unit, non-competition clauses would automatically need to be removed from the field of application of Article 81(1) of the EC Treaty (and exemptions would not need to be made), much like restrictions on competition within groups. However, the notice simply states that such restrictions on competition are eligible for exemption and may exempted only for a limited period of time. Furthermore, in the present case no non-competition agreement between the JV and Celanese has been concluded, and so it must be assumed that Celanese and the JV will continue to compete on the markets for butyl acetate and carboxylic acids after the merger. Any other conclusion would amount to implying that the parties have infringed Article 81 of the EC Treaty. The situation would be different only if, as in Viho v Commission ([14]), the parent company and the subsidiary formed an economic unit managed on a unified basis.

(151) The legal interpretation is not compelling. But, for the purposes of this Decision, there is no need to settle the issue as the merger is compatible with the common market even if Celanese and the JV are regarded as a single business unit.

Competition assessment assuming that the market for butyl acetate covers the whole of the EEA

(152) If it is assumed that the market for butyl acetate is the whole of the EEA and if no distinction is made between n-butyl acetate and iso-butyl acetate, there is no reason to assume that the merger will create a dominant position.

(153) The Commission has calculated that the market volume was around 275 kt in 2002, which is in line with the parties' estimates. When making these calculations, it attributed to 'other suppliers', i.e. suppliers other than the parties, namely BASF, BP/Ineos and Cepsa, sales of […]* kt. It has established that the market volume was between 240 kt and 260 kt in the years from 1999 to 2001.

(154) On this market, taking Celanese and the joint venture EOC as a single business entity, the merger would reduce the number of major suppliers in the EEA from four to three. With sales in 2002 of […]* kt (Degussa)

([14]) Case C-73/95 P [1996] ECR I-5457.

and […]* kt (Celanese including Celanese USA), the parties would have a market share of around [40 to 50 %]*; using turnover figures in euros, the sum of the market shares is slightly lower, at around […]* %.

(155) The parties' market share is also far greater than those of the two next largest suppliers, BASF and Ineos, each with a market share of about 20 %. The remainder of the market is taken by the Spanish supplier Cepsa, which is in business mainly in Spain and Portugal but, to a lesser extent, also in France, and by imports from outside the EEA. Significant here are the American firms Dow and Eastman; there were also imports from Poland and Russia.

(156) Between 1999 and 2002, the market shares of the parties and the competitors remained more or less constant. Over the four year there was a slight increase in the parties' total market share. The Commission has calculated that the parties' total market share was 4,2 % lower than the 2002 figure in 1999 and 2,7 % lower in 2000; in 2001 it was at the 2002 level.

(157) Despite the parties' large combined market share and the substantial gap between them and the nearest competitors, the merger cannot be expected to create a dominant position.

(158) In particular the two larger competitors, Ineos and BASF, each with a market share of around 20 %, can exert competitive pressure that is enough to control the room for manoeuvre of Celanese and the JV.

(159) In addition, the other suppliers can exert tangible competitive pressure. In the recent past, the American producers have imported substantial quantities into Europe. If prices for butyl acetate were to rise to supra-competitive levels, it would be particularly useful for those firms to enter the EEA market on a larger scale. The fact that imports from America to Europe are currently a realistic business proposition can also be seen from the example of Celanese, which takes a market share of more than […]* % with imports from the United States. The remaining suppliers from non-EEA countries still achieve a market share of between 5 % and 10 %.

(160) The absence of spare capacity cannot be taken as an argument against the possibility of competitive pressure from these firms. It is true that, in Europe especially, capacity is close to being fully utilised. BASF has some spare capacity and could easily enough step up production. Ineos's capacity is being extensively utilised. But Ineos produces n-butyl acetate, iso-butyl acetate and iso-propylacetate in batches at the same plants. As Ineos has confirmed, additional quantities of butyl acetate can be produced by lengthening production batches through less frequent changeovers, each of which takes a day for cleaning. Sales on the European market could also be expanded if exports to non-EEA countries were diverted to the EEA market. The parties add that capacity extensions are both technically easy and financially inexpensive to make. Companies questioned by the Commission confirm that the technology is available and that the requisite extra facilities should not be too expensive. But there were doubts as to the profitability of investments for the manufacture of butyl acetate for firms that are not vertically integrated in the production of acetyl acid and butanol.

(161) Lastly, there is no reason to believe that the merger will create a collective dominant position. After the merger the parties, together with BP and Ineos, will have a very large market share of 90 % or so, but there is no reason to expect tacit coordination between them. Their market shares differ too widely and their cost structures also diverge substantially. They differ in size, in the number and location of their production facilities, and in the use they make of the two precursors, acetyl acid and butanol. The parties (Celanese and the JV seen as a single entity) have two production facilities in Europe and one in the United States. In addition, Celanese is the market leader for acetyl acid, so that the parties describe Celanese's US butyl acetate business as 'acetyl-acid-led', unlike Oxeno's business, which rather tends to be 'butanol-led'. BASF is an integrated business while Ineos has to buy in the butanol it needs to produce butyl acid.

Competition assessment assuming separate markets for n-butyl acetate and iso-butyl acetate

(162) Basing the competition assessment on separate markets for the two butyl acetate isomers does not significantly alter the outcome.

(163) In this case, the sum total of the market shares on the larger market for n-butyl acetate would be slightly greater (by less than 2 %) than if a single market were taken as the basis; however, there would be no notable change to the market structure.

(164) It must be taken into consideration that BP/Ineos are in a significantly stronger position on the smaller market for iso-butyl acetate. The company's market share remains far smaller than the sum of the parties' market shares but is still sufficiently significant at more than 35 % for the Commission to assume that a dominant position is unlikely to be created on that market.

(165) It has therefore been decided that there are no objections to the merger in competition terms as regards the European market or markets for butyl acetate.

6. *CARBON ACIDS*

(1) THE RELEVANT PRODUCT MARKET

(166) Carbon acids are generally made by the oxidation of aldehydes such as butyric aldehyde ([15]). In all, there are more than 1 500 carbon acids with different chain-lengths, specifications and raw materials (olefins or naturally occurring substances).

(167) Carbon acids are used in the following applications among others: metal carboxylates (salts) for varnish input products, chloric acid for organic peroxydes/peroxydesters, polyolesters for the production of synthetic lubricants, lubricant additives, esters for plasticisers in safety glass panes, basic materials for the flavour and fragrance industry, catalysts, pharma-chemicals, UV stabilisators and plant-protection substances.

(168) The JV is expected to produce three carbon acids: 2-ethylhexane acid (2-EH-Säure), butyric acid and trimethylhexane acid (TMH). 2-EH acids and butyric acids are downstream products of butyric aldehyde; TMH is produced from the oxidation of trimethylhexanal.

(169) Carbon acids are produced at multi-purpose facilities; a single plant can be used to produce different carbon acids depending on the aldehyde that is available for use. They are in part mutually substitutable on both the supply and the demand sides. The Commission is therefore proceeding on the assumption of a single market for carbon acids for the purposes of this decision.

(2) THE RELEVANT GEOGRAPHIC MARKET

(170) Basically, carbon acids can be transported safely and marketed in cross-border business. In the EEA there is cross-border demand for carbon acids. There is no evidence of substantial imports into the EEA. Exports from the EEA are also only on a limited scale. The Commission is accordingly proceeding on the assumption of an EEA market for the purposes of this decision.

(3) COMPATIBILITY WITH THE COMMON MARKET

(171) There are many suppliers of carbon acids. Not all of them offer the full range of carbon acids. Since carbon acids can be produced at multi-purpose facilities on demand, it is difficult to estimate the capacities available to competitors. Since various carbon acids can be produced on demand depending on the availability of aldehydes, the individual suppliers' market volumes and market shares fluctuate.

(172) Celanese will not be contributing its carbon acid production to the JV but will continue in its speciality chemicals division. Celanese produces ten different carbon acids, two of which overlap with the JV's production — butyric acid and 2-ethylhexane acid. According to the parties' own information for 2002, the combined market share is [30 to 40 %]*. Perstorp Oxo is the market leader with a market share of around 40 %, followed by BASF and ExxonMobil with more than 10 % each. These figures were broadly confirmed by the market investigation. All three principal competitors have their own production of the precursor butyric aldehyde or, in ExxonMobil's case, the corresponding olefins such as heptane and nonane.

(173) No dominant position can therefore be expected to be created or strengthened.

7. *VERTICALLY RELEVANT MARKETS*

(174) The merger further affects a series of markets in vertical terms. These are the markets for butylamine, 2-ethylhexacrylate and for butyl acrylate.

(a) BUTYLAMINE

(175) Butylamine is a derivative of butanol used as an intermediate product for the manufacture of plant protection substances, sealants, specialty plasticisers for polyamides, synthetic additives and other products. Given its specific applications and the lack of substitutability, butylamine is an individual product market.

([15]) In some cases, further intermediate stages are required.

(176) There is cross-border business in the product. Imports into the EEA are unknown, however. It can therefore be assumed that the butylamine market is EEA-wide.

(177) The butylamine market is affect by the merger in vertical terms as only Celanese but not Degussa is in business. On its own estimate, Celanese has a market share of [… %]*. The parties consider the most important competitors to be BASF, with around [… %]*, and Atofina. Given BASF's strong position Celanese does not consider itself to be dominant. The merger would, however, raise no objections in relation to the butylamine market even if Celanese was dominant. The two competitors obtain their butanol from their own production and are not dependent on deliveries from the parties or the JV. Consequently, no negative effects are to be feared.

(b) 2-ETHYLHEXYL-ACRYLAT

(178) 2-ethylhexyl-acrylate (2-EH-acrylat) is a downstream product of 2-EH used for the production of fertilisers, sealants, press-down adhesives, paints, and textile and paper coatings. It is a distinct product market.

(179) Here again the geographic market can be taken to include the entire EEA as there are no barriers to trade; small quantities are imported from Asia.

(180) This market is also vertically affected by the merger as only Celanese is in business here but not Oxeno. Celanese estimates its own market share at around […]* %. Still according to the parties' information, the main competitors are BASF and Atofina, with market shares of the same order of magnitude. No negative effects are to be feared from the merger here either. BASF and Atofina obtain their input material for 2-EH-Acrylat from their own production and are not dependent on deliveries from Celanese or the JV. There is no dominant position for 2-EH. Consequently, no negative effects are to be feared.

(c) BUTYL ACRYLATE

(181) Butyl acrylate is a downstream product of butanol. It is used in solvent-based enamels, latex paints, adhesives, sealants, and textile and paper coatings. Given its specific applications, it is a distinct product market.

(182) There is cross-border trade in butyl acrylate; there are no barriers to trade in the EEA. Imports into the EEA run at a low level. It can therefore be assumed that that the relevant geographic market is the EEA.

(183) Only Celanese but not Oxeno is active in the butyl acrylate business. Celanese is the self-declared market leader with a market share of [30 to 40 %]*. BASF and Atofina are once again its main competitors with comparable market shares. The merger will have no noteworthy effects on the market as the two competitors obtain the butanol needed for butyl acrylate production from their own production. No dominant position can be expected to created or strengthened on this market,

HAS ADOPTED THIS DECISION:

Article 1

The notified operation whereby Celanese AG and Degussa AG acquire joint control within the meaning of Article 3(1)(b) of Regulation (EEC) No 4064/89 over their joint venture European Oxo Chemicals GmbH is declared compatible with the common market and the EEA Agreement.

Article 2

This Decision is addressed to:

Celanese AG
Frankfurter Straße 111
D-61476 Kronberg im Taunus

Oxeno Olefinchemie GmbH
Paul-Baumann-Straße 1
D-45764 Marl.

Done at Brussels, 11 June 2003.

For the Commission
Mario MONTI
Member of the Commission