II

*(Acts whose publication is not obligatory)*

# COMMISSION

## COMMISSION DECISION

**of 5 December 2001**

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

**(Case No COMP/E-1/36 604 — Citric acid**

*(notified under document number C(2001) 3923)*

**(Only the German, English and Dutch texts are authentic)**

**(Text with EEA relevance)**

(2002/742/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,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by Regulation (EC) No 1216/1999 [2], and in particular Articles 3 and 15(2) thereof,

Having regard to the Commission Decision of 28 March 2000 to open a proceeding in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 19(1) of Regulation No 17 and Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty [3],

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

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

Whereas:

### PART I — FACTS

#### A. *SUMMARY OF THE INFRINGEMENT*

(1) This Decision is addressed to the following undertakings:
- — Archer Daniels Midland Company Inc.,
- — Cerestar Bioproducts BV,
- — F. Hoffmann-La Roche AG,
- — Haarmann & Reimer Corporation,
- — Jungbunzlauer AG.

[1] OJ 13, 21.2.1962, p. 204/62.
[2] OJ L 148, 15.6.1999, p. 5.
[3] OJ L 354, 30.12.1998, p. 18.

(2) The infringement consists in the participation of those producers of citric acid in a continuing agreement and/or concerted action contrary to Article 81(1) of the Treaty and Article 53 of the EEA Agreement (from 1 January 1994) covering the whole of the EEA, by which they fixed market shares for citric acid, agreed on price targets for the product, agreed on price lists for the product, agreed to eliminate discounts for all but the five largest customers, and set up machinery to monitor and enforce their agreements.

(3) The undertakings participated in the infringement from March 1991 until May 1995 in the case of Archer Daniels Midland Company Inc, Haarmann & Reimer Corporation, F. Hoffmann-La Roche AG and Jungbunzlauer AG, and from May 1992 until May 1995 in the case of Cerestar Bioproducts BV.

## B. *THE CITRIC ACID INDUSTRY*

### 1. THE PRODUCT

(4) Citric acid is widely distributed throughout nature, occurring in both plants and animals. It is used primarily in the food and beverage industry, where its high solubility, tart flavour, acidity and buffering capabilities make it the most widely adopted acidulent/preservative worldwide.

(5) Citric acid was originally obtained by the physical extraction of the acid from lemon juice. Nowadays, the commercial production of citric acid is mostly accomplished by fermentation processes using either dextrose or beet molasses as raw material and Aspergillus niger mould as the fermenting organism. Fermentation can be carried out in deep tanks (submerged fermentation, which is the most commonly preferred method) or shallow pans (surface fermentation). Fermentation produces liquid citric acid. This is then purified, concentrated and crystallised.

(6) There are various types of citric acid, and their moisture content varies. Citric acid monohydrate (CAH), with a moisture content of approximately 8 %, and citric acid anhydrous (CAA), with a moisture content of approximately 0,5 %, are mainly used in food and beverages. Citric acid solution with a moisture content of approximately 50 %, and tri-sodium citrate (a citric acid salt obtained through the neutralisation of citric acid by caustic soda), are used in detergents and other industrial sectors.

(7) The applications of citric acid are varied and can be divided into four main groups.

(8) *Food and Beverages.* This segment accounted for the largest share of citric acid consumption representing almost 60 % of the total Community market in 1994. The main application is in non-alcoholic beverages. Citric acid accounts for almost three quarters of total acidulent consumption in the Community (measured in volume). Other acidulents include malic acid and fumaric acid, but citric acid remains the overwhelming choice for this application, mainly because of its high solubility rate.

(9) During the 1990s, the strong growth in the soft drink market in Western Europe led to increased consumption of citric acid. In the food sector, citric acid is used in jams, jellies, gelatine desserts, canned fruits and vegetables. It is used for improving the taste of ice cream, cake fillings and fruit creams. It also has certain uses in the meat and bakery industries (flour processing and as a baking additive).

(10) *Household detergents and cleansers.* Citric acid and citrates were extensively introduced in detergents at the beginning of the 1990s to replace phosphates which were deemed to be environmentally damaging. They are used as non-phosphate co-builders, usually together with a builder such as zeolite, in heavy-duty powder laundry detergents. In the light-duty powders, builder concentrations are usually low and there is no need for the addition of a co-builder such as citrate. Citric acid and citrates are also used in surface-cleaning products.

(11) The key advantages of citrates in detergent formulations are its biodegradability and the ease of its processing, particularly in formulations containing zeolite. To contain costs, large detergent companies usually buy citric acid and convert it on site to the required citrate.

(12) Detergent use of citric acid in 1994 represented over 23 % of total citric acid consumption in Western Europe. The sector has a high price elasticity, and therefore the presence of citric acid very much depends on its being competitively priced.

(13) *Pharmaceuticals and cosmetics.* The Western European market for citric acid used in this sector accounted for over 8 % of total citric acid consumption (1994). Pharmaceutical applications include both human and veterinary preparations. For human use, effervescent tablets and powders are the largest segment, followed by syrups and anticoagulants.

(14) *Industrial and other uses.* In 1994 this sector represented over 9 % of total citric acid consumption in Western Europe. The main industrial use of citric acid is in coal power stations where it is used for the cleaning and de-sedimentation of furnace walls. Other technical applications for citric acid include its use in metal surface pre-treatment prior to coating and in industrial cleaning. For all these applications its substitution by other organic or mineral acids is possible.

2. THE PRODUCERS

(a) ***Archer Daniels Midland Company Inc.***

(15) Archer Daniels Midland Company Inc. (ADM) is the ultimate parent company of a group of companies processing corn, soybeans and wheat. ADM's corn by-products include syrups, sweeteners, citric and lactic acids, and ethanol. The company processes soybeans and other oilseeds into vegetable oils and by-products ranging from salad oils and margarine to industrial chemicals and pulp. ADM also produces wheat and durum flour for bakeries and pasta makers.

(16) ADM owns or leases over 350 processing plants worldwide, including the world's largest soya bean processing facility in Europoort, Netherlands, the world's largest multiseed complex in Hamburg, Germany, and the world's largest softseed crushing plant in Erith, United Kingdom. ADM employs approximately 23 000 people worldwide and had a global turnover of EUR 13 935,95 million (USD 12 876,82 million) in 2000.

(17) ADM entered the citric acid market in 1991 as a result of its acquisition of Pfizer Chemical Corporation's production facilities in this market, taking over its plant at Ringaskiddy, Ireland.

(b) ***Cerestar Bioproducts BV***

(18) Cerestar Bioproducts BV (Cerestar Bioproducts) is a wholly owned subsidiary of Cerestar SA, the European leader of starch-based products. The latter was listed on the Paris stock exchange on 2 July 2001, following the division of the Eridania Béghin-Say group (EBS) into four independent entities and its subsequent dissolution. Cerestar S.A, which has 17 production sites and around 3 900 employees worldwide, had pro forma sales of EUR 1 693,20 million in 2000. The Italian-based Montedison group currently holds approximately 54 % of its shares.

(19) Until its break-up, EBS was one of the world's largest agro-industrial groups, active in the following market areas: sugar and derivatives, starch and derivatives, oilseed processing and marketing, animal nutrition, and olive oil, herbs and spices. In 2000, EBS had a turnover of EUR 9 805,3 million and employed approximately 21 700 people in over 30 countries at 165 production sites.

(20) Before the demerger was carried out, Cerestar Bioproducts was a wholly-owned subsidiary of Cerestar Holding BV. The latter was a subsidiary of Eridania Béghin-Say SA, the ultimate parent company of EBS.

(21) Cerestar Bioproducts BV became responsible for the production, sale and marketing of citric acid following the acquisition by EBS, on 31 December 1991, of Biacor's citric acid plant in Italy. In 2000, Cerestar Bioproducts BV reported sales of EUR 17,51 million.

(c) ***Haarmann & Reimer Corporation***

(22) Haarmann & Reimer Corporation (Haarmann & Reimer) is a wholly-owned subsidiary of the Bayer Corporation (USA) which itself is a wholly-owned subsidiary of the German-based company Bayer AG.

(23) Bayer AG is the ultimate parent company of a chemical and healthcare group comprising about 350 individual companies in 150 countries. The Bayer group employs over 120 000 people worldwide, and reported turnover of EUR 30 791 million in 2000.

(24) Between 1991 and 1995 the worldwide citric acid manufacturing facilities of the Bayer group were managed by Haarmann & Reimer through its Food Ingredients Division (Haarmann & Reimer FID) which itself was headquartered (until 1996) in Indiana, USA. Haarmann & Reimer directed the global sales of citric acid and was responsible for worldwide pricing throughout this period. Haarmann & Reimer FID had global sales of USD 293 million during 1996 and employed around 1 300 people.

(25) In April 1996 responsibility for the business of Haarmann & Reimer FID was transferred to Bayer plc, a British subsidiary of Bayer AG, and subsequently sold in June 1998 to the Tate & Lyle group.

(26) In 1999, Haarmann & Reimer reported sales of USD 200 million (EUR 187,62 million). Haarmann & Reimer [Corporation] is now a holding company controlling 51 % of the Haarmann & Reimer partnership. In 2000 the partnership itself achieved a turnover of USD 187,73 million (EUR 203,17 million).

(d) ***F. Hoffmann-La Roche AG***

(27) F. Hoffmann-La Roche AG (Hoffmann-La Roche) is a leading international company in its three main areas of operation: pharmaceuticals, diagnostics, and vitamins and fine chemicals.

(28) The Hoffmann-La Roche group employs almost 65 000 people worldwide. Its overall turnover amounted to EUR 18 403 million in 2000. Sales by region in 2000 were 38 % in Europe, 37 % in North America, 10 % in Latin America, 12 % in Asia and 3 % in Africa, Australia and Oceania.

(29) Citric acid sales are part of the Vitamins and Fine Chemicals division of the Group which achieved sales of EUR 2 314 million in 2000, representing 13 % of the Group's overall sales. Hoffmann-La Roche's citric acid manufacturing facilities are located in Tienen, Belgium, and are managed by its subsidiary, SA Citrique Belge NV (Citrique Belge).

(e) ***Jungbunzlauer AG***

(30) Jungbunzlauer AG (Jungbunzlauer) is a Swiss-based group of companies currently headquartered in Basel. The group is ultimately controlled by the holding Jungbunzlauer Holding AG, all the shares of which are held by a family through the holding Montana AG. The headquarters of the group are located in the premises of Jungbunzlauer AG, the management company which, since 1993, has run the business owned by Jungbunzlauer Holding AG. Before 1993, the whole group was directed by Jungbunzlauer Ges.m.b.H, Vienna, Austria.

(31) The Jungbunzlauer group is engaged in the manufacture and marketing of ingredients used in the food and beverages industry, and the pharmaceutical and cosmetics industry, as well as for various other industrial applications. It is one of the leading manufacturers of citric acid, xantham gum, citrates, gluconates and glucose.

(32) The group employs approximately 500 people and has subsidiaries in five European countries (France, Germany, the Netherlands, Austria and Hungary) as well as in the United States of America, Singapore and Indonesia. Total turnover in 2000 was in the order of EUR 314 million. Jungbunzlauer's citric acid production facilities are currently located in Austria, Germany and France and Indonesia. A new citric acid plant is being built in Canada.

(33) Over the period considered in the present Decision, all citric acid production was handled by Jungbunzlauer Ges.m.b.H. The latter also handled the distribution of the product until 1993, when this responsibility passed to another legal entity, namely Jungbunzlauer International AG.

(34) The executives from the Jungbunzlauer group who were involved in the facts material to the present Decision were employed either by Jungbunzlauer Ges.m.b.H or by Jungbunzlauer AG. For the sake of clarity, and taking into account the fact that Jungbunzlauer Ges.m.b.H and Jungbunzlauer AG successively directed the whole group's operations, both entities will be referred to as 'Jungbunzlauer' unless otherwise indicated.

(f) ***Other producers***

(i) **Chinese**

(35) The Chinese citric acid industry grew very substantially at the end of the 1980s and experienced a threefold increase in its annual production levels between 1990 and 1994, peaking at over 200 000 mt [4]/year. The industry is heavily orientated towards the export market with domestic consumption accounting for around 20 % to 25 % of total production. All Chinese production is channelled through distributor companies and agents. There are very few large citric acid producers in the country and the total number of producers was estimated at 120 in 1994. Producers rely on potatoes from nearby farms for raw materials and the majority of fermentation processes are carried out in reduced facilities that can be operated with a low level of investment. The Chinese citric acid industry is very sensitive to export prices and external demand.

(ii) **Others**

(36) The European market is also supplied by smaller producers such as the Israeli based company Gadot Biochemical Industries, the US multinational, Cargill Inc., and a variety of minor companies based in Eastern Europe and Russia.

3. TRADE ASSOCIATION — ECAMA

(37) The European Citric Acid Manufacturers' Association (ECAMA) is a sector group of the European Chemical Industry Council (CEFIC under its French acronym) based in Brussels, Belgium. It represents the interests of the European citric acid industry and holds a general meeting twice a year. Working parties study technical, regulatory and commercial questions. ECAMA also monitors world market developments by collecting monthly sales data. The data are rendered unidentifiable and cannot be traced to individual companies thereafter. In that anonymous state, the sales figures reported are audited by the Schweizerische Treuhandgesellschaft, Coopers & Lybrand, which delivers a regular report on its findings.

4. THE MARKET FOR CITRIC ACID

(a) ***Supply***

(38) The citric acid business is essentially a global one and is characterised by an oligopolistic structure with relatively low transport costs, representing on average between 5 % and 7 % of the final purchasing price for most large producers. Standard customs duties for non-EEA citric acid stood at 11,1 % in the Community in 1996 and have decreased since. The various applications for citric acid in most cases only require standard know-how, making technological barriers non-appreciable.

[4] mt = metric tonnes.

(39) The major producers of citric acid are, by and large, multinational corporations, the exception being Jungbunzlauer, a family-owned, medium-sized business which in 1996 was nevertheless the largest citric acid producer in the Community.

(40) Whilst sales and production tend to be compartmentalised in three major geographical areas, North America, Europe and Asia, significant amounts of product are traded between these zones. In the case of the Community, imports from China alone account for almost 20 % of total Community consumption although those imports are made by dozens of small companies.

(41) In order to evaluate the size of the market for citric acid over the relevant period, the Commission takes into consideration various estimates, including notably those provided by the main producers of citric acid in their respective replies to the requests for information sent in August 1997. In 1996, ECAMA estimated the worldwide citric acid market at 785 000 mt and the European market for the product at 303 000 mt ([5]). According to the Commission's best estimates, over the period 1994-1997, the worldwide production capacity was at least in the region of 900 000 mt ([6]) and the actual worldwide demand for the product can be estimated as being at least 750 000 mt.

(42) In its reply to the Statement of Objections, Haarmann & Reimer submits that according to its market intelligence, the annual Community market volume was approximately 200 000 mt in the relevant period. Taking into account an average sales price of EUR 1,25 the Community market value in the relevant period would be EUR 250 million, not EUR 350 million as mentioned in the Statement of Objections.

(43) The application of the average price charged for citric acid by Haarmann & Reimer in 1995 ([7]) to the minimum figure of 750 000 mt accepted by the Commission gives a worldwide market value superior to ECU 1 000 million. Similarly, the application of the average price of ECU 1,25/mt (proposed by Haarmann & Reimer in its reply to the Statement of Objections) to ECAMA's estimate of 303 000 mt gives an estimated market value for Europe of ECU 375 million.

(44) On 27 July 2001, the Commission sent to the addressees of the present Decision a request for information asking them to provide their worldwide and EEA-wide sales figures for citric acid in 1995. The figures obtained from the undertakings are the following:

*Table 1*

*(EUR million)*

| Company | Worldwide 'citric acid' turnover in 1995 | EEA-wide 'citric acid' turnover in 1995 |
|---|---|---|
| ADM | 119 751,38 | 45 999,65 |
| Cerestar Bioproducts | 21 694,60 | 21 140,97 |
| Haarmann & Reimer | 195 931,15 | 31 401,73 |
| Hoffmann-La Roche | 80 331,77 | 41 329,60 |
| Jungbunzlauer | [80 000-120 000] | [60 000-80 000] |
| Total | [500 000-540 000] | [200 000-220 000] |

([5]) [374].
([6]) All quantities quoted are expressed in Monhydate Equivalent Units.
([7]) [49]. An average (non-weighted) worldwide price in USD has been calculated for 1995, on the basis of the four average regional prices provided by Haarman & Reimer. It should be noted that this 'worldwide' average price for 1995 is certainly pitched too low vis-à-vis the real weighted price, in view of the relative weight of US and European sales.

(45) The estimated market shares of the market players in 1996 were as follows ([8]):

*Table 2*

| Company | European Union | World |
|---|---|---|
| Jungbunzlauer | (15 %-25 %) | (10 %-15 %) |
| Hoffmann-La Roche | 16 % | 9 % |
| ADM | 14 % | 15 % |
| Haarmann & Reimer | 8 % | 19 % |
| China (many suppliers) | 18 % | 22 % |
| Cerestar Bioproducts | 7 % | 3 % |
| Gadot | 3 % | 3 % |
| Cargill | > 1 % | 8 % |
| Others (including Russian and eastern European) | 11 % | 7 % |

(46) In 1996, according to those figures, the total market shares of the addressees of the present Decision represented approximately 60 % of the worldwide citric acid market and 67 % of the EEA-wide citric acid market ([9]). The combination of these figures with the sales figures set out in Table 1 in recital 44 gives an estimated size of EUR 894,72 million for the total worldwide citric acid market in 1995, and of EUR 323,69 million for the total EEA-wide citric acid market in the same year ([10]).

(47) In this respect, the Commission estimates that over the period considered in the present Decision, the worldwide citric acid market value was in any case around EUR 900 million, and that the EEA-wide market value was in the region of EUR 320 million.

(48) In its reply to the Statement of Objections, Haarmann & Reimer maintains that the strength of its market share in the worldwide market is mainly due to its strong position as a local producer in duty-protected markets in South America. As far as the European market is concerned, Haarmann & Reimer also points out that prior to its take over of Rhône-Poulenc's activities at Selby, it had a capacity of only 10 000 tonnes and that the new plant it erected there initially ran well below its designed capacity of 20 000 tonnes.

(49) As for Hoffmann-La Roche, it argues in its reply to the Statement of Objections that the Commission, by focusing on the undertaking's market share in Europe in 1996, overestimates Hoffmann-La Roche's average market share over the duration of the cartel. Indeed, Hoffmann-La Roche contends that owing to the quota system in place, it was unable to take advantage of the growth on the Community market and its market share fell. Hoffmann-La Roche says it started building up its Community market share again in 1995.

(50) The following table gives an overview of the current size of the main producers of citric acid over the period 1991 to 1995, as well as of the size of the groups to which those undertakings belong.

([8]) *Source:* replies to the requests for information of 6 and 12 August 1997 by ADM [81-82], Haarmann & Reimer (Bayer AG) [51-52], Citrique Belge (Hoffmann-La Roche) [63-64] and Jungbunzlauer [29-30].
([9]) It is assumed here that EEA-wide market shares are similar to EU-wide market shares.
([10]) It is assumed that the market shares held by the addressees of the present Decision in 1995 were similar to those of 1996.

*Table 3*

**Current size of the main producers of citric acid over the period 1991-1995**

(Year 2000)

*(EUR million)*

| Company | Worldwide turnover | Group | Worldwide turnover |
|---|---|---|---|
| Archer Daniels Midland Co. | 13 936 | Archer Daniels Midland Co. | 13 936 |
| Cerestar Bioproducts BV | 17 | Cerestar SA [1] | 1 693 |
| Haarmann & Reimer Corp. [2] | (1999) 188 | Bayer AG | 30 971 |
| Hoffmann-La Roche AG | 18 403 | Hoffmann-La Roche AG | 18 403 |
| Jungbunzlauer AG | 314 | Jungbunzlauer AG | 314 |

[1] The turnover figure indicated is the *pro forma* turnover achieved by Cerestar SA in 2000.
[2] The turnover figure indicated is the turnover achieved by the Haarmann & Reimer partnership, 51 % of which is controlled by Haarmann & Reimer [Corporation].

b) ***Demand***

(51) Customers for citric acid range from large food processing multinationals dealing directly with producers to small and medium-sized companies supplied by distributors. The food and beverages sector accounts for the largest share of consumption, followed by producers of detergents and cleaners.

c) ***Community inter-State trade***

(52) Citric acid is produced in five Member States of the Community (Austria, Belgium, Ireland, Italy and the United Kingdom) and marketed throughout the Community. The five addressees of the present Decision had production facilities in the Community (in certain cases via subsidiaries). The following table shows the annual sales in the Community of companies with production facilities in the Community and the share which sales outside the Member State represented each year. Additional sales of citric acid in the Community came from third countries.

*Table 4*

**Data for the five companies with production sites in the Community [1]**

| Year | Total sales in the EC (mt) | Sales outside the respective Member State (mt) | Percentage |
|---|---|---|---|
| 1991 | 157 371 | 136 616 | 86,8 % |
| 1992 | 189 809 | 153 697 | 81 % |
| 1993 | 184 432 | 153 059 | 83 % |
| 1994 | 161 895 | 134 141 | 82,9 % |
| 1995 | 172 959 | 143 072 | 82,7 % |

[1] *Source*: ADM Article 11 reply of 5 December 1997 [83]; Jungbunzlauer Article 11 reply of 22 September 1997 [32]; Citrique Belge (Hoffmann-La Roche) Article 11 reply of 30 September 1997 [64]; Haarmann & Reimer (Bayer AG) Article 11 reply of 23 September 1997 [53]; Cerestar Bioproducts Article 11 reply of 8 June 1999 [6714].

(53) There is accordingly a very substantial amount of trade between Member States in the citric acid market.

C. *PROCEDURE*

(54) In August 1995, the Commission was notified by the US Department of Justice of a Grand Jury investigation into the citric acid market. In April 1997, the Commission was informed of the plea-bargain agreements reached by Hoffmann-La Roche and Jungbunzlauer in the USA (see recital 64).

(55) In August 1997, the Commission sent requests for information under Article 11 of Regulation No 17 ([11]) to the four largest producers of citric acid in the EC. In January 1998, requests for information were sent to the main consumers of citric acid in the EC market. In June 1998 and July 1998 further requests for information were sent to the main producers of citric acid in the EC.

(56) Following receipt of the first Article 11 request for information addressed to Cerestar Bioproducts in July 1998, the company's legal representatives requested a meeting with the Commission on 29 October 1998. At that meeting, the company expressed its wish to cooperate with the Commission pursuant to the Notice on the non-imposition or reduction of fines in cartel cases ([12]) (the Leniency Notice) and gave an oral description of the cartel activity in which it had been involved. A written statement confirming that account was sent to the Commission on 25 March 1999.

(57) Following a preliminary contact in September 1998, ADM met the Commission on 11 December 1998, after expressing its willingness to cooperate with the Commission under the terms of the Leniency Notice. At this meeting it provided an oral account of the anti-competitive activity in which it had been involved. A written statement confirming this account was provided on 15 January 1999.

(58) On 3 March 1999 additional requests for information were sent to Bayer plc, Hoffmann-La Roche, Jungbunzlauer and Cerestar Bioproducts.

(59) On 28 April 1999 Bayer plc made, on behalf of Haarmann & Reimer, an application under the Leniency Notice and provided a Statement supplementing its reply to the request for information.

(60) In a letter dated 21 May 1999 and following a meeting held with the Commission on 23 April, Jungbunzlauer confirmed its intention to cooperate fully under the conditions of the Leniency Notice and provided a written Statement supplementing its previous reply to the Article 11 request for information.

(61) By letter of 28 July 1999, Hoffmann-La Roche confirmed its participation in the cartel and the purpose of the meetings related to it.

(62) On 28 March 2000 the Commission initiated a proceeding in the present case and adopted a Statement of Objections against the undertakings to which this Decision is addressed. All parties submitted written observations in response to the Commission's objections. None of them requested an oral hearing; nor did they substantially contest the facts as set out in the Statement of Objections.

(63) On 27 July 2001 additional requests for information were sent to ADM, Cerestar Bioproducts, Haarmann & Reimer, Hoffmann-La Roche and Jungbunzlauer, in order to collect additional turnover figures.

D. *PROCEEDINGS IN THE UNITED STATES OF AMERICA AND IN CANADA*

(64) In the United States of America, following investigations conducted by the Department of Justice and the Federal Bureau of Investigation, criminal charges of conspiracy to fix prices contrary to Section 1 of the Sherman Act, were filed against five producers: ADM, Haarmann & Reimer, Hoffmann-La Roche, Jungbunzlauer and Cerestar Bioproducts. In addition, a senior executive at Haarmann &

([11]) OJ 13, 21.2.1962, p. 204/62.
([12]) OJ C 207, 18.7.1996, p. 4.

Reimer, a former Managing Director of Hoffmann-La Roche's affiliate Citrique Belge, the Chairman and President of Jungbunzlauer International AG and the Managing Director of Cerestar Bioproducts were charged personally with conspiracy.

(65) Between October 1996 and June 1998, all the accused pleaded guilty to the charges and agreed to pay fines which were set at USD 30 million for ADM; USD 50 million for Haarmann & Reimer; USD 14 million for Hoffmann-La Roche; USD 11 million for Jungbunzlauer and USD 400 000 for Cerestar Bioproducts.

(66) In addition to the fines on the undertakings, all individuals charged were personally fined USD 150 000 each, except for the Managing Director of Cerestar Bioproducts who paid a criminal fine of USD 40 000.

(67) Civil proceedings were also filed in a United States District Court on behalf of a class of purchasers claiming triple damages against ADM, Haarmann & Reimer, Jungbunzlauer, Hoffmann-La Roche and Cerestar Bioproducts.

(68) In Canada, following a criminal investigation conducted by the Competition Bureau, ADM, Haarmann & Reimer, Jungbunzlauer, and Hoffmann-La Roche pleaded guilty, between May 1998 and September 1999, of participation in a conspiracy to fix prices and share markets for citric acid and were fined CAD 2 million, CAD 4,7 million, CAD 1,9 million and CAD 2,9 million respectively.

## E. *DESCRIPTION OF EVENTS*

### 1. PARTICIPANTS AND ORGANISATION

(69) The structure, organisation and operation of the cartel was based upon a shared assessment of the market. ADM and Haarmann & Reimer had more frequent contacts because, although they both had production facilities in the EC, they considered themselves to be North American rather than European producers and in terms of logistics and coordination it was simpler for them to hold more frequent bilateral meetings.

(70) The usual representatives of the undertakings in meetings were:

— for ADM: the President of the Corn Processing Division and the Vice-President of Sales and Marketing,

— for Haarmann & Reimer: a Senior Vice President of the company, a member of the Board of Haarmann & Reimer USA; the Vice President of Sales and Marketing and the Sales and Marketing Manager,

— for Hoffmann-La Roche: the World Head of Marketing Vitamins and Fine Chemicals; the Head of the Unites States Feed Business — Vitamin Division; two successive General Managers of Citrique Belge; a product manager of Citrique Belge,

— for Jungbunzlauer: the Chief Executive Officer; the Head of Jungbunzlauer Austria and a product manager,

— for Cerestar Bioproducts: the General Manager and a salesperson.

(71) The cartel meetings were established at different levels:

— periodic top level or 'Masters' meetings between Presidents, CEOs, General Managers etc. would take place on average twice a year,

— at a later stage, from 1993 onwards, more technically orientated meetings would take place between the Sales Managers, the so-called 'Sherpa' meetings,

— bilateral contacts between undertakings.

2. BACKGROUND AND INITIAL CONTACTS

(72) The average price of citric acid in Europe declined steadily between 1985 and 1990, falling by around 45 % ([13]). Prices at the end of this period were atypically low, a fact attributed in some quarters to the waging of a price war in Germany and the United Kingdom (for which Jungbunzlauer was held mainly responsible) with the objective of capturing extra market share. Jungbunzlauer's conduct on the market place was perceived to be one of the reasons for this decline in prices. In the same period, Jungbunzlauer virtually tripled its production capacity of citric acid (from […] mt to […] mt) mainly through its acquisition of Boehringer Ingelheim's citric acid manufacturing business in 1985 and Benckiser's organic acid division in 1988 ([14]).

(73) A certain amount of rationalisation of the citric acid industry took place at the end of this period. In 1990, Cargill's entry to the market with a new plant in the United States of America had a negative impact on worldwide prices. In December of the same year, Pfizer's citric acid business was acquired by ADM, making it a new entrant to the market. A smaller European producer, Ebro Spain, stopped production and closed down in 1991, and the Biacor plant in Italy was bought by Cerestar Bioproducts at the end of that year ([15]).

(74) A few weeks after its purchase of Pfizer's citric acid business, ADM arranged several bilateral meetings with other citric acid manufacturers, ostensibly for the purpose of introducing itself to its competitors.

(75) On 14 January 1991 the President for Corn Processing and the Vice-President of Sales and Marketing of ADM met the Senior Vice President and the Vice-President for Sales and Marketing of Haarmann & Reimer in Chicago, United States of America. On 23 January 1991 they met the head of Hoffmann-La Roche's vitamins and fine chemicals business, who at the time was also Chairman of ECAMA, in Basel, Switzerland. On the following day, the same representatives of ADM met two high ranking representatives of Jungbunzlauer at its offices in Vienna. Finally, on 25 January 1991 the ADM representatives met a member of the Board of Haarmann & Reimer USA at Hanover, Germany ([16]).

(76) All of these meetings have been characterised by ADM as being of a purely 'introductory' nature, although whatever the description used, the fact remains that ADM took steps very soon after its entry into the market to contact its most important competitors.

(77) Prior to those events, there had already been moves in the industry to fix prices. Jungbunzlauer states that in 1990 it had been approached by a member of the Management Board of Haarmann & Reimer with a view to establishing a coordinated approach to pricing on the part of citric acid manufacturers ([17]).

3. THE BASIC PRINCIPLES OF THE CARTEL

(78) The first meeting at which all initial participants in the cartel met was organised by Hoffmann La Roche's World Head of Marketing Vitamins and Fine Chemicals and took place on 6 March 1991 ([18]) at the Hotel Plaza, Basel, Switzerland. The meeting was organised and chaired by a representative of Hoffmann-La Roche ([19]). It was attended by two high-ranking representatives of ADM, Haarmann & Reimer, Hoffmann-La Roche and Jungbunzlauer respectively.

([13]) See ADM's document [3321].
([14]) SRI International — Chemical Economics Handbook: Market Research Report on Citric Acid, January 1996 [833]; Jungbunzlauer's statement [6471].
([15]) Bayer's Article 11 reply of 14 September 1998 [426-427]; Cerestar Bioproducts' Statement [3979-3980]; ADM's Statement [3841-3842].
([16]) ADM's Statement [3840-3841]; Exhibit 3 of Bayer's Statement : Federal Bureau of Investigation (FBI) transcripts [4098-4099].
([17]) Jungbunzlauer's Statement [6474].
([18]) ADM's Statement [3842-3843]; Jungbunzlauer's Statement [6474-6475]; Jungbunzlauer's Article 11 reply of 29 April 1999 [5610-5611]; Bayer's Statement [4042]; Exhibit 3 of Bayer's Statement : FBI transcripts [4099-4101]; Hoffmann-La Roche's Article 11 reply of 28 April 1999, Annex 1 [4795].
([19]) Jungbunzlauer's Article 11 reply of 29 April 1999 [5610]; ADM Statement [3842]; Bayer's Statement [4038].

(79) It was at this meeting that the basic principles of the cartel were agreed, providing the blueprint for subsequent actions by the participating undertakings. The following essential features of the arrangement were set out and agreed. They can be identified throughout the whole duration of the cartel and draw a clear picture of the way it functioned.

(a) ***Objectives***

(80) The cartel pursued four main objectives, namely the allocation of specific sales quotas to each member and their adherence to those quotas; the fixing of target and/or 'floor' prices; the elimination of price discounts; and the exchange of specific customer information.

1. **Sales quotas**

(81) Sales quotas were allocated to each undertaking and fixed on a worldwide basis, as all producers considered the market to be global. Following a suggestion made by ADM, it was decided that the basis of the quota would be the average of the last three years' sales of each undertaking (i.e. 1988-90). Haarmann & Reimer initially reserved its position on the figure assigned to it, which was settled soon afterwards, but accepted in principle the concept of a quota system. As early as the March 1991 meeting, a fixed tonnage figure for the sales quota was assigned to each undertaking. Two months later, at a cartel meeting in Vienna in May 1991, this was converted into a market share figure.

2. **'Target' and 'floor' prices**

(82) Cartel members agreed on 'floor' and 'target' prices to be implemented. Prices were established in both USD and DEM terms. In the European market the DEM was used as the benchmark currency and converted into the appropriate national currency when quoting and charging prices to national customers.

3. **No price discounts**

(83) It was further agreed that no customers would be granted discounts and all would be expected to pay the list price. This was designed to prevent any participant from selling below the agreed prices. An exception was made for the five major consumers of citric acid since it was unrealistic to expect them to pay the published list price. It was accepted that these customers could be offered a discount of up to 3 % off the list price ([20]).

4. **Customer information exchange**

(84) Detailed information on specific customers was exchanged during meetings, in particular those of a more technical nature, known as 'Sherpa' meetings. The coordinated targeting of certain customers of the Chinese manufacturers was discussed and carried out, as was concerted bidding for certain very large individual accounts.

(b) ***Implementation***

1. **A monitoring system**

(85) A monitoring system was established to verify that undertakings were strictly adhering to the quota allocated to each of them. At the suggestion of Hoffmann-La Roche's World Head of Marketing Vitamins and Fine Chemicals, the group agreed at the meeting of 6 March 1991 to establish a monitoring system whereby each company would report its monthly sales figures to his secretary in Basel, who would then contact the companies and provide each company's sale figures for the

([20]) Bayer's Statement [4040]; Exhibit 3 of Bayer's Statement : FBI transcripts [4100]; ADM Statement [3843]; Jungbunzlauer's Statement [6482].

corresponding month. Although the sales quota was set at a worldwide level, the monitoring of sales was reported with a regional break-up (Europe, North America and Rest of the World). These figures were never audited independently, but since the sales of the four companies made up a significant part of total ECAMA sales, the regular report of which provided aggregate sale figures, this could be used to identify any company that gave incorrect data.

### 2. **Regular multilateral meetings**

(86) The holding of regular and frequent meetings between the participants was a hallmark of the cartel's organisation. Between March 1991 and May 1995 around 20 multilateral meetings were held between the companies on matters directly related to the cartel. In addition, individuals from ADM and Haarmann & Reimer met on at least ten separate occasions during this period to prepare positions prior to multilateral meetings, review the cartel's situation or deal with compensation matters. After 1993, the cartel decided to hold more technically orientated meetings, known as 'Sherpa' meetings, in order to resolve certain grievances and market 'difficulties'.

(87) The timing of the cartel meetings was usually set to coincide with those of the general assembly of the trade association ECAMA since all cartel participants were members of this association. The companies would typically meet the evening prior to the official ECAMA meeting ([21]).

### 3. **Compensation scheme**

(88) A compensation scheme was agreed to as a corollary to the quota agreement and in order to penalise those companies selling above their assigned sales quota and at the same time compensate those that did not reach it. If a company went over its assigned quota in any one year, it would be obliged to purchase product from the company or companies with sales below their quota during the following year.

## 4. IMPLEMENTATION OF THE CARTEL AGREEMENT

(89) The result of the 6 March 1991 meeting 'was that there was a clear agreement to implement a volume quota, reporting and compensation mechanism and increase the price of citric acid' ([22]). Some participants were surprised at the level of formality and organisation to which the other participants had gone to arrive at this arrangement. Already at this initial stage, the leading representative of Hoffmann-La Roche may have warned participants not to keep any written records of the meetings and the need to be as discreet as possible as far as the existence and content of those meetings was concerned ([23]).

(90) The cartel went through two distinct periods. The first period extended from March 1991 to mid-1993, during which time the overall agreement was implemented quite smoothly, with prices following a steep upward trend and a new member joining the cartel, although the issue of compensation between companies was becoming problematic.

(91) During the second period, from mid-1993 until the ending of the cartel in May 1995, it became increasingly difficult for the participating companies to sustain the price levels, in no small measure due to a dramatic increase of citric acid imports from China, particularly into the European market. Accusations of cheating on the agreement, especially against Jungbunzlauer, became rife and the level of trust between the cartel members deteriorated.

([21]) Jungbunzlauer's Statement [6476]; Exhibit 3 of Bayer's Statement : FBI transcripts [4096]; Cerestar Bioproducts' Statement [3980].
([22]) ADM's statement [3843]; see also Bayer's Statement [4038].
([23]) Exhibit 3 of Bayer's Statement: FBI transcripts [4101].

(a) ***Price increases***

(92) Following a five-year period of declining prices ([24]) it was evident that one of the primary aims of the cartel was to reverse this trend and increase the price of citric acid. Demand for citric acid underwent a substantial increase in the years 1991 and 1992 (9 % or more each year) ([25]). By 1991 new sources of demand for citric acid were emerging. In particular, the use of the product as a more environmentally-friendly substitute for polyphosphates in the detergent industry served to boost demand. The cartel members discussed this source of growing demand at the next meeting ([26]) of the cartel at Jungbunzlauer's offices in Vienna, Austria, on 16 May 1991 ([27]). Overall, they 'saw this as a situation which could be exploited for a coordinated price increase' ([28]). The aim of the producers was to raise prices by a much larger extent than would otherwise have been acceptable to consumers under normal market conditions. The prices thus agreed were subsequently announced to customers and extensively implemented, particularly during the early years of the cartel (see recitals 82 to 84, 95 and 96 and 116 to 118).

(93) Given the global character of the citric acid market and the use of the DEM and USD as benchmark currencies, the value of the exchange rate between the two was critical to the establishment of sustainable and competitive prices, particularly to avoid trans-shipments between the two areas. Pricing decisions were taken by the cartel members in the light of this important consideration. The relative strength of the DEM vis-à-vis the USD between mid-1991 and mid-1992 (it appreciated by almost 20 %) ([29]) meant that citric acid price increases for areas with prices quoted in USD were more frequent and of a higher aggregated amount than in DEM denominated markets, essentially to compensate for the DEM's revaluation.

(94) As already mentioned, citric acid is produced in several forms and specific prices are applicable to each of these. Citric acid monohydrate (CAH) and citric acid anhydrous (CAA) are the two most common forms, CAA being the main product in the North American market and CAH enjoying higher sales in the European one. When discussing prices, the cartel members would almost exclusively refer to CAA prices, which is sold at a somewhat higher price than CAH (around 4-5 % above), as a matter of convenience. Since prices of all forms of the product were related to each other, fixing the price on one form automatically affected the others. In any case, prices for forms other than CAA were also discussed on certain occasions.

(95) One of the first results of the meeting of March 1991 was the concerted implementation of a citric acid price increase to DEM 2,25/kg (CAA) by April 1991. There was little difficulty in introducing this price rise, in part owing to favourable market conditions. At the same time agreement on price increases for the North American market was reached. By July 1991, the European price was lagging behind the USD price and by means of telephone calls exclusively, the cartel members agreed to increase further the price in the European market to DEM 2,70/kg (CAA) with effect from August 1991. This price increase was also successfully implemented. At the following cartel meeting in November 1991 the participants made an explicit commitment not to allow North American and European prices to diverge substantially ([30]). By this time, an agreed increase of the USD price was not paralleled in the European market due to the growing weakness of the USD vis-à-vis the DEM. A final increase to DEM 2,80/kg (CAA) was agreed at the May 1992 meeting with the companies implementing this by June 1992 ([31]). After this date no further increase in prices was agreed but rather talks on price issues at the meeting would focus on the need to maintain these prices in the face of remaining competitive pressures.

([24]) See ADM's document [3321].
([25]) Jungbunzlauer's Statement, Annex 2 [6490].
([26]) ADM's Statement [3845].
([27]) Participants: Hoffmann-La Roche, Jungbunzlauer, ADM and Haarman & Reimer - See ADM's Statement [3844]; Jungbunzlauer's Article 11 reply of 29 April 1999 [5611]; Bayer's Statement [4040]; Exhibit 3 of Bayer's Statement : FBI transcripts [4101]; Hoffmann-La Roche's Article 11 reply of 28 April 1999, Annex 1 [4795].
([28]) Jungbunzlauer's Statement [6474] — 'erkannten darin eine Situation, die für eine koordinierte Preishöhung genutzt werden konnte'.
([29]) Hoffmann-La Roche's Article 11 reply of 28 April 1999, Annex 1 [4795].
([30]) ADM's Statement [3847].
([31]) ADM's Statement [3844-3849]; Jungbunzlauer's Article 11 reply of 29 April 1999 [5610-5611, 5613]; ADM price instructions, doc. 2352-54, 2280-82, 2300-01.

(96) In the space of 14 months the European price for citric acid had risen by 40 %. The cartel members were achieving one of the main goals they had set at their initial meeting in March 1991.

(b) ***Market sharing and monitoring system***

(97) The sales quotas established at the meeting of 6 March 1991 were instrumental to the sustained upward pressure on citric acid prices which followed. Each producer was assigned a worldwide market share expressed as a percentage of total sales by ECAMA members (in 1991), not of total world market volume ([32]). Quotas were initially set in terms of total tonnage. Haarmann & Reimer was unhappy with its allocation and there was some dispute over Jungbunzlauer's share as well ([33]). These matters were clarified at the subsequent meeting in Vienna on 16 May 1991. At the same meeting it was decided to express the quotas in terms of market share figures, rather than total tonnage. Final market share quotas for each company were as follows: Haarmann & Reimer 32 %, ADM 26,3 %; Jungbunzlauer 23 %; Hoffmann-La Roche 13,7 % and Cerestar Bioproducts 5 % ([34]).

(98) ADM, Haarmann & Reimer and Jungbunzlauer have provided slightly different figures for the exact percentage of each quota. The precise allocation, however, can be calculated from the tables provided by Jungbunzlauer which show the same figures for the assigned sales quotas for each year in the 1991-94 period.

*Table 5*

**World market sales quotas (metric tonnes and market shares)**

| **1991** | Haarmann & Reimer | ADM | Jungbunzlauer | Hoffmann-La Roche | Cerestar Bioproducts | Total (actual) |
|---|---|---|---|---|---|---|
| Allocated sales | 138 592 | 113 561 | 99 781 | 59 139 | 21 764 | 432 837 (432 358) |
| Market share ([1]) | 32,02 % | 26,24 % | 23,05 % | 13,66 % | 5,03 % | 100 % |
| **1992** | Haarmann & Reimer | ADM | Jungbunzlauer | Hoffmann-La Roche | Cerestar Bioproducts | Total (actual) |
| Allocated sales | 142 549 | 117 030 | 102 737 | 60 947 | 22 337 | 445 600 (446 006) |
| Market share | 31,99 % | 26,26 % | 23,06 % | 13,68 % | 5,01 % | 100 % |
| **1993** | Haarmann & Reimer | ADM | Jungbunzlauer | Hoffmann-La Roche | Cerestar Bioproducts | Total (actual) |
| Allocated sales | 135 330 | 111 172 | 97 484 | 58 047 | 21 304 | 423 337 (424 116) |
| Market share | 31,97 % | 26,26 % | 23,03 % | 13,71 % | 5,03 % | 100 % |
| **1994** | Haarmann & Reimer | ADM | Jungbunzlauer | Hoffmann-La Roche | Cerestar Bioproducts | Total (actual) |
| Allocated sales | 121 651 | 99 998 | 87 173 | 52 336 | 18 960 | 380 118 (379 489) |
| Market share | 32 % | 26,31 % | 22,93 % | 13,77 % | 4,99 % | 100 % |
| Avertage allocated market share 1991-94 | 32 % | 26,27 % | 23,02 % | 13,7 % | 5,01 % | 100 % |
| **Assigned quotas** | **32 %** | **26,3 %** | **23 %** | **13,7 %** | **5 %** | **100 %** |

([1]) Market share is slightly different for each year because the deviation from allocated quotas in the original table is indicated to the nearest percentage point, which results in small variations when the actual quota assigned is calculated. The sum of the allocated sales shown and the total present on the original table (shown as actual here) is not equal for the same reason. Nevertheless, the average market share for the whole period 1991-94 is virtually identical with the assigned quotas.

([32]) Jungbunzlauer's Statement [6475].
([33]) Jungbunzlauer's Statement [6475]; Bayer's Statement [4041].
([34]) ADM's Statement [3845, 3851]; Jungbunzlauer's Statement [6475]; Bayer's Statement [4040].

(99) Cerestar Bioproducts was not present at the meeting in Basel but, being a member of ECAMA, it was included in the aggregate data provided by that association. The other four cartel participants used the ECAMA data to cross-check the data reported and apparently allocated a 5 % share ([35]) to Cerestar Bioproducts, in all likelihood without its knowledge. This is reflected in the tables provided by Jungbunzlauer ([36]).

(100) In order to monitor the correct implementation of these quotas and avoid, as far as possible, the need for compensation at the end of each year, a regular exchange of monthly sales information was established from March 1991 ([37]). As Jungbunzlauer declares, 'each of the participants reported the tonnage they had sold in each region (Europe, North America, and the rest of the world) to the secretariat of the ECAMA President by the seventh (day) of each month. In the secretariat these sales figures were assembled and then reported back to the members by telephone, broken down by firm and by region. This made it possible to monitor the relative market shares continuously. The information also formed the basis of the market analysis carried out at the meetings' ([38]). Although companies reported sales for various regions, only the worldwide sales figure had to be complied with.

(101) The tables provided by Jungbunzlauer ([39]) were drawn up on the basis of the data supplied through those monthly telephone calls and contain detailed figures and calculations of the monthly sales of each participant in the cartel. They show a constant monitoring of each individual undertaking's level of compliance with its sales quota. As to the interpretation of the tables themselves, Jungbunzlauer explains: 'The five rows 1 to 5 arranged one below the other show Haarmann & Reimer, ADM, Jungbunzlauer, Hoffmann-La Roche and Cerestar (respectively). The twelve columns arranged side by side show these firms' reported monthly sales volumes. For each firm there are four separate rows showing the volume of citric acid sold in Europe, North America, and the rest of the world, and the total for the three regions together. The row marked 'total' also shows the percentage difference from the agreed sales volumes. The last row shows the difference for Europe as a whole ([40]). Two separate tables exist for each year in the period 1991-94. One provides the information on a cumulative monthly basis and the other on a simple monthly basis.

(c) ***Compensation system***

(102) At the meeting on 14 November 1991 in Brussels ([41]), the first at which sufficient data had been gathered on the progress of sales, it became clear that ADM was falling far short of its sales quota whilst Haarmann & Reimer was ahead of its quota by a similar quantity: 'By the end of 1991,

([35]) Jungbunzlauer's Statement [6475].
([36]) Tables under Jungbunzlauer's Article 11 reply of 29 April 1999, Annex 3.1 (contain data for 1991 onwards) [5637-5644].
([37]) ADM's Statement [3843]; Bayer Statement [4039, 4045]; Tables under Jungbunzlauer's Article 11 reply of 29 April 1999, Annex 3.1 [5637-5644].
([38]) Jungbunzlauer's Statement [6477] — 'meldeten die beteiligten Unternehmen jeweils bis zum 7. eines jeden Monats ihre verkauften Tonnagen pro Region beim Sekretariat des ECAMA-Präsidenten. Im Sekretriat wurden die Verkäufe konsolidiert und dann den Teilnehmern — aufgeteilt nach Firma und Region (Europa, Nordamerika, Rest der Welt) — telefonisch zurückgemeldet. Dadurch konnten die relativen Marktanteile laufend verfolgt werden. Diese Informationen waren dann auch die Grundlage der Marktanalyse in den Sitzungen.'
([39]) Jungbunzlauer's Article 11 reply of 29 April 1999, Annex 3.1 [5637-5644].
([40]) Jungbunzlauer's Statement [6477-6478] — 'In dieser Liste sind in fünf untereinander angeordneten Zeilen unter den Ziff. 1 bis 5 die Unternehmen Haarmann & Reimer, ADM, Jungbunzlauer, Hoffmann La Roche und Cerestar aufgelistet. In den zwölf nebeneinander angeordneten Spalten sind die monatlich gemeldeten Verkaufsmengen dieser Unternehmen aufgelistet. Für jedes einzelne Unternehmen ist in vier einzelnen Zeilen jeweils die verkaufte Menge Zitronensäure für die Regionen Europa, Nordamerika und Rest der Welt sowie die Gesamtsumme der drei Regionen angegeben. In der Zeile "Total" ist die Zusammenrechnung aller Verkäufe der einzelnen Regionen und deren Gesamtsumme aufgelistet. In der letzten Zeile ist die Abweichung, bezogen auf Gesamteuropa, wiedergegeben.'
([41]) Participants: Hoffmann-La Roche, Jungbunzlauer, ADM and Haarman & Reimer - See ADM's Statement [3846-3847]; Jungbunzlauer's Article 11 reply of 29 April 1999 [5611]; Bayer's Statement [4040-4041, 4043]; Exhibit 3 of Bayer's Statement : FBI transcripts [4102]; Hoffmann-La Roche's Article 11 reply of 28 April 1999, Annex 1 [4795].

Haarmann & Reimer needed to buy 7 000 tons of citric acid from ADM' ([42]). The other two producers were broadly in line with their quotas. At the meeting concern was expressed on this divergence because it had been agreed that one of the aims of the meticulous monitoring of sales was precisely to avoid the need for any compensation at the end of the year. It had been agreed earlier that imbalances of this kind were not to be allowed. At a subsequent meeting on 2 January 1992 in Germany ([43]) this question of compensation, as well as pricing and the state of the market, was further discussed.

(103) The issue of compensation surfaced early on in the life of the cartel, particularly following these large, and roughly equivalent, divergences by Haarmann & Reimer and ADM (see Table 6). An enhanced compensation system may have been discussed at the meeting in Jerusalem on 19 May 1992 ([44]), but eventually it was decided that 'individual compensation arrangements were to be sought between the firms that departed furthest from the volumes laid down' ([45]). At the meeting in Jerusalem, ADM's compensation was the main topic of discussion. Haarmann & Reimer was reluctant to compensate ADM. Hoffmann-La Roche's World Head of Marketing Vitamins and Fines Chemicals, as Chairman, intervened in the dispute, making it clear that this was an essential part of the agreement and that non-compliance on this point would undermine the trust necessary to maintain the cartel and would therefore be harmful to all participants. Accordingly, he urged Haarmann & Reimer to fulfil its agreement. The representatives of ADM and Haarmann & Reimer were told to work out a solution to this dispute and they discussed the subject at a subsequent bilateral meeting.

(104) This was only one meeting in a series which would continue until April 1995. ADM confirms that 'it was not unusual for (a representative of ADM) and (a representative of Haarmann & Reimer) to meet to discuss the North American position prior to ECAMA meetings' ([46]). In fact, other members of Haarmann & Reimer were present at certain of these meetings, thirteen of which have been identified. The compensation dispute figured prominently in many of these discussions, at least until the bulk of the transaction was concluded during the second half of 1992.

(105) The following table shows the divergence of each company with respect to its allocated quota for each year from 1991 to 1994. ADM was the company with the largest deficit in terms of volume throughout this period and Haarmann & Reimer had the largest surplus.

(106) Actual sales of citric acid between the companies do not correspond precisely with the figures given in the following table for two reasons. First, citric acid was traded between companies for legitimate purposes unconnected with the compensation measures (as part of swap agreements or on an ad hoc basis). Second, owing to the fact that there was an element of flexibility in the actual level of compensation made between the companies, disputes and negotiations on the actual compensation volumes were intense and not every single tonne of citric acid oversold was subject to compensation.

([42]) Exhibit 3 of Bayer's Statement: FBI transcripts [4103] — note that this figure corresponds to that shown in Table 5.

([43]) Participants: Hoffmann-La Roche, Jungbunzlauer, ADM and Haarman & Reimer - See ADM's Statement [3848]; Jungbunzlauer's Article 11 reply of 29 April 1999 [5611].

([44]) Participants: Hoffmann-La Roche, Jungbunzlauer, ADM, Haarman & Reimer and Cerestar Bioproducts - See ADM's Statement [3849]; Jungbunzlauer's Article 11 reply of 29 April 1999 [5612]; Bayer's Statement [4043]; Exhibit 3 of Bayer's Statement : FBI transcripts [4104]; Hoffmann-La Roche's Article 11 reply of 28 April 1999, Annex 1 [4795]; Cerestar Bioproducts'Statement [3979,3983].

([45]) Jungbunzlauer's statement [6478] — 'dass zwischen Unternehmen, zwischen denen die grössten Abweichungen von den Mengenvorgaben vorliegen würden, individuelle Ausgleichsmassnahmen zu suchen wären'.

([46]) ADM's Statement [3847]; see also Bayer's Statement [4043].

*Table 6*

**World market: Divergence on sales quotas (1) (metric tonnes)**

| **1991** | Haarmann & Reimer | ADM | Jungbunzlauer | Hoffmann-La Roche | Cerestar Bioproducts | Total |
|---|---|---|---|---|---|---|
| Sales allocated | 138 355 | 113 710 | 99 442 | 59 233 | 21 618 | 432 258 |
| Difference with Actual Sales | + 7 167 | – 6 963 | – 1 657 | + 1 089 | + 364 | 70 % of world market (2) |
| **1992** | Haarmann & Reimer | ADM | Jungbunzlauer | Hoffmann-La Roche | Cerestar Bioproducts | Total |
| Sales allocated | 142 722 | 117 300 | 102 581 | 61 103 | 22 300 | 446 006 |
| Difference with Actual Sales | + 2 678 | + 900 | + 156 | – 1 984 | – 1 750 | 66 % of world market |
| **1993** | Haarmann & Reimer | ADM | Jungbunzlauer | Hoffmann-La Roche | Cerestar Bioproducts | Total |
| Sales allocated | 135 717 | 111 542 | 97 547 | 58 104 | 21 206 | 424 116 |
| Difference with Actual Sales | + 2 320 | – 3 705 | + 1 887 | + 1 104 | – 1 606 | 59 % of world market |
| **1994** | Haarmann & Reimer | ADM | Jungbunzlauer | Hoffmann-La Roche | Cerestar Bioproducts | Total |
| Sales allocated | 121 436 | 99 806 | 87 283 | 51 990 | 18 974 | 379 489 |
| Difference with Actual Sales | + 1 431 | – 4 808 | + 762 | + 2 439 | + 176 | 52 % of world market (2) |

(1) The figures in this Table are based on the data contained in the tables under Jungbunzlauer's Article 11 reply of 29 April 1999, annex 3.1 [5637-5644]. The sales allocated row corresponds to the sales volume using the quota figure assigned to each company (see Table 1).
(2) World market percentage calculated on the basis of data in Jungbunzlauer's statement, Annex 2 [6490].

(107) Nevertheless, volumes purchased under the scheme were significant. ADM's sales to Haarmann & Reimer represented the most significant part of the compensation and, in ADM's own calculation, reached almost 7 200 mt between 1992 and 1995 ([47]). Cerestar Bioproducts admits to selling 702 mt of CAA plus 126 mt of tri-sodium citrate to Haarmann & Reimer in 1994-95 in addition to 96 mt to Jungbunzlauer in 1994 (this was the remainder of a consignment of 900 mt, most of which was rejected by Jungbunzlauer due to the allegedly substandard quality of the product) ([48]).

(108) In its reply to the Statement of Objections, Jungbunzlauer says that the Commission conveyed the incorrect overall impression that there was a detailed system of penalties to enforce the quota agreements. Jungbunzlauer adds that the statement of ADM quoted by the Commission ([49]) is not quite correct, in so far as no compensation system was ever introduced, though it may well have been the intention of some participants at the cartel meetings to do so ([50]). According to Jungbunzlauer, the agreement reached on 6 March 1991 concerned only the reporting of sales and not the compensation mechanism. While it is true that the possibility of a compensation mechanism was discussed at the Jerusalem meeting in May 1992, it was only agreed that separate compensation arrangements were to be made between the firms which had departed furthest from the agreed volumes.

(109) Since the Commission confirms that, as already reported in the Statement of Objections, the meeting in Jerusalem in May 1992 led to the conclusion that individual compensation arrangements should be sought between the undertakings concerned, it can only reject Jungbunzlauer's contention that no compensation agreement was in place over the period of infringement.

([47]) ADM's Statement [3850-3851,3854, 3859], ADM doc. ADMZ0037264, 0037107, 0037097 & 0000111.
([48]) Cerestar Bioproducts'Statement [3982]; Jungbunzlauer's Statement [6478].
([49]) At paragraph (70) of the Statement of Objections.
([50]) Jungbunzlauer's reply to the Statement of Objections [7669].

(110) From the outset, in March 1991, the principle that overselling participants would have to compensate those who undersold played a central role in the cartel arrangement. Whatever form, multi or bilateral, the implementation of the compensation scheme may have taken, it had the object and the effect of introducing disciplined compliance with the quotas, as all participants knew that they would lose any benefit obtained from a lack of respect of the market sharing agreement. This is confirmed by the statement made by Haarmann & Reimer to the effect that as early as November 1991 it knew it had to buy 7000 tonnes from ADM. As explained in recital 107, purchases of citric acid between cartel participants in compliance with quota agreements took place throughout the period of infringement.

(111) Whilst accepting that it bought 7 200 mt from ADM during the years 1992 to 1994, Haarmann & Reimer contends that it is going too far to say that the volumes purchased under the compensation scheme were significant, since they represented less than 2 % of its average worldwide annual sales. The Commission cannot share this view. Taken as a whole, the purchases were in no way minor, and in any event, even if their importance were regarded as limited, their relevance is obvious, as they shed a great deal of light on the efforts deployed by the cartel members to maintain the agreed quotas.

## 5. CERESTAR BIOPRODUCTS JOINS THE CARTEL

(112) Cerestar Bioproducts first established contact with the members of the cartel at the ECAMA general meeting of 15 November 1991 to which, as a new member of this trade association, it had been invited. The General Manager of Cerestar Bioproducts was approached on that occasion by Hoffmann-La Roche's World Head of Marketing Vitamins and Fine Chemicals, whom he subsequently met on 12 February 1992 in Basel where he was 'explained the basic mechanisms of the cartel' ([51]) which Cerestar Bioproducts eventually joined.

(113) There is some discrepancy in the accounts given by the various participants as to the actual date on which Cerestar Bioproducts attended its first cartel meeting. Hoffmann-La Roche has stated that 'representatives of Cerestar did not attend meetings before the year 1992' ([52]). ADM believes that Cerestar Bioproducts only joined the cartel at its meeting of 18 November 1992 in Brussels ([53]), whilst Jungbunzlauer puts it at 1 June 1993 ([54]), although Jungbunzlauer admits that it is unsure of this. Cerestar Bioproducts, for its part, is adamant that it was present at the meeting in Jerusalem in May 1992 ([55]) and it is this date which must be accepted as being the most accurate, mainly because Cerestar Bioproducts was the smallest player in the cartel and its participation at meetings was not systematically recorded by the other participants.

(114) At the meeting of November 1992, which took place on the afternoon prior to the official ECAMA meeting, the cartel members agreed to establish Cerestar Bioproducts' quota formally at 5 % of the cartel members' total worldwide sales ([56]), as had informally been agreed amongst the other members previously. At the same time it was decided that no compensation between companies was necessary for sales in 1992 since the differences between actual and assigned sales were small enough to be acceptable to all ([57]).

([51]) Cerestar Bioproducts' Statement [3980].
([52]) Hoffmann-La Roche's Article 11 reply of 28 April 1999 [4792].
([53]) Participants: Hoffmann-La Roche, Jungbunzlauer, ADM, Haarman & Reimer and Cerestar Bioproducts - See ADM's Statement [3851]; Jungbunzlauer's Article 11 reply of 29 April 1999 [5612]; Bayer's Statement [4043]; Exhibit 3 of Bayer's Statement : FBI transcripts [4104]; Hoffmann-La Roche's Article 11 reply of 28 April 1999, Annex 1 [4795]; Cerestar Bioproducts' Statement [3983].
([54]) Jungbunzlauer's Article 11 reply of 29 April 1999 [5613]; ADM's Statement [3851].
([55]) Cerestar Bioproducts' Statement [3979, 3983].
([56]) Cerestar Bioproducts' Statement [3982].
([57]) ADM's Statement [3851].

6. CONCERTED ACTION AGAINST CHINESE MANUFACTURERS

(115) From the end of the 1980s, Chinese manufacturers of citric acid had begun to increase their presence on the world market and in particular in Europe. Chinese product was generally perceived to be below the quality criteria of most established suppliers, by far the greater volume of production being in the form of CAH since the resources and technology to produce CAA were generally not available to the Chinese producers. They therefore had to compete almost exclusively on the basis of price and systematically sold at prices below those of the established manufacturers ([58]).

(116) The important rise in prices at the beginning of the 1990s was partially responsible for a new influx of citric acid imports from China. These more than doubled between 1991 and 1992, reaching 32 500 mt in 1992, that is to say, 14,2 % of the Community market volume. In 1994 they would rise to 59 448 mt, that is to say, 23,6 % of the Community market volume that year ([59]). This had an important impact on the cartel's ability to maintain the agreed prices and became an increasingly serious problem, although various means of counteracting the price-depressing effect of Chinese imports were devised and implemented. Under cover of their ECAMA membership, the undertakings composing the cartel studied the possibility of causing an anti-dumping proceeding to be initiated against the Chinese importers by the European Commission. They continued to apply this type of pressure by sending representatives of Jungbunzlauer and ADM to China, on behalf of ECAMA, to inform the local manufacturers that anti-dumping proceedings would be initiated if their price-cutting practices were not terminated. This had no perceivable effect on prices. In the meantime, the cartel members had been targeting individual customers of the Chinese producers in order to undermine their market position. The mechanics of this practice is explained below.

(117) One result of this was that by 1993 difficulties between some of the cartel members were beginning to surface. In the first quarter of 1993, Jungbunzlauer was seen to be 'causing problems' in the group because it did not strictly adhere to the agreement at all times and was perceived to be 'badly disciplined' by the other participants ([60]). By the following meeting of the cartel on 1 June 1993 at the Kildare Country Club in Ireland ([61]), the main point of discussion was the lack of discipline on the part of certain members vis-à-vis adherence to the agreement that all customers (except the five largest) were to pay the list price. In particular, ADM and Haarmann & Reimer expressly accused Jungbunzlauer of this lack of discipline. In order to remedy this perceived flaw, it was decided that 'junior' members of the group should meet separately to identify the various 'exceptions' made in order to clarify the situation. These rather technical meetings would later be referred to as 'Sherpa' meetings, as opposed to the main 'Masters' meetings.

(118) At the cartel meeting on 27 October 1993 at Bruges, Belgium ([62]), the difficulties due to lack of discipline on pricing continued. 'The fundamental agreement was still in place but there was an increasing number of exceptions for which the group saw Jungbunzlauer as being primarily responsible' ([63]). The falling market share of the cartel members was also a matter of concern. From 1991 to 1993 the cartel members' world market share in terms of total sales had fallen from around 70 % to less than 60 % and continued to fall to 52 % in 1994 ([64]). This continuous decline meant that the size of the 'pie' being shared out between the companies in the cartel was steadily decreasing, a factor which led to increased tension between them ([65]).

([58]) See Cerestar Bioproducts' Statement [3986] and Jungbunzlauer's Statement [6480-6481].
([59]) Hoffmann-La Roche's Article 11 reply of 28 April 1999 [4793].
([60]) Exhibit 3 of Bayer's Statement: FBI transcripts [4104]; Jungbunzlauer's Statement [6474].
([61]) Participants: Hoffmann-La Roche, Jungbunzlauer, ADM, Haarman & Reimer and Cerestar Bioproducts - See ADM's Statement [3849]; Jungbunzlauer's Article 11 reply of 29 April 1999 [5613]; Bayer's Statement [4043]; Exhibit 3 of Bayer's Statement : FBI transcripts [4105]; Hoffmann-La Roche's Article 11 reply of 28 April 1999 Annex 1 [4795]; Cerestar Bioproducts' Statement [3984].
([62]) Participants: Hoffmann-La Roche, Jungbunzlauer, ADM, Haarman & Reimer, and Cerestar Bioproducts — See ADM's Statement [3853]; Jungbunzlauer's Article 11 reply of 29 April 1999 [5613]; Bayer's Statement [4043]; Cerestar Bioproducts' Statement [3984].
([63]) ADM's Statement [3853].
([64]) See Table 2 above.
([65]) See ADM's Statement [3854-3855].

(119) A 'Sherpa' meeting was held in London on 14 January 1994 ([66]) with the remit of reviewing the citric acid market situation and finding ways to encourage a growth of sales by cartel members. The increasing availability of Chinese production in the European market and the need for a more forceful stance by the cartel members to maintain their level of sales in the light of this were subjects of discussion at the meeting. Participants 'accepted that there would have to be a price war against the competition from China' ([67]) and that they had to 'try and regain particular accounts [lost to the Chinese producers] at whatever price was necessary with the blessing of the others' ([68]).'These customers were identified by name, and were allocated to individual participants, who were to make the necessary offers' ([69]). This catalogue of undertakings came to be known as the 'Serbia List' and was the subject of regular monitoring and discussion at subsequent 'Sherpa' meetings, the first of which were held in London from 23 to 25 March 1994 ([70]).

(120) The next 'Masters' meeting was held on 18 May 1994 at the Savoy Hotel in London ([71]). The issue of Chinese producers was raised including an initial discussion on the possibility of bringing an anti-dumping complaint before the European Commission. Further accusations were levelled against Jungbunzlauer for its perceived breaking of the agreement as far as prices were concerned. Jungbunzlauer's CEO took over the chairmanship of the cartel meetings at this time, following his election to the Chairmanship of ECAMA and the retirement of Hoffmann-La Roche's World Head of Vitamins and Fine Chemicals, and, accordingly, all monthly price information was subsequently reported to his secretary.

(121) A further 'routine' 'Sherpa' meeting was held on 7 July 1994 in Zurich ([72]), followed by a Masters meeting there on 31 August 1994 ([73]), at which Jungbunzlauer continued to be blamed for undermining the pricing agreements. The possibility of causing an anti-dumping proceeding to be initiated against the Chinese producers was once again discussed. Following its chairmanship of the group, Jungbunzlauer was now responsible for the logistical organisation of the meetings.

(122) At the meeting on 2 November 1994 ([74]) at the Hotel Amigo in Brussels, the 'Serbia List' was reviewed and further discussed. It was agreed that on forthcoming trips by representatives of Jungbunzlauer and ADM to China, the local producers were to be threatened with an anti-dumping complaint. In addition, individual large accounts were partitioned between the undertakings, with the 'Masters' entrusting the 'Sherpas' 'with arriving at some commonality of price between those bidding for the [1995] […] business (…) After the cartel meeting the sherpas stayed behind and established a broad commonality of price for the[…]bid' ([75]).

(123) Further agreements on quotations to single customers were discussed at 'Sherpa meetings' on 16 November 1994 ([76]) at the Mariott Hotel in Slough, United Kingdom, and on 18 November 1994 ([77]) at the Hotel Concorde Lafayette, Paris. At the first of these meetings, a bid to (…) was one of

([66]) Participants: Hoffmann-La Roche, Jungbunzlauer, ADM, Haarman & Reimer and Cerestar Bioproducts —See ADM Statement [3854-3855]; Jungbunzlauer's Article 11 reply of 29 April 1999 [5614].
([67]) Jungbunzlauer's Article 11 reply of 29 April 1999 [5614] — 'Es wurde erkannt, dass gegen die Konkurrenz aus China ein Preiskampf aufgenommen werden musste.'
([68]) ADM's Statement [3858].
([69]) Jungbunzlauer's Article 11 reply of 29 April 1999 [5614] — 'Diese Kunden wurden namentlich identifiziert und den einzelnen Teilnehmern für die Abgabe der entsprechenden Angebote zugeteilt.'
([70]) Participants: ADM met Haarman & Reimer and Cerestar Bioproducts in London on 23-24 March 1994 and Hoffmann-La Roche on 25 March 1994 in London. — ADM's Statement [3855].
([71]) Participants: Hoffmann-La Roche, Jungbunzlauer, ADM, Haarman & Reimer, Cerestar Bioproducts — See ADM's Statement [3856]; Jungbunzlauer's Article 11 reply of 29 April 1999 [5614]; Bayer's Statement [4043]; Cerestar Bioproducts' Statement [3985]; Hoffmann-La Roche's Article 11 reply of 28 April 1999, Annex 1 [4795].
([72]) Participants: Hoffmann-La Roche, Jungbunzlauer, ADM, Haarman & Reimer and Cerestar Bioproducts — See ADM's Statement [3856-3857].
([73]) Participants: Hoffmann-La Roche, Jungbunzlauer, ADM, Haarman & Reimer and Cerestar Bioproducts — See ADM's Statement [3857]; Jungbunzlauer's Article 11 reply of 29 April 1999 [5615]; Cerestar Bioproducts' Statement [3985].
([74]) Participants: Hoffmann-La Roche, Jungbunzlauer, ADM, Haarman & Reimer and Cerestar Bioproducts — See ADM's Statement [3858]; Jungbunzlauer's Article 11 reply of 29 April 1999 [5615]; Bayer's Statement [4043]; Exhibit 3 of Bayer's Statement : FBI transcripts [4106]. Cerestar Bioproducts' Statement [3985].
([75]) ADM's Statement [3858].
([76]) Participants: Hoffmann-La Roche, Jungbunzlauer, ADM and Haarman & Reimer - See ADM's Statement [3858-3859]; Jungbunzlauer's Article 11 reply of 29 April 1999 [5615].
([77]) Participants: Hoffmann-La Roche, Jungbunzlauer, ADM, Haarman & Reimer, Cerestar Bioproducts — See ADM's Statement [3859]; Jungbunzlauer's Article 11 reply of 29 April 1999 [5616]; Cerestar Bioproducts' Statement [3985].

the main topics (if not the only one). Notes taken by ADM's representative at the meeting show that each undertaking was assigned a bidding price for orders in individual countries ([78]). Discussions on (…) and other multinational companies were held at both meetings. The main theme of discussion at the Paris meeting was how to follow through with the implementation of the 'Serbia List'.

(124) By the beginning of 1995 the impact of the Chinese imports, particularly on the European market, together with the perception that Jungbunzlauer was not keeping to the agreement on prices and was therefore undercutting the other cartel members were having a clear effect on the cohesiveness and effectiveness of the cartel. Prices in Europe were falling from the last agreed price of DEM 2,80/kg (CAA).

## 7. THE END OF THE CARTEL

(125) The following three meetings on 6 January 1995 ([79]) at the Hotel Hilton O'Hare in Chicago, on 2 February 1995 ([80]) at the Hotel Hilton at Heathrow, London, and on 21 February 1995 ([81]) at the Hotel Sheraton in Toronto, Canada, did not fundamentally change any previous pattern of behaviour. The other undertakings attacked Jungbunzlauer for its 'almost total lack of adherence to the agreed prices which Jungbunzlauer had reduced, particularly though not exclusively in Europe' ([82]). Monitoring of the implementation of the 'Serbia List' continued and whilst the atmosphere was 'much less friendly' and the group was starting to fall apart, monthly sales data continued to be regularly exchanged and all parties were still very much in contact with each other. Given the state of relations between the companies, particularly with Jungbunzlauer, three companies (Hoffmann-La Roche, ADM and Haarmann & Reimer) discussed 'the possibility of forming other arrangements in the citric acid market, not including Jungbunzlauer' ([83]), although these did not ultimately result in any concrete action.

(126) The meeting held on 1 May 1995 ([84]) at the Hilton Airport Hotel in Zurich was the last cartel meeting to be prearranged. As ADM states 'the cartel was coming to an end', but not quite. Accusations continued to be levelled against Jungbunzlauer, and the other companies held bilateral and side discussions on other possible arrangements. It was not until the last, unplanned, meeting on 22 May 1995 ([85]) at the Schweiz Park Hotel in Vitznau, Switzerland, that it became clear that 'the cartel was in total disarray and was not working. (The CEO of Jungbunzlauer) was told that unless JBL was seen to do something to repair the damage that they had done the agreement was at an end' ([86]).

(127) Notwithstanding this turn of events the parties continued to exchange the monthly sales data until May 1995. After this date ADM, Hoffmann-La Roche and Haarmann & Reimer continued to discuss the possible continuation of the agreement in a modified form. The American firm Cargill was deemed to be a possible new addition to this group, although it does not appear that concrete steps to this effect were taken.

(128) In any case, the raid conducted by the United States of America Federal Bureau of Investigation (FBI) on the premises of ADM in the United States of America in June 1995 brought an end to this company's involvement in the cartel and according to the information available to the Commission, all remaining contacts between the parties in relation to the anti-competitive practices were drawn to a close.

([78]) ADM document 1965 and ADM's Statement [3859].
([79]) Participants: Hoffmann-La Roche, Jungbunzlauer, ADM and Haarman & Reimer - See ADM's Statement [3860]; Jungbunzlauer's Article 11 reply of 29 April 1999 [5616]; Cerestar Bioproducts' Statement [3985].
([80]) Participants: Hoffmann-La Roche, Jungbunzlauer, ADM, Haarman & Reimer, Cerestar Bioproducts — See ADM's Statement [3860]; Jungbunzlauer's Article 11 reply of 29 April 1999 [5616]; Cerestar Bioproducts' Statement [3985].
([81]) Participants: Hoffmann-La Roche, Jungbunzlauer, ADM, Haarman & Reimer and Cerestar Bioproducts — See ADM's Statement [3860-3861]; Jungbunzlauer's Article 11 reply of 29 April 1999 [5617].
([82]) ADM's Statement [3860].
([83]) ADM's Statement [3861].
([84]) Participants: Hoffmann-La Roche, Jungbunzlauer, ADM, Haarman & Reimer and Cerestar Bioproducts — See ADM's Statement [3861]; Jungbunzlauer's Article 11 reply of 29 April 1999 [5617].
([85]) Participants: Hoffmann-La Roche, Jungbunzlauer, ADM, Haarman & Reimer and Cerestar Bioproducts — See ADM Statement [3861]; Jungbunzlauer's Article 11 reply of 29 April 1999 [5617]; Bayer's Statement [4043]; Cerestar Bioproducts' Statement [3985].
([86]) ADM's Statement [3861].

## PART II — LEGAL ASSESSMENT

### A. *JURISDICTION*

(129) The arrangements described applied to all countries in the EEA which were consumers of citric acid.

(130) The EEA Agreement, which contains provisions on competition analogous to those of the Treaty, came into force on 1 January 1994. The present Decision therefore includes the application as from that date of the rules on competition of the EEA Agreement (in particular Article 53(1)) to the arrangements to which objection is taken ([87]).

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

(132) If an agreement or practice affects only trade between Member States of the EC, the Commission retains competence and applies Article 81 of the Treaty. On the other hand, if an agreement affects only trade between EFTA States, then the EFTA Surveillance Authority ('ESA') is alone competent and will apply the EEA competition rules in Article 53 of the EEA Agreement ([88]).

(133) In the present case, the Commission is the competent authority to apply both Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement on the basis of Article 56 of that Agreement since the cartel had an appreciable effect on trade between the EC Member States ([89]).

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

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

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

(135) Article 53(1) of the EEA Agreement (which is modelled on Article 81(1) of the Treaty) contains a similar prohibition, although the reference in Article 81(1) to trade 'between Member States' is replaced by a reference to trade 'between contracting parties' and the reference to competition 'within the common market' is replaced by a reference to competition 'within the territory covered by … (the EEA) Agreement'.

#### 2. AGREEMENTS AND CONCERTED PRACTICES

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

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

([87]) See Final Act of the Agreement on the European Economic Area, OJ L 1, 3.1.1994, p. 3.
([88]) Pursuant to Article 56(1)b) of the EEA Agreement, and without prejudice to the competence of the EC Commission where trade between EC Member States is affected, the ESA is also competent in cases where the turnover of the undertakings concerned in the territory of the EFTA States equals 33 % or more of their turnover in the territory of the EEA.
([89]) See Chapter 5 Effect upon trade between EU Member States and between EEA Contracting Parties.

(138) In its judgment in Joined Cases T-305/94 etc. Limburgse Vinyl Maatschappij NV and Others v Commission (PVC II) ([90]), the Court of First Instance 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'.

(139) Article 81 of the EC Treaty ([91]) draws a distinction between the concept of 'concerted practices' and that of 'agreements between undertakings' or of 'decisions by associations of undertakings'; the object is to bring within the prohibition laid down in that provision a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition ([92]).

(140) The criteria of coordination and cooperation laid down by the case-law of the Court, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the commercial policy which he intends to adopt in the common market. Although that requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators the object or effect whereof 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 ([93]).

(141) Thus conduct may fall within the scope of Article 81(1) of the Treaty as a concerted practice even where the parties have not explicitly subscribed to a common plan defining their action in the market, if they nevertheless knowingly adopt or adhere to collusive devices which facilitate the coordination of their commercial behaviour ([94]).

(142) Although in terms of Article 81(1) of the Treaty the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period ([95]).

(143) It is not necessary, particularly in the case of a complex infringement of long duration, that the Commission characterise it as exclusively one or other of these forms of illegal behaviour. The concepts of agreement and concerted practice are fluid and may overlap. Indeed, it may not even be possible realistically to make any such distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while considered in isolation some of its manifestations could accurately be described as one rather than the other. It would however be artificial analytically to subdivide what is clearly a continuing common enterprise having one and the same overall objective into several discrete forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time. Article 81 lays down no specific category for a complex infringement of that type ([96]).

([90]) Joined Cases T-305/94 etc. Limburgse Vinyl Maatschappij and Others v Commission (PVC II) [1999] ECR II-931, paragraph 715.
([91]) The case-law of the Court of Justice and Court of First Instance in relation to the interpretation of the terms 'agreements' and 'concerted practices' in Article 81 of the Treaty expresses principles well established before the signature of the EEA Agreement. It therefore applies equally to these terms in so far as they are used in Article 53 of the EEA Agreement. References to Article 81 therefore apply also to Article 53.
([92]) Case 48/69 Imperial Chemical Industries v Commission [1972] ECR 619, paragraph 64.
([93]) Joined Cases 40-48/73 etc. Suiker Unie and Others v Commission [1975] ECR 1663.
([94]) See also Case T-7/89 Hercules Chemicals v Commission [1991] ECR II-1711, paragraph (256).
([95]) See Case C-199/92 P Hüls v Commission [1999] ECR I-4287, paragraphs 158-166.
([96]) Case T-7/89 Hercules Chemicals v Commission, paragraph 264.

(144) In PVC II, the Court of First Instance stated that '(i) in the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article (81) of the Treaty' ([97]).

(145) An 'agreement' for the purposes of Article 81(1) of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract at civil law. Moreover, in the case of a complex cartel of long duration, the term 'agreement' can properly be applied not only to any overall plan or to the terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose.

(146) Although a cartel is a joint enterprise, each participant in the agreement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries, or even cheating may occur, but will not prevent the arrangement from constituting an agreement/concerted practice for the purposes of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement where there is a single common and continuing objective. A complex cartel may properly be viewed as a single continuing infringement for the time frame in which it existed. The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments.

(147) Indeed, in a complex cartel of long duration, where the various concerted practices followed and agreements concluded form part of a series of efforts made by the undertakings in pursuit of a common objective of preventing or distorting competition, the Commission is entitled to find that they constitute a single continuous infringement. As the Court of First Instance observed on this point in Case T-7/89 Hercules v Commission ([98]), it would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as a number of separate infringements: 'the fact is that the (undertakings) took part — over a period of years — in an integrated set of schemes constituting a single infringement, which progressively manifested itself in both unlawful agreements and unlawful concerted practices.'

(148) The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not preclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and the same anti-competitive effect. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. This is certainly the case where it is established that the undertaking in question was aware of the unlawful behaviour of the other participants or could have reasonably foreseen or been aware of them and was prepared to take the risk ([99]).

3. SINGLE, CONTINUOUS INFRINGEMENT

(149) At their first meeting of 6 March 1991 in Basel, Switzerland, the major producers, Haarmann & Reimer, ADM, Jungbunzlauer and Hoffmann-La Roche, agreed the basic principles by which they would cartelise the world market for citric acid ([100]).

(150) This plan, to which they all subscribed, as did Cerestar Bioproducts at a later stage, was implemented over a period of four years employing the same mechanisms and pursuing the same common purpose of eliminating competition.

(151) The working out of the plan in regular meetings did not give rise to discrete 'agreements' but constituted the implementation of the same overall and illegal scheme.

([97]) Paragraph 696.
([98]) Case T-7/89 Hercules Chemicals v Commission, paragraphs 262-263.
([99]) Case C-49/92 P Commission v Anic [1999] ECR I-4125, paragraph 83.
([100]) See recitals 78 to 84.

(152) Given the common design and common objective which the producers steadily pursued of eliminating competition in the citric acid industry, the Commission considers that the conduct in question constituted a single continuing infringement of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

(153) Although the arrangements between the producers could correctly be considered as presenting all the characteristics of a full 'agreement', some factual elements of the illicit conduct could aptly be described as constituting a concerted practice were it appropriate to do so.

(154) In its reply to the Statement of Objections, Jungbunzlauer alleges that the Commission is not correct in saying that an agreement was reached on 6 March 1991 and that a commonly agreed plan to restrict competition was implemented over a long period, employing the same mechanisms.

(155) According to Jungbunzlauer, not only did the parties fail to reach agreement in March 1991, but from 1993 onwards, Jungbunzlauer participated only partly in the implementation of the principles in question, and from the second half of 1994 it played no further part at all.

(156) In the light of recitals 136 to 148, the argument according to which there was no agreement over the period considered in the present Decision must be dismissed. The question whether the agreements and/or concerted practices were actually implemented is addressed in recitals 212 to 218.

4. RESTRICTION OF COMPETITION

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

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

— limit, or control production,

— share markets or sources of supply.

(158) In the complex of agreements and arrangements considered in the present case, the following elements can be identified as relevant in order to find an infringement of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement:

— allocating markets and market shares quotas,

— freezing/restricting/closing down production capacity,

— agreeing concerted price increases,

— designating the producer which was to 'lead' price increases in each national market,

— circulating lists of current and future target prices in order to coordinate price increases,

— devising and applying a reporting and monitoring system to ensure the implementation of their restrictive agreements,

— sharing out, or allocating customers,

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

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

(160) 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.

(161) However, the cartel also had a restrictive effect on competition. Indeed the price rises which were the primary objective of the cartel were agreed, announced to customers and extensively implemented, particularly during the course of the early years of the cartel, throughout the EEA. Moreover, the maintenance of each company's market share, agreed in order to make the price agreements work, was largely achieved; the divergence between overall actual and allocated sales was above 3 % only for some companies in the first year of the cartel and remained below this figure for the later period (see Table 6). The restrictive effect of the arrangements in question are established in more detail in recitals 205 to 218.

(162) In its reply to the Statement of Objections, Jungbunzlauer declares that the Commission has wrongly given the impression that improper pressure was brought to bear on the Chinese producers. Jungbunzlauer goes on to say that cheap imports from China were distorting competition to a considerable extent and that there is nothing reprehensible in threatening to take a legitimate step. Jungbunzlauer states that the anti-dumping complaint contemplated by ECAMA can in no way be regarded as an abuse. This is also demonstrated by the facts that Turkey imposed anti-dumping duties on imports of Chinese citric acid between May 1995 and May 2000.

(163) It is not the Commission's intention to maintain that filing or planning to file an anti-dumping complaint, or even informing third parties of an intention to file such a complaint may constitute, as such, an infringement of Article 81(1) of the Treaty.

(164) However, it is clearly established in the present case that the increases in the price of citric acid that were successfully brought about by the cartel members through their competition-restricting agreements, had the effect of strongly increasing Chinese exports of citric acid to Europe.

(165) In this context, the various joint efforts made by the cartel members to convince the Chinese producers that they should limit their price-cutting exports to Europe can aptly be described as a strategy aimed at protecting the cartel from an unexpected competitive threat, irrespective of the question of the lawfulness, under EC anti-dumping law, of the prices charged by the Chinese producers.

(166) Whilst it is perfectly legitimate for an industry to discuss whether an anti-dumping complaint should be filed with the Commission, it is certainly not for the main players of a given market segment to take concerted actions regarding the prices they charge to their respective customers in order to evict third parties from this market. The facts described in recitals 115 to 124 illustrate very clearly the illegal character of the practices used by the cartel participants in order to discipline the Chinese producers. The counter-offers targeted at specific companies, identified in a catalogue known as the 'Serbia list' and individually allocated to each of the cartel participants, clearly formed part of an overall strategy to eliminate competition in the citric acid market in the EEA.

(167) In this respect, the Commission is well founded in considering that the conduct of the cartel members vis-à-vis the Chinese producers amounted to a concerted practice falling under Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

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

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

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

(170) As demonstrated in the section 'Inter-State trade' (recitals 52 and 53), the citric acid market is one which is characterised by a substantial volume of trade between EC Member States. There was also a considerable volume of trade between the EU and EFTA countries party to the EEA. All EFTA countries party to the EEA import 100 % of their requirements. Prior to the accession of Austria, Finland and Sweden to the Community, Austria exported a substantial quantity and the other two countries imported the totality of their requirements of citric acid.

(171) The application of Articles 81(1) of the Treaty and 53(1) of the EEA Agreement to a cartel is not, however, limited to that part of the members' sales which actually involve the transfer of goods from one State to another. Nor is it necessary, in order for these provisions to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States ([101]).

(172) In the present case, the cartel arrangements covered virtually all trade throughout the EC and EEA in this important industrial sector. The existence of price-fixing and quota mechanisms must have resulted, or was likely to result, in the automatic diversion of trade patterns from the course they would otherwise have followed ([102]).

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

(173) 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.

(174) 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 an infringement 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.

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

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

## C. *ADDRESSEES*

### 1. PRINCIPLES APPLICABLE

(177) In order to identify the addressees of the present Decision, it is necessary to determine the legal entities responsible for the infringement.

(178) In this regard, 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' ([103]).

([101]) Case T-13/89 Imperial Chemical Industries v Commission [1992] ECR II-1021, paragraph 304.
([102]) Joined Cases 209 to 215 and 218/78 Van Landewyck and Others v Commission [1980] ECR 3125, paragraph 170).
([103]) Case 48/69 Imperial Chemical Industries v Commission [1972] ECR 619, paragraphs 132-133.

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

(180) 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 served as the vehicle for the infringement and withdraws from the market concerned, the undertaking in question will continue, if it is still in existence, to be held responsible for the infringement over the period considered ([104]).

2. ADDRESSEES OF THE DECISION

(181) ADM directly and autonomously participated in the cartel. Consequently the group as a whole bears responsibility for the infringement and is therefore an addressee of the present Decision.

(182) Hoffmann-La Roche, together with its subsidiary Citrique Belge, was also directly involved in the cartel. Consequently Hoffmann-La Roche bears direct responsibility for the infringement and is an addressee of the present Decision.

(183) In April 1996, responsibility for the business of Haarmann & Reimer FID was transferred to Bayer plc, and subsequently sold in June 1998 to the Tate & Lyle group. The sale of Haarmann & Reimer FID to Tate & Lyle occurred after the end of the infringement considered in the present Decision. As Haarmann & Reimer is still in existence, it bears responsibility for the infringement. Haarmann & Reimer is therefore an addressee of the present Decision.

(184) Cerestar Bioproducts is a wholly-owned subsidiary of Cerestar Holding BV Over the period of infringement, the latter was controlled by Eridania Béghin-Say SA, a company ultimately controlled by the Montedison Group. Cerestar Bioproducts was directly involved in the cartel and is therefore an addressee of the present decision.

(185) Jungbunzlauer Ges.m.b.H is now a wholly-owned subsidiary of Jungbunzlauer Holding AG, but the business controlled by the latter is effectively managed by Jungbunzlauer AG, where the headquarters of the whole group are also located. This is confirmed in the reply to the Statement of Objections, where Jungbunzlauer says that since 1993, responsibility for the management of the group has lain with Jungbunzlauer AG. Before that date, the whole group was directed by Jungbunzlauer Ges.m.b.H ([105]).

(186) In its reply to the Statement of Objections, Jungbunzlauer AG and Jungbunzlauer Ges.m.b.H have jointly replied that Jungbunzlauer Ges.m.b.H should be the addressee of any decision relating to the facts in question. In support of this assertion, they argue that those who took part in the conduct described in the Statement of Objections were for the most part representatives of Jungbunzlauer Ges.m.b.H, that the Commission initially sent a request for information to that undertaking and that all submissions on the part of the Jungbunzlauer group in the present case were made on behalf of Jungbunzlauer Ges.m.b.H.

(187) The Commission must dismiss these arguments. First, until the second half of 1993, Jungbunzlauer Ges.m.b.H was not solely a subsidiary in charge of the production and distribution of citric acid, but also the legal entity responsible for the management of the whole Jungbunzlauer group. In 1993, that responsibility passed to Jungbunzlauer AG, which can be regarded as the successor to Jungbunzlauer Ges.m.b.H with respect to the management of the Jungbunzlauer group. Since that date, Jungbunzlauer Ges.m.b.H became a wholly-owned subsidiary within the group, which did not decide independently upon its own conduct on the market, but carried out, in all material respects, the instructions issued by Jungbunzlauer AG, the company responsible for management of the group.

([104]) See Commission Decision of 23 April 1986 (IV/31.149-Polypropylene), OJ L 230, 18.8.1986, p. 1, para. 96; Commission Decision of 21 December 1988 (IV/31.865-PVC), OJ L 74, 17.3.1989, p. 1, para. 43; and Commission Decision of 13 July 1994 (IV/C/33.833-Cartonboard), OJ L 243, 19.9.1994, p. 1, para. 156. See also Case T-6/89 Enichem Anic SpA v. Commission (Polypropylene) [1991] ECR II-1623. Judgment upheld by the Court of Justice in Case C-49/92 P Commission v. Anic Partecipazioni SpA [1999] ECR I-4125. See also Case T-327/94 SCA Holdings v. Commission [1998] ECR II- 1373. Judgment upheld by the Court of Justice in Case C-297/98 P SCA Holdings Ltd. (not yet reported).

([105]) Jungbunzlauer's reply to the Statement of Objections [7669].

(188) For a certain part of the period considered in the present Decision, Jungbunzlauer AG took part directly in cartel meetings, notably in the person of its CEO. It must therefore be concluded that at any period of time considered in the present Decision, the legal entity responsible for the management of the whole Jungbunzlauer group was actively and directly involved in the cartel. Since the legal entity in question is currently Jungbunzlauer AG, the latter must be an addressee of the present Decision.

## D. *DURATION OF THE INFRINGEMENT*

(189) Although bilateral contacts between certain citric acid producers took place before the initial multilateral meeting, and although ADM has alleged the existence of agreements ([106]) prior to those concerned by the present proceedings, the Commission will in the present case limit its assessment under Article 81 of the Treaty and Article 53 of the EEA Agreement, as well as the application of any fines, to the period from 6 March 1991 onwards.

(190) That was the date of the first multilateral cartel meeting in Basel, Switzerland, when the basic principles for the cartelisation of the market were agreed. (It should of course be noted that in so far as the cartel affected Austria, Finland, Norway, Sweden, Iceland and Liechtenstein, that does not constitute an infringement of the competition rules before 1 January 1994 when the EEA Agreement came into effect.)

(191) The participation in the infringement of Haarmann & Reimer, ADM, Jungbunzlauer and Hoffmann-La Roche from that date is established by the participation at that meeting of their respective Presidents/General Managers.

(192) Cerestar Bioproducts only entered the citric acid market in 1992 and by its own admission became a participant at the meetings from 19 May 1992.

(193) The cartel continued until May 1995. Two meetings were held in this month, the first a regular, planned meeting on 1 May, and the second an impromptu one on 22 May. It was during the course of the latter that Jungbunzlauer was issued an ultimatum to demonstrate its continued willingness to keep to the agreement, in light of its previous practice. Since this was not forthcoming, Jungbunzlauer was deemed to have left the group and ADM, Hoffmann-La Roche and Haarmann & Reimer discussed the possibility of continuing with the agreement under a modified form (see recitals 125 to 127). According to the information available to the Commission, the raid conducted by the FBI on ADM's premises in the United States of America in June 1995 put an end to all remaining contacts between the parties involved in the anti-competitive practices.

## E. *REMEDIES*

### 1. ARTICLE 3 OF REGULATION No 17

(194) Where the Commission finds an infringement of Article 81(1) of the Treaty or Article 53(1) of the EEA Agreement it may require the undertakings concerned to bring such infringement to an end in accordance with Article 3 of Regulation No 17 ([107]).

(195) In the present case the participants in the cartel went to considerable lengths to conceal their unlawful conduct. In these circumstances, the Commission maintained in its Statement of Objections that it was not possible to declare with absolute certainty that the infringement had ceased.

(196) In its reply to the Statement of Objections, Cerestar Bioproducts claimed that it put an end to its participation in May 1995. Haarmann & Reimer pointed out for its part that it sold the activities in question in 1998 and that 'with respect to Haarmann & Reimer/Bayer plc it would be pointless to include such a requirement in the operative part of the decision' ([108]).

([106]) ADM's Statement [3847]; Exhibit 3 of Bayer's Statement: FBI transcripts [4101-4102].
([107]) Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements of implementing the Agreement on the European Economic Area 'the Community rules giving effect to the principles set out in Articles 85 and 86 [now Articles 81 and 82] of the EC Treaty […] shall apply *mutatis mutandis*'. (OJ L 305, 30.11.1994, p. 6).
([108]) Haarman & Reimer's reply to the Statement of Objections [7585].

(197) Notwithstanding these observations, and for the avoidance of doubt, it is necessary to require the addressee undertakings that remain active in the citric acid market to bring the infringement to an end, if they have not already done so, and henceforth to refrain from any agreement, concerted practice or decision of an association which, in object or effect, is the same or similar.

2. ARTICLE 15(2) OF REGULATION No 17

(a) ***General considerations***

(198) Under Article 15(2) of Regulation No 17, the Commission may by decision impose upon undertakings fines 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.

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

(200) The role played by each undertaking party to the infringement will be assessed on an individual basis. In particular, the Commission will reflect in the fine imposed any aggravating or mitigating circumstances and will apply, as appropriate, the Notice on the non-imposition or reduction of fines in cartel cases ([109]).

(201) 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.

(b) ***The amount of the fine***

(202) 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 leading producers combined to set up a secret and institutionalised system designed to restrict competition in a significant industrial sector.

1. **The basic amount**

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

*Gravity*

(204) In its assessment of the gravity of the infringement, the Commission takes account of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

*Nature of the infringement*

(205) It follows from the facts described that the present infringement consisted in market-sharing and price-fixing practices, which are by their very nature the worst kind of infringements of Article 81(1) of the Treaty and 53(1) of the EEA Agreement.

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

(206) The cartel arrangements involved all major operators in the EEA and were conceived, directed and encouraged at high levels in each participating company ([110]). By its very nature, the implementation of a cartel agreement of the type described leads automatically to a significant distortion of competition, which is of exclusive benefit to producers participating in the cartel and is highly detrimental to customers and, ultimately, to the general public.

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

(208) ADM argues that in the present case, the infringement should be considered, with regard to its nature, as 'serious' instead of 'very serious'. According to ADM, the infringement did not jeopardise the proper functioning of the market as there was no partitioning of national markets. In ADM's view, the Commission's documents show that the quotas were worldwide and that the European target prices were primarily set in DEM and then converted in local currency equivalents.

(209) The Commission rejects this approach. It is clear that price and market sharing cartels by nature jeopardise the proper functioning of the single market. It would be erroneous to conclude from the mere fact that the quotas and prices made no distinction between individual Member States that this infringement is serious rather than very serious. What matters is that the normal competitive pattern that would have governed the single market for citric acid was replaced by a collusive regime relating to quantities and prices, the essential components of competition.

*The actual impact of the infringement on the citric acid market in the EEA*

(210) The infringement was committed by undertakings, which during the material period covered on average over 60 % of the world market and around 70 % of the European market for citric acid. Moreover, the arrangements were specifically aimed at restricting sales quantities, and raising prices higher than they would otherwise have been and restricting sales to certain customers. Given that these arrangements were implemented, they had an actual impact on the market.

(211) 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 factors.

(212) The cartel agreements described were carefully implemented. As already mentioned, one of the participants declared that it was 'surprised at the level of formality and organisation to which the participants had gone to arrive at this arrangement' ([111]).

(213) From March 1991 to mid-1993, the prices agreed within the cartel were announced to customers and extensively implemented, in particular during the early years of the cartel. The price increase to DEM 2,25/kg (CAA) by April 1991, decided at the cartel meeting of March 1991, was easily introduced. It was followed by a decision, taken by telephone in July, to increase the price to DEM 2,70/kg (CAA) by August. This price increase was also successfully implemented. A final increase to DEM 2,80/kg (CAA) was agreed at the meeting in May 1992 and was implemented in June 1992 ([112]). After this date, no further price increase was implemented, and the cartel concentrated on the need to maintain these prices.

(214) The sales quotas established at the March 1991 meeting were instrumental to the sustained upward pressure on the prices and thus constituted a critical element of the cartel. The parties devised and applied a detailed reporting and monitoring system to ensure implementation of the quotas. Each individual undertaking's level of compliance was constantly monitored. These aspects have been described in detail in recitals 81, 85 and 97 to 101.

([110]) See recital 70.
([111]) See FBI Transcript, p. 8. [4100].
([112]) ADM's Statement [3844-3849]; Jungbunzlauer's reply to Article 11 of 29 April 1999 [5610-5611,5613]; ADM price instructions, [3578-3580, 3740-3742, 3760-3761].

(215) As discussed in recitals 88 and 102 to 111, the compensation system agreed upon in March 1991 was also carefully implemented, and actual purchases of product deriving directly from the anti-competitive arrangement actually took place.

(216) In the light of the foregoing and of the efforts devoted by each participant to the complex organisation of the cartel, the effectiveness of the implementation cannot be questioned.

(217) Cerestar Bioproducts also contends that it 'refused to adhere to the blueprint and (that) its prices were from January 1992 on continuously below those of other producers' ([113]). As for Jungbunzlauer, it states in its reply that by the middle of 1994 at the latest, it distanced itself openly from the attempted price increases and offered prices on the market that were clearly below the target prices. It goes even further, saying that it never paid attention in practice to the market shares agreed initially ([114]), and that it even played a role in the ending of the cartel.

(218) Cerestar Bioproducts' and Jungbunzlauer's argument that they behaved as 'free riders' and cheated on the other cartel participants must be dismissed. Both companies attended the cartel meetings until the end. With regard to Jungbunzlauer's assertion that it played an active part in ending the cartel, it must be mentioned that as late as the last cartel meeting in Vitznau in May 1995, Jungbunzlauer is reported to have played an active role. According to ADM's Statement ([115]), Jungbunzlauer's representative took the initiative in organising the cartel meeting by sending messages to the others. According to ADM's Statement, 'Jungbunzlauer wanted to bring some stability in the market but no agreement was reached' ([116]).

(219) The fact that Cerestar Bioproducts and Jungbunzlauer may well have disregarded to some extent the commitments made towards the other cartel participants does not imply that they did not implement the cartel agreement. As the Court of First Instance said in Cascades, 'an undertaking which, despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit' ([117]).

(220) ADM, Haarmann & Reimer and Jungbunzlauer disagree with the Commission's conclusion regarding the impact of the cartel on the citric acid market in the EEA. Whereas Haarmann & Reimer 'does not deny that the cartel has a certain effect on the market (…), [it] respectfully submit[s] that this effect cannot be translated into concrete figures and it should not be overstated' ([118]). As for ADM and Jungbunzlauer, they submit that the cartel had very little impact on the market.

(221) ADM and Jungbunzlauer contend that from 1993 onwards, price increases were no longer implemented due to the influx of cheap Chinese products. Haarmann & Reimer also submits that the effects on the market were limited because of the increased demand in the years 1991 to 1992, due to the increase in sales by Chinese manufacturers as well as to the 'cheating' practices of the cartel members. Haarmann & Reimer also contends that the limited effect in the market is confirmed by the replies given by customers to the Commission's requests for information of 20 January 1998. The company concludes that the Commission's statement that the price for citric acid rose by 40 % during the first 14 months has to be understood in the light of the broader economic context of the market.

(222) In support of its arguments, ADM submitted to the Commission an expert report consisting of an economic analysis of the citric acid industry during the period considered in the Statement of Objections. The report concludes that the citric acid market is an oligopoly in which the situation of capacity vis-à-vis total demand is the major determinant of pricing, which would therefore be characterised by cyclical variations. The report submits that a steep increase in prices in the early period of the cartel would have occurred in any event. Being abnormally low in 1990-1991 prices logically rose in 1991 and 1992. According to the report, the hypothesis of an impact of the cartel on prices is destroyed by the fact that during the period of infringement, prices did not attain levels seen in the mid-1980s.

([113]) Cerestar Bioproducts's reply to the Statement of Objections, p. 8. [7557].
([114]) Jungbunzlauer's reply to the Statement of Objections [7675].
([115]) ADM's Statement, p. 22. [3861].
([116]) Idem.
([117]) T-308/94 [1998] ECR II-925, paragraph 230.
([118]) Haarman & Reimer's reply to the Statement of Objections [7585].

(223) The report also submits that the great majority of ADM's sales to customers in the EEA countries were at prices below the floor price. This would lend support to the conclusion that pricing during the relevant period resulted more from a situation of oligopolistic competition than from coordination. Furthermore, it is contended that 'Chinese exports were sufficient to constrain pricing to oligopolistic (competitive) rather than collusive levels (…)' ([119]).

(224) In its reply to the Statement of Objections, Jungbunzlauer draws the same conclusions, underlining that the main reason for the price increase in 1991 and 1992 was the substantial, unmatched expansion of demand as a result of the development of citric acid as a sequestering agent in the detergent industry. Jungbunzlauer also insists that the rise in prices of 1991-1992 should be seen in the perspective of their fall over the period 1986-1990 and that they therefore merely represented a return to a more normal situation.

(225) Jungbunzlauer contends that in spite of the cartel agreements, there was still intense competition in the citric acid market from 1991 to 1995. This is illustrated by the replies of customers to the Commission's requests for information of January 1998. Furthermore, the fact that the overall worldwide market share of the parties fell from 70 % originally to 52 % in 1994 would demonstrate that the cartel was no longer in a position to influence price formation.

(226) None of those arguments used by the parties to minimise the Commission's finding that the cartel had an actual effect on the market is conclusive. The explanations for the price increases of 1991-1992 provided by ADM, Haarmann & Reimer and Jungbunzlauer may have some validity, but they do not demonstrate in any convincing manner that the implementation of the cartel agreement could not have played any role in the price fluctuations. Whilst the phenomena described may occur in the absence of a cartel, they are also perfectly consistent with a cartel situation. The fact that the prices for citric acid increased by 40 % in 14 months cannot be explained solely in terms of a competitive reaction, but must be interpreted in the light of the facts that the participants had agreed on coordinated price increases and market share allocation, as well as on a reporting and monitoring system. All this would have contributed to the success of the price increases.

(227) Jungbunzlauer's argument based on the replies from various buyers of citric acid to the Commission's requests for information in January 1998 is not conclusive either. The question asked by the Commission concerning the intensity of competition in the market has to be seen in the context of a preliminary investigation into the main features of the citric acid market, and was therefore framed in general terms. Many replies merely point out that the citric acid market is worldwide, that several major players compete through quotations on the occasion of bids and that the price of the product has varied significantly over the years. The answers given to the Commission can in no way be construed as a demonstration of the inexistence of the effects of the cartel. In view of the high degree of sophistication characterising the illegal arrangements, one could certainly not expect the customers to be in a position to confirm the inexistence of competition in the market in question. It should also be noted that some replies drew attention to the broad similarity between the prices quoted by the main producers.

(228) The fact, highlighted by Jungbunzlauer, that the cartel's overall 'market share' diminished over time, from around 70 % initially to 52 % in 1994, certainly illustrates the difficulties encountered by the cartel participants in keeping the prices above a competitive level. This nevertheless does not demonstrate that the illegal practice had no effect on the market. On the contrary, the strong increase in imports from China from 1992 onwards, indicates that the cartel members were not adapting as they normally would have done to the price pressure exerted by such imports.

([119]) ADM's reply to the Statement of Objections (Economist's report) [7867].

*The size of the relevant geographic market*

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

*Commission's findings concerning the gravity of the infringement*

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

(231) Haarmann & Reimer submitted in its reply to the Statement of Objections that according to its own calculation, the total annual market value of the citric acid market in the EC was only some EUR 250 million in 1996, and that the Commission should reconsider its statement that this is a major industrial sector.

(232) This request must be rejected. Even if the value of a market affected by a price-fixing or market-sharing cartel (at Community or EEA level) is moderate, the Commission is not obliged to classify the infringement as serious rather than very serious.

*Classification of cartel participants*

(233) Within the category of very serious infringements, the proposed scale of 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 a sufficiently deterrent effect. The Commission notes that this exercise seems particularly necessary where, as in the present case, there is considerable disparity in the size of the undertakings participating in the infringement.

(234) In the circumstances of this case, which involves several undertakings, it will be necessary in setting the basic amount of the fines to take account of the specific weight of each undertaking and therefore the real impact on competition of its misconduct.

(235) For this purpose the undertakings concerned can be divided into various categories according to their relative importance in the market concerned, subject to adjustment where appropriate to take account of the need to ensure effective deterrence.

(236) As the basis for assessing the relative importance of an undertaking in the market concerned, the Commission considers it appropriate to take in the present case the worldwide product turnover. Given the global character of the market, these figures give the most appropriate picture of the participating undertakings' capacity to cause significant damage to other operators in the common market and/or the EEA. This approach is supported by the fact that this was a global cartel, the object of which was, *inter alia*, to allocate markets on a worldwide level, and thus to withhold competitive reserves from the EEA market. Moreover, the worldwide turnover of any given party to the cartel also gives an indication of its contribution to the effectiveness of the cartel as a whole or, conversely, of the instability which would have affected the cartel had it not participated. The comparison is made on the basis of the worldwide product turnover in the last year of the infringement (year 1995). The table set out in recital 44 provides the relevant figures.

(237) In 1995, Haarmann & Reimer, with a worldwide market share of 22 %, was the largest player in the market. ADM and Jungbunzlauer followed, with similar market shares […]. Hoffmann-La Roche had a market share of 9 %, whilst Cerestar Bioproducts was the smallest player in the market: in 1995, its estimated market share was 2,5 %.

(238) Haarmann & Reimer, given its large market share, will be placed in the first group. ADM, Hoffmann-La Roche and Jungbunzlauer will be placed in a second group. Cerestar Bioproducts, which was by far the smallest player, will be placed in a third group.

(239) On the basis of the foregoing, the appropriate starting amount for a fine, on the basis of the criterion of relative importance in the market concerned, is as follows:

— Haarmann & Reimer: EUR 35 million,

— ADM, Hoffmann-La Roche and Jungbunzlauer: EUR 21 million,

— Cerestar Bioproducts: EUR 3,5 million.

*Sufficient deterrence*

(240) In order to ensure that the fine has a sufficiently deterrent effect, the Commission will determine whether any further adjustment of the starting amount is needed in the case of any undertaking.

(241) The table set out in recital 50 gives an indication of the relative size of the addressees of the present Decision, as well as of the relative size of the overall economic entity to which they ultimately belong, on the basis of 100 % ownership.

(242) With respective worldwide turnovers in 2000 of EUR 18 403 million and EUR 13 936 million, Hoffmann-La Roche and ADM are much larger players than the other addressees. In this respect, the Commission considers that the appropriate starting point for a fine on the basis of the criterion of relative importance in the market concerned requires further upward adjustment to take account of the size and overall resources of Hoffmann-La Roche and ADM respectively.

(243) A comparative analysis of the respective size of the economic entities to which the addressees of the present Decision ultimately belong, on the basis of 100 % ownership, shows that Haarmann & Reimer is an integral part of a very large economic entity. Haarmann & Reimer is ultimately controlled by Bayer AG which in 2000 had a worldwide turnover of EUR 30 791 million.

(244) The Commission takes the view that it would be inequitable to apply an upward adjustment exclusively to ADM and Hoffmann-La Roche, and not to Haarmann & Reimer. Such an approach would mean that the possibility for the Commission to take into account the large size of the economic entities as described in recital 50 would be contingent on their organisational structure. An economic entity organised as a single legal entity comprising several industrial divisions would be unduly penalised as compared with one organised in the form of a group of successive, wholly controlled, subsidiaries.

(245) Consequently, the Commission considers that in order to take into account the size and overall resources of the economic entity to which the undertakings belong, it is necessary to adjust upwards the starting point for the fine set for Haarmann & Reiner on the basis of the criterion of its relative importance in the market concerned.

(246) On the basis of the foregoing, the Commission considers that the need for deterrence requires that the starting points for the fines determined under recital 239 should be increased by 100 % to EUR 42 million in the case of ADM and Hoffmann-La Roche, and by 150 % to EUR 87,5 million in the case of Haarmann & Reimer.

*Duration of the infringement*

(247) The Commission considers that ADM, Haarmann & Reimer, Hoffmann-La Roche and Jungbunzlauer infringed Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement from March 1991 until May 1995.

(248) Cerestar Bioproducts infringed Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement from May 1992 until May 1995.

(249) ADM, Haarmann & Reimer, Hoffmann-La Roche and Jungbunzlauer committed the infringement for four years, which corresponds to a medium duration. The starting amounts of the fines determined for gravity (see recitals 239 and 246) is therefore increased by 40 %.

(250) Cerestar Bioproducts committed the infringement for three years, which also corresponds to a medium duration. The starting amount of the fine determined for gravity (see recital 239) is therefore increased by 30 %.

*Conclusion on the basic amounts*

(251) ADM argues that, in the present case, it would not be appropriate for the Commission, in fixing the amount of fines, to follow the methodology explained in its Guidelines on Fines. It maintains that the Commission is not allowed to radically alter the method of setting fines so as to disregard relevant EEA product turnover. According to ADM, the Guidelines should apply only to infringements occurring after their publication in the Official Journal on 14 January 1998.

(252) ADM refers to the judgment in Case T-77/92 Parker Pen ([120]) in which the Court of First Instance stated that the Commission did not take into account the fact that the turnover accounted for by the product to which the infringement related was relatively low in comparison with the turnover resulting from Parker's total sales, and therefore reduced the Commission's fine. ADM is of the opinion that the Court made it clear that a fine set without regard to the company's Community turnover in the goods to which the infringement relates would be considered disproportionate for that very reason.

(253) The Commission acknowledges that, in the past, it frequently determined the fine according to a base rate representing a certain percentage of sales in the relevant Community market. However, the only requirements regarding the exercise of the Commission's discretion in the fixing of fines pursuant to Article 15(2) of Regulation No 17 are that regard be had to the gravity and duration of the infringement and that a ceiling determined by reference to the total turnover of the undertakings concerned be observed. These factors are fully and fairly taken into account in the present Decision.

(254) The Commission accordingly sets the basic amounts of the fines as follows:

| | |
|---|---|
| — Archer Daniels Midland Company Inc.: | EUR 58,8 million, |
| — Cerestar Bioproducts BV: | EUR 4,55 million, |
| — F. Hoffmann-La Roche AG: | EUR 58,8 million, |
| — Haarmann & Reimer Corporation: | EUR 122,5 million, |
| — Jungbunzlauer AG: | EUR 29,4 million. |

2. **Aggravating circumstances**

*Role of leader in the infringement*

(255) The Commission considers that ADM and Hoffmann-La Roche were the two leaders of the infringement.

(256) In its reply to the Statement of Objections, ADM submits that it was not an instigator or a leader and that, on the contrary, that it played a follow-my-leader role in the cartel.

([120]) Case T-77/92 Parker Pen v Commission [1994] ECR II-549.

(257) In support of this assertion, ADM declares that the Statement of Objections refers to the fact that 'there had already been moves in the industry to fix prices prior to (March 1991)' and that 'Jungbunzlauer states that in 1990 it had been approached by a member of the management board of Haarmann & Reimer (…) in order to coordinate an approach on prices by citric acid manufacturers' ([121]). ADM also refers to 'the impression of ADM's witness who, although having no direct evidence, was given to understand at certain meetings that there had been a citric acid arrangement pre-dating ADM's participation' ([122]). ADM also refers to other cases investigated by the Commission which, it maintains, implicitly point to the existence of the citric cartel prior to ADM's entry in the market. ADM submits that, to the extent that such arrangements did exist prior to ADM's involvement, ADM could not have been an instigator.

(258) ADM also points out that the first meeting on 6 March 1991 was led by Hoffmann-La Roche. It says that Haarmann & Reimer is wrong to infer from the statements made by an employee of ADM to the FBI that ADM was the leader of the cartel. ADM also underlines that it never acted as chairman of the cartel and that it was not responsible for inviting or coercing other participants to join.

(259) On its part, Hoffmann-La Roche submits that it was neither an instigator, nor a ringleader of the citric acid cartel, and that it did not urge any other company to take part in the infringement. Hoffmann-La Roche asserts that the driving force behind the cartel came primarily from ADM's directors. According to Hoffmann-La Roche, ADM decided on its own initiative to develop bilateral contacts with the other citric acid producers. It generally played the role of price leader, as allegedly confirmed by the admission of one of its representatives ([123]). Hoffmann-La Roche also argues that Cerestar Bioproducts' statement confirms the leading role played by ADM ([124]).

(260) Hoffmann-La Roche further points out that the first cartel meeting took place on the occasion of an ECAMA meeting, the chairmanship of which had passed to it in accordance with rotation arrangements. The cartel participants reached agreement with the chair that there should be a certain organisational function within the cartel, which explains why Hoffmann-La Roche was then entrusted with conducting the cartel discussions and managing through its secretariat the contact point set up by the parties. Hoffmann-La Roche nevertheless submits that it was not given any specific role over and above that administrative function. In so far as Hoffmann-La Roche had any special position in the cartel, this may have been a role of mediator, in the event of internal disagreements between the cartel participants.

(261) Hoffmann-La Roche adds that after the chairmanship of ECAMA passed to Jungbunzlauer in 1994, the latter also took over the organisational role in the cartel. Hoffmann-La Roche goes on to say that after its initial representative (and chairman of ECAMA) retired, his successor played a very subordinate role in the cartel.

(262) In spite of those arguments, the Commission maintains that ADM and Hoffmann-La Roche must be regarded as the two leaders of the citric acid cartel.

(263) Although successive meetings in January 1991 between ADM and, respectively, Haarmann & Reimer, Hoffmann-La Roche and Jungbunzlauer were characterised by ADM as being of an 'introductory nature', the Commission is of the opinion that it is very likely that these meetings played a determining role in the establishment (or reestablishment) of the citric acid cartel in March 1991. In view of the very short lapse of time separating this series of meetings from the first multilateral cartel meeting of 6 March 1991, it is most likely that the possibility or intention of setting up a formalised cartel was discussed. This is supported in particular by the content of the discussions held, as reported by an employee of ADM: although the description of the discussions remains vague, the employee indicates that on two occasions at least, a competitor was 'disparaged' for the manner in which it conducted its citric acid business. This expression of resentment against a competitor accused of not behaving properly in the market is clearly an indication of the anti-competitive purpose of introducing more discipline to the market.

([121]) Para (59) of the Statement of Objections.
([122]) ADM's reply to the Statement of Objections [7622].
([123]) Interview of a representative of ADM by the FBI, Appendix 4, p. 11. [4103].
([124]) Appendix 8, p. 2. [3980].

(264) The Commission is nevertheless of the opinion that the fact that a round of bilateral meetings took place between ADM and its competitors shortly before the first multilateral cartel meeting is not sufficient to show that ADM was the instigator of the cartel, even though it strongly suggests that this was the case. However, the Commission is in possession of enough additional elements to conclude that ADM was a leader of the cartel.

(265) During his interview by the FBI in 1996, a former representative of ADM at the cartel meetings referred to another representative of ADM at the same meetings and said about him that 'the mechanics of the G-4/5 arrangement seemed to be (name of that ADM representative)'s idea, and at the 6 March, 1991 meeting in Basel, where the CA arrangement was formulated, [name of the ADM representative] took a fairly active role'. Referring to the same colleague, he went on to say that [name of the ADM representative] was viewed as 'The Wise Old Man', and was even dubbed the Preacher by (name of a representative of Jungbunzlauer) ([125]).

(266) In its statement of 25 March 1999, Cerestar Bioproducts also declares that 'although (name of representatives of Hoffmann-La Roche and Jungbunzlauer) normally chaired Masters meetings, it was Bioproduct's clear impression that (name of a representative of ADM) played a leading role. (Name of a representative of ADM) chaired the Sherpa meetings and tended to prepare matters and make the proposals for the price lists to be agreed' ([126]).

(267) The Commission therefore concludes that ADM was a leader of the citric acid cartel.

(268) In spite of its denial, it is also clear that Hoffmann-La Roche played a decisive role in the cartel. The first multilateral meeting of the cartel on 6 March 1991 was organised and chaired by a representative of Hoffmann-La Roche. The same person continued to chair all 'Masters' meetings until 1994, when he went into retirement.

(269) The leading role of Hoffmann-La Roche is also highlighted by the statement made to the FBI by ADM's former representative in the cartel. The transcripts of the interview indicate that ADM's representative at the meeting of 6 March 1991 declared that the representative of Hoffmann-La Roche 'may have alluded to the need for care in the writing of notes about Hoffmann-La Roche and the need to be quiet about the meetings, and referred to another price-fixing matter in which Laroche was implicated. (Name of the representative of Hoffmann-La Roche) admonished the group that nothing should be kept in writing' ([127]).

(270) The fact that, as the undertaking itself acknowledges in its reply to the Statement of Objections, Hoffmann-La Roche acted as mediator in the event of internal disagreement between the participants illustrates Hoffmann-La Roche's commitment to the smooth functioning of the cartel. The efforts it deployed to sort out internal quarrels, far from exculpating Hoffmann-La Roche, show on the contrary that it exercised a degree of leadership over the group.

(271) In the Commission's view, the circumstances surrounding Cerestar Bioproducts' entry in the cartel also points to Hoffmann-La Roche's leadership. Cerestar Bioproducts describes as follows the first contact made in November 1991 in the context of ECAMA: 'On the occasion of an ECAMA General Assembly meeting in Brussels, (name of a representative of Hoffmann-La Roche) invited (name of the General Manager of Cerestar Bioproducts) to visit him to Basle to discuss the possibility of joining a "club". A so-called club (i.e. cartel) meeting had apparently taken place the previous afternoon' ([128]). It was thus the representative of Hoffmann-La Roche who approached the General Manager of Cerestar Bioproducts and who explained to him, on 12 February 1992, the basic mechanisms of the cartel ([129]).

([125]) FBI transcript [4113-4114].
([126]) Statement made by Cerestar Bioproducts [3980].
([127]) Exhibit 3 of Bayer's Statement: FBI transcripts [4101].
([128]) Cerestar Bioproducts' Statement [3980].
([129]) See paragraph and Cerestar Bioproducts' Statement, p. 2. [3980].

(272) The argument put forward by Hoffmann-La Roche, according to which it chaired the meetings because it was chairman of the ECAMA meetings, cannot exonerate it, since Hoffmann-La Roche was in no way coerced by the other participants and could have refused to assume chairmanship of the cartel and responsibility for collecting the sales data. That argument must therefore be dismissed. Similarly, the possibility that Hoffmann-La Roche adopted a 'lower profile' in the cartel after chairmanship of the cartel meetings passed to Jungbunzlauer does not invalidate the Commission's finding that Hoffmann-La Roche played overall a leading role in the cartel.

(273) In conclusion, the Commission considers that ADM and Hoffmann-La Roche were the two leaders of the cartel. This is therefore regarded as an aggravating factor to be taken into account in the determination of the amount of the fines imposed on ADM and Hoffmann-La Roche respectively, justifying an increase in their respective basic amounts by 35 %. This increase reflects the fact that whilst both these undertakings clearly had a prominent role in the infringement, other members of the cartel also carried out activities usually associated with a leadership role, such as the chairing of meetings, or the centralisation of data collection and distribution.

3. **Attenuating circumstances**

*Exclusively passive role in the infringement*

(274) Cerestar Bioproducts states in its reply that it neither initiated nor led the cartel, but on the contrary played a minor role. It further submits that its small market share in the EEA, the fact that it did not participate in all meetings and that it never organised or hosted any of the cartel meetings should be taken into account in order to lower any fine to be imposed on it. Cerestar Bioproducts further says that it was worried about the consequences of not joining the cartel. It declares that its acquisition of the Biacor plant was greeted with open hostility by the major citric acid producers and that it feared being put out of business by retaliation measures if it did not join the cartel.

(275) Jungbunzlauer also contends in its reply to the Statement of Objections that its participation in the cartel was confined to a passive, 'follow-my-leader role'. As a preliminary argument, Jungbunzlauer submits that the set-up of the cartel was triggered by its conduct as a 'newcomer' in the citric acid market. Given the aggressive pricing implemented by Jungbunzlauer to establish itself in the market, the cartel agreements were initially an attempt to tie the 'troublemaker' into an agreed common discipline. Jungbunzlauer adds that it could not avoid the cartel agreements in the initial period because it was afraid of being driven out of the market by competitors which, it says, were much larger and financially far stronger.

(276) Being mainly a citric acid producer, Jungbunzlauer states that it was in considerably greater commercial danger than the other companies, and that its continued existence would have been jeopardised if it had lost a significant volume of sales. Jungbunzlauer further submits that it was dependent, as a buyer of glucose, on the goodwill of the other cartel participants, and that these could have exerted influence on glucose manufacturers outside their own groups, thus compromising Jungbunzlauer's sources of supply.

(277) Jungbunzlauer also contends that 'massive pressure' was brought to bear on it by Haarmann & Reimer in order to compel it to take part in the agreement. In 1990, Jungbunzlauer was allegedly visited in Vienna by a representative of Haarmann & Reimer, who told it that the producers ought to be coordinating their actions. According to Jungbunzlauer, it was only when Jungbunzlauer had reason to fear that coordinated conduct on the part of its competitors might also be directed against it that it declared itself willing to attend a meeting ([130]).

([130]) Jungbunzlauer's Statement [6474] and Jungbunzlauer's reply to the Statement of Objections [7704].

(278) Finally, Jungbunzlauer submits that it did not play any active role in the implementation of the agreements, and that the fact that Jungbunzlauer's CEO took over the role of reporting centre in its secretariat does not show that it played such a role.

(279) In its reply to the Statement of Objections, Haarmann & Reimer contests strongly Jungbunzlauer's assertion that it was pressurised by Haarmann & Reimer and that it was merely a newcomer or an 'outsider'. Haarmann & Reimer also vigorously contests Jungbunzlauer's description of the other suppliers as 'established suppliers', while denying that it, Jungbunzlauer, belonged to that category.

(280) Haarmann & Reimer points out that according to its own statement, Jungbunzlauer has been supplying citric acid since 1967, and that it has been for many years the leading European manufacturer of the product, with the largest market share in Europe. Haarmann & Reimer also submits that the fact that the CEO of Jungbunzlauer took over responsibility for the logistical organisation of the meetings from 1994 onwards, and subsequently chaired some cartel meetings demonstrates the decisive role played by Jungbunzlauer in the cartel.

(281) In its reply, Hoffmann-La Roche also contests the assertions by Jungbunzlauer regarding the pressure to which it was allegedly subjected. Hoffmann-La Roche points out that Jungbunzlauer does not describe in any way how and when pressure was brought to bear on it, and contests Jungbunzlauer's contention that it is a small player by submitting that the latter already held a 16 % of the world market in 1990, with production facilities in four countries. Hoffmann-La Roche also points to Jungbunzlauer's leading role in preparing anti-dumping proceedings against the Chinese manufacturers, as well as its participation in all multilateral cartel meetings over the period of infringement.

(282) The Commission must dismiss all the arguments put forward by Cerestar Bioproducts and Jungbunzlauer respectively.

(283) The fact that Cerestar Bioproducts was a small player in the citric acid market and that it may have been worried about the consequences of not joining the cartel does not relieve it of its own corporate responsibility. For instance, Cerestar Bioproducts could have reported the cartel to the Commission.

(284) Jungbunzlauer's arguments cannot be regarded as relevant by the Commission. The mere fact that from 1994 onwards Jungbunzlauer took over responsibility for the collection of sales data and that its CEO chaired the cartel meetings suffices to demonstrate that Jungbunzlauer's involvement in the cartel was active and went much further than it acknowledges.

*Non-implementation in practice of the offending agreements*

(285) As discussed in recitals 212 to 218 the Commission considers that the anti-competitive agreements were carefully implemented. This attenuating circumstance is therefore not applicable to any of the addressees of the present Decision.

*Other attenuating circumstances*

(286) Cerestar Bioproducts submits that the citric acid plant it acquired from Biacor never made any profits, and did not benefit from the cartel. It says that towards the end of the 1990's this situation had become untenable and points out that Cerestar Bioproducts subsequently sold the site and ceased citric acid production in June 1999.

(287) The Commission does not consider that, in general, either non-benefit from a cartel or any economic disadvantage suffered due to participation in a cartel, constitutes attenuating circumstances for the purposes of fixing a fine. The argument of Cerestar Bioproducts must therefore be dismissed.

(288) ADM suggests that its first Corporate Code of Conduct and Compliance Policy, approved by ADM's Board of Directors in July 1996, should be taken into account as an attenuating circumstance. Similarly, Haarmann & Reimer points out that it introduced a compliance programme 'several years ago' (without indicating the date or content of such programme) and that in December 1996 and January 1997, the President and CEO of Bayer Corporation sent a letter to all employees of the company reminding them of their obligations under competition law. Finally, Jungbunzlauer also submits that during the autumn of 1995, it introduced an antitrust compliance policy.

(289) The Commission welcomes the fact that those companies set up antitrust law compliance policies. It nevertheless considers that these initiatives came too late and cannot, as a prevention tool, dispense the Commission from its duty to penalise the infringement of the competition rules which ADM, Haarmann & Reimer and Jungbunzlauer have committed in the past.

(290) Jungbunzlauer submits that the facts that the agreements 'were also a defensive measure against cheap imports from China which were causing serious distortion of competition' ([131]) ought to reduce the fine. Jungbunzlauer contends that the Chinese producers' exports had State assistance and that the Chinese products were offered in Europe at very low prices which were clearly below cost.

(291) The Commission must dismiss this argument in its entirety. As already stated in recital 166, it is certainly not for the main players of a given market segment to take concerted private actions regarding the prices they charge to their customers in order to compensate, in any manner whatsoever, for 'dumping' strategies employed by undertakings from third countries.

### 4. **Conclusion on the amounts of fines prior to any application of the Commission notice on the non-imposition or reduction of fines in cartel cases ('the Leniency Notice')**

(292) The Commission accordingly sets the amounts of the fines prior to any application of the Leniency Notice as follows:

| | |
|---|---|
| — Archer Daniels Midland Company Inc.: | EUR 79,38 million, |
| — Cerestar Bioproducts BV: | EUR 4,55 million, |
| — F. Hoffmann-La Roche AG: | EUR 79,38 million, |
| — Haarmann & Reimer Corporation: | EUR 122,5 million, |
| — Jungbunzlauer AG: | EUR 29,4 million. |

(293) However, since the final amounts calculated according to that method may not in any case exceed 10 % of the worldwide turnover of the addresses (as laid down by Article 15(2) of Regulation 17), the fines will be set as follows, in order not to exceed the permissible limit:

| | |
|---|---|
| Archer Daniels Midland Company Inc.: | EUR 79,38 million, |
| Cerestar Bioproducts BV: | EUR 1,75 million, |
| F. Hoffmann-La Roche AG: | EUR 79,38 million, |
| Haarmann & Reimer Corporation: | EUR 20,31 million ([1]), |
| Jungbunzlauer AG: | EUR 29,4 million. |

([1]) For the purpose of calculating the upper limit applicable to the fine on Haarmann & Reimer, which was a non-operating holding company in 2000, the Commission took account of the global turnover of the partnership 'Haarmann & Reimer' in the same year. Haarmann & Reimer Corporation controls 51 % of this partnership.

### 5. **Application of the Commission's Leniency Notice**

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

([131]) Jungbunzlauer's reply to Statement of Objections [7705]: die Absprachen [darstellen] auch eine Gegenmassnahme gegen die Billigimporte aus China, die ihrerseits eine erhebliche Wettbewerbsverzerrung bewirkten.

*Non-imposition of a fine or a very substantial reduction of its amount*

(295) ADM submits that it satisfies each and every one of the requirements of Section B of the Leniency Notice.

(296) ADM points out that it first contacted the Commission on 9 September 1998, and that it expressed its intention to cooperate within the framework of the Leniency Notice at the subsequent meeting of 29 September 1998, by offering evidence of the citric acid arrangement in the form of documents and testimony. ADM further submits that after seeking guidance from the Commission at a meeting on 10 November 1998 on the type and nature of evidence most useful to the latter, it undertook an internal investigation and was able to provide first-hand witness testimony to the Commission at a meeting on 11 December 1998, in the form of contemporary documentary evidence and documents revealing the context and implementation of the cartel arrangement.

(297) ADM submits that it was therefore the first to provide documentary evidence in respect of the cartel on 11 December 1998, as well as 'the first to provide a written statement detailing ADM's participation, meetings, attendees, price/quotas agreed and the cartel's monitoring/compensation mechanisms' ([132]).

(298) ADM also submits that it was the first to produce decisive evidence of the cartel's existence, including 'extensive detail of meetings, attendees, compensation and monitoring mechanisms, prices and quotas applicable to the EU' ([133]). ADM says that the evidence it supplied formed the basis of a further request for information to other citric producers, which subsequently prompted them to admit participation in the cartel and to cooperate with the Commission's investigation.

(299) ADM says that prior to the evidence it supplied, the Commission had no substantive evidence of the existence of the cartel, in particular with respect to the Community.

(300) ADM notes that Cerestar Bioproducts also cooperated with the Commission and that the Commission's file suggests that Cerestar Bioproducts' first offer of cooperation was on 7 October 1998, that is to say, after ADM's initial admission and offer of cooperation. ADM submits that Cerestar Bioproducts provided its written confirmation of its participation on 25 March 1999, after ADM had submitted its written statement of 15 January 1999, and only after the Commission had sent a further request for information to Cerestar Bioproducts on 3 March 1999, based on ADM's information.

(301) ADM contends that the evidence ultimately provided by Cerestar Bioproducts was limited and that it is not clear whether first-hand witness evidence was offered. It says that no detail of agreed prices or quotas was supplied (beyond the quotas established for Cerestar Bioproducts itself); that the identities of other attendees were only provided for three of the 17 meetings identified as 'possible' cartel meetings; and that six of the cartel meetings so identified did not, in fact, take place at all according to the evidence of the other defendants and the findings of the Commission. In particular, ADM notes that after its admission, Cerestar Bioproducts itself was subject to a further more detailed request for information based on ADM's data.

(302) On its part, Cerestar Bioproducts submits that although it was not the first party to submit a written statement, it 'was the first to cooperate and to provide detailed information on the cartel, its structure, basic rules and the meeting between competitors' ([134]).

([132]) ADM's reply to the Statement of Objections [7614].
([133]) Idem.
([134]) Cerestar's reply to the Statement of Objections [7551].

(303) Cerestar Bioproducts submits that the Statement of Objections does not fully describe the level of Cerestar Bioproducts's cooperation with the Commission and the importance of that substantial cooperation for the progress of the Commission's investigation. It says that the dates that should be taken into account are 29 October 1998, when Cerestar Bioproducts gave a first detailed description of the cartel, 17 December 1998, when it provided further background information and documentation, and 23 February 1999, when Cerestar Bioproducts provided the Commission with a mark-up of the Commission's minute of the 29 October 1999 meeting, which eventually formed the basis for Cerestar Bioproducts' statement of 25 March 1999.

(304) Cerestar Bioproducts submits that at a meeting that took place at its request on 29 October 1998, it orally explained the background, origin, and history of the cartel. It submits that at the time the Commission did not have any direct evidence of any cartel or illicit practices other than the information it had received from the Department of Justice, and that this was the first real evidence received relating to possible cartel activities by citric acid producers in the European Union.

(305) The Commission accepts that Cerestar Bioproducts was the first undertaking to submit decisive information on the existence of an international cartel affecting the EEA in the citric acid industry. That information was provided at the meeting of 29 October 1998, although it was not immediately provided in written form.

(306) The information provided by Cerestar Bioproducts at the meeting of 29 October 1998, which corresponds to the information provided later in the written statement of 25 March 1999, was sufficient to establish the existence of the cartel and was communicated to the Commission before ADM provided such information. The information given by ADM at the meeting of 29 September did not constitute decisive evidence since it was not sufficient to establish the existence of the cartel.

(307) Cerestar Bioproducts was the first company to provide decisive information to the Commission before the latter had undertaken any investigation ordered by decision. Cerestar Bioproducts therefore fulfils the conditions set out in Section B of the Leniency Notice.

(308) Conversely, ADM does not fulfil condition (b) of Section B of the Leniency notice and therefore cannot benefit from a reduction of its fine as contemplated in this section. Moreover, the Commission found that ADM was a leader of the cartel and therefore it does not fulfil condition (e) of Section B of the Leniency Notice either.

(309) The Commission notes that Cerestar Bioproducts approached the Commission only after it received the request for information addressed to it in July 1998. Cerestar Bioproducts' application for leniency was therefore not entirely spontaneous, and the Commission will take this fact into account when determining the amount of the reduction of fine.

(310) The Commission accordingly grants Cerestar Bioproducts a 90 % reduction of the fine that would otherwise have been imposed if it had not cooperated with the Commission.

*Substantial reduction of a fine*

(311) Neither ADM, Haarmann & Reimer, Hoffmann-La Roche, nor Jungbunzlauer were the first to provide the Commission with decisive information on the citric acid cartel, as required under point (b) of Section B of the Leniency Notice. Consequently none of those undertakings meet the conditions set out in Section C of the leniency Notice.

*Significant reduction of a fine*

(312) During a meeting held on 11 December 1998, ADM provided the Commission with an oral account of the citric acid cartel. On 15 January 1999, a written statement confirming this account was communicated to the Commission.

(313) The Commission accepts that the information submitted by ADM was detailed and therefore extensively used by the Commission in the pursuit of its investigation. Together with the information obtained from Cerestar Bioproducts, it was used to draft requests for information that greatly helped to trigger the admission by Haarmann & Reimer, Hoffmann-La Roche and Jungbunzlauer that they had participated in the citric acid cartel.

(314) The Commission also notes that ADM was able to provide the Commission with documents contemporaneous with the infringement, including hand-written notes taken during cartel meetings and price instructions relating to the decisions taken by the cartel.

(315) The Commission accordingly concludes that ADM fulfils the condition set out in the first indent of Section D(2) of the Leniency Notice and grants ADM a 50 % reduction of the fine that would have been imposed if it had not cooperated with the Commission.

(316) In its reply to the Statement of Objections, Jungbunzlauer mentions that it filed an application under the Leniency Notice at a meeting with the Commission on 23 April 1999, and that it made a constructive contribution to the establishment of the facts in its statement and reply to the request for information of 29 April 1999. It therefore claims to qualify under Section D, 'at a rate close to 50 % ([135])', as it submits that the information it provided played a central role in the evidence at the disposal of the Commission.

(317) The Commission accepts that Jungbunzlauer filed an application under the Leniency Notice and started to cooperate before a Statement of Objections was issued. It is equally true that the Commission relies to a significant extent on the information provided by Jungbunzlauer. The latter confirmed the vast majority of the meetings, the identity of the participants, as well as the facts in question. Jungbunzlauer also notably submitted to the Commission a number of tables created contemporaneously with the infringement. These tables, which indicate the quotas allocated to each of the cartel participants, as well as the divergences between sales quotas and real sales, have been used as evidence in the present Decision.

(318) The Commission notes nevertheless that a large part of the information provided was in reply to the request for information of 3 March 1999 and therefore falls, as such, within the ambit of an undertaking's duty under Article 11 of Regulation No 17 to reply fully to such requests.

(319) The Commission accordingly concludes that Jungbunzlauer fulfils the condition set out in the first indent of Section D(2) of the Leniency Notice and grants Jungbunzlauer a 40 % reduction of the fine that would have been imposed if it had not cooperated with the Commission.

(320) Haarmann & Reimer submits in its reply to the Statement of Objections that it cooperated with the Commission and provided it with a comprehensive description of the infringement. Indeed, on 28 April 1999, Bayer plc filed an application under the Leniency Notice and provided a written statement supplementing its reply to the request for information of 3 March 1999.

(321) The Commission accepts that an application under the Leniency Notice was filed on behalf of Haarmann & Reimer and that its cooperation began before a Statement of Objections was issued. Haarmann & Reimer's statement confirmed the vast majority of the meetings, the identity of the participants, as well as a number of the facts in question.

([135]) Jungbunzlauer's reply to the Statement of Objections [7706].

(322) The Commission notes nevertheless that a large part of the information provided was in reply to the request for information of 3 March 1999 and therefore falls, as such, within the ambit of an undertaking's duty under Article 11 of Regulation No 17 to reply fully to such requests.

(323) The Commission accordingly concludes that Haarmann & Reimer fulfils the condition set out in the first indent of Section D(2) of the Leniency Notice and grants Haarmann & Reimer a 30 % reduction of the fine that would have been imposed if it had not cooperated with the Commission.

(324) Hoffmann-La Roche did not formally file any application under the Leniency Notice. Nevertheless, in a letter of 28 July 1999, Hoffmann-La Roche confirmed its participation in the cartel and the purpose of the meetings related to it.

(325) The Commission accordingly concludes that Hoffmann-La Roche fulfils the condition set out in the first indent of Section D(2) of the Leniency Notice and grants Hoffmann-La Roche a 20 % reduction of the fine that would have been imposed if it had not cooperated with the Commission.

*Conclusion on the application of the Leniency Notice*

(326) In conclusion, with regard to the nature of their cooperation and in the light of the conditions set out in the Leniency Notice, the Commission will grant to the addressees of the present Decision the following reductions of their respective fines:

— Cerestar Bioproducts: a reduction of 90 %,

— ADM: a reduction of 50 %,

— Jungbunzlauer: a reduction of 40 %,

— Haarmann & Reimer: a reduction of 30 %,

— Hoffmann-La Roche: a reduction of 20 %.

6. ***'Non bis in idem'***

(327) In assessing the fine to be imposed on each individual undertaking, the Commission has taken account, *inter alia*, of the gravity of the infringement and the respective duration of their participation, as well as of the role played by each undertaking in the collusive arrangements. Possible aggravating and/or mitigating circumstances have been considered. The importance of each undertaking in the citric acid industry and the impact of their respective conduct on competition have also been taken into account.

(328) ADM, Cerestar Bioproducts, Haarmann & Reimer and Jungbunzlauer submit that the Commission should take account of, and deduct from any fine, the penalties imposed on them for the same conduct in the United States of America, and in some cases also in Canada.

(329) According to ADM, there is no need in its case for further deterrence under the Community competition rules because of the fines and damages it has paid in lysine and citric acid matters in the United States of America. In October 1996, it pleaded guilty in a United States Federal Court to a criminal charge of conspiracy to restrain trade in lysine and citric acid in the United States of America and elsewhere. ADM underlines that the plea agreement also closed the United States authorities' sodium gluconate investigation into ADM.

(330) Apart from those criminal fines, ADM submits that it settled consolidated United States class action law suits relating specifically to citric acid. ADM also suggests that the Commission should take into account the settlements it paid as a result of the shareholder derivative action brought against it, based in part on the behaviour which is the subject of the citric acid matter.

(331) Jungbunzlauer AG, too, submits that in its case the Commission should take account of penalties imposed by the United States and Canadian authorities, because the acts challenged by the Commission and those authorities are the same. Jungbunzlauer refers to the United States and Canadian criminal fines imposed on it as a result of the plea agreements in 1997 and 1998, respectively, for 'inadmissible agreements in respect of the sale of citric acid and similar facts relating to sodium gluconate'. It claims that in the United States proceedings fines had already been imposed in respect of effects on the European market.

(332) The Commission rejects in their entirety the arguments put forward by ADM, Cerestar Bioproducts, Haarmann & Reimer and Jungbunzlauer. The exercise by the United States of America and Canada of their criminal jurisdiction in respect of cartel acts can in no way limit or exclude the Commission's jurisdiction under Community competition law.

(333) By virtue of the principle of territoriality, Article 81 of the Treaty is limited to acts likely to restrict competition in the internal market. In the same way, United States and Canadian antitrust laws are limited to their respective territorial scope. The United States and Canadian authorities only exercise jurisdiction to the extent that the conduct has a direct and intended effect on United States and Canadian commerce respectively. In fact, the plea agreements concluded with the United States authority confirms this for the United States procedure, when it states that 'the volume of defendant's sales in the United States does not adequately reflect the effect on United States commerce of its participation in the worldwide conspiracy'.

(334) Moreover, criminal fines imposed on individuals cannot in any event be taken into account because the present proceedings do not relate to natural persons.

(335) Furthermore, the possibility that undertakings may have been required to pay damages in civil actions does not have any bearing on the fines to be imposed for infringing Community competition rules. Payments of damages in civil-law actions which have the objective of recouping the damage caused by cartels to individual companies or consumers cannot be compared with public-law penalties for illegal conduct.

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

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

| | |
|---|---|
| — Archer Daniels Midland Company Inc.: | EUR 39,69 million, |
| — Cerestar Bioproducts BV: | EUR 170 000, |
| — F. Hoffmann-La Roche AG: | EUR 63,5 million, |
| — Haarmann & Reimer Corporation: | EUR 14,22 million, |
| — Jungbunzlauer AG: | EUR 17,64 million, |

HAS DECIDED AS FOLLOWS:

*Article 1*

Archer Daniels Midland Company Inc., Cerestar Bioproducts BV, F. Hoffmann-La Roche AG, Haarmann & Reimer Corporation and Jungbunzlauer AG have infringed Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement by participating in a continuing agreement and/or concerted practice in the sector of citric acid.

The duration of the infringement was as follows:

— in the case of Archer Daniels Midland Company Inc., F. Hoffmann-La Roche AG, Haarmann & Reimer Corporation and Jungbunzlauer AG: from March 1991 until May 1995,

— in the case of Cerestar Bioproducts BV: from May 1992 until May 1995.

*Article 2*

The undertakings named in Article 1 shall immediately bring to an end the infringement referred to in Article 1, in so far as they have not already done so. They shall refrain from any act or conduct which, in object or effect, is the same as the infringement or equivalent thereto.

*Article 3*

For the infringement referred to in Article 1, the following fines are imposed:

| | |
|---|---|
| (a) Archer Daniels Midland Company Inc.: | EUR 39,69 million, |
| (b) Cerestar Bioproducts BV: | EUR 170 000, |
| (c) F. Hoffmann-La Roche AG: | EUR 63,5 million, |
| (d) Haarmann & Reimer Corporation: | EUR 14,22 million, |
| (e) Jungbunzlauer AG: | EUR 17,64 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 (code SWIFT: BBVABEBB - code IBAN BE76 6420 0290 0095) of the European Commission with Banco Bilbao Vizcaya Argentaria (BBVA) SA, Avenue des Arts/Kunstlaan, 43, B-1040 Brussels.

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.

*Article 5*

This Decision is addressed to:

(a) Archer Daniels Midland Company Inc.,
4666 Faries Pkwy
Decatur
IL — 62525
United States of America.

(b) Cerestar Bioproducts BV
Nijverheidstraat, 1
4550 LA Sas van Gent
Netherlands.

(c) F. Hoffmann-La Roche AG
Grenzacherstrasse 124
CH-4070 Basel.

(d) Haarmann & Reimer Corporation
300 North Street
Terterboro
NJ — 07608-1204
United States of America.

(e) Jungbunzlauer AG
St Alban — Vorstadt 90, Postfach
CH-4002 Basel.

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

Done at Brussels, 5 December 2001.

*For the Commission*

Mario MONTI

*Member of the Commission*