COMMISSION DECISION

of 27 November 2002

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

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

(notified under document number C(2002) 4557)

(Only the German and French texts are authentic)

(Text with EEA relevance)

(2004/104/EC)

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

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SUMMARY

Addressees

This Decision is addressed to the following undertakings:

— Rhône-Poulenc Biochimie SA

— Aventis Pharma SA

— Merck KgaA

Articles infringed

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

Relevant product

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

Community market value

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

Specification of the infringement

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

Duration of the participation

— Merck KgaA from 22 November 1990 to 31 December 1999

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

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

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

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the treaty establishing the European Community,

Having regard to the Agreement of the European Economic Area,

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

Having regard to the Commission decisions of 1 October 2001 and 17 December 2001 to open a proceeding in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 19(1) of Regulation No 17 and Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty ([4]),

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

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

Whereas:

PART I — FACTS

1. THE METHYLGLUCAMINE INDUSTRY

1.1. The product

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

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

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

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

1.2. The market for methylglucamine

(a) *Supply*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) *Demand*

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

(c) *Trade between Member States*

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

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

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

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

1.3. **The producers**

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

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

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

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

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

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

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

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

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

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

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

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

(b) *Merck*

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

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

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

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

(c) *Other producers*

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

2. **PROCEDURE**

2.1. **Investigations in the Community**

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

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

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

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

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

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

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

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

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

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

3. **THE CARTEL**

3.1. **The documentary evidence**

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

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

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

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

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

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

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

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

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

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

Merck:

[Merck employee 1] (1990—1996) ([21])

[Merck employee 2] (1996—1999) ([22])

Aventis:

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

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

3.3. **Background and initial contacts**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

([36]) Doc. 00025.

([37]) Doc. 00125.

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

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

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

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

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

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

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

([39]) Doc. 00124.

([40]) Doc. 6890.

([41]) Doc. 00047, Doc. 00136—00137.

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

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

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

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

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

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

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

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

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

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

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

3.5.1. *Exchange of information*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.5.3. *Market sharing and customer allocation*

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

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

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

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

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

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

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

([58]) Doc. 00024—00025.

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

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

([61]) Doc. 9066.

([62]) Doc. 9067.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

— annual meeting 1991

— annual meeting September or October 1992

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

— annual meeting about 19 October 1994, Frankfurt

— annual meeting 4 October 1995, Frankfurt

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

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

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

— annual meeting about 7 October 1998, Frankfurt

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.16. **The end of the cartel**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

([119]) Doc. 00736—00738.

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

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

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

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

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

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

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

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

PART II — LEGAL ASSESSMENT

1. **JURISDICTION**

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

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

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

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

([125]) Doc. 00696.

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

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

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

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

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

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

2.2. Agreements and concerted practices

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

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

(173) In its judgment in Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij NV and others* v *Commission* (PVC II), the Court of First Instance of the European Communities ([127]) stated that 'it is well established in the case-law that for there to be an agreement within the meaning of Article 81(1) of the Treaty, it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way' ([128]). Thus, an agreement for the purposes of Article 81(1) of the Treaty and/or Article 53(1) of the EEA Agreement does not require the same certainty as would be necessary for the enforcement of a commercial contract at civil law.

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

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

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

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

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

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

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

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

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

2.3. **Single, continuous infringement**

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

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

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

2.4. **Restriction of competition**

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

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

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

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

— limit or control production, markets or technical development,

— share markets.

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

(183) In order to conclude that Articles 81(1) of the Treaty and 53(1) of the EEA Agreement apply, there is no need to consider the actual effects upon competition of an agreement once it is established that the agreements had the object of restricting competition ([132]).

(184) The effect upon competition of the cartel has to be considered as a whole and in the light of the totality of the circumstances, but in the complex of agreements and arrangements, the following elements can be identified as relevant in order to find a breach of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement:

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

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

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

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

([132]) Judgment, *Ciment* [2000] II-491, paragraph 3927. See also judgment in Cases T-374/94, T-375/94, T-384/94 and T-388/94, *European Night Services* [1998] ECR II-3196, paragraph 136, where the Court has stated this in specific relation to price-fixing agreements.

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

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

(185) Article 81 of the Treaty prohibits all agreements which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

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

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

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

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

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

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

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

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

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

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

(195) In the period 1 January to 31 December 1994, the provisions of the EEA Agreement applied to the six EFTA Member States; the cartel thus constituted a violation of Article 53(1) of the EEA Agreement as well as of Article 81(1) of the Treaty, and the Commission is competent to apply both provisions. The restriction of competition in these six EFTA states during this one-year period falls under Article 53(1) of the EEA Agreement.

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

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

2.7. **Duration of the infringement**

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

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

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

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

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

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

2.8. **Liability for the infringement**

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

2.8.1. *Principles applicable*

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

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

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

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

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

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

2.8.2. *Addressees*

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

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

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

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

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

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

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

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

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

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

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

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

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

— Merck KgaA

— Rhône-Poulenc Biochimie SA

— Aventis Pharma SA.

3. **REMEDIES**

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

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

(217) The undertakings to which this Decision is addressed should be required to bring the infringement to an end (if they have not already done so) and henceforth to refrain from any agreement or concerted practice which may have the same or similar object or effect, including any exchange of commercial information by which the participants are directly or indirectly informed of their mutual individual sales data.

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

(218) Pursuant to Article 15(2) of Regulation No 17, the Commission may by decision impose upon undertakings fines of from EUR 1 000 to EUR 1 million, or a sum in excess thereof not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 81(1) of the Treaty and/or Article 53(1) of the EEA Agreement.

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

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

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

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

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

3.3. **The amount of the fine**

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

3.3.1. *The basic amount*

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

3.3.1.1. Gravity

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

3.3.1.2. Nature of the infringement

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

(228) By its very nature, the implementation of a cartel agreement of the type described above leads automatically to an important distortion of competition, which is of exclusive benefit to producers participating in the cartel and is detrimental to customers and, ultimately, to the general public.

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

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

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

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

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

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

3.3.1.4. The size of the relevant geographic market

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

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

3.3.1.5. Conclusion on the gravity of the infringement

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

3.3.2. *Classification of cartel participants*

(236) Within the category of very serious infringements, the proposed scale of likely fines makes it possible to apply differential treatment to undertakings in order to take account of the effective economic capacity of the offenders to cause significant damage to competition and to set the fine at a level which ensures it has sufficient deterrent effect.

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

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

— Merck KgaA: EUR 2,5 million

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

3.3.2.1. Sufficient deterrence

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

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

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

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

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

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

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

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

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

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

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

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

3.3.3. *Duration of the infringement*

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

3.3.4. *Conclusion on the basic amounts*

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

— Merck KgaA: EUR 9,5 million

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

3.3.5. *Aggravating circumstances*

3.3.5.1. Role of leader in the infringement

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

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

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

3.3.6. *Attenuating circumstances*

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

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

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

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

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

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

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

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

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

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

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

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

3.3.7. *Application of the Leniency Notice*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.3.7.4. Conclusion on the application of the Leniency Notice

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

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

— to Merck KgaA a reduction of 100 %.

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

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

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

— Merck KgaA: EUR 0 million.

HAS ADOPTED THIS DECISION:

Article 1

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

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

Article 2

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

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

Article 3

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

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

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

Article 4

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

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

(SWIFT CODE: BBVABEBB)

(IBAN-CODE BE 76 6420 0290 0095).

After expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3,5 percentage points, namely….

Article 5

This Decision is addressed to:

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

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

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

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

Done at Brussels, 27 November 2002.

For the Commission
Mario MONTI
Member of the Commission