COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 01.10.2003
C(2003)3426 final

COMMISSION DECISION

of 01.10.2003

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

(Case COMP/E-1/37.370 – Sorbates)

(Only the English and German texts are authentic)

(Text with EEA relevance)

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 81 and 82 of the Treaty[1] as last amended by Regulation (EC) No 1216/1999[2], and, in particular, Articles 3 and 15 (2) thereof,

Having regard to the Commission Decision of 20 December 2002 to initiate proceedings in this case,

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

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

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

WHEREAS:

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

1. INTRODUCTION

(1) This Decision concerns the following world-wide suppliers of sorbates :

- Chisso Corporation (Chisso)
- Daicel Chemical Industries, Ltd. (Daicel)
- Hoechst AG (Hoechst)
- The Nippon Synthetic Chemical Industry Co, Ltd. (Nippon)
- Ueno Fine Chemicals Industry, Ltd. (Ueno)

(2) Those undertakings participated in a complex, single and continuous infringement contrary to Article 81 of the Treaty and, as of 1 January 1994, Article 53 of the EEA Agreement, covering the whole of the EEA territory, by which they agreed on price targets, allocated volume quotas for sorbates, decided not to supply technology to potential market entrants and monitored their anti-competitive arrangements.

(3) The undertakings participated in the infringement from at least 31 December 1978 until at least 30 November 1995 in the case of Nippon, and until at least 31 October 1996 for the other Parties.

2. THE PROCEDURE

2.1.The Commission's investigation

(4) At a meeting held on 29 September 1998 between the legal representative of Chisso and the Commission Services, Chisso expressed its willingness to co-operate with the Commission within the framework of the Commission Notice on the non-imposition or reduction of fines in cartel cases[4] (hereinafter "the 1996 Leniency Notice") with regard to a world-wide cartel in the sorbic acid market[5]. At a meeting held on 13 November 1998 between the legal representative of Chisso and the Commission Services, an oral description of the cartel's activities was provided together with documentary evidence[6]. At a meeting held on 9 December 1998, the Commission Services received the oral testimony of Chisso's representative in the cartel, who provided specific explanations and clarifications on the documents supplied to the Commission by Chisso on 13 November 1998[7]. A written Statement confirming and expanding upon the oral account provided at this meeting was sent to the Commission on 20 April 1999[8].

(5) On 27 October 1998, Nutrinova Nutrition Specialities & Food Ingredients GmbH ("Nutrinova"), a 100% Hoechst subsidiary, contacted the Commission and expressed its wish to co-operate with the Commission pursuant to the 1996 Leniency Notice with regard to a

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4 OJ C 207, 18.7.1996, p. 4..

5 See Notes for the file D/478(98)- see pages 18994 and 18995 of the file - and D/477(98) – see page 18993 of the file - of 1 and 2 October 1998, respectively.

6 See Note for the file IV/E/2/FWP-D/(98) of 19 November 1998 (pages 18982 – 18987 of the file), as well as pages 0009-0168 and 0386-0389 of the file.

7 See pages 18964-18973 of the file.

8 See pages 0423-0697 of the file.

world-wide cartel in the sorbic acid market [9]. At a meeting on 29 October 1998 between the legal representative of Nutrinova and the Commission Services, an oral description of the product market, the producers and respective market-shares, the US proceedings and the cartel's activities was provided[10]. On 21 December 1998, Nutrinova submitted a Memorandum on the sorbates market[11] and on 19 March[12] and 28 April 1999[13], it submitted a Memorandum setting out facts related to the anti-competitive activities affecting the sorbates market together with documentary evidence and admitted participating in a world-wide cartel to fix prices and allocate quotas for sorbates. On 19 March 1999, Nutrinova indicated that it intended to supplement orally in due course the information provided in the Memorandum through direct witness testimony[14].

(6) On 26 May and on 17 June 1999, the Commission sent requests for information under Article 11 of Regulation 17 to Daicel, Nippon and Ueno.

(7) On 15 July 1999, following the receipt of the request for information, Nippon expressed its willingness to co-operate with the Commission under the 1996 Leniency Notice, with regard to the sorbates cartel and on 30 August 1999, Nippon provided a Statement and documentary evidence of the agreements supplementing its reply to the request for information.

(8) [...][...][...]On 17 and 24 November 1999, Chisso provided a Supplemental Statement and a second Supplemental Statement, respectively.

(9) On 24 October 2001, Ueno responded to the Commission's request for information dated 26 May 1999 and at the same time made an application under the 1996 Leniency Notice and provided a Statement and documentary evidence of the agreements.

(10) At a meeting held on 21 February 2002 between Daicel's legal representative and the Commission Services, Daicel expressed its willingness to co-operate with the Commission within the framework of the 1996 Leniency Notice, with regard to the sorbates cartel. On 4 March 2002, Daicel responded to the Commission's request for information dated 26 May 1999 and on 8 March 2002 it provided a Statement and some information of the agreements.

(11) On 14 May 2002, the Commission sent an additional request for information to [...][...][...]Hoechst and Chisso, Daicel, Nippon and Ueno.

(12) On 31 May 2002 and 5 June 2002, [...]Nippon and Ueno, respectively, responded to the Commission's request for information. On 6 and 10 June 2002, Chisso responded to the Commission's request for information. On 13 June 2002, Daicel and Hoechst responded to the Commission's request for information. On 2 July 2002, [...] responded to the Commission's request for information. On 11 September 2002, the Commission sent an additional request for information to Hoechst.

(13) On 19 September 2002, Hoechst responded to the Commission's additional request for information.

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9 See pages 6-8 of the file.
10 See Note for the file D/538(98) of 6 November 1998 (pages 18990 – 18992 of the file).
11 See pages 0179-0384 of the file.
12 See pages 0405-0416 of the file.
13 See pages 0698-2662 of the file.
14 See page 0405 of the file.

(14) On 24 September 2002, the Commission sent an additional request for information to [...]Chisso, Daicel, Nippon and Ueno and on 25 September 2002 to Nutrinova. On 26 September 2002, the Commission sent an additional request for information to Hoechst. On 4 October 2002, 8 October 2002, 10 October 2002, 11 October 2002, 15 October 2002 and 17 October 2002, Nutrinova, Daicel, [...]and Ueno, Nippon, Hoechst and Chisso, respectively, responded to the Commission's request for information. On 25 October 2002, Daicel sent a supplementary response to the Commission's request for information.

(15) On 8 November 2002, the Commission sent an additional request for information to Nutrinova. Nutrinova responded to this request for information on 27 November 2002.

(16) On 22 and 27 November 2002, the Commission sent a letter to[...], Chisso, Daicel, Hoechst, Nippon, Nutrinova and Ueno [...]requesting the companies to substantiate their claims that part or all of the information contained in the documents provided to the Commission constitutes a business secret or is otherwise confidential and to provide the Commission with a non-confidential version of the documents in which business secrets and other confidential passages are deleted.

(17) On 29 November 2002, the Commission sent an additional request for information to Hoechst. Hoechst responded to this request for information on 9 December 2002.

(18) On 26 and 27 November 2002 and 5 and 6 December 2002, Daicel responded to the Commission's request on confidentiality. On 6 and 12 December 2002, [...] Hoechst, Nippon, Nutrinova, Ueno and Chisso [...]responded to the Commission's request on confidentiality.

(19) On 12 December 2002, Chisso submitted to the Commission a third Supplemental Statement.

(20) On 13 December 2002, the Commission sent an additional request for information to Chisso. On 16 December, Chisso responded to this request for information.

2.2.The adoption of the Statement of Objections and subsequent procedure

(21) On 20 December 2002, the Commission initiated proceedings in this case and adopted a Statement of Objections against the undertakings to which this decision is addressed, as well as against [...]Nutrinova. After having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission, the Commission decided to close the proceedings against [...]Nutrinova[...][...][...].

(22) At this same date, the Parties were granted access to the file, in the form of two CD-ROM's containing a full copy, excluding business secrets and other confidential information, of all the documents in the Commission's file on this case.

(23) Hoechst argued that it did not have complete access to the file, as the Commission refused to disclose to it the confidential parts of all the documents provided by Chisso, as well as some of the Commission's internal notes referring to the meetings and telephone contacts with the Parties. Hoechst maintains that it was therefore not possible to get a complete

overview of contacts, notably, telephone contacts, between the Commission and Chisso in the context of their co-operation pursuant to the 1996 Leniency Notice[15].

(24) This argument must be rejected.

(25) As regards the documents or parts of documents provided by Chisso for which it claimed protection as "business secrets", their non transmission to the other Parties protects the legitimate commercial interests of this company. It prevents the other Parties from obtaining strategic information on Chisso's commercial interests and on the operation and development of its business, pursuant to Article 20 of Regulation No 17 and the Commission Notice on the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles 85 and 86 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89[16] .

(26) Secondly, as to the access to the Commission's internal documents, according to well established case-law[17], the Commission is under no obligation with regard to the rights of the defence to grant access to its internal documents during the procedure. Moreover, as far as contacts with undertakings in the context of their co-operation are concerned, the Commission considers that Hoechst's reasoning is based on a fundamentally wrong premise. Additional access to the Commission's internal documents in no way would facilitate the companies' rights of defence and contribute to determine who was the first undertaking to provide the Commission with decisive evidence. In fact, this appraisal will be made exclusively on the basis of the documents provided by the undertakings, to which the Parties had access.

(27) In accordance with the provision of Article 19(1) of Regulation No 17 and Regulation No 2842/98, the Parties were entitled to send their views on the objections within a time limit of six weeks from the date of receipt of the Statement of Objections. Following a request submitted by some addressees, the Hearing Officer granted an extension of two weeks to all the addressees. They all replied to the Statement of Objections within this eight weeks time limit accorded.

(28) Having replied in writing to the Statement of Objections, all the addressees of this Decision took part in the Oral Hearing on the case, which was held on 24 April 2003. Neither Party substantially contested the facts on which the Commission based its Statement of Objections nor the anti-competitive infringements identified in this Decision, with the exception of Ueno for some facts related to its participation in some cartel meetings[...].

2.3.Investigations and proceedings in other jurisdictions

(29) In the United States, the Department of Justice conducted from 1998 until 2001 a grand jury investigation into suspected price fixing and other restraints of trade by certain producers and distributors of sorbates sold in the United States. This conduct would constitute a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

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15 See Hoechst and Nutrinova's representative letter of 22 January 2003, as well as Hoechst and Nutrinova's reply to the Statement of Objections, p.20.

16 See OJ C 23, 23.1.1997, p. 3.

17 See the Judgements of the Court of First Instance in Case T-7/89 *Hercules* v *Commission* [1991] ECR II-1711, paragraph 54 and Joined Cases T-25/95, etc. *Cimenteries CBR and others* v *Commission*, [2000] ECR II-00491.

(30) Five producers pleaded guilty to the charges and agreed to pay fines of USD 11 million in the case of Eastman (October 1998); USD 36 million for Hoechst (June 1999) and USD 21 million for Nippon (July 1999). In July 2000 and January 2001, Daicel and Ueno agreed to plead guilty and to pay a USD 53 million and USD 11 million fine, respectively.

(31) In Canada, following a criminal investigation conducted by the Competition Bureau, in October 1998, Hoechst and Eastman pleaded guilty to having participated in a conspiracy to fix prices and share markets for sorbates and were fined CAD […] million and CAD […] respectively. In September 2000 and in July 2001, Daicel and Ueno were fined CAD […] million and CAD […] million, respectively.

PART I - FACTS

3. THE UNDERTAKINGS CONCERNED

3.1.Chisso

(32) Chisso is a company active in the chemical sector. It produces a comprehensive range of basic chemicals, plastics, fibers and other products.

(33) Chisso manufactures sorbic acid and potassium sorbate in its premises in Japan since 1967.

(34) Chisso sells sorbates in Europe through intermediaries, Japanese trading houses, that either directly sell and ship the product to a dealer or distributor in Europe or sell to dealers or distributors from the Japanese trading house's warehouse in Europe.

(35) The company headquarters are situated in Tokyo and it has over 28 subsidiaries world-wide.

(36) Chisso's total world-wide and EEA-wide turnover in 1995[18] was JPY 139,400 million (EUR 1,133.3 million[19]) and JPY […] million (EUR […] million), respectively. Its sorbates world-wide and EEA-wide turnover in the same fiscal year was JPY […] million (EUR […] million) and JPY […] million (EUR […] million), respectively. Chisso's total world-wide turnover in 2002[20] was JPY 117,711 million (EUR 973.4 million[21]).

3.2.Daicel

(37) Daicel is a company active in the chemical sector. It manufactures and markets speciality chemical products, such as cellulose derivatives, organic chemicals, plastic and films, functional products, automobile airbag inflators and propulsion systems. Daicel supplied sorbic acid to Ueno.

(38) Its sorbates business represents approximately […]% of its total consolidated sales.

(39) Daicel sells sorbates in Europe through an intermediary that sells the product, either to a local distributor or directly to the end-user.

(40) The company's headquarters are situated in Osaka and Tokyo. The Daicel group comprises the parent company, Daicel Chemical Industries Ltd, about 70 subsidiaries and affiliates. Daicel has three subsidiaries in Europe.

(41) Daicel's total world-wide and EEA-wide turnover in the fiscal year 1995[22] was JPY 165,292 million (EUR 1,343.8 million[23]) and JPY […] million (EUR […] million),

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18 Chisso 1995 fiscal year corresponds to the period from 1 April 1995 to 31 March 1996.
19 Average rate for Chisso's 1995 fiscal year. Source: European Central Bank.
20 Chisso 2002 fiscal year corresponds to the period from 1 April 2002 to 31 March 2003.
21 Average rate for Chisso's 2002 fiscal year. Source: European Central Bank.
22 Daicel 1995 fiscal year corresponds to the period from 1 April 1995 to 31 March 1996.

respectively. Its sorbates world-wide and EEA-wide turnover in the same fiscal year was JPY […] million (EUR […] million) and JPY […] million (EUR […] million), respectively. Daicel's total world-wide turnover in the fiscal year 2002[24] was JPY 271,341 million (EUR 2,243.9 million[25]).

3.3.Hoechst

(42) Hoechst is part of a group of international companies operating in the life sciences industry, specifically pharmaceuticals, agriculture and animal health. Since December 1999, Hoechst is an intermediate holding company which is an affiliate of Aventis. Around 97% of the shares of Hoechst are held by Aventis. The remaining 3% are held by different private and institutional shareholders.

(43) Until 1997, Hoechst sold sorbates in Europe both via its European subsidiaries and directly to customers (end-users and local/regional distributors). In September 1997, Hoechst transferred the sorbates business to Nutrinova, a 100 % Hoechst subsidiary.

(44) The company's headquarters are situated in Frankfurt am Main.

(45) The group's total world-wide and EEA-wide turnover in 1995 was EUR 28,181 million and EUR […] million, respectively. Its sorbates world-wide and EEA-wide turnover in the same fiscal year was EUR […] million and EUR […] million, respectively[26]. The Hoechst group's total world-wide wide turnover in 2002 was EUR 9,200 million.

3.4.Nippon

(46) Nippon is a company active in the chemical sector. The company's principal activity is the manufacture and sales of industrial chemicals such as polyvinyl alcohol and vinyl acetate monomer, as well the development of fine chemicals, including pharmaceuticals and agro-chemicals, electronic materials and functional resins.

(47) Nippon sells sorbates in Europe through an exclusive intermediary, that sells the product to local distributors in Europe.

(48) The company headquarters are situated in Osaka. Nippon has a subsidiary in Düsseldorf.

(49) Nippon's total world-wide turnover in the fiscal year 1995[27] was JPY 55,340 million (EUR 449.9 million[28]). The EEA-wide turnover for the same fiscal year was JPY […] million (EUR […] million). Its sorbates world-wide and EEA-wide turnover in the same fiscal year was JPY […] million (EUR […] million) and JPY […] million (EUR […] million),

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23 Rate for 1995. Source: European Central Bank.

24 Daicel 2002 fiscal year corresponds to the period from 1 April 2002 to 31 March 2003.

25 Average rate for Daicel's 2002 fiscal year. Source: European Central Bank.

26 The data concerning Hoechst's sorbates world-wide and EEA-wide turnover was provided by Nutrinova on 13 December 2002 (see pages 18622-18623 of the file). In Hoechst's reply of 19 September, 15 October and 9 December 2002, the company informed the Commission that it had transferred all product related data concerning its sorbates business to Nutrinova and no longer had such information.

27 Nippon 1995 fiscal year corresponds to the period from1 April 1995 to 31 March 1996.

28 Rate for 1995. Source: European Central Bank

respectively. Nippon's total world-wide turnover in the fiscal year 2002[29] was JPY 38,872 million (EUR 321.5 million[30]).

3.5.Ueno

(50) Ueno is a Japanese company engaged in the production, manufacturing, distribution, sale and supply of sorbates and parabens.

(51) Ueno facilities only allow it to convert sorbic acid into potassium sorbate rather than producing sorbic acid itself. It purchases sorbic acid and sorbates from Daicel for conversion and re-sale[31]. It has the broadest product line in Japan for synthetic preservatives and it is the leading player for *parabens*, one of the main substitution products for sorbates.

(52) It sells sorbates in Europe through local distributors.

(53) The company headquarters are situated in Osaka.

(54) Ueno's total world-wide and EEA-wide turnover in 1995 was JPY [ ] (EUR […] million) and JPY […] million (EUR […] million), respectively. Its sorbates world-wide and EEA-wide turnover in the same fiscal year was JPY […] million (EUR […] million) and JPY […] million (EUR […] million), respectively. Ueno's total world-wide turnover in 2002 was JPY […] million (EUR […] million).

4. THE SORBATES MARKET

4.1.The product

(55) These proceedings concern *sorbates*. Sorbates are chemical preservatives (anti-microbial agents) capable of retarding or preventing growth of micro-organisms, such as yeast, bacteria, moulds or fungi, used primarily in food and beverages. Their principal mechanisms are to reduce water availability and increase acidity. Sometimes these additives also preserve other important food characteristics such as flavour, colour, texture and nutritional value. In addition to their use as a preservative in food and beverages, sorbates also perform well in the stabilisation of other types of products such as pharmaceutical products, cosmetics, pet food and animal feed.

(56) There are three main types of sorbates: sorbic acid, potassium sorbate and calcium sorbate:

(57) *Sorbic acid* is the basic product. It is a fatty acid, decomposed and utilised in the body, and physiologically inert. It has no effect on the odour or flavour of products it is used to preserve. It is widely used in margarine, mayonnaise, salads, cheese, fish products, meat and sausage products, fruit products, beverages, confectionery and bakery products, and for fungistatic packaging materials. It is a technically complex substance to produce, whilst other sorbate products are the result of a technically simpler conversion step from sorbic acid. The production of sorbic acid requires two essential raw materials ketene and crotonic aldehyde,

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29 Nippon 2002 fiscal year corresponds to the period from 1 April 2002 to 31 March 2003.

30 Average rate for Nippon's 2002 fiscal year. Source: European Central Bank

31 See page 7722 of the file.

the former (a gas) must be produced on site. The high investment necessary for production plants poses important barriers for potential entrants.

(58) *Potassium sorbate* is used where high water solubility is desired. Use of sorbic acid is limited because of its low solubility in water. Therefore, potassium sorbate is the primary form used in most products with a high water content.

(59) *Calcium sorbate* is produced in small quantities, being used for the coating of cheese wrapping paper in France and Italy.

(60) Sorbic acid and its salts (including potassium sorbate) rank among the main preservatives used in Western Europe. Sorbic acid represents 30 % of sorbates sales and potassium sorbate represents the remaining 70%.

(61) Preservatives are mature products and not research and development intensive, and the prospects for new preservatives entering the market place are minimal.

(62) Sorbates are the leading product segment in the preservatives sector. The main substitution products for sorbates are sodium and potassium benzoate together with parabens. However, many manufacturers prefer the sorbates, notwithstanding their higher price, for quality reasons. None of these products constitute perfect substitutes, with parabens in particular occupying only a niche market in the food preservative industry. The demand for sorbates is not price elastic since there are few, if any, alternatives to its use[32].

4.2.The supply

(63) During the investigation period, there were seven main world-wide suppliers of sorbates: two European companies, Hoechst and Cheminova; an American company, Monsanto (later Eastman), and four Japanese companies, Chisso, Daicel, Nippon and Ueno.

(64) Until it transferred its sorbates business to Nutrinova in September 1997, Hoechst was the world's largest producer of sorbic acid and potassium sorbate, followed by Daicel. The four Japanese producers together hold approximately half of the world's sorbate capacity and market share. There are other smaller producers of sorbates, notably in China and Russia.

(65) Cheminova, a European undertaking situated in Harboore, in the Western part of Denmark - which has subsidiaries in Spain, France, United Kingdom, Italy, amongst others located outside the Community -, entered the sorbates market in the second half of the 1980s. Its main business is the production and marketing of plant protection products, in particular insecticides and their intermediate products..

(66) Eastman entered the market in the 1990s when it acquired Monsanto's sorbic acid business. Some of the Chinese competitors entered the European market in 1995.

(67) There have been no major new market entrants in recent years. The number of potential competitors in the sorbates business is limited by the extreme complexity of the sorbates production process.

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[32] See pages 0347-0366 and 7715-7768 of the file, in particular pages 0350 and 7720.

(68) In the EEA, during the period of the infringement, Hoechst had an estimated market share of […]% of the market; the Japanese producers together had around […]% of the market[33]. Cheminova, Eastman and (to a small extent) Chinese producers supplied the rest of demand in the Community/EEA. Eastman has not been present in the Community/EEA market since the first half of 1994.

(69) Declared world-wide and EEA-wide sorbates turnover and estimated market shares for the year 1995 were as follows:

Table I
Size and relative importance in the sorbates market

Undertaking	World-wide sorbates turnover (in EUR million) and estimated market shares for the year 1995	EEA sorbates turnover (in EUR million) and estimated market shares for the year 1995
Chisso	… (…%)	… (…%)
Daicel	… (…%)	… (…%)
Hoechst	… (…%)	… (…%)
Nippon	… (…%)	… (…%)
Ueno	… (…%)	… (…%)
Cheminova	… (…%)	… (…%)
Eastman	… (…%)	…
Others**	… (…%)	… (…%)
Total	… (…%)	… (…%)

* See recital 69 of the present Decision

** Turnovers estimated

Source: Chisso, Daicel, Hoechst, Nippon and Ueno's responses to the requests for information dated 26 May 1999 and 14 July 2003 from the Commission. The information about sorbates turnovers is based on the declared world-wide and EEA product turnovers by the addressees of this Decision and Cheminova and Eastman. For the purpose of the estimation of the marketshares the world-wide and EEA markets for sorbates are estimated to be EUR … million and EUR … million. The estimates seems reasonable considering that (1) The total declared 1995 EEA sorbates turnover for the addressees of this decision and Cheminova is EUR … million. (2) The total declared 1995 world wide sorbates turnover of the addressees of this decision and Cheminova and Eastman is EUR … million. (3) It has been estimated that The Community represents about 25 % of world-wide demand for sorbates (see recital 72).

[33] See pages 0186-0187 of the file

4.3.The demand

(70) During the investigation period, world-wide demand for sorbates has increased due mainly to the rise in the consumption of convenience foods and additional markets for sorbates. The growing demand for ethnic foods, pastas, pastry containing products, sauces and toppings, products that require the use of sorbates, is another important factor explaining the relatively strong growth in demand for sorbates.

(71) It has been estimated that the US accounts for approximately 50% of world-wide demand for sorbates, the Community represents about 25%, with the remaining quarter spread over the rest of the world[34].

(72) The main customers for sorbates are food and beverage producers, such as […] and […][35]. Sorbates are sold by producers partly directly to customers and partly through dealers, which do not usually sell exclusively for one producer[36].

(73) According to a specialised magazine on speciality chemicals[37], in Europe, food manufacturers operate more on a European than on a national basis. Their food additive suppliers are therefore being required to serve these companies throughout Europe. The marketing of preservatives is generally accomplished by specialised distributors with a strict focus on the needs of the food industry and with a countrywide or regional orientation. It is estimated that about 80% of the total Western European consumption of food preservatives reaches the end user through distributors.

4.4.Inter-state trade

(74) European sorbates production is concentrated in a small number of sites. There are only two European producers, Hoechst and Cheminova, which have their production facilities in Frankfurt, and in Harboore, respectively. From these units the two companies supply the EEA market.

(75) Chisso, Daicel[...], Nippon and Ueno do not produce sorbates in Europe. During the infringement period of the cartel they used to sell their products in almost every Member State both directly to end-users and through a network of independent distributors in the different European countries[38].

(76) Therefore, during the period considered in this Decision, the sorbates market was characterised by important trade flows between Member States, as well as between the Contracting Parties to the EEA Agreement.

(77) There is accordingly a substantial volume of trade between Member States, as well as between the Contracting Parties to the EEA Agreement in the sorbates market.

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34 See page 0186 of the file

35 See page 0187 of the file.

36 See page 0187 of the file.

37 See page 0358 of the file.

38 See pages 0546 – 0555, 3458 – 3467, 9667 and 17846 – 17849 of the file.

5. DESCRIPTION OF THE EVENTS

5.1. The origin of the cartel

(78) Bilateral meetings between Hoechst and the Japanese producers began in 1974-1975. At that time, Hoechst contacted all four of the Japanese companies on a bilateral basis aiming to discuss information on technical, quality and purity problems together with the size of the market. At this time, the Japanese producers were very aggressive in the sorbates market, attempting to increase exports and their sorbic acid sales.

(79) These bilateral contacts between the sorbates producers frequently involved complaints among them about the low price and profitability for sorbates world-wide. These complaints eventually evolved into the suggestion to create a "sorbates producers group" in order to achieve better results.

(80) In addition to these contacts with Hoechst, the four Japanese producers decided to meet among themselves on a regular basis, primarily at Daicel's headquarters in Tokyo. Such meetings were a *forum* for exchanging information on various world markets and for discussing the strategies to prevent anti-dumping claims, in the light of the anti-dumping claim that had been filed in the U.S. by Monsanto in 1977 against all the four Japanese producers. In June 1981, Chisso, Daicel, Nippon and Ueno formed a "Sorbates Export Cartel" within the Japan Chemical Exporters Association (hereinafter "JCEA"), an industry organisation formed under the auspices of the Japanese Ministry of International Trade and Industry (hereinafter "MITI").

(81) Multilateral contacts between the four Japanese producers and Hoechst with a view to concluding price-fixing and a quota system agreement in Europe and elsewhere were initiated at least in 1978. Indeed, a Chisso Memo from 1980 reads as follows[39]:

> 2-2 Export sales
>
> 2-2-a Industry share by region
>
> – Although we won the lawsuit, we spent a great deal of energy on the dumping lawsuit and particularly because of the emergence of a domestic producer in the U.S. (Monsanto), our tendency toward orderly marketing became stronger. Products that should have had added value were made subject to a quota system that started in 1978 and included Hoechst of West Germany, and because of this, we began to revise prices step by step. Hoechst vs. the 4 Japanese companies was decided by referring to the actual figures of 1977, and shares among the 4 Japanese companies were decided from the actual figures of the past 5 years.

6. ORGANISATION AND STRUCTURE OF THE CARTEL

(82) The structure, organisation and operation of the cartel were based upon a shared assessment of the market. Hoechst, representing the European market[...] and Daicel, Chisso, Nippon and Ueno, as a group, representing the Japanese market.

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[39] See pages 0460-0528 of the file, especially page 0475.

(83) Cartel meetings were held at several different levels. The twice-yearly meetings between Hoechst and the four Japanese producers ("joint meetings"); the Japanese producers' preparatory meetings ("preparatory meetings" or "pre-meetings") and the bilateral meetings and telephone contacts ("bilateral contacts").

(84) Prior to each joint meeting, the Japanese producers used to have a series of preparatory meetings in order to agree on the prices and volume quotas to be discussed with Hoechst.

(85) In addition to group meetings, there were a number of bilateral meetings and telephone contacts, between Hoechst and the Japanese producers[...].

(86) […].

7. THE PARTICIPANTS

Chisso

(87) The usual representatives of Chisso in the cartel meetings or other kind of collusive contacts were the following individuals:

[…]**Daicel**

(88) Daicel was in charge of the communications with Hoechst and acted as intermediary between the Japanese producers and Hoechst. Along with Hoechst, it was in charge of scheduling and chairing the joint meetings[40]. It had regular bilateral contacts with Hoechst during all the period of the infringement in order to agree on the agenda and to exchange information in order to compare this information with the documents distributed during the joint meetings[41]. It generally sent employees of higher rank than the other Japanese companies to the meetings. It also organised the pre-meetings and most of them were held in a conference room at its headquarters in Tokyo[42]. It was Daicel which insisted most vehemently on complying with the set market share quota, because it had the largest share of all the Japanese producers and therefore had the greatest interest in maintaining the *status quo*. In 1981, it implemented the cartel penalty system against Chisso, having compelled Chisso to buy 60 to 70 tons from it because Chisso had exceeded its volume quota for 1980[43]. When Nippon decided no longer to attend the joint meetings, Daicel tried to convince it to stay in the group and to stick to the volume quotas and the target prices. In November 1996, when the last joint meeting took place, it advocated, along with Hoechst, the continuation of the meetings and the agreements.

(89) [...].

(90) The usual representatives of Daicel in the cartel meetings or other kind of collusive contacts were the following individuals[44]:

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40 See pages 5154 – 5155, 0705 – 0706, 0426, as well as pages 9662 and 18218 – 18220 of the file.
41 See pages 0706, 0732 and 18249 of the file.
42 See pages 0427 – 0428, 2790 – 2791 and 9662 – 9663 of the file.
43 See page 7782 of the file.
44 See pages 18883 – 18888 of the file.

– […].

Hoechst

(91) Along with Daicel, Hoechst was in charge of scheduling and chairing the joint meetings[45]. It acted as host for the joint meetings held in Europe and it organised and paid for these joint meetings[46]. Being conscious of the risks of detection by the Commission, Hoechst organised some of the cartel meetings outside the Community[47]. It had regular bilateral contacts with Daicel during all the period of the infringement in order to agree on the agenda and to exchange information in order to compare this information with the documents distributed during the joint meetings[48]. In 1992, it proposed to establish a price difference between sorbic acid and potassium sorbate and instituted it unilaterally in Europe as an experimental initiative. In autumn1994, it convinced the Japanese producers to establish it, as well[49]. After each joint meeting, Hoechst was usually the first to announce the new prices in Europe, followed by the Japanese producers[50].

(92) Moreover, it proposed the creation of a neutral Swiss organisation to collect the sales figures of the Japanese producers[51] and it unilaterally added 600 tons to its volume quota in 1995 due to the existence of grey material not reported by the Japanese producers[52].

(93) In November 1996, when the last joint meeting took place, it advocated, along with Daicel, the continuation of the meetings and the agreements[53].

(94) In addition, Hoechst gradually reinforced its already strong position on the European market, demanding larger shares of the European market to the detriment of the Japanese producers[54]. [...][...][...][...]

(95) The usual representatives of the company in the cartel meetings or other kind of collusive contacts were the following individuals:

[…]**Nippon**

(96) The usual representatives of Nippon in the cartel meetings or other kind of collusive contacts were the following individuals:

– […].

Ueno

(97) The usual representatives of Ueno in the cartel meetings or other kind of collusive contacts were the following individuals:

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45 See pages 5154 – 5155, 0705 – 0706, 0426, as well as pages 9662 and 18218 – 18220 of the file.
46 See page 18219 of the file.
47 See pages 0426, 5154 – 5155, 11103 – 11104 and 18218 – 18220 of the file.
48 See pages 0706, 0732 and 18249 of the file.
49 See pages 7785 and 18220 of the file.
50 See page 0707 of the file.
51 See page 7800 of the file.
52 See page 7800 of the file.
53 See page 7810 of the file.
54 See pages 0708-0709 of the file.

8. […]THE AGREED CONSTITUENT PRINCIPLES

8.1.Fixing of target prices

(98) Hoechst and the four Japanese producers agreed on the prices to be charged to customers in all Europe for sorbates at least from 1979[55].

(99) Target prices for Europe and other parts of the world were agreed in each twice-yearly joint meeting[56]. During the spring joint meetings, the conspirators set target prices for the second and third quarters of that current calendar year and at the autumn joint meeting, they set the target price for the last quarter of the current year and the first quarter of the next calendar year[57].

(100) The conspirators agreed on target prices for each EEA country. From 1989 to 1992, target prices agreed for each EEA country referred to the prices to end user customers. During the 1993 spring joint meeting, however, it was agreed that target prices should in future relate to the price to be charged to dealers[58], given the difficulties encountered among the Japanese producers in finding information about and controlling prices to end users[59]. They used the Deutsche Mark (DEM) as the base currency. They set a price for all of Europe in DEM and then converted it to each country's currency, using the exchange rate for that country's currency as compared to the DEM.

(101) There was no specific formula or method used to calculate target prices. The conspirators discussed target prices based on current market conditions and on the price the producers believed customers would accept to pay. According to Nippon, the target price was determined by taking into account the declared results of the producers in each market and the applicable exchange rate[60]. At times, the conspirators agreed to maintain the existing target price in order to meet market conditions[61].

(102) At the joint meetings, the conspirators discussed the implementation of any price increases agreed in the previous joint meeting. The group decided that the announcement of the newly agreed prices should be staggered (in order to avoid detection of the agreements) and agreed on the sequence of the announcements[62].

(103) After each joint meeting, the agreed target prices were announced to agents, distributors and customers[63].

– Hoechst was usually the first to announce the new price in Europe, followed by the Japanese producers (for example, two months later). When it did not directly negotiate with customers, Hoechst used to give price ranges (target price/limit price) to its European subsidiaries – that would constitute a "working tool", giving them some flexibility when negotiating with the customers (both end users and

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55 See pages 7778 – 7810 and 0459 – 0528, especially pages 0475 and 7783 – 7785 of the file.
56 See pages 7783 – 7785, 2785 and 0703 – 0713 of the file, especially page 0707.
57 See pages 7783-7785 of the file.
58 See pages 18602 – 18620, especially page 18603 the file.
59 See pages 18582-18588 of the file.
60 See page 7208 of the file.
61 See page 7789 of the file.
62 See page 7784 of the file.
63 See page 7784 of the file.

local/regional distributors) - and tell them that the price would be applicable from a specified date. If a European subsidiary wished to sell below these price ranges, it was instructed to contact Hoechst's Frankfurt headquarters first. As for other European distributors which were not Hoechst subsidiaries, Hoechst influenced the sales price by determining the transfer price taking into account the distributors assumed margins in order to try to arrive at the target sales price[64].

– For the European market, the Japanese producers handed out a new price list to their trading companies and announced to them the price increase. The Japanese producers normally consulted each other on the timing of their announcements to their respective trading houses. The trading companies, in turn, would tell their dealers about the new prices list[65].

(104) Throughout 1979 to 1996, target prices either raised actual prices or prevented actual prices from coming down. The goal was to bring actual prices as close to the target price as possible. The market would not always permit the target price increase. The target price was normally higher than the actual price, but when a wide gap between the target price and the actual price existed, the group reviewed its initial price agreement and in some cases agreed to lower the target prices. This would be done on a country by country basis[66].

(105) In 1992, Hoechst proposed to establish a price difference between sorbic acid and potassium sorbate and instituted it unilaterally in Europe. The Japanese producers decided however to wait and see if Hoechst was successful. In autumn 1994, the Japanese producers finally agreed to establish this price difference in Europe. The price difference was based on the fact that sorbic acid has a perceived value of approximately 1.33 times the value of the potassium sorbate. One of the purposes of the price difference was to reduce competition from conversion manufacturers, which used to buy sorbic acid from the Parties to this agreements in order to convert it into potassium sorbate. In 1995-1996, the members of the cartel achieved price increases that were particularly close to the target prices, because supply of the product was quite tight at that time[67].

8.2.Volume quotas

(106) Hoechst and the four Japanese producers agreed on volume allocations for sorbates sales in Europe from at least 1978[68]. The first volume allocation for 1978 was based on their actual sales volumes in 1977 for each region of the world, as well as current and forecasted demand. The corresponding volume allocation between the Japanese producers was based on the average of their actual sales volumes from 1973 to 1977[69].

(107) Market allocations were thus based on the actual market shares at the time the conspiracy began. The market was allocated in two ways. First, the producers estimated the total demand in Europe, and then subtracted the estimated sales volume of Monsanto and

64 See pages 0707 and 18245 - 18248 of the file.
65 See page 7789 of the file.
66 See page 7789 of the file.
67 See page 7785 of the file.
68 See pages 18701-18702 of the file.
69 See pages 7781 - 7783, 0475, 0511, as well as pages 2785 - 2786 of the file.

Cheminova. The remaining market was divided between Hoechst and the Japanese producers based on the previous market shares[70].

(108) The agreements on volume quotas and target prices were inter-linked. They were intended to enable each party to sell its allocated volume at the highest possible price. The purpose of the quota system was in fact to gradually increase the market price. According to Chisso, the volume quotas prevented the companies from competing for market share, which would have driven prices down[71].

(109) The amount of sales for each company was limited according to the fixed market share: the companies with the greatest market shares benefited most from maintaining the *status quo,* and were the most insistent on making sure market share levels remained unchanged[72].

(110) During the period of the infringement, the allocations between Hoechst and the Japanese producers benefited Hoechst[73]. The allocations among the Japanese producers remained essentially the same over the life of the agreement[74].

(111) Table II compares the actual sales volume of the cartel members with the volume quotas in tonnes allocated at the spring joint meetings between the Japanese producers and Hoechst from 1978 to 1995. This table shows that the producers generally respected the agreed volume quotas during all the period of the infringement, even if there was some distrust among them concerning the implementation of volume quotas. By the end of 1995, for example, the conspirators had a discussion about volume discrepancies because there was a difference between the official statistical data and the self-declared figures[75].

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70 See page 7208 of the file.
71 See pages 7782 - 7783 of the file.
72 See pages 2785 and 7800 – 7801 of the file.
73 See pages 0708 – 0709 of the file.
74 See pages 0530 – 0541 and 18225 - 18227 of the file.
75 See page 7807 of the file.

Table II

Actual and agreed volume quotas for sorbates sales in Europe

Year	Hoechst		Japanese producers		[...]	
	Actual	Agreed	Actual	Agreed	Actual	Agreed*
1978	[…]	2,000	[…]	2,556	[…]	-
1979	[…]	1,800	[…]	2,300	[…]	-
1980	[…]	2,200	[…]	2,200	[…]	-
1981	[…]	2,100	[…]	2,000	[…]	-
1982	[…]	2,100	[…]	2,000	[…]	-
1983	[…]	1,900	[…]	1,800	[…]	-
1984	[…]	2,300	[…]	2,100	[…]	-
1985	[…]	2,400	[…]	2,200	[…]	-
1986	[…]	2,300	[…]	2,100	[…]	-
1987	[…]	2,400	[…]	2,200	[…]	[…]
1988	[…]	2,320	[…]	2,130	[…]	[…]
1989	[…]	2,520	[…]	2,311	[…]	[…]
1990	[…]	2,558	[…]	2,344	[…]	[…]
1991	[…]	2,665	[…]	2,350	[…]	[…]
1992	[…]	2,665	[…]	2,350	[…]	[…]
1993	[…]	2,877	[…]	2,579	[…]	[…]
1994	[…]	2,705	[…]	2,399	[…]	[…]
1995	[…]	3,109	[…]	2,491	[…]	[…]

* These "agreed" volume quotas were the volume quotas reserved and accorded to […][...]by Hoechst and the four Japanese producers during the joint meetings.

Source: Chisso Statement, appendix 1, page C0109 and appendix 2 ("Sales Estimate") and appendix 3 ("Sales Results")[76].

[76] See pages 0475, 0538 – 0539 and 0543 - 0544 of the file.

(112) During the preparatory meetings, the Japanese producers used to discuss the quotas to be proposed to Hoechst at the joint meetings. During the spring joint meeting, Hoechst and the Japanese producers used to present their own quota proposals and reach an agreement on volume quotas for the current year. After the joint meetings, the Japanese producers met and divided up the total quota allocated to them.

8.3.Monitoring of target prices and volume quotas

(113) Hoechst and the Japanese producers monitored target price adherence through the data regarding competitor pricing which they used to receive through their dealers. When prices fell below the target prices for key customers, the Japanese companies (mainly Daicel) and Hoechst did on occasions telephone each other to try to ensure that such prices were brought closer into line with the targets in the next large contract with the same customer[77].

(114) As for volume quotas, before preparatory meetings, Daicel used to collect sales information from each of the Japanese producers and to prepare charts reflecting this information. During the preparatory meetings, the Japanese producers monitored sales results for the year to date and compared them to the agreed volume quotas for the same period[78].

(115) There was some distrust among the producers concerning the implementation of target prices and volume quotas. The participants knew that sales figures were often understated. At the autumn joint meeting, Hoechst and the Japanese producers compared sales results to date for the current calendar year with the volume quotas established at the spring joint meeting so that they could monitor compliance with the market allocations[79].

(116) According to Chisso, among the Japanese producers there was a penalty system in the early years of the agreements. In 1981, for instance, Daicel compelled Chisso to buy 60 to 70 tons from Daicel because Chisso had exceeded its volume quota for 1980. The penalty system was abandoned after 1981, at Chisso's request[80].

8.4.Non-supply of technology to potential market entrants

(117) During the joint meetings, there was considerable discussion about new market entrants, particularly the Chinese and the Russians[81]. In the late 1980's and during the 1990's several potential competitors from China requested sorbates technology from the existing producers, but Hoechst and the Japanese producers decided that no technology would be provided to other sorbates producers[82]. Hoechst, in agreement with the Japanese producers, also encouraged [...]not to transfer sorbates technology to potential competitors[83].

(118) Discussions among the conspirators involved reporting on enquiries from potential market entrants and reporting on companies' individual decisions not to sell such a technology[84].

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77 See pages 0708, 2786 – 2788, 7783 – 7785 and 18213 - 18217 of the file.
78 See pages 7782 – 7783 and 18217 - 18218 of the file.
79 See pages 7782 – 7783 and 18217 – 18218 of the file.
80 See page 7782 of the file.
81 See pages 0042, 0048, 0077, 0122, 2999, 7804, especially pages 3011, 3091 and 3099 of the file.
82 See pages 0709 – 0710 of the file.
83 See page 18256 of the file.
84 See pages 0710 and 18254 of the file.

9. THE OPERATION OF THE CARTEL

9.1.Joint meetings

(119) Hoechst, Chisso, Daicel, Nippon and Ueno met twice a year to discuss sorbates prices and agreed on target prices for each country (CIF in the country's local currency) and volume allocations for sorbates. The meetings occurred every year from at least the spring of 1979[85] until November 1996[86]. These semi-annual meetings alternated between various locations in Europe (generally in the autumn) and Japan (generally in the spring)[87].

(120) Prior to holding meetings, the representative of the Japanese companies, Daicel, and Hoechst agreed on an agenda for the forthcoming meeting. This was usually done by telephone[88]. Not all topics were discussed at all times and the emphasis varied over time, but the spring meeting agenda typically included the following *items*: a discussion of the sales results from the preceding year; an agreement setting a volume quota for Hoechst and a volume quota for the Japanese producers as a group for the current calendar year; an analysis of prevailing market conditions and prices; an agreement on target prices for the following six months in Europe[89] and other parts of the world. Such target prices would always be uniform for Europe. According to Chisso, meetings held in "spring" usually took place in February or March[90]. The joint meetings held in Europe in the autumn reviewed actual sales results from January to August in the same calendar year and compared those results to the quotas established at the spring meetings[91]. Meetings held in "autumn" were usually held in September[92].

(121) The joint meetings were conducted in English. This was not a problem for the Japanese producers because an employee of Hoechst Japan, Mr. […] (and later Mr. […]) used to attend the joint meetings in order to serve as interpreter. The meetings were initially conducted with the assistance of written information on a blackboard, which was then wiped clean. At some meetings, "electronic whiteboards" were used of which printouts were made and handed out to the meeting participants[93]. No official minutes were taken of the meetings. Participants made their own notes on occasions[94].

(122) The following description of each individual joint meeting is not exhaustive, it just describes the discussed subjects which the Commission is able to document[95]. During each of these meetings, other issues were usually discussed between the producers.

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85 See page 7772 of the file.

86 See pages 0740, 1601 - 1606 and 7771 – 7777 of the file. For the meetings held between September 1979 and November 1996, see Annex 6 of Nutrinova Memorandum of 19 March 1999 (see page 0740 of the file). For the meetings held between the spring 1981 and September 1996, see Daicel response to the Commission request for information dated 26 May 1999 (pages 17798 – 17800 of the file) and Nippon response of 30 August 1999 to the Commission request for information (pages 2788 – 2790 of the file).

87 See pages 7779 – 7780 of the file.

88 See pages 0706 and 0732 of the file.

89 See pages 0707 and 7779 of the file.

90 See page 7779 of the file.

91 See page 7780 of the file.

92 See page 7779 of the file.

93 See pages 2790 and 3133 – 3142 of the file.

94 See page 0706 of the file.

95 As regards, for example, the level of the target prices agreed until the January 1988 meeting, although the Commission has in its possess documentary evidence on the discussions held between the

9.1.1. Details of the joint meetings

Spring 1979[96]

(123) The first documented joint meeting was held in Japan in the spring of 1979. Participants were Mr. […], Mr. […] and Mr. […] from Daicel; Mr. […] from Nippon; Mr. […] from Ueno; Mr. […] and Mr. […] from Hoechst; and Mr. […] from Chisso.

(124) At that meeting, the producers agreed on a target price and volume quota for Europe. The volume quotas agreed for Europe were for Hoechst 1,800 metric tons and for the Japanese producers 2,300 metric tons[97].

(125) After the joint meeting, the Japanese producers agreed to the following allocation in Europe: Chisso 580 metric tons; Daicel 925 metric tons; Nippon 354 metric tons; and Ueno 442 metric tons.

Autumn 1979[98]

(126) A joint meeting was held in September1979[99] at Hoechst headquarters in Frankfurt. The participants in that meeting were Mr. […] and Mr. […] from Daicel; Mr. […] from Nippon; Mr. […] from Ueno; Mr. […], Mr. […] and Mr. […] from Hoechst; and Mr. […] from Chisso.

(127) At that meeting, the group agreed on a target price for Europe.

Spring 1980[100]

(128) A joint meeting was held in Japan in the spring of 1980. The participants were Mr. […] and Mr. […] from Daicel; Mr. […] from Nippon; Mr. […] from Ueno; Mr. […], Mr. […] and Mr. […] from Hoechst; and Mr. […] from Chisso.

(129) At that meeting, the producers agreed on a target price and on volume quotas for Europe. The volume quotas agreed to for Europe were 2,200 metric tons for Hoechst and 2,200 metric tons for the Japanese producers.

(130) After the joint meeting, the Japanese producers agreed to the following allocation in Europe: Chisso 554 metric tons; Daicel 884 metric tons; Nippon 339 metric tons; and Ueno 422 metric tons.

Autumn 1980[101]

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conspirators during this period aiming at setting the target prices, it is not possible to determine exactly the level of the target price they set in each joint meeting for Europe. See, for example, pages 7304 – 7323, 7345 – 7357 and 7483 - 7498 of the file.

96 See pages 7772 and 0530 – 0541 of the file.

97 See page 0475 of the file.

98 See pages 7772 and 0536 – 0541 of the file.

99 See page 0740 of the file.

100 See pages 7773 and 0536 – 0541 of the file.

101 See pages 0740 and 7773 of the file.

(131) A joint meeting was held in August 1980 at Hoechst's headquarters in Frankfurt. The participants were the same as for the September 1979 meeting, except in the case of Ueno, where Mr. […] replaced Mr. […].

(132) At that meeting, the group agreed on a target price for Europe. Hoechst demanded larger shares of the market, based on the expansion of its production facilities in 1979. Hoechst demanded a share of 53% in its "home market" and claimed that its share in Eastern Europe, as part of Europe, should be tripled from the existing share of […]%, but the Japanese producers denied Hoechst's demands.

Spring 1981[102]

(133) This meeting was held in March[103] 1981 in a hotel conference room in Tokyo. The participants at the meeting were Mr. […], Mr. […] and Mr. […] from Hoechst; Mr. […], Mr. […] and Mr. […] from Daicel; Mr. […] and Mr. […] from Nippon; Mr. […] and Mr. […] from Ueno; and Mr. […] and Mr. […] from Chisso[104].

(134) There was an agreement on volume quotas in Europe between Hoechst and the Japanese producers. The volume quotas agreed to at that meeting were as follows: Hoechst was allocated 2,100 tons (51%) and the Japanese producers were allocated 2,000 tons (49%).

(135) The group discussed market conditions in Europe and confirmed sales levels based on information from Hoechst and the trading houses. It also debated target prices and agreed on a specific new target price for Europe in DEM which was announced after the joint meeting.

(136) Following the spring 1981 meeting, the Japanese producers met to apportion the Japanese quota for Europe among them as follows: Daicel was allocated 804 tons, Chisso 504 tons, Ueno 384 tons and Nippon 308 tons.

Autumn 1981[105]

(137) This meeting was held in Zurich on 16 and 17 June 1981. It was decided to bring forward the autumn meeting in response to the "aggressive moves" by Hoechst both in Europe and USA[106]. A representative from each of the producers attended this meeting (Hoechst, Daicel, Nippon, Chisso and Ueno).

(138) There was an agreement between Hoechst and the Japanese producers on target prices for Europe.

Spring 1982[107]

(139) This meeting was held in Tokyo. The participants at this meeting were Mr. […], Mr. […] and Mr. […] from Hoechst; Mr. […], Mr. […] and Mr. […] from Daicel; Mr. […]

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102 See pages 0740, 5219, 7785 – 7786 of the file.
103 See pages 7546 - 7547 of the file.
104 See pages 7785 - 7786 of the file.
105 See pages 5219, 7546 – 7547, 7774, as well as page 0740 of the file.
106 See pages 7546 – 7547 of the file.
107 See pages 0740, 5219 and 7786 – 7787 of the file.

and Mr. […] from Nippon; Mr. […] and Mr. […] from Ueno; and Mr. […] and Mr. […] from Chisso.

(140) There was an agreement on a target price and volume quotas for Europe. The volume quotas for Europe agreed to at that meeting were as follows: Hoechst was allocated 2,100 tons (51%) and the Japanese producers were allocated 2,000 tons (49%).

(141) After the joint meeting, the Japanese producers met and divided the total quota allocated to them. For 1982, the Japanese quota for Europe was as follows: Daicel was allocated 804 tons, Chisso 504 tons, Ueno 384 tons and Nippon 308 tons.

Autumn 1982[108]

(142) This meeting was held in Vienna and was attended by a representative of each producer (Chisso, Daicel, Hoechst, Nippon and Ueno). Hoechst and the four Japanese producers agreed on target prices for Europe.

Spring 1983[109]

(143) This meeting was held in Tokyo. Mr. […] and Mr. […] attended this meeting on behalf of Chisso. A representative from each of the other producers attended (Daicel, Hoechst, Nippon and Ueno).

(144) The sorbates group agreed on a target price and volume quotas for Europe. The volume quotas for Europe agreed to at the meeting were as follows: Hoechst was allocated 1,900 tons (51%) and the Japanese producers were allocated 1,800 tons (49%).

(145) After the joint meeting, the Japanese producers met and divided the total quota allocated to them. For 1983, the Japanese quota for Europe was as follows: Daicel was allocated 724 tons, Chisso 454 tons, Ueno 346 tons and Nippon 277 tons.

Autumn 1983[110]

(146) This meeting was held in Vienna. A representative of each producer attended the meeting (Chisso, Daicel, Hoechst, Nippon and Ueno).

(147) The group agreed on a target price for Europe. The overall percentage allocation between Hoechst and the four Japanese sorbates producers was fixed but prior to agreement on the volume split there was a discussion among the producers because the four Japanese producers were demanding a larger share of sorbates sales in Europe, but Hoechst wanted to maintain its share in Europe.

Spring 1984[111]

(148) This meeting took place in Tokyo on 27-29 February 1984[112]. The participants at this meeting were Mr. […], Mr. […] and Mr. […] from Hoechst; Mr. […] and Mr. […] from

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108 See pages 5219 and 7788 of the file.
109 See pages 5219 and 7788 of the file.
110 See pages 0740, 5219 and 7788 of the file.
111 See pages 0740, 5219 and 7789 of the file.
112 See page 5219 of the file.

Daicel; Mr. […] and Mr. […] from Nippon; Mr. […] and Mr. […] from Ueno; and Mr. […] and Mr. […] from Chisso.

(149) There was an agreement on volume quotas and a target price for Europe. The volume quotas agreed were as follows: Hoechst was allocated 2,300 tons (52%) and the Japanese producers were allocated 2,100 tons (48%).

(150) After the joint meeting, the Japanese producers met and divided the total quota allocated to them. For 1984, the allocation between the Japanese producers was as follows: Daicel was allocated 844 tons, Chisso 529 tons, Ueno 403 tons and Nippon 323 tons.

Autumn 1984[113]

(151) This joint meeting was held in Athens on 20-21 September 1984. The participants were Mr. […], Mr. […] and Mr. […] from Hoechst; Mr. […] and a Daicel Europe representative from Daicel; Mr. […] from Nippon; Mr. […] from Ueno; and Mr. […] from Chisso.

(152) At the meeting, the producers reached an agreement on target prices for Europe.

Spring 1985[114]

(153) This meeting was held in Tokyo on 19-21 February 1985. A representative from each of the producers attended (Chisso, Daicel, Hoechst, Nippon and Ueno).

(154) Agreements were reached on a target price and volume quotas for Europe. The target price agreed was at the same level as that agreed in 1984. The volume quotas agreed for Europe were as follows: Hoechst was allocated 2,400 tons (52%) and the Japanese producers were allocated 2,200 tons (48%).

(155) After the joint meeting, the Japanese producers met and divided the total quota allocated to them. For 1985, the allocation for Europe among the Japanese producers was as follows: Daicel 884 tons; Chisso 554 tons; Ueno 423 tons and Nippon 339 tons.

Autumn 1985[115]

(156) This joint meeting was held in Helsinki in September 1985. Hoechst and the four Japanese producers were represented at the meeting. They agreed on target prices for Europe.

Spring 1986[116]

(157) This meeting was held in Japan in February 1986. The participants at this joint meeting were Mr. […], Mr. […] and Mr. […] from Hoechst; Mr. […] and Mr. […] from Daicel; Mr. […] from Nippon; Mr. […] and Mr. […] from Ueno; and Mr. […] and Mr. […] from Chisso.

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113 See pages 0740, 5219 and 7789 of the file.
114 See pages 0740, 5219 and 7790 of the file.
115 See pages 0740, 5219 and 7790 of the file.
116 See pages 0740, 5219, 7484 and 7790- 7791 of the file.

(158) There was an agreement on volume quotas and a target price for Europe. According to Mr. […]'s notebook, the agreed target price for Europe in September 1986 was DEM 11. As target prices used to be fixed in each joint meeting for the six-month period preceding the next joint meeting, it may legitimately be deduced that this target price was the target price fixed in the February 1986 joint meeting[117]. Hoechst and Daicel stressed that they wanted all of the producers to follow the target price. The producers who exceeded their volume quotas were accused by Hoechst and Daicel of cutting their prices in order to gain volume. The volume quotas for Europe agreed to at this meeting were as follows: Hoechst was allocated 2,300 tons (52%) and the Japanese producers were allocated 2,100 tons (48%).

(159) After the joint meeting, the Japanese producers met and divided the total quota allocated to them. For 1986, the allocation among the Japanese producers was as follows: Daicel 844 tons; Chisso 529 tons; Ueno 403 tons and Nippon 323 tons.

Autumn 1986[118]

(160) This meeting was held in Salzburg. The participants at the meeting were Mr. […], Mr. […] (Mr. […]'s replacement), Mr. […], Mr. […], Mr. […] and Mr. […] from Hoechst; Mr. […] and Mr. […] from Daicel; Mr. […] from Ueno; Mr. […] from Nippon; and Mr. […] and Mr. […] from Chisso.

(161) There was a review of sales levels and an agreement on target prices for Europe.

Spring 1987[119]

(162) This joint meeting was held in Tokyo on 2-3 March 1987. The participants at the meeting were Mr. […], Mr. […] and Mr. […] from Hoechst; Mr. […] and Mr. […] from Daicel; Mr. […] and Mr. […] from Ueno; Mr. […] from Nippon; and Mr. […] and Mr. […] from Chisso.

(163) The meeting followed the usual agenda and there was an agreement on a target price and on volume quotas for Europe. The volume quotas agreed to at that meeting were as follows: Hoechst was allocated 2,400 tons (52%) and the Japanese producers were allocated 2,200 tons (48%).

(164) After the joint meeting, the Japanese producers met and divided the total quota allocated to them. For 1987, the allocation among the Japanese producers was as follows: Daicel 884 tons; Chisso 554 tons; Ueno 423 tons and Nippon 339 tons.

Autumn 1987[120]

(165) This meeting was held at Interlaken, in July 1987. The participants at the meeting were Mr. […], Mr. […], Mr. […] and Mr. […] from Hoechst; Mr. […], Mr. […] and Mr. […] from Daicel; Mr. […] from Ueno; Mr. […] from Nippon; and Mr. […] from Chisso.

(166) At this joint meeting, Hoechst and the four Japanese producers agreed on a target price for Europe.

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117 See page 7483 of the file.
118 See pages 0740, 5220 and 7791 of the file.
119 See pages 0740, 5220 and 7792 of the file.
120 See pages 0740, 5220 and 7792 of the file.

Spring 1988[121]

(167) This meeting was held in Tokyo on 25-26 January 1988. A representative from each of the producers (Hoechst, Daicel, Nippon, Ueno and Chisso) attended.

(168) There was an agreement on volume quotas and a target price for Europe. The target price for Europe was set at DEM 11.70. The volume quotas agreed to at the meeting were as follows: Hoechst was allocated 2,320 tons (52%) and the Japanese producers were allocated 2,130 tons (48%).

(169) After the joint meeting, the Japanese producers met and divided the total quota allocated to them. For 1988, the allocation among the Japanese producers was as follows: Daicel 856 tons; Chisso 537 tons; Ueno 409 tons and Nippon 328 tons.

Autumn 1988[122]

(170) This meeting was held in Lisbon, on 27-28 June 1988. The participants were Mr. […] and Mr. […] from Hoechst; Mr. […] and Mr. […] from Daicel; Mr. […] from Ueno; Mr. […] from Nippon; and Mr. […] and Mr. […] from Chisso.

(171) The usual agenda was followed at this joint meeting. The producers agreed on a target price for Europe and confirmed the volume quotas allocated to each producer in the January 1988 joint meeting. The target price agreed for Europe was DEM 11.70.

Spring 1989[123]

(172) This meeting was held in Japan in February 1989. The usual agenda was followed. A representative from each of he producers (Hoechst, Daicel, Nippon, Ueno and Chisso) attended this meeting.

(173) There was an agreement on a target price for Europe. The target price agreed for Europe was DEM 11.70. There was also an agreement on volume quotas. The volume quotas agreed for Europe were as follows: Hoechst was allocated 2,520 tons (52%) and the Japanese producers were allocated 2,311 tons (48%).

(174) After the joint meeting, the Japanese producers met and divided the total quota for Europe allocated to them. For 1989, the allocation among the Japanese producers was as follows: Daicel 929 tons; Chisso 582 tons; Ueno 444 tons and Nippon 356 tons.

Autumn 1989[124]

(175) This meeting was held outside Vienna on 10-11 October 1989. A representative from all the producers (Hoechst, Daicel, Nippon, Ueno and Chisso) attended this meeting.

(176) The target price agreed for Europe was DEM 11.70. It was decided that the Japanese producers would make a price announcement early February 1990 and that Hoechst would follow them.

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121 See pages 0740, 5220 and 7793 of the file.
122 See pages 0740, 5283 – 5298, 5220 and 7793 of the file.
123 See pages 0740, 5221 and 7794 of the file.
124 See pages 0740, 5221, 7794 and 3003 – 3013 of the file.

(177) The participants in this meeting also agreed that the volume quotas previously allocated to each producer did not need to be changed.

Spring 1990[125]

(178) This meeting was held in Japan on 27-28 February 1990. A representative of each of the producers (Hoechst, Daicel, Nippon, Ueno and Chisso) attended this meeting. The usual agenda was followed.

(179) There was an agreement on a target price for Europe. The target price agreed for Europe was DEM 11.70. There was also an agreement on volume quotas. The volume quotas agreed for Europe were as follows: Hoechst was allocated 2,558 tons (52%) and the Japanese producers were allocated 2,344 tons (48%).

(180) After the joint meeting, the Japanese producers met and divided the total quota for Europe allocated to them. For 1990, the allocation among the Japanese producers was as follows: Daicel 942 tons; Chisso 591 tons; Ueno 450 tons and Nippon 361 tons.

Autumn 1990[126]

(181) This joint meeting was held in Prague on 19-22 September 1990. The participants were Mr. […], Mr. […] and Mr. […] from Hoechst; Mr. […], Mr. […] and Mr. […] from Daicel; Mr. […] from Ueno; Mr. […] from Nippon; and Mr. […] and Mr. […] from Chisso.

(182) The usual agenda was followed at this joint meeting. The producers agreed on a target price for Europe of DEM 11.70. They also agreed to retain the current volume quotas.

Spring 1991[127]

(183) This meeting was held in Sapporo, Japan, on 11-12 March 1991. The participants at the meeting were Mr. […], Mr. […] and Mr. […] from Hoechst; Mr. […], Mr. […] from Daicel; Mr. […] and Mr. […] from Chisso, and; representatives from Ueno and from Nippon.

(184) There was an agreement to maintain target prices, followed by a price announcement. The target price agreed for Europe was DEM 11.70. There was also an agreement on volume quotas. The volume quotas agreed for Europe were as follows: Hoechst was allocated 2,665 tons (53%) and the Japanese producers were allocated 2,350 tons (47%).

(185) After the joint meeting, the Japanese producers met and divided the total quota for Europe allocated to them. For 1991, the allocation among the Japanese producers was as follows: Daicel 945 tons; Chisso 592 tons; Ueno 451 tons and Nippon 362 tons.

Autumn 1991[128]

(186) This joint meeting was held in Budapest on 19-20 September 1991. The participants at the meeting were Mr. […], Mr. […], Mr. […] and Mr. […] from Hoechst; Mr.

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125 See pages 0740, 5221 and 7794 - 7795 of the file.
126 See pages 0740, 5221 and 7795 of the file.
127 See pages 0740, 5221 and 7795 - 7796 of the file.
128 See pages 0740, 5221 and 7796 - 7797 of the file.

[…], Mr. […] and Mr. […] from Daicel; Mr. […] from Ueno; Mr. […] from Nippon; and Mr. […] and Mr. […] from Chisso.

(187) There was an agreement on target prices for Europe for the remainder of 1991 and for 1992. The target price agreed for the remainder of 1991 was DEM 11.70; as from January 1992 it was DEM 12.30[129]. The sales quotas agreed in the previous joint meeting were confirmed.

Spring 1992[130]

(188) This meeting was held in Tokyo in February 1992. The meeting followed the usual agenda. A representative from each of the producers (Hoechst, Daicel, Nippon, Ueno and Chisso) attended this meeting.

(189) The target price for Europe was set at DEM 12.00. There was also an agreement on volume quotas. The volume quotas agreed for Europe were as follows: Hoechst was allocated 2,665 tons (53%) and the Japanese producers were allocated 2,350 tons (47%).

(190) After the joint meeting, the Japanese producers met and divided the total quota for Europe allocated to them. For 1992, the allocation among the Japanese producers was as follows: Daicel 945 tons; Chisso 592 tons; Ueno 451 tons and Nippon 362 tons.

Autumn 1992[131]

(191) This joint meeting was held in Stockolm in September 1992. The participants at this meetings were Mr. […], Mr. […] and Mr. […] from Hoechst; Mr. […] and Mr. […] from Daicel; Mr. […] from Ueno; Mr. […] from Nippon; and Mr. […] from Chisso.

(192) The group reviewed sales results and confirmed the volume allocations agreed in the previous joint meeting. They also discussed the problem of "grey material", but no conclusion was drawn on this point. Around this time, the group started noticing the existence of "grey material" – which corresponded to the difference between the self-declared sales results and the published Japanese export data. This "grey material" was due to the fact that the producers did not report all of their sales results to the group. The self-declared figures were not verified and the group assumed that the Japanese export data was accurate [and therefore the discrepancy was due to the producers not reporting their sales accurately]. Hoechst was always aware of the Japanese export statistics because it was a member of the Chemical Industrial Products Export Co-operative (CIPEC), a Japanese organised export cartel that had no relationship with the conspiracy, and, consequently, had access to the Japanese export statistics. The Japanese producers, however, had no way of checking the Hoechst sales figures since they could not obtain the German official statistical data[132].

(193) The target price for Europe was set at DEM 12.00.

Spring 1993[133]

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129 See page 2880 of the file.
130 See pages 0740, 5221 and 7797 of the file.
131 See pages 0740, 5221 and 7797 - 7798 of the file.
132 See page 7797 of the file.
133 See pages 0740, 5221 and 7798 - 7799 of the file.

(194) This meeting took place in Tokyo in February 1993. The participants at this meeting were Mr. […] and Mr. […] from Hoechst; Mr. […], Mr. […] and Mr. […] from Daicel; Mr. […] from Ueno; Mr. […] and Mr. […] from Nippon; and Mr. […], Mr. […] and Mr. […] from Chisso.

(195) The usual agenda was followed. There was a discussion on volume quotas and on the target price for Europe. Grey material was discussed and Hoechst continued to complain about it to the Japanese producers.

(196) The volume quotas agreed for Europe were as follows: Hoechst was allocated 2,877 tons (53%) and the Japanese producers were allocated 2,579 tons (47%). The target price for Europe was reduced from DEM 12.00 to DEM 10.50 because there was a wide gap between the target price and the actual price at the time

(197) After the joint meeting, the Japanese producers met and divided the total quota for Europe allocated to them. For 1993, the allocation among the Japanese producers was as follows: Daicel 999 tons; Chisso 650 tons; Ueno 510 tons and Nippon 422 tons.

Autumn 1993[134]

(198) This joint meeting was held in Prague on 26-27 September 1993. The participants at the meeting were Mr. […], Mr. […] and Mr. […] from Hoechst; Mr. […] and Mr. […] from Daicel; Mr. […] from Ueno; Mr. […] and Mr. […] from Nippon; and Mr. […] and Mr. […] from Chisso.

(199) The target price agreed for Europe was set at DEM 11.00. Grey material was once again discussed because Hoechst was convinced that the Japanese producers did not report all of their sales results to the group[135].

Spring 1994[136]

(200) This meeting was held at Makuhari, near Tokyo, on 15 March 1994. The participants at the meeting were Mr. […], Mr. […] and Mr. […] from Hoechst; Mr. […], Mr. […] and Mr. […] from Daicel; Mr. […] or Mr. […] from Ueno; Mr. […] and Mr. […] from Nippon; and Mr. […], Mr. […] and Mr. […] from Chisso.

(201) Chisso organised this meeting. The usual agenda was followed. There was a discussion on volume quotas and on the target price for Europe. The volume quotas agreed for Europe were as follows: Hoechst was allocated 2,705 tons (53%) and the Japanese producers were allocated 2,399 tons (47%). The target price for Europe was set at DEM 11.00. Grey material was also discussed and Hoechst strongly protested about the fact that the Japanese producers could not eliminate the grey material.

(202) After the joint meeting, the Japanese producers met and divided the total quota for Europe allocated to them.

Autumn 1994[137]

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134 See pages 0740, 5222 and 7799 of the file.
135 See page 7799 of the file.
136 See pages 0740, 5222 and 7799 - 7800 of the file.

(203) This meeting was held in Warsaw, in September 1994. It was attended by Mr. […], Mr. […] and Mr. […] from Hoechst; Mr. […] from Daicel; Mr. […] from Ueno; Mr. […] from Nippon; and Mr. […] and Mr. […] from Chisso.

(204) At the joint meeting, there was a discussion about price levels in Europe generally and in all major countries within the Community. Demand was steadily increasing and capacity utilisation was good at this time. An agreement on target prices was reached for Europe for the remainder of 1994 (DEM 12.00 for potassium sorbate and DEM 12.30 for sorbic acid) and from January 1995 (DEM 12.50 for potassium sorbates and DEM 12.80 for sorbates acid). According to Chisso, these target prices were announced after the meeting and were achieved[138].

(205) In addition, the group reviewed the sales levels in Europe for 1994. Hoechst proposed that if the Japanese producers could not identify the cause of the grey material, this amount should be added to Hoechst's volume quota. The Japanese did not agree with Hoechst's proposal, but Hoechst unilaterally added 600 tons to its quota in 1995.

(206) Hoechst also proposed a neutral Swiss organisation to collect the sales figures of the Japanese producers and come up with a total figure for the Japanese producers, without a breakdown by company. Some of the Japanese producers, however, did not approve this proposal. Chisso declared that the volume quotas system should be abolished since it prevented the producers of increasing their sales. Ueno shared Chisso's view. Daicel wanted to maintain the *status quo* and wanted to prevent members from leaving the group. It supported Hoechst's proposal of the independent audit firm and argued against abolishing the quotas.

Spring 1995[139]

(207) This joint meeting was held in Tokyo on 2-3 March 1995. The participants were Mr. […], Mr. […] and Mr. […] from Hoechst; Mr. […], Mr. […] and Mr. […] from Daicel; Mr. […] from Ueno; Mr. […], Mr. […] and Mr. […] from Nippon; and Mr. […], Mr. […] and Mr. […] from Chisso.

(208) The agenda for this meeting included, amongst others, the following points: *i)* pricing; *ii)* sales results (including a discussion of the discrepancy), and; *iii)* estimate (which meant sales quota).

(209) With respect to prices, actual prices in Europe were reviewed and target prices agreed. The group discussed the price difference between sorbic acid and potassium sorbates and agreed to settle the price difference at DEM 0.50. Mr. […] of Daicel proposed to raise the target price for potassium sorbates to DEM 15.00, but Mr. […] from Hoechst responded that users might switch to other products or different manufacturing processes. Finally, the target prices for June 1995 and December 1995 were set for potassium sorbates at DEM 12.50 and DEM 13.00 for sorbic acid.

(210) Hoechst complained that the sales results for 1994 (January to December) did not match the quotas. It stated that the discrepancy should be reduced. The Japanese responded by

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137 See pages 0740, 5222 and 7800 - 7801 of the file.

138 See page 7801 of the file.

139 See pages 0740, 5222, 7802 - 7804 and 010 - 039 of the file.

saying that the official statistics were wrong and that they were still investigating the reasons for these discrepancies.

(211) At this joint meeting, the Japanese producers and Hoechst each presented their proposals with respect to the volume quotas for 1995. Hoechst proposed to increase its share by 600 tons. All the producers agreed to this extra tonnage. The Japanese producers indicated that one of them would be prepared to purchase products from Hoechst in order to avoid Hoechst obtaining more quota, but the amount was too much to purchase. Therefore, the volume quotas agreed for Europe were as follows: Hoechst was allocated 3,109 tons (56%) and the Japanese producers were allocated 2,491 tons (44%).

(212) After the joint meeting, the Japanese producers met and divided the total quota for Europe allocated to them. For 1995, the allocation among the Japanese producers was as follows: Daicel 977 tons; Chisso 628 tons; Ueno 488 tons and Nippon 400 tons.

Autumn 1995[140]

(213) This joint meeting was held in Vienna on 21-22 September 1995. The participants were Mr. […], Mr. […] and Mr. […] from Hoechst; Mr. […] from Daicel; Mr. […] from Nippon; and Mr. […] and Mr. […] from Chisso. Ueno did not attend this meeting[141].

(214) The agenda for this meeting included, notably, the following points: *i)* pricing; *ii)* sales results; *iii)* new comers, and; *iv)* others.

(215) With respect to prices in Europe, Mr. […] of Daicel opened the joint meeting by stating that the price increases in 1995 were going smoothly. He said that this was due, in part, to a lot of effort by the group's members, but that the Japanese producers were still not satisfied and that they would have to have a stronger control over the supply of the product in order to ensure the effectiveness of price increases. Mr. […] from Chisso commented that the price difference between sorbic acid and potassium sorbate had been achieved thanks to Hoechst, which had been the leader. Mr. […] from Hoechst responded that there was a long way to go with the price difference between sorbic acid and potassium sorbates because this price difference had just been started. It said that the difference of DEM 0.50 for sorbic acid was still not enough and that the price difference should be increased gradually. It stated that it would analyse the market situation in order to determine when a price increase would be possible.

(216) There was a review of target prices for January-June 1995 and July-December 1995 and the actual price in September 1995. It was felt by the group that a price increase in Europe in the fourth Quarter of 1995 was absolutely necessary. The Japanese producers wanted a price increase to DEM 14.00 for potassium sorbates in January 1996. Hoechst agreed on the date but considered that the price was getting close to the limit and that customers might switch to other products and stop using sorbates. Mr. […] from Daicel considered that the price in the European market was too low and that it was preferable to flow the product to the United States. Chisso stated that there seemed to be a price difference in the European market with major customers and that Hoechst should make this price difference narrower. Finally, they agreed that everyone should co-operate to achieve DEM

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140 See pages 0740, 5222, 7804 - 7808 and 041 - 088 of the file.

141 See page 0587 of the file.

13.00 for potassium sorbates and DEM 13.50 for sorbic acid[142] and that this intent should be conveyed to […][...].

(217) The producers also discussed the timing of the press releases about price increases. Hoechst proposed that the announcement should be made in November, but the press release should not be issued at the same time. The producers agreed that the Japanese producers would announce their price increase first, followed by […][...]. Mr. […] from Hoechst proposed a price increase announcement in November 1995 to come into effect on 1 January 1996.

(218) The producers had a discussion on the volume discrepancies since there was a 2,000 tons gap between the official statistical data and the self-declared figures. Hoechst indicated that the problem should be solved on the Japanese side. The Japanese indicated that they could not identify the cause.

(219) [...][...][...].

(220) In addition, there was a discussion about the low prices charged by the Chinese producers and the fact that these low prices were threatening the producers and preventing them from raising prices.

Spring 1996[143]

(221) This joint meeting was held in Tokyo on 18 April 1996. The participants were Mr. […], Mr. […] and Mr. […] from Hoechst; Mr. […], Mr. […], Mr. […] and Mr. […] from Daicel; Mr. […] from Ueno; and Mr. […], Mr. […] and Mr. […] from Chisso.

(222) The agenda for this meeting included the following points: *i)* the "Society" after Nippon left; *ii)* sales results from 1995, including a discussion on discrepancy between the self-declared sales results and the export statistics; *iii)* pricing by region for 1996; *iv)* the volume quota for 1996, and; *v)* others (Nippon, [...], [...]and new comers)[144].

(223) The target price agreed for Europe was DEM 13.00 for potassium sorbates. Daicel conveyed a comment by[…] [...].

(224) The sorbates producers did not agree on volume quotas for 1996, because Nippon did not participate in this meeting[145]. In fact, after the appointment of a new President in autumn 1995, Nippon decided no longer to attend the meetings with Hoechst and the other Japanese producers. In December 1995, at a meeting among the four Japanese producers in Tokyo, a representative from Nippon formally declared that Nippon would no longer take part in the meetings[146]. Daicel tried to convince Nippon to stay in the group and to stick to the volume quotas and the target prices, but it did not succeed. This fact disrupted the agreement on volume quotas.

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142 See page 0590 of the file.
143 See pages 0740, 5222, 7808 - 7810, 089 – 099 and 0119 - 0150 of the file.
144 See pages 7808 - 7809 of the file.
145 See page 7809 of the file.
146 See pages 0655, 2786, 7779 and 7808 of the file.

(225) After this joint meeting, Nippon met with Hoechst, Daicel and Chisso separately and discussed with them the results of the joint meeting[147].

Autumn 1996[148]

(226) This joint meeting was held in Tokyo in November 1996[149]. This was the last joint meeting between Hoechst and the Japanese producers. The participants at the meeting were Mr. […] and Mr. […] from Hoechst; Mr. […], Mr. […] and Mr. […] from Daicel; and Mr. […], Mr. […] and Mr. […] from Chisso.

(227) At this meeting, there was a discussion about a target price for the remainder of 1996 of DEM 14.00 for potassium sorbates for Europe.

(228) The joint meetings ended in November 1996 for a number of reasons: *i*) Nippon and Ueno had stopped participating in the joint group meetings and their failure to participate was a signal leading to the end; *ii*) Chisso and Nippon stopped reporting their sales figures to Daicel for the year 1996, which prevented the participants in this meeting from monitoring the volume quotas allocated in the previous meeting; *iii*) Chisso and Hoechst increased their capacity - Hoechst, for example, had increased its capacity in the mid-90's from 9,000 to 11,000 tons -, and; *iv*) Hoechst signed in 1997 a joint venture agreement with Chinese producers[150]. Daicel and Hoechst, however, advocated the continuation of the meetings and agreements[151].

9.2.Preparatory and post meetings

(229) Before the joint meetings with Hoechst, the Japanese producers used to meet to discuss and agree upon the target prices and volume allocations to be proposed to Hoechst. Daicel organised the preparatory meetings and a representative of Daicel led the meetings. Most of the preparatory meetings were held in a conference room at Daicel's headquarters in Tokyo[152]. On rare occasions, these meetings were held at the Tokyo offices of other Japanese producers.

(230) Not all Japanese producers were represented at every preparatory meeting. In this case, Daicel used to obtain the sales results prior to the meetings from those that could not attend. After the meeting, it used to contact and provide them with a report of the meeting.

(231) Prior to each preparatory meeting, the Japanese producers other than Daicel provided sales figures to Daicel via telephone calls – the telephone was used instead of faxing the information to avoid written evidence in order to avoid detection of the meetings. The information gathered via telephone calls would be written down by Daicel at the preparatory meeting on a whiteboard or distributed on a piece of paper.

(232) Daicel acted as the contact with Hoechst in order to organise the forthcoming joint meeting and share with Hoechst the Japanese producers' proposal regarding the agenda in

147 See page 2786 of the file.
148 See pages 0100 – 0118, 0416, 0740, 7776 and 7810 of the file.
149 See page 0416 of the file.
150 See pages 0733 - 0734 of the file.
151 See pages 0677 – 0685 and 7810 – 7811 of the file.
152 See page 5154 of the file.

advance of that meeting[153]. A representative of Daicel used to write the agenda for the meetings with Hoechst on a whiteboard during the preparatory meetings[154].

(233) At the preparatory meetings, the Japanese producers confirmed their sales figures for the previous calendar year and discussed price levels and market conditions in Europe. During these meetings, Daicel collected market information from the other Japanese producers and then relayed the information to Hoechst, by telephone or fax[155].

(234) After each joint meeting, the Japanese used to meet in order to divide the total quota allocated to them.

9.3.Bilateral contacts

9.3.1. Hoechst and the Japanese producers

(235) Telephone contacts between Hoechst and the Japanese producers on matters directly or indirectly related to the agreements used to take place regularly to verify price discipline and to discuss specific customers. In general, however, when telephone communications were initiated by the Japanese producers, these were normally made to Hoechst Japan, due to language problems, or channelled through Daicel (Mr. […] was Hoechst's contact person). The frequency of the calls varied between once every two weeks and two or three phone calls per week at times, until the late 1980s[156]. During the period from the late 1980s to the mid-1990s, call frequency varied from 2 to 10 calls per month[157].

(236) Hoechst and Daicel used to have regular contacts during the whole period of the infringement. They used to exchange information, as reports on volumes and prices by region in order to compare this updated information with the documents distributed during the joint meetings. In the mid-1990s, Ueno occasionally called (approximately 10 times in total) Hoechst to discuss some specific UK customers, due to the fact that Hoechst had taken these customers from Ueno. Nippon also called Hoechst a few times[158].

9.3.2. Hoechst and […][...]

(237) [...].

(238) [...].

(239) [...].

(240) [...].

(241) [...][...].

(242) [...].

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153 See page 5154 of the file.
154 See page 7781 of the file.
155 See pages 7780 - 7781 of the file.
156 See pages 18248 – 18249 of the file.
157 See page 18249 of the file.
158 See page 18249 of the file.

(243) [...].

(244) [...]:

(245) [...].

(246) [...].

(247) [...].

(248) [...].

(249) [...].

PART II – LEGAL ASSESSMENT

10. THE EC TREATY AND THE EEA AGREEMENT

10.1. Relationship between the EC Treaty and the EEA Agreement

(250) The arrangements described applied to all the territory of the EEA in which a demand of sorbates existed, as the cartel members had sales in practically all the Member States and in the EFTA States, Parties to the EEA Agreement. The arrangements in question extended to Austria, Sweden and Finland prior to their accession to the European Union on 1 January 1995.

(251) The EEA Agreement, which contains provisions on competition analogous to those of the EC Treaty, came into force on 1 January 1994. For the period prior to that date during which the cartel operated, the only provision applicable to these proceedings is Article 81 of the EC Treaty.

(252) Insofar as the arrangements affected competition in the Common Market and trade between Member States, Article 81 of the Treaty is applicable; as regards the operation of the cartel in EFTA States which are part of the EEA and its effect upon trade between the Community and EEA States or between EEA States, this falls under Article 53 of the EEA Agreement.

10.2. Jurisdiction

(253) In this case, the Commission is the competent authority to apply both Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement on the basis of Article 56 of the EEA Agreement, since the cartel had an appreciable effect on competition in the Common Market as well as on trade between Member States.

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

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

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

(255) Article 53(1) of the EEA Agreement contains a similar prohibition. However, the reference in Article 81(1) of the Treaty to "trade between Member States" is replaced in the EEA Agreement by a reference to "trade between contracting Parties" and the reference to competition "within the common market" is replaced by a reference to competition "within the territory covered by the…[EEA] agreement".

11.2. The nature of the infringement in this case

(256) Articles 81(1) of the Treaty and 53(1) of the EEA Agreement prohibit *agreements* between undertakings, *decisions by associations of undertakings* and *concerted practices*.

11.2.1. Agreements and concerted practices

(257) An *agreement* can be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The fact of agreement may be express or implicit in the behaviour of the parties. Furthermore, it is not necessary, in order for there to be an infringement of Article 81(1) of the Treaty, for the participants to have agreed in advance upon a comprehensive common plan. The concept of *agreement* in Article 81(1) of the Treaty would apply to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement.

(258) In its Judgement in Joined Cases T-305/94 *Limburgse Vinyl Maatschappij N.V. and others v. Commission* (*PVC II*)[159], the Court of First Instance stated that "it is well established in the case-law that for there to be an agreement within the meaning of Article [81(1)] of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way"[160].

(259) Article 81 of the Treaty and Article 53 of the EEA Agreement draw a distinction between the concept of "*concerted practice*" and that of "*agreements between undertakings*". The object is to bring within the prohibition of these Articles a form of co-ordination between undertakings by which, without having reached the stage where an agreement properly so-called has been concluded, they knowingly substitute practical co-operation between them for the risks of competition[161].

(260) The criteria of co-ordination and co-operation laid down by the case law of the Court of Justice, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the commercial policy which it intends to adopt in the common market. Although that requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators the objet 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[162].

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159 [1999] ECR II-931, at paragraph 715.

160 The case law of the Court of Justice and the Court of First Instance in relation to the interpretation of Article 81 of the Treaty applies equally to Article 53 of the EEA Agreement. See recitals No 4 and 15 as well as Article 6 of the EEA Agreement, Article 3(2) of the EEA Surveillance and Court Agreement, as well as Case E-1/94 of 16.12.94, recitals 32-35.

161 Case 48/69 *Imperial Chemical Industries v Commission* [1972] ECR 619 at paragraph 64.

162 Joined Cases 40-48/73, etc. *Suiker Unie and others v Commission* [1975] ECR 1663.

(261) Thus, conduct may fall under Article 81(1) of the Treaty as a *concerted practice* even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour[163]. Furthermore, the process of negotiation and preparation culminating effectively in the adoption of an overall plan to regulate the market may well also (depending on the circumstances) be correctly characterised as a concerted practice.

(262) Although in terms of Article 81(1) of the Treaty the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active on the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period. Such a concerted practice is caught by Article 81 (1) of the Treaty even in the absence of anti-competitive effects on the market[164].

(263) Moreover, it is established case-law that the exchange, between undertakings, in pursuance of a cartel falling under Article 81 (1) of the Treaty, of information concerning their respective deliveries, which not only covers deliveries already made but is intended to facilitate constant monitoring of current deliveries in order to ensure that the cartel is sufficiently effective, constitutes a concerted practice within the meaning of that article[165].

(264) It is demonstrated in the facts described in this Decision that during the relevant period, the addressees of this Decision expressed their joint intention to fix target prices and allocate volume quotas, for Europe and elsewhere, that they decided not to supply technology to potential market entrants, and that they instituted a monitoring system for target prices and volume quotas, with the aim of controlling the world market for sorbates.

(265) Even if the arrangements between the addressees of this Decision could correctly be considered as presenting all the characteristics of a full "agreement", some factual elements of the illicit venture could aptly be described as a concerted practice. In particular, the exchange of information that occurred regularly between the sorbates producers intending to facilitate the monitoring of current prices and volume quotas in order to ensure adequate effectiveness of the agreement, can be considered as a concerted practice. Regarding the anti-competitive object and effect of the information exchanged, the exercise has to be seen in its context and in the light of all the circumstances. The exchange served to attain the single objective and further enabled the undertakings to adapt their strategies to the information received from competitors. This permanent exchange of information guaranteed the survival of the restricted competition system. In the event of a manifest imbalance in market shares or

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163 See also the judgement of the Court of First Instance in Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, at paragraph 256.

164 See also the judgement of the Court of Justice in Case C-199/92 *P Hüls v Commission*, [1999] ECR I-4287, at paragraphs 158-166.

165 See, in this sense, the judgements of the Court of First Instance in Case T-147/89, *Société Métallurgique de Normandie v Commission* [1995] ECR II-1057, Case T-148/89 *Trefilunion v Commission* [1995] ECR II - 1063 and Case T-151/89 *Société des treillis et panneaux soudés v Commission* [1995] ECR II-1191, each time at paragraph 72.

prices, the conflict could be settled through discussion, proposals, persuasion, or "force" if necessary[166].

(266) However, in the case of a *complex infringement* of long duration, it is not necessary for the Commission to characterise the conduct as exclusively one or other of these forms of illegal behaviour. The concepts of agreement and concerted practice are fluid and may overlap. The anti-competitive behaviour may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when considered in isolation some of its manifestations could accurately be described as one rather than the other. It would however be artificial analytically to sub-divide what is clearly a continuing common enterprise having one and the same overall objective into several different forms of infringement.

(267) In its *PVC II* judgement, the Court of First Instance confirmed that "[i]n the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [81] of the Treaty"[167].

(268) An agreement for the purposes of Article 81(1) of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract at civil law. Moreover, in the case of a complex cartel of long duration, the term "agreement" can properly be applied not only to any overall plan or to the terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose. As the Court of Justice, upholding the judgement of the Court of First Instance, has pointed out in Case C-49/92P *Commission v Anic Partecipazioni SpA*[168] it follows from the express terms of Article 81(1) of the Treaty that agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.

(269) The Commission therefore considers that the complex of infringements in this case present all the characteristics of an agreement and/or a concerted practice in the sense of Article 81 of the Treaty.

11.2.2. Single and continuous infringement

(270) A complex cartel may properly be viewed as a *single and continuous infringement* for the time frame in which it existed. The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. The validity of this assessment is not affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute a violation of Article 81(1) of the Treaty.

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166 See also judgement of Court of Justice in Case C-7/95P *John Deere* v *Commission* [1998] ECR I-3111, paragraph 67, upholding the judgement of Court of First Instance, see in particular paragraph 96.

167 See paragraph 696 of *PVC II* judgement.

168 [1999] ECR I - 4125, at paragraph 81.

(271) The agreements and concerted practices found to exist form part of an overall scheme which laid down the lines of the actions of the cartel members in the market and restricted their individual commercial conduct with the aim of pursuing an identical anti-competitive object and a single economic aim, namely to distort the normal movement of prices in the world-wide market for sorbates and to restrict world-wide production by the allocation of volumes quotas. Moreover, the Commission considers that it would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which simultaneously would manifest itself in both agreements and concerted practices.

(272) Although a cartel is a joint enterprise, each participant in the agreement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries, or even cheating may occur, but will not however prevent the arrangement from constituting an agreement/concerted practice for the purposes of Article 81(1) of the Treaty where there is a single common and continuing objective.

(273) The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and the same anti-competitive effect. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. This is certainly the case where it is established that the undertaking in question was aware of the unlawful behaviour of the other participants or could have reasonably foreseen or been aware of them and was prepared to take the risk[169].

(274) In fact, as the Court of Justice stated in its judgement in *Commission v Anic Partecipazioni*, the agreements and concerted practices referred to in Article 81 (1) of the Treaty necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged. It follows that infringement of that article may result not only from an isolated act but also from a series of acts or from a continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves an infringement of Article 81 of the Treaty[170].

(275) In this case, the behaviour of both the Japanese producers and Hoechst constitutes undoubtedly a single and continuous infringement.

(276) The fact that the undertakings concerned did not participate directly in all the constituent elements of the overall cartel cannot relieve them of responsibility for the infringement of Article 81 (1) of the Treaty. Such a circumstance may nevertheless be taken into account when assessing the seriousness of the infringement which they are found to have committed.

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169 *Commission v Anic Partecipazioni*, at paragraph 83.

170 paragraphs 78-81, 83-85 and 203.

(277) Such a conclusion is not at odds with the principle that responsibility for such infringements is personal in nature, nor does it neglect individual analysis of the evidence adduced, in disregard of the applicable rules of evidence, or infringe the rights of defence of the undertakings involved.

11.3. Restriction of competition

(278) The anti-competitive behaviour in this case had the object and effect of restricting competition in the Community and EEA.

(279) Article 81(1) of the Treaty and Article 53 (1) of the EEA Agreement expressly include as restrictive of competition agreements and concerted practices which[171]:

(a) directly or indirectly fix selling prices or any other trading conditions;

(b) limit or control production, markets or technical development;

(c) share markets or sources of supply.

(280) 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 inflating prices to their benefit. By fixing volume quotas, the producers would be prevented from competing for market share and would gradually succeed in increasing the market price. Price fixing and allocation of volume quotas by their very nature restrict competition within the meaning of both Article 81(1) of the Treaty and Article 53 (1) of the EEA Agreement. While, as a general rule, no undertaking can be obliged to provide technology to actual or potential competitors, agreements between undertakings not to supply such technology to other undertakings go beyond acceptable business practice and constitute an infringement of competition rules.

(281) The cartel has to be considered as a whole and in the light of the overall circumstances. The principal aspects of the complex of agreements and concerted practices which can be characterised as restrictions of competition are:

(a) fixing of target prices;

(b) allocating volume quotas;

(c) agreeing not to supply technology to potential market entrants;

(d) defining and applying a reporting and monitoring system to ensure the implementation of restrictive agreements;

(282) This complex of agreements and concerted practices have as their object the restriction of competition within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

(283) It is settled case-law that for the purpose of application of Article 81(1) of the Treaty and Article 53 (1) of the EEA Agreement there is no need to take into account the

[171] The list is not exhaustive.

actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved[172].

(284) In this case, however, the Commission considers that, on the basis of the elements which are put forward in this Decision, it has also proved that the anti-competitive cartel decisions have been implemented and that the cartel arrangements have therefore had actual anti-competitive effects.

(285) The implementation of the cartel decisions was ensured by the monitoring scheme instituted by the conspirators. When prices fell below the target prices for key customers, they used to call each other on the telephone to try to ensure that such prices were brought closer into line with the targets. As for volume quotas, "Table I" shows that the producers generally respected the agreed volume quotas during all the period of the infringement. Moreover, they used to compare sales results with the allocated volume quotas, so that they could monitor compliance with the market allocations (see recitals (114) to (117).

(286) Even if it is not necessary to show actual anti-competitive effects where the anti-competitive object of a conduct is proved, the anti-competitive effects of the cartel arrangements were established in "Part I". It is, in fact, proved, that throughout the relevant period, target prices either raised actual prices or prevented actual prices from coming down (see recital (105)) and volume quotas prevented the companies from competing for market share, which would have driven prices down (recital 109)).

11.4. Effect upon trade between Member States and between EEA Contracting Parties

(287) The continuing agreement between the sorbates producers had an appreciable effect on trade between Member States and between EEA Contracting Parties.

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

(289) As demonstrated in recitals (75) to (78), the market for sorbates is characterised by a substantial volume of trade between Member States. There is also a considerable volume of trade between the Community and EFTA countries belonging to the EEA.

(290) The application of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement to a cartel is not, however, limited to that part of the members' sales that actually involve the transfer of goods from one State to another. Nor is it necessary, in order for these provisions to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States[173].

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172 Case T-62/98 *Volkswagen AG v Commission* [2000] ECR II-2707, paragraph 178.

173 See judgement of the Court of First Instance in Case T-13/89 *Imperial Chemical Industries v Commission* [1992] ECR II-1021, at paragraph 304.

(291) In this case, the cartel arrangements covered virtually all trade throughout the Community and EEA. The existence of a price-fixing mechanism and a quota allocation system must have resulted, or was likely to result, in the automatic diversion of trade patterns from the course they would otherwise have followed[174].

(292) Insofar as the activities of the cartel related to sales in countries that are not members of the Community or the EEA, they lie outside the scope of this Decision.

11.5. Duration of the infringement

(293) It is apparent from the facts described in recitals (82) and (107) that contacts between the four Japanese producers and Hoechst with a view to concluding price-fixing and a quota system agreement were initiated at least in 1978 when Hoechst and the four Japanese producers – Chisso, Daicel, Nippon and Ueno – agreed on the allocation of volume quotas for that year. As it is not possible for the Commission to establish the exact date when the conspirators agreed on the allocation of volume quotas for 1978, the Commission will take 31 December 1978 as the relevant date for determining duration in their case.

(294) In its reply to the Statement of Objections, Ueno contested its participation in the first meeting when the conspirators agreed on the allocation of volume quotas for 1978, as well as in the 1979 spring joint meeting.

(295) The Commission proved in Part I (see recitals (82) and (124) that Ueno instituted the quota system at the same time as the other conspirators in 1978 and that it participated in the 1979 spring joint meeting, having notably been allocated a volume quota in Europe of 442 metric tons. The direct evidence provided in recital (82) (a Chisso Memo from 1980) clearly and explicitly mentions the "4 Japanese companies". Furthermore, several other passages of that Memo extensively and explicitly refer to Ueno's participation in the first volume allocation for 1978[175]. As regards Ueno's participation in the 1979 spring joint meeting, its participation and the volume quotas allocated to this company in 1979 were clearly proved in recitals (124) to (126) [176]. The Commission will thus take 31 December 1978 as the relevant date for determining the duration of Ueno's participation in the infringement.

(296) The last of the joint group meetings occurred in November 1996 between Hoechst, Daicel and Chisso. As it is not possible for the Commission to establish the exact day when this meeting took place, the Commission will take 31 October 1996 as the relevant date for determining the duration of Chisso, Daicel and Hoechst's participation in the infringement.

(297) In its reply to the Statement of Objections, Ueno claims that the date taken by the Commission for the end of its infringement should be 3 March 1995, since no Ueno representative attended the joint group meeting of 18 April 1996.

(298) The Commission must dismiss this argument. Ueno's participation in the joint group meeting of 18 April 1996 was proved in the Part I. Direct and contemporaneous

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174 See judgement of the Court of Justice in Joined Cases 209 to 215/78 and 218/*78 Van Landewyck and others v Commission* [1980] ECR 3125, at paragraph 170.

175 See pages of the file mentioned in footnote 45.

176 See especially Mr. Akuzawa tables and Chisso's explanatory notes in the pages of the file mentioned in footnote 106.

evidence (Mr. […]'s notes of this meeting) explicitly refers to "U" (Ueno)[177]. Having proved Ueno's participation in the joint group meeting of 18 April 1996, account should be taken of the fact that the producers agreed during this meeting on the sorbates target price for Europe to be charged until the November 1996 joint meeting (see recital 224). Consequently, the Commission will take 31 October 1996 as the relevant date for determining duration in Ueno's case.

(299) Nippon formally declared that it would no longer take part in the cartel meetings in December 1995 (see recital (225)). The Commission will take 30 November 1995 as the relevant date for determining duration in Nippon's case.

11.6. Addressees of this Decision

(300) It is established by the facts described in Part I that Chisso, Daicel, Hoechst, Nippon and Ueno have directly participated in the single continuous infringement found in this Decision, for the periods indicated.

(301) Although only Nutrinova contacted the Commission on 27 October 1998 and expressed its wish to co-operate with the Commission pursuant to the 1996 Leniency Notice with regard to the sorbates cartel and it was only on 28 April 1999 that the Commission received the power of attorney conferred by Hoechst on Nutrinova's legal representative, the Commission will accept Nutrinova's leniency application, as also being submitted by Hoechst.

(302) On the basis of the above considerations, the Commission considers that the following companies should bear responsibility for their respective infringements and be addressees of this Decision:

(a) Chisso Corporation

(b) Daicel Chemical Industries, Ltd.

(c) Hoechst AG

(d) The Nippon Synthetic Chemical Industry Co, Ltd.

(e) Ueno Fine Chemicals Industry, Ltd.

12. REMEDIES

12.1. Article 3 of Regulation No 17

(303) Where the Commission finds that there is an infringement of Article 81(1) of the Treaty or Article 53 (1) of the EEA Agreement it may require the undertakings concerned to bring such infringement to an end in accordance with Article 3 of Regulation No 17[178].

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177 See, especially, pages 0122, 0127 and 0131 of the file..

178 Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements of implementing the Agreement on the European Economic Area "the Community rules giving effect to the principles set out in Articles 85 and 86 [now Articles 81 and 82] of the EC Treaty […] shall apply *mutatis mutandis*", OJ L 305/6 of 30 November 1994.

(304) In this case, the participants in the cartel went to considerable lengths to conceal their unlawful conduct. The Commission stated in its Statement of Objections that it was not possible to declare with absolute certainty that the infringement had ceased.

(305) In their replies to the Statement of Objections, the undertakings claimed that they had ended their participation in the infringement. Notwithstanding these observations, and in the interest of clarity, it is necessary for the Commission to require the undertakings to which this Decision is addressed to bring the infringement to an end, if they have not already done so, and henceforth to refrain from any agreement, concerted practice or decision of an association which might have the same or a similar object or effect.

(306) The prohibition should apply not only to secret meetings and multilateral or bilateral contacts but also to the activities of the undertakings in so far as they involve, in particular, collecting and diffusing individualised sales statistics.

12.2. Article 15(2) of Regulation No 17

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

(308) In fixing the amount of any fine the Commission must have regard to all relevant circumstances and particularly the gravity and duration of an infringement, which are the two criteria explicitly referred to in Article 15(2) of Regulation No 17.

(309) In relation to each undertaking, the fine imposed for each infringement should reflect any aggravating or attenuating circumstances[179]. It should take account of, *inter alia,* the role played by each participant, in particular the role of leader or instigator or the exclusively passive or "follow-my-leader" role played by some undertakings, a repeated infringement of the same type by the same undertakings, retaliatory measures against other undertakings with a view to enforcing practices which constitute an infringement and the termination of the infringement as soon as the Commission intervenes, in particular when it carries out an inspection.

(310) The Commission will apply, as appropriate, the 1996 Leniency Notice.

12.2.1. Application of the "ne bis in idem" Principle

Arguments of the Parties

(311) Daicel, Hoechst and Nippon submit that they were already fined by the US and Canadian authorities for the same facts. Therefore, under the fundamental principle of *ne bis in idem*, they should not be punished a second time under Community competition law or, at the least, the Commission should take into account the sanctions already imposed in these jurisdictions. They argue that the US and Canadian fines imposed on them for the unlawful restrictions of competition having not excluded anti-competitive activity which had effects on

[179] See Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty ("the guidelines on fines"), OJ C 9, 14.1. 1998, p.3.

the European market, these sanctions would have to be fully set off against any Community fines, pursuant to the *Boehringer II* case-law[180].

Assessment of the Commission

(312) The Commission rejects this argument. It does not consider that fines imposed elsewhere have any bearing on the fines to be imposed for infringing Community competition rules. The exercise by the United States (or any third country) of its jurisdiction against cartel behaviour can in no way limit or exclude the Commission's jurisdiction under Community competition law.

(313) More importantly, in any case the Commission has no intention to sanction them for the same facts as the US and Canadian authorities had. By virtue of the principle of territoriality, Article 81 of the Treaty is limited to restrictions of competition in the common market and Article 53 EEA is limited to restrictions of competition in the EEA market. In the same way, the US and Canadian antitrust authorities only exercise jurisdiction to the extent that the conduct has a direct effect on commerce in their jurisdictions.

(314) The case-law of the Community judicature confirms the Commission's position. In fact, it is established case-law[181] that the procedures conducted and penalties imposed by the Commission on the one hand and the American and Canadian authorities on the other clearly pursue different ends. The aim of the first is to preserve undistorted competition within the Community and the EEA, whereas the aim of the second is to protect the American and Canadian markets. Given that, at present, there is no principle of public international law that prevents the authorities or courts of different States from trying and convicting the same person on the basis of the same facts - and such a rule could arise today only through very close international co-operation leading to the adoption of common rules -, the Parties cannot claim that the Commission failed to satisfy such an obligation.

12.2.2. Application of Article 15(2) of Regulation No 17

12.2.2.1. Intentional or negligent behaviour

(315) 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 illegality of their actions, the leading producers combined to set up a secret and institutionalised system designed to restrict competition in a major industrial sector.

(316) In any way, an infringement of the competition rules may be regarded as having been committed intentionally if the undertaking could not have been unaware that the object of its conduct was the restriction of competition. It is not therefore necessary for an undertaking to have been aware that it was infringing those rules[182].

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180 See judgement in Case 7/72 Boehringer v Commission (*Boehringer II*) [1972] ECR page 1281, at paragraph 3.

181 See, for example, judgement of the Court of First Instance of 9 July 2003 in Case T-224/**00**, *Archer Daniels Midland Company v Commission*, paragraphs 85-104, especially paragraphs 89-90, not yet published.

182 See Cases T-143/89 *Ferriere Nord v Commission* [1995] II-917, paragraph 41, as well as Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and others v Commission* [2001] II-03757, paragraph 200.

Arguments of Ueno

(1) Ueno submits that it was not aware of the illicit character of the cartel meetings from September 1979 until May 1990, since *i)* the Japanese Government had authorised the creation of the Japanese sorbates export cartel and an act authorised by the Government is supposed to be lawful and proper, and; *ii)* it was convinced that the other meetings held outside the Japanese sorbates export cartel were motivated by lawful intentions. According to Ueno, the sole purpose of these meetings was to avoid anti-dumping claims by discussing floor prices, that is, prices under which the producers should not sell to avoid anti-dumping actions.

Assessment of the Commission

(2) The Commission rejects Ueno's argument. The facts in this case contradict Ueno's contention that the Parties fixed floor prices, the sole purpose of which was to avoid anti-dumping claims. On the contrary, the discussions concerning target prices and volume quotas aimed at fixing the highest price possible under the current market conditions at the time, in order to ensure the maximum profit. Secondly, it was not in the context of the Japanese sorbates export cartel that the four Japanese producers, addressees of this Decision, used to meet and agree the target prices and volume quotas. The cartel meetings were organised at different levels and with secrecy, as it was explained in recitals (83) to (87). The Japanese Government was neither aware of the parallel cartel meetings between the Japanese producers nor of the joint meetings between the Japanese producers and Hoechst[183]. Consequently, Ueno could not have been unaware that the object of these actions was the restriction of competition.

12.2.2.2. The basic amount of the fines

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

Gravity

(318) In assessing the gravity of the infringement, account should be taken of, *inter alia*, its nature, its actual impact on the market when it can be measured and the size of the relevant geographic market.

Nature of the infringement

(319) It follows from the facts described in Part I that this infringement consisted mainly of price-fixing and market-sharing practices. The cartel arrangements were mostly conceived, directed and encouraged at a very high level of the undertakings concerned and operated entirely for the benefit of the participating producers and to the detriment of their customers and ultimately the general public. Therefore, they are by their nature very serious violations of Articles 81(1) of the Treaty and 53(1) of the EEA Agreement.

Arguments of Daicel

[183] See Ueno response to the Commission's question during the hearing held on 24 April 2003.

(320) Daicel submits that both the background (anti-dumping claims filed in the US by Monsanto in 1977 against all the four Japanese producers and the threats of similar actions by Hoechst) and the Japanese Government sponsored origins of the cartel, should lead the Commission to characterise the infringement as belonging to the category of a serious, rather than a very serious, violation of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement, at least for the period covered by the Japanese sorbates export cartel (1981-1990).

Assessment of the Commission

(321) The Commission rejects this approach and maintains that, by their very nature, price-fixing cartels jeopardise the proper functioning of the common market. Furthermore, within the category of price-fixing cartels, the fact that the behaviour of companies may have been influenced by some external circumstances in the relevant market cannot, in view of the incompatibility of such cartels with the common market and with regard to the gravity of the infringement as a whole, be taken into account.

(322) The anti-dumping actions brought by Monsanto and the alleged threats of similar actions by Hoechst, on the one hand, and the existence of the Japanese sorbates export cartel, on the other hand, constitute external circumstances that cannot be taken into account in the assessment of the infringement's nature. These external circumstances do not change the objective and intrinsic nature of the anti-competitive behaviour of the companies.

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

(323) The infringement in this case has an anti-competitive object, because the Parties agreed on price targets, allocated volume quotas for sorbates, decided not to supply technology to potential market entrants and monitored their anti-competitive arrangements. It is settled case-law that for the purpose of application of Article 81(1) of the Treaty and Article 53 (1) of the EEA Agreement there is no need to take into account the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved[184]. However, the Commission is of the opinion that in this case the infringement had an actual impact on the sorbates market in the EEA.

(324) The actual impact of a complex agreement in the market depends in the first place on whether it was implemented and the effect the implementation of the agreement produced in the market.

(325) To the greatest extent possible, a distinction is drawn between the question of the implementation of the agreement and the question of its effect in the market. Nonetheless, there is, understandably, some overlap between the factual elements used to reach conclusions on these two points.

Implementation of the illegal scheme

(3) As it was established in Part I, the cartel agreements were carefully implemented.

184 Case T-62/98 *Volkswagen AG vs Commission,*paragraph 178.

(4) The cartel members had a continuous concern for the setting of target prices (see recitals (99) to (106). Price levels were discussed at the joint cartel meetings, where a price was set for each EEA country in DEM and then converted into each country's currency. Initially a price was set for end user customers, but later by reference to the price to dealers. The reporting and monitoring system of target prices instituted by the Parties ensured the effective implementation of the targets set.

(5) Volume quotas were allocated in tonnes for each region of the world by the cartel members at the spring joint meetings. The purpose of this quota system was to gradually increase the market price, since each cartel member would sell its allocated volume at the highest possible price. The reporting and monitoring system of volume quotas instituted by the Parties ensured the effective implementation of the quotas.

Effect of the infringement on the sorbates market

(6) Even if it is difficult to measure in a precise manner the actual impact in the market of the cartel at stake, the infringement committed by the addressees of this decision, which during its duration controlled directly or indirectly practically the entire EEA market for sorbates, had the effect of raising prices higher than they would otherwise have been, and therefore undoubtedly had an actual impact on the sorbates market in the EEA.

(7) In fact, target prices either raised actual prices or prevented actual prices from coming down. The conspirators' goal was to bring actual prices as close to the target price as possible, deciding to review their initial price agreements and occasionally agreeing to lower the target prices where the market conditions did not permit a target price increase. It has to be observed, however, that, since this was an agreement relating to target prices, rather than to fixed prices, it is clear that the implementation of the agreements simply meant that the Parties would endeavour to achieve those objectives[185].

(326) As regards the effect the cartel had on sales volumes, it was clearly demonstrated in Part I (see Table II, in recital (112)) that the volume quotas actually achieved were in line with what had been allocated to each of them under the volume quota agreements, although there was a substantial amount of "grey material" which can be attributed to Ueno.

(327) Finally, as indicated in recital (63), the product concerned by the cartel is the leading product in the preservatives sector. In this sector, many purchasers prefer the sorbates, notwithstanding their higher price, for quality reasons. Neither of the other preservatives constitute perfect substitutes. Hence, the sorbates producers were in a position to control not only the sorbates market but to a great extent the preservatives sector. Therefore, the implementation of the cartel arrangements had a significant impact on the sorbates market, as the cartel members were in a position to impose their co-ordinated behaviour in the market and sorbates purchasers could not turn to substitute products.

Conclusion

[185] See, in this sense, judgement in Case T-224/00, *Archer Daniels Midland Company and Archer Daniels Midland Ingredients Ltd v Commission*, at paragraph 160.

(8) In the light of the foregoing and of the efforts put by each participant into the organisation of the cartel, there is no doubt that the anti-competitive agreements have been implemented throughout the infringement period. Such continuous implementation has had an impact on the sorbates market.

Arguments of Daicel

(328) Daicel argues that the infringement could only have had a limited effect on the market given that any target prices and volumes were rarely, if ever, achieved in practice, particularly given overriding market conditions during the relevant period.

Assessment of the Commission

(329) Daicel's argument is not conclusive. The Commission firstly notes that the implementation of agreements on target prices does not necessarily require that these exact prices be applied. The agreements can be held to be implemented when the parties fix their prices in order to move them in the direction of the target agreed upon. The explanations for occasional failures to achieve the target prices are far from demonstrating in any convincing manner that the implementation of the cartel agreement could not have influenced the setting and fluctuation of prices in the sorbates market.

(9) There is no need to quantify 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 products, thereby making it extremely difficult to draw conclusions on the relative importance of all possible causal effects.

(10) The fact that in spite of the cartel's efforts the results sought by the participants were not entirely achieved may illustrate the difficulties encountered by the parties in increasing prices in a specific market situation, but it does not prove in any way that the cartel had no effect on the market, nor that prices were not kept above competitive level. Although it is difficult to determine precisely to what extent prices would have been different without the cartel, the conscious implementation of the cartel agreements had an actual impact on the sorbates market in the EEA.

(11) In the case of a collusion consisting, *inter alia*, of a collaborative strategy of higher pricing, the fact that a number of external factors may simultaneously have affected the price development of the product makes it extremely difficult to draw conclusions as to the relative importance of all possible causal effects.

The size of the relevant geographic market

(330) For the purpose of assessing gravity it is important to note that the cartel covered the whole of the common market and, following its creation, the whole of the EEA market. The Commission considers thus the whole of the EEA to have been affected by the cartel.

The Commission's conclusion on gravity

(331) Taking into account the nature of the infringement in this case, its actual impact on the sorbates market and the fact that it covered the whole of the common market and, following its creation, the whole of the EEA market, the Commission considers that the

undertakings concerned by this Decision have committed an infringement of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement, which was very serious.

Differential treatment

(332) Within the category of very serious infringements, the 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. This exercise is particularly necessary where, as in this case, there is considerable disparity in the market size of the undertakings participating in the infringement.

(333) In the circumstances of this case, which involves several undertakings, it will be necessary in setting the basic amount of the fines to take account of the specific weight and therefore the real impact of the offending conduct of each undertaking on competition. For this purpose, the undertakings concerned can be divided into different groups established according to their relative importance in the relevant market.

Arguments of Ueno and Nippon

(334) Ueno submits that there are significant differences between Ueno and the other undertakings, notably as to their size, since it is by far the smallest company of all the Parties. Its turnover is 1/10 of that of Daicel, 1/67 of Hoechst's, 1/5 of Chisso's and 2/3 of Nippon's. In terms of assets, its total assets are 1/16 of those of Daicel's, 1/115 of Hoechst's and 1/7 of Nippon.

(335) Nippon submits that it is the smallest player in the market.

Assessment of the Commission

(336) The gravity of a cartel infringement and, especially, its impact on competition within a particular region may be measured in an accurate way by regarding the market size within that region. However, given the circumstances of this case, in particular the fact that the relevant market, being world-wide in scope, exceeds the region to which the sanction applies, namely the EEA, and that the functioning of the cartel was organised on a world-wide basis - , the object of which was *inter alia* to allocate markets on a world-wide level, and thus to withhold competitive reserves from the EEA market -, the undertaking's world-wide product turnover provides a precise estimation of each company's relative capacity and contribution to the overall damage caused to competition in the EEA. Moreover, the world-wide product turnover of any given party to the cartel also gives an indication of its contribution to the effectiveness of the cartel as a whole or, conversely, of the instability which would have affected the cartel had it not participated. Therefore, the fact that world-wide product turnover is taken into account when deciding on differential treatment of undertakings participating in a global cartel, in no way implies that the undertakings are being penalised twice for the same behaviour. In any event, a differential treatment of the Parties in this case based on the EEA-wide product turnover would not lead to a different outcome.

(337) In this case, the Commission therefore considers it appropriate to take the world-wide product turnover in the last full year of the infringement (1995) as the basis for comparing the relative importance of each undertaking in the market concerned.

(338) The comparison is made on the basis of the 1995 world-wide market shares referred to in Table I, which were obtained from the 1995 world-wide product turnover

provided by the companies themselves in their response to the Commission's requests for information.

(339) Table I shows that in 1995 Hoechst was by far the largest producer of sorbates in the world-wide market with a market share of […]% (in the EEA […]%). It is therefore placed in the first group. Daicel, Chisso Nippon and Ueno all have market shares between […]% and […]% (in the EEA between […]% and […]%). Therefore, they are placed in the second group.

(340) The Commission accepts that the effect of this method is to make the basic amounts for all undertakings in the same group the same, and therefore has the effect of ignoring the differences in size between undertakings in the same group. However, the Commission is not required, when determining fines on the basis of the gravity and duration of the infringement in question, to ensure, where fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines resulting from its calculations for the undertakings concerned reflect any distinction between them in terms of their turnover[186].

(341) The likely fine for very serious infringements is above EUR 20 million.

(342) On the basis of the foregoing, the appropriate starting amount for the fines to be imposed in this case resulting from the criterion of relative importance in the market concerned is, for each of the two groups defined in recital (352), as follows:

– first group: EUR 20 million

– second group: EUR 6,66 million.

Sufficient deterrence

(343) In order to ensure that the fine has a sufficient deterrent effect on large undertakings and take 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 to be aware of the consequences stemming from that conduct under competition law, the starting amount for Hoechst should be further adjusted.

(344) In the case of Hoechst, being by far the largest undertaking concerned by this Decision, the Commission considers that the appropriate starting amount for a fine resulting from the criterion of the relative importance in the market concerned requires further upward adjustment to take account of its size and its overall resources. Therefore, the starting amount of its fine determined in recital (355) should be increased by 100 %. to EUR 40 million.

Duration of the infringement

(345) The Commission has regard to the duration of each undertaking's participation in the infringement.

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[186] See, in this sense, judgement of the Court of First Instance of 19 March 2003 in Case T-213/00, *CMA and others v Commission*, at paragraph 385, not yet published.

(346) As mentioned, the Commission considers that Chisso, Daicel, Hoechst and Ueno infringed Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement from 31 December 1978 until 31 October 1996. They committed a long-term infringement of seventeen years and ten months. The starting amount of the fines determined for gravity, in recital (355) for Chisso, Daicel and Ueno and in recital (357) in the case of Hoechst, should therefore be increased by 175 %.

(347) Nippon infringed Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement from 31 December 1978 until 30 November 1995. It committed a long-term infringement of sixteen years and eleven months. The starting amount of its fine determined in recital (355) for gravity should therefore be increased by 165 %.

Conclusion on the basic amounts

(348) The Commission accordingly sets the basic amounts of the fines for Chisso at EUR 18,315 million, for Daicel at EUR 18,315 million, for Hoechst at EUR 110 million, for Nippon at EUR 17,649 million and for Ueno at EUR 18,315 million.

12.2.2.3. The individual fines

(349) On the basis of its conclusions on the basic amount of fines, the Commission assesses for each company on an individual basis any aggravating or attenuating circumstances and will apply, as appropriate, the 1996 Leniency Notice.

Hoechst

Aggravating circumstances

(350) The gravity of the infringement is aggravated in Hoechst's case by the following circumstances:

(a) Hoechst's role as a leader of the cartel (recitals (92) to (95);

(b) Hoechst has been subject to previous decisions finding an infringement of the same type[187].

(351) As to Hoechst's leading role, it is apparent from the facts that Hoechst, along with Daicel, was an important driving force and one of the most active members in the cartel. As it was by far the most powerful cartel member and the world's largest producer of sorbic acid and potassium sorbate, it was therefore in a good position to persuade the other members of the cartel to follow its proposals, which were naturally in accordance with its own commercial strategic interests, allowing it to benefit the most from the cartel arrangements. In particular, Hoechst succeeded to impose its proposals during the joint meetings on the Japanese producers, especially with regard to volume quotas and prices on the European market. In 1992, it proposed to establish a price difference between sorbic acid and potassium sorbate and instituted it unilaterally in Europe as an experimental initiative. In autumn 1994 it also

[187] See Commission Decisions 94/599/EC (*PVC II*) (OJ L239, 14.9.1994, p.14.), 89/191/EEC (*PVC I*) (OJ l 74, 17.3.1989, p. 21.), 86/398/EEC (*Polypropylene*) (OJ L 230, 18.8.1986, p. 1.) and 69/243/EEC (*Dyestuffs*) (OJ L 195, 7.8.1969, p.11).

convinced the Japanese producers to establish it. After each joint meeting, Hoechst was usually the first to announce the new prices in Europe, followed by the Japanese producers.

(352) Furthermore, along with Daicel, Hoechst was in charge of scheduling and chairing the joint meetings (see recital (92). It acted as host for the joint meetings held in Europe, which it organised and paid for. Being conscious of the risks of detection by the Commission, Hoechst organised some of the cartel meetings outside the Community. It had regular contacts with Daicel during all the period of the infringement in order to exchange information, namely reports on volumes and prices by region, with the purpose of comparing the updated information with the documents distributed during the joint meetings. Moreover, it took several initiatives to effectively ensure monitoring of volume quotas adherence. It proposed the creation of a neutral Swiss organisation to collect the sales figures of the Japanese producers and it even unilaterally add 600 tons to its volume quota in 1995 due to the existence of grey material not reported by the Japanese producers. Being a member of the Chemical Industrial Products Export Co-operative (CIPEC), a Japanese organised export cartel that had no relationship with the conspiracy, Hoechst had access to the Japanese export statistics. It therefore was in a position to check the individual sales figures of the Japanese producers, whereas the Japanese producers had no access to Hoechst's sales figures.

(353) Moreover, it succeeded in ensuring the control of the European branch of the cartel, gradually managing to reinforce its already strong position on this market, demanding larger shares of the European market to the detriment of the Japanese producers, and completely controlling the anti-competitive contacts with [...]. It convinced the Japanese producers that [...] should not participate in the joint meetings (see recital (229)), and this fact allowed it to centralise the contacts with the only other European producer. Hoechst managed to ensure by its regular and exclusive contacts with [...], that the market behaviour of that undertaking would be in conformity with the decisions taken by the cartel members.

(354) Finally, in November 1996, when the last joint meeting took place, it tried to convince the other members, along with Daicel, to continue with the meetings and the agreements (see recital (94)).

(355) It is necessary to ensure that the level of the fine has sufficient deterrent effect. The Commission notes that previous Decisions addressed to Hoechst ordered the company to put an end to its anti-competitive conduct and to refrain from repeating it (see recital (363)). This should have prompted it to pay special attention to compliance with Community competition law and refrain from all deliberate violations. The fact that it repeated the same conduct shows that the previous fines were not such a deterrent as to make it change its conduct.

Arguments of Hoechst

(356) Hoechst contests the Commission’s finding that it was a leader of the cartel. It also argues that it only accepted the invitation to join the Japanese sorbates producer group. Moreover, it was neither the idea nor the initiative of Hoechst alone to approach [...]. During the lifetime of the cartel, it argues that it did not play the determining role. It took over the organisation of meetings in Europe due to the fact that it was the only European company to have participated in the cartel meetings.

(357) As far as recidivism is concerned, Hoechst claims that, in accordance with the general principles of limitation, where previous decisions for which sanctions have been imposed on an undertaking are so far back in time, they should no longer be relevant.

Assessment of the Commission

(358) As to Hoechst's contention that it was not a leader of the cartel, the Commission notes that Hoechst does not contest the facts on which the Commission bases its conclusion. It is clear that Hoechst, along with Daicel, was a driving force in the cartel, leading the others. However, the Commission accepts that other members of the cartel took certain initiatives in order to realise their common anti-competitive goals.

(359) Concerning Hoechst's position as recidivist, the Commission notes that the last decision ordering Hoechst to put an end to its anti-competitive conduct and to refrain from repeating it dates from July 1994. After that decision Hoechst continued the infringement which is the subject of these proceedings for more than two years. This clearly shows that the previous decision did not deter Hoechst from continuing its participation in a similar cartel.

Conclusion

(360) Hoechst's leading role in the cartel and its recidivist behaviour should therefore be considered as aggravating circumstances, justifying increases of 30 % and of 50 % respectively of the basic amount of the fine.

Attenuating circumstances

(361) There are no attenuating circumstances relating to the infringement in Hoechst’s case that could justify a reduction.

Conclusion

(362) The total fine to be imposed on Hoechst, before considering its co-operation with the Commission in these proceedings, amounts to EUR 198 million.

Daicel

Aggravating circumstances

(363) The gravity of the infringement is aggravated in Daicel’s case by its role as a leader of the cartel (see recitals (89) and (90).

(364) It is apparent from the facts, that Daicel acted as intermediary between the Japanese producers and Hoechst and [...]. It used to organise the preparatory meetings and a representative of Daicel used to chair these meetings. Daicel was in charge of scheduling the joint meetings and chaired the joint meetings, along with Hoechst. It had regular contacts with Hoechst during all the period of the infringement in order to exchange information, namely reports on volumes and prices by region, with the purpose of comparing the updated information with the documents distributed during the joint meetings. In 1981, it implemented the cartel penalty system against Chisso, having compelled Chisso to buy 60 to 70 tons from it because Chisso had exceeded its volume quota for 1980. Moreover, it was Daicel which insisted most vehemently on complying with set market share quotas, because it had the

largest share of all the Japanese producers and therefore had the greatest interest in maintaining the *status quo*. When Nippon decided no longer to attend the joint meetings, Daicel tried to convince it to stay in the group and to stick to the volume quotas and the target prices. In November 1996, when the last joint meeting took place, it wanted, along with Hoechst, to continue with the meetings and the agreements (see recital (89).

Arguments of Daicel

(365) Daicel contends that it would be wrong and unfair to equate Daicel's position as the largest Japanese producer and the role it played as intermediary between Hoechst and the other Japanese producers with that of Hoechst as the leader of the cartel. It argues that its intermediary role was essentially administrative in nature, as it evolved largely as a result of administrative convenience. To the extent that it may have played any greater role in the infringement compared to the other Japanese producers, it was, nevertheless, a much lesser and rather subsidiary role, which fell far short of Hoechst's leadership role as the principal motivator of the cartel.

Assessment of the Commission

(366) The Commission rejects Daicel's arguments. It acknowledges that due to language problems of the other Japanese producers, Daicel may have been in better position to establish the communications with Hoechst, especially the telephone contacts, than the other Japanese producers (see recital (236)). However, even if these regular bilateral contacts with Hoechst sometimes had administrative purposes, they permitted these two undertakings to set the agenda of the joint meetings, to select the subjects to be discussed and, consequently, to determine the general strategy of the cartel. In fact, Daicel, alongside with Hoechst, was a driving force behind the cartel. The two undertakings were by far the most powerful cartel members, with the largest market share and sharing the same interests. The fact that Hoechst played a leading role in the infringement does not mean that Daicel did not also do so. However, the Commission accepts that other members of the cartel took certain initiatives in order to realise their common anti-competitive goals.

Conclusion

(367) Having regard to the foregoing, the basic amount of the fine should be increased, in the case of Daicel, by 30 %.

Attenuating circumstances

(368) There are no attenuating circumstances relating to the infringement in Daicel's case.

Arguments of Daicel

(369) Firstly, Daicel submits that the inability of the sorbates producers to realise the target prices and the constant cheating of the producers with regard to target volumes, as well as the relatively modest size of its sorbates sales and its relatively low market share in Europe, prove that Daicel's participation in the infringement could only have had a limited effect on the market and, in particular, on purchasers of sorbates and ultimate consumers. Daicel submitted that the volumes of sorbates which it sold into Europe exceeded the quota allocated

to it for more half of the period of the infringement. In order to prove this claim it provided a graph comparing the cartel allocation with its actual sales.[188]

(370) Secondly, Daicel submits that the profits derived from its sorbates business in Europe are negligible when viewed in the context of its world-wide profits and the proportion of these profits accounted for by the infringement is even smaller. Moreover, any financial benefit which it may have derived from the infringement is likely to have been largely eroded by the fines and civil claims already paid by Daicel in other jurisdictions in sorbates related proceedings.

(371) Thirdly, Daicel submits that the discussions of price and volume targets, including those with Hoechst, arose out of an Official Export Cartel sanctioned by the Japanese Government. Consequently, they have to be viewed in context by the Commission, since they stemmed from legitimate concerns over dumping allegations and oversupply and were conducted during a period of time in which Japanese law had, in fact, generally permitted these information exchanges to take place, including with Hoechst.

(372) Fourthly, Daicel submits that the Commission should take into account the fact that Daicel ceased attending the cartel meetings in 1996 and did so prior to the opening of any investigations by the Community, as well as the US and Canadian, authorities.

(373) Fifthly, Daicel argues that the current proceedings (together with the related proceedings in the US and Canada) represent the first investigations to which Daicel has been subject in respect of any infringements of competition laws and that it has implemented a comprehensive compliance programme throughout the company.

(374) Finally, Daicel submits that the Commission should take into account as attenuating circumstance the fact that other jurisdictions outside the Community have already imposed fines relating to proceedings which emanate from essentially the same set of facts and that it has paid compensation in excess of USD […] to settle civil claims in the US. It also submits that, at the very least, the Commission should not punish Daicel for its participation in an unlawful agreement outside the EEA for which it has already been fined by calculating a fine for its infringement of Community law on the basis of Daicel's world-wide turnover.

Assessment of the Commission

(375) The Commission already rejected Daicel's argument concerning the inability of the sorbates producers to realise the target prices when examining the actual impact of the infringement on the sorbates market in the EEA (see recitals (327) to (337).

(376) Secondly, the fact that an undertaking which has been proved to have participated in a collusion on prices with its competitors and did not behave at all times on the market in the manner agreed with its competitors, and despite colluding with its competitors, follows a more or less independent policy on the market, simply exploits the cartel for its own benefit[189]. Such behaviour affects the market in a similar way as the implementation of the agreements.

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188 See annex 5 of Daicel's written observations of 12 March 2003.

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

(377) As to Daicel's claim that it did not implement in practice the agreed volume quota allocations, the graph on which Daicel bases its claim does not demonstrate a significant deviation between allocations and actual sales for a prolonged period of time. Indeed, the graph shows excessive sales of about 20-30% for three years, and only for 1990 sales exceeding the quota by about 50%.

(378) As to Daicel's claim that its participation in the infringement could only have had a limited effect on the market and, in particular, on purchasers of sorbates and ultimate consumers due to the relative modest size of its sorbates sales and its relatively low market share in Europe, the Commission has already duly taken into account Daicel's economic size in comparison to the other cartel members and its effective economic capacity to influence the EEA market (see recitals (349) to (354).

(379) Concerning Daicel's second argument, the Commission does not consider that the fact that Daicel did not -benefit from the cartel or suffered any economic disadvantage due to participation in a cartel, constitutes attenuating circumstances for the purposes of fixing the fine. The gravity of Daicel's anti-competitive behaviour in no way is attenuated by the fact that the profits derived may have been negligible.

(380) Thirdly, the Commission already rejected in recital (320), the argument related to the origins of the infringement and the existence of doubt of illegality due to the fact that the cartel meetings arose out of the official Export Cartel sanctioned by the Japanese Government. In reality, the facts clearly show that the discussions concerning target prices and volume quotas aimed at fixing the highest price possible under the current market conditions at the time, in order to ensure the maximum profit. Secondly, it was not in the context of the Japanese sorbates export cartel that the four Japanese producers used to meet and agree the target prices and volume quotas. The cartel meetings were organised at different levels and with secrecy and the Japanese Government was neither aware of the parallel cartel meetings between the Japanese producers nor of the joint meetings between the Japanese producers and Hoechst. Consequently, Daicel could not have been unaware that the object of these actions was the restriction of competition.

(381) As to Daicel's fourth argument, the Commission considers that if the undertakings ended the infringement on their own initiative before the Commission intervened, this unilateral action by the undertaking cannot be construed as constituting an attenuating circumstance. In order to benefit from an attenuating circumstance, the undertaking has to show that its voluntary action to terminate the infringement is directly linked to the Commission's action. There are therefore no grounds under the Commission's guidelines on fines to reduce Daicel's fine in this respect.

(382) Fifthly, the Commission does not consider that the lack of antecedents in the violation of competition rules constitutes an attenuating circumstance to be taken into account for the fixing of the fine. On the contrary, the first indent of point 2 of the Guidelines on Fines refers to repeated infringements as a particular category of aggravating circumstances. The absence of an aggravating circumstance does not amount to an attenuating circumstance. Furthermore, although the Commission welcomes the fact that Daicel set up a compliance programme, this initiative cannot dispense the Commission from its duty to sanction the very serious infringement of competition rules that Daicel committed in the past before implementing the compliance programme.

(383) Finally, the Commission rejects Daicel's last argument. The Commission cannot take into account as an attenuating circumstance damages paid following legal proceedings in other jurisdictions. As already stated in recitals (314) and (315), fines imposed in third countries have no bearing on the fines to be imposed for infringing Community and EEA competition rules.. Finally, payments of damages in civil law actions which have the objective of compensating for the harm caused by cartels to individual companies or consumers cannot be compared with public law sanctions for illegal behaviour.

(384) In this case, the Commission does not calculate the fine to be imposed on Daicel on the basis of Daicel's total world-wide turnover. The only express reference in Article 15(2) of Regulation No 17 to the total turnover of the undertaking concerns the limit of the fine. As to Daicel's world-wide product turnover, it has already been explained that world-wide product turnover is taken into account when deciding on differential treatment of undertakings participating in a global cartel, and that this in no way implies that the undertakings are being penalised twice for the same behaviour.

Conclusion

(385) The total fine to be imposed on Daicel, before considering its co-operation with the Commission in these proceedings, amounts to EUR 23,8095 million.

Chisso

Aggravating circumstances

(386) There are no aggravating circumstances relating to the infringement in Chisso's case.

Attenuating circumstances

(387) There are no attenuating circumstances relating to the infringement in Chisso's case.

Arguments of Chisso

(388) Chisso argues that, taking into account its modest market share of just approximately […]% in the sorbates market in the EEA, its low sorbates turnover and its limited production of sorbates compared to the other cartel participants, it was not by itself economically capable of causing significant damage on the market and any detrimental impact of its participation in the infringement was minor.

(389) Moreover, Chisso argues that its first full Antitrust Compliance Policy, adopted in early 1999, which states that Chisso demands strict adherence to antitrust law and makes it clear that a breach of the Policy is a disciplinary offence, should be considered as an attenuating circumstance.

Assessment of the Commission

(390) As already stated in recital (390) above, the undertaking's economic size and capacity in comparison to the other cartel members and its effective economic capacity to influence the EEA market has already been duly taken into account.

(391) Finally, although the Commission welcomes the fact that Chisso set up a compliance programme, this initiative cannot dispense the Commission from its duty to sanction the very serious infringement of competition rules that Chisso committed in the past before implementing the compliance programme.

Conclusion

(392) The total fine to be imposed on Chisso, before considering its co-operation with the Commission in these proceedings, amounts to EUR 18,315 million.

Nippon

Aggravating circumstances

(393) There are no aggravating circumstances relating to the infringement in Nippon's case.

Attenuating circumstances

(394) There are no attenuating circumstances relating to the infringement in Nippon's case.

Arguments of Nippon

(395) Nippon argues that the following factors should be taken into account by the Commission as additional attenuating circumstances:

(a) It felt compelled to participate given that it was the smallest undertaking participating in the infringement,

(b) it spontaneously put an early end to the cartel, long before any competition authority commenced an investigation,

(c) it was awarded the smallest volume allocations,

(d) it often ignored the offending agreements, that is, it often failed to implement the target prices and the volume quotas agreed and misrepresented its sales figures, and therefore the actual effect on competition of its participation in the cartel was limited,

(e) its new management in 1995 adopted a long-term compliance policy program, prior to the instigation of any competition law investigation and prior to the institution of the Commission's leniency policy.

Assessment of the Commission

(396) The Commission notes that Nippon does not submit facts that show that it was in fact compelled to participate in the infringement. Its economic size is not relevant in this context.

(397) As stated in recital (394), if the undertakings ended the infringement on their own initiative before the Commission intervened, this unilateral action by the undertaking cannot

be construed as constituting an attenuating circumstance. In order to benefit from an attenuating circumstance, the undertaking has to show that its voluntary action to terminate the infringement is directly linked to the Commission's action.

(398) The Commission does not contest that Nippon was awarded the smallest volume allocations. However, its agreement to this allocation was an important element in the infringement, and therefore its small volume allocation cannot be taken into account as an attenuating circumstance.

(399) The circumstances put forward by Nippon do not show that during the period in which it was party to the infringing agreements it actually avoided applying them by adopting competitive conduct in the market[190]. As demonstrated in Part I, during the relevant period of the infringement, Nippon did always agree and respect the cartel agreements. It usually participated in the cartel meetings and never effectively and explicitly refused to implement the decisions taken by the group. In particular, Nippon did not provide the Commission with any data demonstrating any deviation between volume allocations and actual sales. Nippon's behaviour, over such a long period of time, clearly demonstrates that Nippon had no desire actually to avoid applying the price and volume quotas agreements.

(400) The Commission notes once again that the implementation of agreements on target prices does not necessarily require that these exact prices be applied.

(401) Finally, although the Commission welcomes the fact that Nippon set up a compliance programme, this initiative cannot dispense the Commission from its duty to sanction the very serious infringement of competition rules that Nippon committed in the past before implementing the compliance programme.

Conclusion

(402) The total fine to be imposed on Nippon, before considering its co-operation with the Commission in these proceedings, amounts to EUR 17,649 million.

Ueno

Aggravating circumstances

(403) There are no aggravating circumstances relating to the infringement in Ueno's case

Attenuating circumstances

(404) Non-implementation in practice of the offending agreements or practices

– Non implementation in practice of the agreed volume quota allocations

(405) As an attenuating circumstance, the Commission will take into account the fact that Ueno did not implement in practice the agreed volume quota allocations.

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[190] See, to this effect, Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/*95 Cimenteries CBR and Others v Commission* [2000] ECR II-491, paragraphs 4872 to 4874.

(406) In its written observations to the Statement of Objections, Ueno demonstrated that it substantially exceeded the volume quotas awarded to it in the cartel meetings[191]. In particular since 1991, it sold in Europe each year more than the double of the volume agreed. Ueno developed its production capacity, being responsible for the problem relating to the "grey material" (see recitals (193), (196), (206) and (219)) which was a destabilizing element of the cartel regularly discussed during the joint meetings and the reason for some tensions and distrust among the cartel members. The Commission considers this behaviour as an attenuating circumstance.

– Non implementation in practice of the agreed target prices

Arguments of Ueno

(407) Ueno argues that, in practice, it did not implement the agreement on target prices.

Assessment of the Commission

(408) The Commission rejects Ueno's argument that it did not implement price targets. The implementation of agreements on target prices does not necessarily require that these exact prices be applied. The agreements can be regarded as being implemented when the parties fix their prices in order to move them in the direction of the target agreed upon. The fact that an undertaking which has been proved to have participated in collusion on prices with its competitors did not behave on the market in the manner agreed with its competitors is not necessarily a matter which must be taken into account as a mitigating circumstance when determining the amount of the fine to be imposed. Such behaviour may simply indicate an attempt to exploit the cartel for its own benefit. Moreover, as the anti-competitive agreements related to target prices, rather than to fixed prices, it is clear that the implementation of the agreements simply meant that the participants would endeavour to achieve those objectives (see recital (334)).

– Other attenuating circumstances

Arguments of Ueno

(409) Ueno argues that the following factors should be taken into account by the Commission as additional attenuating circumstances:

(a) The specific circumstance of being the only family-owned non-publicly traded company involved in this cartel, as the other participants in the infringement are large publicly traded corporations with better financial and other resources for absorbing any penalties that might be imposed in this case;

(b) it played only a passive role in the infringement, as i) it depended upon Daicel for supplies of sorbic acid and it acted under economic pressure from it; ii) it usually sent a single very junior employee; iii) it did not participate in the three meetings after March 1995, the spring 1992 and the autumn 1993 meetings; iv) it did not initiate or instigate meetings and it never took the lead during discussions or set any of the agendas for the

[191] See pages 17390-17391 of the file.

meetings, and v) it was not aware of the numerous meetings between the other participants until very recently;

(c) it was the first company to stop attending the joint meetings in March 1995 and then to terminate the infringement before the other participants and long before the Commission intervened.

Assessment of the Commission

(410) The fact that Ueno is the only family-owned non-publicly traded company involved in this cartel is not relevant in this context. The disparity in the market size of the undertakings participating in the infringement has already been duly taken into account above in the assessment concerning the differential treatment (see recitals (349) to (354).

(411) The Commission does not accept Ueno's arguments that it played a passive role in the infringement. As for the argument that it depended upon Daicel for supplies of sorbic acid and that it acted under economic pressure from Daicel, firstly, Ueno cannot claim that, because it was dependent on Daicel for deliveries of sorbic acid, it no longer had the necessary autonomy to participate in an agreement on its own behalf. Although Ueno's scope for manoeuvre was limited because it depended on Daicel for its supplies, that does not alter the conclusion that Ueno, by participating on its own behalf, in the anti-competitive agreements and practices, restricted competition on the European market. Although it is true that the bonds of economic dependence existing between participants in an agreement is liable to affect their freedom of initiative and decision, the existence of those bonds does not make it impossible to refuse to consent to the agreement which is proposed to them[192]. Secondly, as regards Ueno's argument that it acted under economic pressure from Daicel, even if it might be correct that Daicel put pressure on Ueno, it remained Ueno's own decision and responsibility to participate in the infringement. In addition, it could have complained to the competent authorities about the pressure brought to bear on it and have lodged a complaint with the Commission under Article 3 of Regulation No 17 rather than participating in the activities in question[193].

(412) Moreover, the fact that it usually sent a single very junior employee is not relevant in this context. Part I clearly demonstrate that Ueno's participation in the cartel meetings was as regular as that of the other members of the cartel and that its decisions and agreements during these meetings in no way were affected by the fact it was represented by a junior employee.

(413) Finally, the fact it did not initiate or instigate meetings, it never took the lead during discussions or set any of the agendas for the meetings, and it was not aware of the numerous meetings between the other participants until very recently do not preclude Ueno's responsibility for its participation as an active member of the overall cartel over such a long period of time.

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192 See Joined Cases 32/78 and 36/78 to 82/78 *BMW and Others v Commission* [1979] ECR 2435, paragraph 36, , as well as Case 17/99, *Ke-Kelit v Commission* [2002].ECR II-01647, paragraph 48.

193 See, in this sense, Case T-9/89 *Hüls v Commission* [1992] ECR II-499, paragraphs 123 and 128, and Case T-141/89 *Tréfileurope v Commission* [1995] ECR II-791, paragraph 58, as well as Case 17/99, *Ke-Kelit v Commission*, paragraph 50.

(414) As stated above in recitals (394) and (410), the fact an undertaking terminated the infringement long before the Commission intervened is not relevant as an attenuating circumstance. In order to benefit from an attenuating circumstance, the undertaking has to show that its voluntary action to terminate the infringement is directly linked to the Commission's action.

Conclusion

(415) The total fine to be imposed on Ueno, before considering its co-operation with the Commission in these proceedings, amounts to EUR 16,4835 million.

12.2.3. Application of the 1996 Leniency Notice

(416) The addressees of this Decision have co-operated with the Commission, at different stages of the investigation into the infringements, for the purpose of receiving the favourable treatment set out in the 1996 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 co-operation, the Commission will examine whether the parties concerned satisfied the conditions set out in this Notice.

– *Application of the 2002 Leniency Notice in this case*

Arguments of Hoechst

(417) Hoechst claims that the 2002 Commission Notice on immunity from fines and reduction of fines in cartel cases[194] ("the 2002 Leniency Notice") should be applicable in this case, as a result of the principle of most favourable treatment. Considering that this general principle of Community Law should prevail over other Community legislation and, in particular, over notices of the Commission, more lenient legislation or practices, which are adopted after the offending act was committed, must be applied retroactively. Furthermore, it argues that both the Commission and the Court of First Instance acted in accordance with this principle in the cartel cases *British Sugar/Tate & Lyle*[195], by accepting that the 1996 Leniency Notice could be applied by analogy, by the way of an extension *ratione temporis,* to the cases where co-operation took place before the publication of that Notice.

Assessment of the Commission

(418) The 2002 Leniency Notice is clearly inapplicable to this case. The dividing line for the application *ratione temporis* of the 1996 and 2002 Notices has been drawn in point 28 of the 2002 Notice, which reads as follows:

> *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.*

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194 OJ C 45, 19.2.2002, p. 3.

195 See Commission Decision 1999/210/EC in Case IV/F-3/33.708 – *British Sugar plc*; Case IV/F-3/33.709 – *Tate & Lyle plc.*; Case IV/F-3/33.710 – *Napier Brown & Company Ltd*; Case IV/F-3/33.711 – *James Budgett Sugars Ltd*) (OJ L 76, 22.3.1999, p.1.), and judgment in Joined Cases T-202/98, T-204/98, *Tate & Lyle plc and others v. Commission*, ECR [2001] II-2035, at paragraphs 154 and 157.

(419) In this case, several undertakings - including Hoechst - had already "contacted" the Commission before that date. The 1996 Leniency Notice therefore remains applicable.

(420) Hoechst claims that under the general legal principle of most favourable treatment, the Commission should have applied, by the way of an extension *ratione temporis,* the 2002 Leniency Notice. The Commission contends the application of this principle in this case.

(421) First, the legal basis for any element of lenient treatment, as one of the factors used for the calculation of the fine, is Article 15 (2) of Regulation No 17. This provision does not lay down an exhaustive list of criteria which the Commission must take into account when fixing the amount of the fine. Co-operative conduct of the undertaking during the administrative procedure may therefore be one of the factors to be taken into account when fixing that fine, but Regulation No 17 neither obliges nor forbids the Commission to reward such conduct. Therefore, lenient policy is clearly a matter of the Commission's discretion. However, the Commission accepts that both Notices indicate the way in which the Commission will exercise its discretion, as long as they apply. Thus, the Notices in no way affect the legal framework constituted by Article 15 (2) of Regulation No 17[196]. As the principle of most favourable treatment in criminal law is exclusively applicable when there is a modification of the law on the basis of which a fine is imposed, this means that the application of the 1996 Leniency Notice in this case does not violate this principle.

(422) Furthermore, and more importantly, when Hoechst and the other undertakings to which this Decision is addressed, offered to co-operate with the Commission, their legitimate expectations as to the benefits that would result from that co-operation were based exclusively on the 1996 Leniency Notice, which was the one applicable at that time.

(423) Second, the *rationale* followed by the Commission in the *British Sugar/Tate & Lyle* Decision concerning the application of the 1996 Leniency Notice can not be transposed to this case, as the situations are materially different. Before the publication of the 1996 Leniency Notice, the Commission did not have any policy of lenient treatment applicable to undertakings wishing to co-operate with it. Exercising its power of discretion, the Commission decided to apply this lenient treatment by analogy to the on-going cases where co-operation had taken place before the publication of the Notice. When it adopted the new Leniency Notice in 2002, it decided to include the transitional clause in point 28 of the Notice, which establishes the dividing line between the existing Leniency Notice at the time and the new one.

(424) Third, it is not possible to conclude overall that the 2002 Leniency Notice is more favourable for undertakings than the 1996 Leniency Notice. The purpose of this revision was not simply to increase the incentives available to undertakings, but to come to a "closer alignment between the level of reduction of fines and the value of a company's contribution to establishing the infringement"[197]. Whether this move procures an advantage to a given undertaking is highly dependent on its individual situation.

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196 See, in this sense, judgement of the Court of First Instance in Case T-16/99, *Lögstör Rör v Commission* [2002] ECR, page II-1633, at paragraph 233 and 234.

197 See point 5 of the 2002 Leniency Notice.

12.2.3.1. Non-imposition of a fine or a very substantial reduction in its amount (“Section B of the 1996 Leniency Notice”)

(425) Under Section B of the 1996 Leniency Notice, an undertaking which:

(a) informs the Commission about a secret cartel before the Commission has undertaken an investigation, ordered by decision, of the enterprises involved, provided that it does not already have sufficient information to establish the existence of the alleged cartel;

(b) is the first to adduce decisive evidence of the cartel's existence;

(c) puts an end to its involvement in the illegal activity no later than the time at which it discloses the cartel;

(d) provides the Commission with all the relevant information and all the documents and evidence available to it regarding the cartel and maintains continuous and complete co-operation throughout the investigation;

(e) has not compelled another enterprise to take part in the cartel and has not acted as an instigator or played a determining role in the illegal activity,

will benefit from a reduction of at least 75% of the fine or even from total exemption from the fine that would have been imposed if they had not co-operated.

Chisso

(426) On 29 September 1998, Chisso informed the Commission about the sorbates cartel in which it participated. At that time, the Commission had not undertaken an investigation, ordered by decision, of the enterprises involved, and did not have any information to establish the existence of the alleged cartel.

(427) At a meeting held on 13 November 1998, Chisso submitted an oral description of the cartel's activities and provided documentary evidence (see recital (4)). The Commission considers that on that occasion Chisso was the first undertaking to adduce decisive evidence on the existence of the cartel which is found in this Decision. The evidence handed over to the Commission on 13 November 1998 consisted, in particular, of hand-written notes on a number of cartel meetings. The oral description of the cartel's activities allowed the Commission to put the documents in their real context. The information provided by Chisso enabled the Commission to establish the existence, content and the participants of most of the cartel meetings, as described in Part I.

(428) The information provided to the Commission by Chisso during the meeting of 13 November 1998 is not the only evidence used by the Commission to prove the infringement in this case. As demonstrated by the structure of the 1996 Leniency Notice, the submission by an undertaking of "decisive evidence" within the meaning of Sections B (and C) of the Notice, as Chisso did in this case, does not mean that other undertakings may not adduce evidence that materially contributes to establishing the existence of the infringement. In this context, it is not relevant if other undertakings have provided the Commission with information - which does not constitute decisive evidence - before or after the submission of the "decisive evidence" of the cartel's existence. Moreover, the co-operation obligation on an undertaking having legitimate expectations to benefit at least from a substantial reduction of the fine indicates that undertakings which provide the Commission with "decisive evidence"

can, and in fact should, supplement it with additional information throughout the investigation period.

(429) Chisso put an end to its involvement in the illegal activities at the time when it disclosed the cartel to the Commission.

(430) To the Commission's knowledge, Chisso provided the Commission with all the relevant information and all the documents and evidence available to it regarding the cartel and maintained continuous and complete co-operation throughout the investigation. In particular, Chisso submitted a written Corporate Statement in April 1999, a Supplemental Statement and a second Supplemental Statement on 17 and 24 November 1999, respectively, and a third Supplemental Statement on 12 December 2002.

(431) Chisso did not compel other enterprises to take part in the cartel, nor did it act as an instigator of the unlawful conduct.

(432) Chisso therefore fulfils all the conditions set out in Section B of the 1996 Leniency Notice.

Conclusion

(433) In accordance with Section B of the 1996 Leniency Notice, the Commission grants Chisso a 100 % reduction of the fine that would otherwise have been imposed had it not co-operated with the Commission.

(434) Therefore, the Commission will not impose any fine on Chisso.

12.2.3.2. Significant reduction in a fine ("Section D")

(435) Under Section D of the 1996 Leniency Notice, where an undertaking co-operates without having met all the conditions set out in Sections B or C, it will benefit from a reduction of 10% to 50% of the fine that would have been imposed if it had not co-operated.

(436) Such cases may include the following:

(a) before a statement of objections is sent, a company provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement;

(b) after receiving a statement of objections, a company informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.

Hoechst

(437) Hoechst expressed its willingness to co-operate with the Commission within the framework of the 1996 Leniency Notice with regard to the sorbates cartel for the first time on 27 October 1998 and provided an oral description of the product market, the producers and respective market-shares, the US proceedings and the cartel's activities at a meeting held on 29 October 1998 between Nutrinova's representative and the Commission Services (see

recital (5). On 21 December 1998, Hoechst submitted a Memorandum on the sorbates market[198] and on 19 March[199] and 28 April 1999[200], it submitted a Memorandum setting out facts related to the anti-competitive activities affecting the sorbates market together with documentary evidence and admitted participating in a world-wide cartel to fix prices and allocate quotas for sorbates.

(438) A reduction of the fine which would otherwise have been imposed should be granted in recognition of Hoechst's co-operation under the 1996 Leniency Notice. Although it was not the first company to provide the Commission with decisive evidence, it contributed, at an early stage, to establishing important aspects of the case and, after having received the Statement of Objections, it did not substantially contest the facts on which the Commission based its allegations.

Arguments of Hoechst

(439) Hoechst argues that it was not Chisso, but itself, that was the first undertaking to adduce decisive evidence in this case. It notes that on 29 October 1998 it provided the Commission with detailed oral evidence on the cartel's structure, basic rules, meetings, members, market and product concerned. In Hoechst's view, it provided orally all the essential elements of the cartel as set out in the Statement of Objections.

(440) In this context, Hoechst claims that it was disadvantaged in terms of treatment by the Commission in comparison with Chisso in three ways: (a) ability to provide oral witness testimony; (b) opportunities for meetings with the Commission; and, (c) warning with regard to priority in terms of leniency co-operation.

(441) Hoechst also asserts that, unlike Chisso, as a result of its procedural position in the US proceedings on the sorbates cartel, it was not in a position to provide written submissions at an early stage of its co-operation with the Commission due to the risk of such written submissions becoming discoverable prior to potential US criminal prosecution. It therefore offered the Commission direct witness testimony in March 1999, which the Commission refused.

Assessment of the Commission

(442) The Commission accepts that Hoechst was the first undertaking to provide the Commission with an oral description of the cartel's activities at a meeting held on 29 October 1998 between its legal representative and the Commission Services and that it was only on 13 November 1998 that Chisso provided an oral description of the cartel together with documentary evidence.

(443) However, the information provided by Hoechst during that meeting cannot be considered as decisive evidence of the cartel's existence. Even if it refers to the product market, the producers and respective market-shares, the US proceedings and the cartel's activities, the information submitted was imprecise and not sufficiently detailed in order to allow the Commission to establish the existence of the alleged cartel. The description of the cartel's activities, especially of the anti-competitive practices, is rather succinct and to a

198 See pages 0179-0384 of the file.
199 See pages 0405-0416 of the file.
200 See pages 0698-2662 of the file.

certain extent even misleading. In the oral description, Hoechst emphasised the social character and the non systematic regularity of the meetings, as well as the moderate nature of the cartel[201], having simply provided a vague version of the facts. By contrast, the documentary evidence provided by Chisso on 13 November 1998 was extensively used by the Commission to prove the infringement[202].

(444) Moreover, and more importantly, on 29 October 1998 Hoechst solely provided an oral description of the cartel, not based on documentary evidence. Its written Corporate Statement (which confirmed and expanded upon the oral description of the cartel presented on 29 October 1998) and the documentary evidence was provided to the Commission only on 19 March 1999. Based exclusively on this oral description of the cartel, the Commission could not establish the existence of the alleged cartel.

(12) The Commission rejects Hoechst's argument that it was disadvantaged in terms of treatment by the Commission in comparison with Chisso. The oral witness testimony suggested by Hoechst and its requests for meetings would not have served any useful purpose to the Commission at a moment when Hoechst had already provided an oral description of the cartel and a written statement expanding the oral description of the cartel, but it had not yet provided any documentary evidence. A second oral presentation of the cartel, not based on documentary evidence, would simply not have materially contributed to establishing the existence of the cartel[203]. Moreover, Hoechst's requests for meetings with the Commission were made in January and March 1999, at a time when, on the one hand, Hoechst was not fully and continuously co-operating with the Commission services (see recitals (462) and (463)) and, on the other hand, the Commission had already in its possession decisive evidence of the cartel. As to the alleged warning with regard to priority in terms of leniency co-operation, this actually did not happen.

(445) The Commission notes Hoechst's position as to its co-operation with the Commission in the light of potential US criminal proceedings. However, any benefit from the application of the 1996 Leniency Notice can only be granted on the basis of actual co-operation and not the intention of co-operation.

(446) Finally, as to Hoechst's claim that it has legitimate expectations to benefit from a very substantial reduction of the fine, the Commission notes that it does not, in any event, qualify for such a reduction of the fine. Hoechst did not provide the Commission with all the relevant evidence available to it regarding the cartel at the preliminary stage of the procedure and it did not maintain continuous and complete co-operation throughout the investigation, within the meaning of Section B (d) of the 1996 Leniency Notice. Secondly, it played a determining role in the cartel, within the meaning of Section B (e) of the 1996 Leniency Notice.

(447) Hoechst does not meet the criteria set out in Section B (d) of the 1996 Leniency Notice. Firstly, it did not provide the Commission with all the relevant evidence available to it regarding the cartel at the preliminary stage of the procedure, since despite having expressed its willingness to co-operate on 27 October 1998 and provided the oral description of the cartel on 29 October 1998, it was only in March and April 1999 that Hoechst provided a

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201 See pages 18990-18992 of the file.

202 See footnotes 99, 157, 158, 161 and 167.

203 See pages 0405-0407 of the file.

Corporate Statement and the documentary evidence available to it regarding the cartel. This evidence was in Hoechst's possession, however, long before that date. It could have provided the Commission with those elements immediately after the first contacts it had with the Commission services, since the documentary evidence (mainly travel records and hotel invoices) was already effectively available in Hoechst archives and the written Corporate Statement could have been drafted and submitted to the Commission in a short period of time, if it really intended to immediately co-operate with the Commission. Hoechst decided, on the contrary, to do it only on 19 March 1999, having formally informed the Commission on 21 December 1998 that it could not co-operate fully and immediately with the Commission (see recital (463)).

(448) Secondly, it did not maintain complete co-operation at the preliminary stage of the procedure since the oral description it provided on 29 October 1998 differed noticeably from the reality of the facts described in Part I. In fact, the description provided at that date by Hoechst referring to the main characteristics of the cartel, especially to the anti-competitive behaviour of the undertakings, was rather imprecise and, to a certain extent, even misleading. It emphasised the social character and the non systematic regularity of the meetings and the moderate nature of the cartel (see recital (456)).

(449) Thirdly, Hoechst did not maintain continuous co-operation throughout the investigation. On 21 December 1998, it informed the Commission that it found itself in a position whereby, whilst wishing to co-operate fully and immediately with the Commission in its investigation, it could not do so without serious risks, in the light of potential US criminal proceedings. Therefore, it only provided the Commission with information concerning the sorbates market, having informed the Commission that it would supply further information as soon as it became possible[204].

(450) Hoechst's determining role in the cartel has already been established by the Commission in recitals (364) to (367).

Conclusion

(451) After due consideration of Hoechst's co-operation under the 1996 Leniency Notice, the Commission grants it, in accordance with the first and second indent of Section D(2) of that Notice, a 50 % reduction of the fine that would have been imposed if it had not co-operated with the Commission.

(452) The total fine imposed on Hoechst should therefore be EUR 99 million.

Nippon

(453) Following the receipt of a request for information, Nippon made an application under the 1996 Leniency Notice on 15 August 1999 and, on 30 August 1999, provided a Statement and documentary evidence of the agreements supplementing its reply to a request for information (see recital (7).

(454) The Commission acknowledges that it contributed to establishing important aspects of the case. It provided direct evidence of the cartel, in particular contemporaneous notes of the cartel meetings (Mr. […] and Mr […]'s notes). After having received the

[204] See pages 0179-0182 of the file, especially page 0181.

Statement of Objections, it did not substantially contest the facts on which the Commission based its allegations.

Conclusion

(455) After due consideration of Nippon's co-operation under the 1996 Leniency Notice, the Commission grants it, in accordance with the first and second indent of Section D(2) of that Notice, a 40 % reduction of the fine that would have been imposed if it had not co-operated with the Commission.

(456) The total fine imposed on Nippon should therefore be EUR 10,5 million.

Daicel

Arguments of Daicel

(457) Daicel argues that it co-operated with the Commission in order to facilitate and expedite its investigation.

Assessment of the Commission

(458) The information provided voluntarily by Daicel should be taken into account when determining the amount of the reduction of the fine. Following the response, on 4 March 2002, to the Commission's request for information dated 26 May 1999, Daicel provided a Statement on 8 March 2002 containing a chapter summarising the operation of the cartel, going beyond the information requested by the Commission (see recital (11)). This information submitted at a late stage of these proceedings corroborated the information already in the Commission's possession at this time.

(459) Moreover, after having received the Statement of Objections, it did not substantially contest the facts on which the Commission based its allegations.

Conclusion

(460) After due consideration of Daicel's co-operation under the 1996 Leniency Notice, and having taken into account the stage of the procedure when this co-operation took place, the Commission grants it, in accordance with the first and second indent of Section D(2) of that Notice, a 30 % reduction of the fine that would have been imposed if it had not co-operated with the Commission.

(461) The total fine imposed on Daicel should therefore be EUR 16,6 million.

Ueno

Arguments of Ueno

(462) Ueno submits that it provided the Commission with all the relevant information and all the documents and evidence available to it regarding the cartel and it maintained effective co-operation throughout the investigation.

Assessment of the Commission

(463) On 24 October 2001, Ueno made an application under the 1996 Leniency Notice and provided a Statement and some contemporaneous documentary evidence of the agreements (see recital (10)). This submission was made at the same time it responded to the Commission's request for information dated 26 May 1999. The information provided voluntary by Ueno should be taken into account when determining the amount of the reduction of fine. Moreover, although after having received the Statement of Objections Ueno contested its participation in two cartel meetings, it did not substantially contest the facts on which the Commission based its allegations.

Conclusion

(464) After due consideration of Ueno's co-operation under the 1996 Leniency Notice, and having taken into account the stage of the procedure when this co-operation took place, the Commission grants it, in accordance with the first and second indent of Section D(2) of that Notice, a 25 % reduction of the fine that would have been imposed if it had not co-operated with the Commission.

(465) The total fine imposed on Ueno should therefore be EUR 12,3 million.

12.2.3.3. Conclusion on the application of the 1996 Leniency Notice

(466) In conclusion, with regard to the nature of their co-operation and in the light of the conditions as set out in the 1996 Leniency Notice, the fines to be imposed on the addressees of this Decision should be reduced as follows:

(a) Chisso : a reduction of 100 %

(b) Daicel : a reduction of 30 %

(c) Hoechst : a reduction of 50 %

(d) Nippon : a reduction of 40 %

(e) Ueno : a reduction of 25 %.

12.2.4. Ability to pay

(467) The Commission Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty state in point (5) (b) that:

> *Depending on the circumstances, account should be taken, once the above calculations have been made, of certain objective factors such as […] [the undertakings] real ability to pay in a specific social context, and the fines should be adjusted accordingly.*

Arguments of Chisso and Ueno

(468) Chisso submits that its financial situation has deteriorated in recent years due to the severe and lasting economic crisis in Japan for over two decades and the immense financial exposure to Chisso for damages and clean up costs arising from the Minamata

disease. In its submission made on 10 June 2003, Chisso further explains and describes its precarious financial position and provides the Commission with financial data.

Assessment of the Commission

(469) The Commission notes that Ueno failed to produce consolidated figures. After having examined Ueno's financial situation on the basis of non-consolidated figures, the Commission concludes that it is not appropriate to adjust the amount of the fine in Ueno's case. Although […], to take into account the adverse financial situation of an undertaking would be tantamount to conferring an unjustified competitive advantage on undertakings least well adapted to the conditions of the market. As the Commission does not impose a fine on Chisso, its argument is irrelevant.

12.3. The amount of the fines imposed in these proceedings

(470) In conclusion, the fines to be imposed pursuant to Article 15(2) of Regulation No17 should be as follows:

- Daicel Chemical Industries, Ltd.: EUR 16,6 million
- Hoechst AG: EUR 99,0 million
- The Nippon Synthetic Chemical Industry Co, Ltd.: EUR 10,5 million
- Ueno Fine Chemicals Industry, Ltd: EUR 12,3 million

HAS ADOPTED THIS DECISION:

Article 1

The following undertakings have infringed Article 81(1) of the Treaty and - from 1 January 1994 - Article 53(1) of the EEA Agreement, by participating, for the periods indicated, in a complex, single and continuous agreement and concerted practice in the sorbates sector, by which they agreed to fix target prices and to allocate volume quotas, to define a reporting and monitoring system, and not to supply technology to potential market entrants:

(a) Chisso Corporation, from 31 December 1978 to 31 October 1996;

(b) Daicel Chemical Industries, Ltd., from 31 December 1978 to 31 October 1996;

(c) Hoechst AG, from 31 December 1978 to 31 October 1996;

(d) The Nippon Synthetic Chemical Industry Co, Ltd., from 31 December 1978 to 30 November 1995;

(e) Ueno Fine Chemicals Industry, Ltd., from 31 December 1978 to 31 October 1996.

Article 2

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

They shall refrain from repeating any act or conduct described in Article 1, and from adopting any measure having equivalent object or effect.

Article 3

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

(a) Daicel Chemical Industries, Ltd.:	EUR 16,6 million
(b) Hoechst AG:	EUR 99,0 million
(c) The Nippon Synthetic Chemical Industry Co, Ltd.:	EUR 10,5 million
(d) Ueno Fine Chemicals Industry, Ltd:	EUR 12,3 million

Article 4

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

Account N°

001-3953713-69 of the European Commission with:

FORTIS Bank,

Rue Montagne du Parc 3,1000 Bruxelles/Brussels

(Code SWIFT: GEBABEBB – Code IBAN BE71 0013 9537 1369)

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

Article 5

This Decision is addressed to:

CHISSO CORPORATION

Forefront Tower II

13-1, Kachidoki 3-chome

Chuo-Ku

Tokyo 104-8555

JAPAN

DAICEL CHEMICAL INDUSTRIES, LTD

2-5, Kasumigaseki 3-chome

Chiyoda-ku

Tokyo 100-6077

JAPAN

HOECHST AKTIENGESELLSCHAFT

Building C 660

D-65926 Frankfurt am Main

GERMANY

THE NIPPON SYNTHETIC CHEMICAL INDUSTRY CO., LTD.

Umeda Sky Bldg.

1-88, Oyodonaka 1-chome

Kita-ku

Osaka 531-6029

JAPAN

UENO FINE CHEMICALS INDUSTRY LTD.

2-4-8, Koraibashi

Chuo-ku

Osaka 541-8543

JAPAN

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

Done at Brussels, 01.10.2003

For the Commission

Mario MONTI
Member of the Commission