

IN THE FEDERAL COURT OF CANADA
TRIAL DIVISION

REGISTRY GENERAL
Federal Court of Canada
Cour Fédérale du Canada
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Date March 24, 2000
Clerk Peter L. Hébert
Agent
Peter L. Hébert
Registry Clerk
Agent du greffe

BETWEEN

HER MAJESTY THE QUEEN

and

MERCK KGaA.

Accused

AGREED STATEMENT OF FACTS

I. THE ACCUSED

Merck KGaA

1. Merck KGaA ("Merck") is a company organized and existing under the laws of Germany with its head office located in Darmstadt, Germany. Merck produces certain bulk vitamins abroad, including vitamin C and biotin, which it sells in Canada through its subsidiary, BDH Inc., located in Toronto, Ontario. BDH Inc. is not charged with any offence in Canada in connection with the conduct described herein.

II. OTHER RELEVANT CORPORATIONS

2. The information set out in paragraphs 3 - 8 relates to parties whose conduct is relevant to the present proceeding. This information has been obtained from sources available to the Commissioner of Competition ("Commissioner"), of which Merck may not be aware, but for the purposes of this proceeding, does not contest.

F. Hoffmann-La Roche Ltd

3. F. Hoffmann-La Roche Ltd ("Roche") is a corporation organized and existing under the laws of Switzerland with its principal place of business in Basel, Switzerland. Roche produces numerous bulk vitamins and related products abroad and it sells them in Canada and elsewhere. Roche has a Canadian subsidiary, Hoffmann-La Roche Limited/Limitée, located in Mississauga, Ontario.

BASF Aktiengesellschaft

4. BASF Aktiengesellschaft ("BASF") is a company organized and existing under the laws of Germany. It manufactures a range of bulk vitamins and related products abroad and sells these products in Canada and elsewhere. BASF's principal place of business is in Ludwigshafen, Germany. BASF has a Canadian subsidiary, BASF Canada Inc., in Toronto, Ontario.

Takeda Chemical Industries, Ltd.

5. Takeda Chemical Industries, Ltd. ("Takeda") is a corporation organized and existing under the laws of Japan. Takeda manufactures certain bulk vitamins (including vitamin C) and, since 1993, has distributed them in Canada through its wholly owned subsidiary, Takeda Canada Vitamin and Food Inc., headquartered in Toronto, Ontario. Prior to that time, Takeda sold these bulk vitamins in Canada through Chorney Chemical Co.

Lonza AG

6. Lonza AG is a corporation organised and existing under the laws of Switzerland, with its principal place of business in Basel, Switzerland. During the relevant period, Lonza manufactured certain bulk vitamins, including biotin, which it sold through distributors in Canada and elsewhere.

Sumitomo Chemical Co., Ltd.

7. Sumitomo is a corporation organised and existing under the laws of Japan, with its principal place of business located in Osaka, Japan. Sumitomo is a supplier of numerous products in Canada and elsewhere. During the relevant time, Sumitomo produced biotin, among other products, which it supplied in Canada through Sumitomo Canada Limited/Limitée, located in Vancouver, B.C.

Tanabe Seiyaku Co., Ltd.

8. Tanabe is a corporation organised and existing under the laws of Japan, with its principal place of business located in Osaka, Japan. It is engaged in a number of businesses, including the manufacture and distribution of biotin. During the relevant time period, Tanabe supplied biotin to customers in Canada and elsewhere, through distributors.

III. BULK VITAMINS AND THE CANADIAN MARKET FOR BULK VITAMINS

9. On a commercial basis, vitamins are produced synthetically through highly sophisticated processes. There are natural sources of certain vitamins, but they are not economic substitutes for the volume of synthetic output that is marketed in Canada and world wide.
10. Vitamins are used in animal feed, food and pharmaceuticals. In animal feed products, vitamins are added to compound feeds to obtain optimal growth, to aid in disease prevention and to promote healthy growth of each species. For some animal feed applications, vitamins are distributed as a product known as "premix"; that is, a specific formulation or mixture of vitamins and other nutritional additives which is supplied on a vegetable or other carrier. In food products, vitamins are used mainly to replace losses in processing or to fortify

the products and thus supplement the nutritional value of human foods. Vitamins are also used in food as antioxidants or colorants. In the pharmaceutical industry, vitamins are used for the production of vitamin supplements such as tablets and capsules.

11. The producers identified above manufactured the substantial majority of the vitamin C and biotin sold in Canada during the period of the offences.
12. Based upon facts obtained by the Commissioner, the relevant volume of commerce of vitamin C and biotin sold in Canada by Merck during the period of the offences was approximately \$4.5 million Canadian, of which approximately \$100,000 related to biotin. Based on information available to the Commissioner, of which Merck is unaware but does not contest for the purposes of this proceeding, total sales of all bulk vitamins by all producers implicated in illegal agreements during the period of those offences was in excess of \$700 million. Roche, BASF and Takeda, among other parties, have pleaded guilty in the Federal Court to a number of offences under s.45 of the *Competition Act*, including offences in connection with vitamin C and other vitamins.

IV. THE AGREEMENTS

Vitamin C

13. Vitamin C is primarily used in the food and pharmaceutical industries. The conspiracy affecting this product lasted from 1991 to 1995. The participants in this conspiracy were Roche, Takeda, Merck and BASF. Commencing in May, 1991, senior executives of Merck met with their counterparts from the other three producers and agreed to allocate their market shares in Canada and elsewhere. At this time and at other meetings, the parties periodically agreed to

fix, increase and maintain prices for vitamin C in Canada and elsewhere between 1991 and November of 1995, when the conspiracy ended.

Biotin

14. From early in 1991 until September of 1995, senior executives of Merck met periodically with their counterparts from the other major manufacturing companies, including Roche, Lonza, Sumitomo and Tanabe, to discuss biotin. From at least as early as October, 1991, the parties entered into an agreement to allocate markets and to fix, increase and maintain the prices for biotin in Canada and elsewhere. The parties continued to meet for this purpose, on a periodic basis, and they exchanged information relating to sales volumes and prices for biotin, in Canada and elsewhere, until September, 1995.

V. OTHER CONSIDERATIONS

15. Pursuant to his responsibilities for the administration and enforcement of the *Competition Act*, the Commissioner has conducted and continues to conduct extensive inquiries into the bulk vitamins industry in Canada and elsewhere, along with inquiries into other matters of competitive concern. All these matters are of a complex nature, with significant international ramifications and jurisdictional considerations. Merck has agreed to provide its full cooperation to the Commissioner in connection with these matters, which will assist in the investigation of other individuals and corporations for violations of the *Competition Act*.
16. Merck has voluntarily appeared and submitted to the jurisdiction of the Canadian Courts solely for the purposes of pleading guilty herein. This has

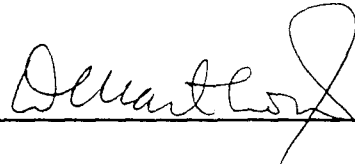
saved considerable costs of further investigation and trial which would otherwise have been incurred by the Government of Canada.

VI. CONCLUSION

17. Merck admits the above facts, except where otherwise indicated, pursuant to section 655 of the *Criminal Code*, solely for the purpose of dispensing with their proof at trial in this proceeding and for no other purpose.
18. Merck acknowledges, pursuant to section 655 of the *Criminal Code*, solely for the purpose of dispensing with proof at trial in this proceeding and for no other purpose, that with respect to the agreements alleged in each count of the Indictment, all the constituent elements of an indictable offence under subsection 45(1)(c) of the *Competition Act* have been established.
19. The parties agree that this document may be executed by signatures conveyed by facsimile transmission or in counterparts.



Prof. Dr. C. Flämig
Merck KgaA
by her General Counsel
March 15, 2000



The Attorney General of Canada
by her counsel D. Martin Low, Q.C.
March 6, 2000

Court File No. T- 304-00

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(TRIAL DIVISION)

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Accused

AGREED STATEMENT OF FACTS

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