

Undertaking to the Australian  
Competition and Consumer  
Commission

Given under section 87B by Merck & Co., Inc.  
and Schering-Plough Corporation

# Undertaking to the Australian Competition and Consumer Commission

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# Undertaking to the Australian Competition and Consumer Commission

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## 1. Background

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- 1.1 Merck & Co., Inc. (*Merck*) and Schering-Plough Corporation (*SP*) are global, research-driven pharmaceutical companies that both have a presence in the human health and animal health markets in Australia. For the reasons contained in clause 1.9 below, Merck ceased to have a presence in animal health markets in Australia on 17 September 2009.
- 1.2 SP's animal health activities in Australia are conducted under the name "Intervet Schering-Plough Animal Health" by Intervet Australia Pty Ltd, a wholly owned subsidiary of SP.
- 1.3 Merck's animal health activities were conducted through a joint venture with sanofi-aventis known as Merial Limited (*Merial*), in which Merck had a 50% interest. Merial's Australian subsidiaries are Merial Australia Pty Ltd and Ancare Australia Pty Ltd.
- 1.4 Pursuant to the Merger Agreement, Merck and SP will combine in a stock and cash transaction (the *Proposed Transaction*). The Proposed Transaction will be structured as a reverse merger whereby SP will acquire Merck, but will operate under the name "Merck" (*New Merck*).
- 1.5 The Parties compete in certain human health markets within Australia, and Merial and SP compete in certain animal health markets within Australia.
- 1.6 On 19 May 2009, the Australian Competition and Consumer Commission (the *Commission*) commenced its informal review of the Proposed Transaction.
- 1.7 The Commission undertook market inquiries and considered information provided by the Parties, industry participants and others. The Commission's market inquiries were aimed at assessing whether or not the Proposed Transaction would have the effect or be likely to have the effect of substantially lessening competition in a market in contravention of section 50 of the *Trade Practices Act 1974* (the *Act*).
- 1.8 The Commission has expressed concerns that the Proposed Transaction would result, or be likely to result, in a substantial lessening of competition in an animal health market in Australia.
- 1.9 Since the Parties entered into the Merger Agreement, Merck agreed to sell its 50% interest in Merial to sanofi-aventis pursuant to the Share Purchase Agreement (the *Merial Transaction*). The Merial Transaction was completed on 17 September 2009. As a result of the Merial Transaction, there are no longer any overlaps between the Parties in relation to animal health in Australia.
- 1.10 Merck and sanofi-aventis have also entered into a Call Option Agreement. If the Proposed Transaction completes and sanofi-aventis exercises the Call Option, sanofi-aventis's Merial business will be combined with New Merck's animal health business. The Call Option Transaction will constitute a separate transaction to the Proposed Transaction.
- 1.11 The Parties have decided to offer this Undertaking on a voluntary basis. The Undertaking is conditional upon the Proposed Transaction completing and provides for New Merck to notify the Commission upon sanofi-aventis exercising the Call Option, and that New Merck will not complete

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the Call Option Transaction or any other transaction which results in the combining of New Merck's animal health business and Merial's business in Australia until the Commission indicates that it does not have competition concerns in accordance with the Commission's informal merger review procedures, as set out in more detail below.

## 2. Commencement and termination of the Undertaking

---

### 2.1 Commencement

This Undertaking comes into effect when:

- (a) the Undertaking has been executed by the Parties; and
- (b) the Undertaking so executed is accepted by the Commission,

*(Commencement Date)*

### 2.2 Termination

This Undertaking terminates on the earlier of:

- (a) three years from the date on which the Undertaking is accepted by the Commission; or
- (b) on the date the Commission consents in writing to the withdrawal of this Undertaking in accordance with section 87B of the Act.

## 3. Undertaking

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### 3.1 Conditions precedent

This Undertaking is conditional upon the completion of the Proposed Transaction as defined in and pursuant to the Merger Agreement.

### 3.2 Undertaking

Subject to clause 3.1, the Parties undertake that:

- (a) New Merck will notify the Commission immediately upon sanofi-aventis exercising the Call Option; and
- (b) New Merck will not complete the Call Option Transaction until the Commission is satisfied that the Call Option Transaction will not raise competition concerns in Australia and informs the merger parties in writing that it will not intervene in the Call Option Transaction pursuant to the Act; and
- (c) New Merck will not, otherwise, effect any transaction which would result in the combination of the New Merck animal health business with the Merial business in Australia until the Commission is satisfied that any such transaction will not raise competition concerns in Australia and informs the merger parties in writing that it will not intervene in any such transaction pursuant to the Act.

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## 4. Obligation to procure

---

- 4.1 Where the performance of an obligation under this Undertaking requires a Related Body Corporate of either of the Parties to take or refrain from taking some action, the Parties will procure that Related Body Corporate to take or refrain from taking that action as the case may be.

## 5. Information

---

- 5.1 The Commission may direct the Parties in respect of their compliance with this Undertaking to:
- (a) furnish information, documents and materials to the Commission in the time and in the form requested by the Commission;
  - (b) produce information, documents and materials to the Commission within the Parties' custody, power or control in the time and in the form requested by the Commission; and/or
  - (c) direct its personnel, including its directors, contractors, managers, officers, employees and agents, to attend the Commission at a time and place appointed by the Commission to answer any questions the Commission (including its Commissioners, its staff or its agents) may have.
- 5.2 The Parties must comply with a direction of the Commission made under clause 5.1.
- 5.3 Information furnished, documents and material produced or information given in response to any request or direction from the Commission under clause 5.1 may be used by the Commission for any purpose consistent with the exercise of its statutory duties.
- 5.4 Any direction made by the Commission under clause 5.1 will be notified to Allens Arthur Robinson, in accordance with clause 9.2.
- 5.5 Nothing in this clause 5 requires the provision of information or documents in respect of which the Parties have a claim of legal professional privilege.

## 6. Confidentiality and disclosure

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- 6.1 The Parties acknowledge that the Commission may:
- (a) make this Undertaking publicly available;
  - (b) publish this Undertaking on its Public Section 87B Undertakings Register; and
  - (c) from time to time publicly refer to this Undertaking.

## 7. No derogation

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- 7.1 This Undertaking does not prevent the Commission from taking enforcement action at any time whether during or after the period of this Undertaking in respect of any breach by the Parties of any term of the Undertaking.

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- 7.2 Nothing in this Undertaking is intended to restrict the right of the Commission to take action under the Act for penalties or other remedies in the event that the Parties do not fully implement and/or perform their obligations under this Undertaking or in any other event where the Commission decides to take action under the Act for penalties or other remedies.

## 8. Costs

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- 8.1 All costs incurred by the Parties in providing information to the Commission, in responding to Commission inquiries as required by this Undertaking and in complying with this Undertaking are to be paid by the Parties.

## 9. Notices

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- 9.1 Any notice, demand, consent or other communications given or made under this Undertaking to the Commission should be sent to:

Attention: Executive General Manager – Mergers and Acquisitions Group  
Australian Competition and Consumer Commission  
23 Marcus Clarke Street  
Canberra ACT 2601

Fax +61 2 6243 1212  
Email: [mergers@acc.gov.au](mailto:mergers@acc.gov.au)

- 9.2 Any notice, demand, consent or other communications given or made under this Undertaking to the Parties should be sent to:

c/- Carolyn Oddie  
Allens Arthur Robinson  
Level 28  
Deutsche Bank Place  
Corner Hunter and Phillip Streets  
Sydney NSW 2000 Australia

Tel +61 2 9230 4203  
Fax +61 2 9230 5333  
Email: [Carolyn.Oddie@aar.com.au](mailto:Carolyn.Oddie@aar.com.au)

- 9.3 If the Parties or the Commission gives the other 3 Business Days' notice of a change to its address or fax number, any notice or communication is only given to the relevant entity if it is delivered, posted or faxed to the most recently advised address or fax number.

## 10. Definitions and Interpretation

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- 10.1 The meanings of the terms used in this document are as follows:

*Act* means the *Trade Practices Act 1974* (Cth).

# Undertaking to the Australian Competition and Consumer Commission

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**Business Day** means a day on which all banks are open generally in Canberra, Australia but does not include a Saturday, Sunday or a public holiday.

**Call Option** means the call option granted to sanofi-aventis under the Call Option Agreement.

**Call Option Agreement** means the Call Option Agreement between Merck, Merck SH Inc., Merck Sharp & Dohme (Holdings) Limited, Schering-Plough Corporation and sanofi-aventis dated 29 July, 2009.

**Call Option Transaction** means the transaction the subject of the Call Option Agreement, which provides for the combining of New Merck's animal health business with the Merial business, if sanofi-aventis exercises the Call Option.

**Commission** means the Australian Competition and Consumer Commission.

**Merck** means Merck & Co., Inc, and its Related Bodies Corporate.

**Merger Agreement** means the agreement entered into by the Parties on 8 March 2009 in relation to the Proposed Transaction.

**Merial** means Merial Limited, a joint venture between Merck and sanofi-aventis governed by the Merial Joint Venture Agreement, and its Related Bodies Corporate.

**Merial Joint Venture Agreement** means the joint venture agreement between Merck and sanofi-aventis dated 23 May, 1997.

**New Merck** means the entity formed upon completion of the Proposed Transaction, and its Related Bodies Corporate.

**Parties** means Merck and SP.

**Proposed Transaction** means a cash and stock transaction under the terms of the Merger Agreement, which will be structured as a reverse merger.

**Public Section 87B Undertakings Register** means the ACCC's public register of s 87B undertakings, available at [www.accc.gov.au](http://www.accc.gov.au).

**Related Body Corporate** has the meaning given to that phrase by section 4A of the Act.

**sanofi-aventis** means sanofi-aventis S.A., and its Related Bodies Corporate.

**Share Purchase Agreement** means the Share Purchase Agreement between Merck, Merck SH Inc., Merck Sharp & Dohme (Holdings) Limited, and sanofi-aventis dated 29 July, 2009.

**SP** means Schering-Plough Corporation, and its Related Body Corporate.

**Undertaking** is a reference to all of the provisions of this document, including its schedules.

## Interpretation

10.2 In the interpretation of this Undertaking, the following provisions apply unless the context otherwise requires:

- (a) a reference to 'this Undertaking' includes all of the provisions of this document including its schedules;
- (b) headings are inserted for convenience only and do not affect the interpretation of this Undertaking;

# Undertaking to the Australian Competition and Consumer Commission

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- (c) if the day on which any act, matter or thing is to be done under this Undertaking is not a Business Day, the act, matter or thing must be done on the next Business Day;
- (d) a reference in this Undertaking to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
- (e) a reference in this Undertaking to any company includes its Related Bodies Corporate;
- (f) a reference in this Undertaking to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced;
- (g) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Undertaking;
- (h) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
- (i) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- (j) a word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other genders;
- (k) a reference to the words 'such as', 'including', 'particularly' and similar expressions is to be construed without limitation;
- (l) a construction that would promote the purpose - or object - underlying the Undertaking (whether expressly stated or not) will be preferred to a construction that would not promote that purpose or object;
- (m) material not forming part of this Undertaking may be considered to:
  - (i) confirm the meaning of a clause is the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the competition concerns intended to be addressed by the Undertaking and the clause in question;  
or
  - (ii) determine the meaning of the clause when the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the purpose or object underlying the Undertaking, leads to a result that does not promote the purpose or object underlying the Undertaking;
- (n) in determining whether consideration should be given to any material in accordance with clause 1, or in considering any weight to be given to any such material, regard must be had, in addition to any other relevant matters, to:
  - (i) the effect that reliance on the ordinary meaning conveyed by the text of the clause would, have (taking into account its context in the Undertaking and whether that meaning promotes the purpose or object of the Undertaking); and
  - (ii) the need to ensure that the result of the Undertaking is to completely address any ACCC competition concerns;



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- (o) the ACCC may authorise the Mergers Review Committee, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under this Undertaking on its behalf and that authorisation may be subject to any conditions which the ACCC may impose;
- (p) in performing their obligations under this Undertaking, the Parties will do everything reasonably within their power to ensure that their performance of those obligations is done in a manner which is consistent with promoting the purpose and object of this Undertaking.
- (q) a reference to:
  - (i) a thing (including, but not limited to, a chose in action or other right) includes a part of that thing;
  - (ii) a party includes its successors and permitted assigns; and
  - (iii) a monetary amount is in Australian dollars.

# Undertaking to the Australian Competition and Consumer Commission

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**Merck & Co., Inc.**

By:

\_\_\_\_\_  
Name: Bruce N. Kuhlik

\_\_\_\_\_  
Title: Executive Vice President and General Counsel

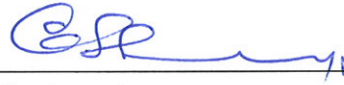
**Schering-Plough Corporation**

By:

  
\_\_\_\_\_  
Name: Joseph L. Koerwer

\_\_\_\_\_  
Title: Vice President and Associate General Counsel

**Accepted by the Australian Competition and Consumer  
Commission pursuant to section 87B of the *Trade  
Practices Act 1974***

  
\_\_\_\_\_  
Graeme Julian Samuel

Chairman

\_\_\_\_\_  
Date

14<sup>th</sup> October 2009

Undertaking to the Australian  
Competition and Consumer  
Commission

Given under section 87B by Merck & Co., Inc.  
and Schering-Plough Corporation

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## 1. Background

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- 1.1 Merck & Co., Inc. (*Merck*) and Schering-Plough Corporation (*SP*) are global, research-driven pharmaceutical companies that both have a presence in the human health and animal health markets in Australia. For the reasons contained in clause 1.9 below, Merck ceased to have a presence in animal health markets in Australia on 17 September 2009.
- 1.2 SP's animal health activities in Australia are conducted under the name "Intervet Schering-Plough Animal Health" by Intervet Australia Pty Ltd, a wholly owned subsidiary of SP.
- 1.3 Merck's animal health activities were conducted through a joint venture with sanofi-aventis known as Merial Limited (*Merial*), in which Merck had a 50% interest. Merial's Australian subsidiaries are Merial Australia Pty Ltd and Ancare Australia Pty Ltd.
- 1.4 Pursuant to the Merger Agreement, Merck and SP will combine in a stock and cash transaction (the *Proposed Transaction*). The Proposed Transaction will be structured as a reverse merger whereby SP will acquire Merck, but will operate under the name "Merck" (*New Merck*).
- 1.5 The Parties compete in certain human health markets within Australia, and Merial and SP compete in certain animal health markets within Australia.
- 1.6 On 19 May 2009, the Australian Competition and Consumer Commission (the *Commission*) commenced its informal review of the Proposed Transaction.
- 1.7 The Commission undertook market inquiries and considered information provided by the Parties, industry participants and others. The Commission's market inquiries were aimed at assessing whether or not the Proposed Transaction would have the effect or be likely to have the effect of substantially lessening competition in a market in contravention of section 50 of the *Trade Practices Act 1974* (the *Act*).
- 1.8 The Commission has expressed concerns that the Proposed Transaction would result, or be likely to result, in a substantial lessening of competition in an animal health market in Australia.
- 1.9 Since the Parties entered into the Merger Agreement, Merck agreed to sell its 50% interest in Merial to sanofi-aventis pursuant to the Share Purchase Agreement (the *Merial Transaction*). The Merial Transaction was completed on 17 September 2009. As a result of the Merial Transaction, there are no longer any overlaps between the Parties in relation to animal health in Australia.
- 1.10 Merck and sanofi-aventis have also entered into a Call Option Agreement. If the Proposed Transaction completes and sanofi-aventis exercises the Call Option, sanofi-aventis's Merial business will be combined with New Merck's animal health business. The Call Option Transaction will constitute a separate transaction to the Proposed Transaction.
- 1.11 The Parties have decided to offer this Undertaking on a voluntary basis. The Undertaking is conditional upon the Proposed Transaction completing and provides for New Merck to notify the Commission upon sanofi-aventis exercising the Call Option, and that New Merck will not complete

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the Call Option Transaction or any other transaction which results in the combining of New Merck's animal health business and Merck's business in Australia until the Commission indicates that it does not have competition concerns in accordance with the Commission's informal merger review procedures, as set out in more detail below.

## 2. Commencement and termination of the Undertaking

---

### 2.1 Commencement

This Undertaking comes into effect when:

- (a) the Undertaking has been executed by the Parties; and
- (b) the Undertaking so executed is accepted by the Commission,

*(Commencement Date)*

### 2.2 Termination

This Undertaking terminates on the earlier of:

- (a) three years from the date on which the Undertaking is accepted by the Commission; or
- (b) on the date the Commission consents in writing to the withdrawal of this Undertaking in accordance with section 87B of the Act.

## 3. Undertaking

---

### 3.1 Conditions precedent

This Undertaking is conditional upon the completion of the Proposed Transaction as defined in and pursuant to the Merger Agreement.

### 3.2 Undertaking

Subject to clause 3.1, the Parties undertake that:

- (a) New Merck will notify the Commission immediately upon sanofi-aventis exercising the Call Option; and
- (b) New Merck will not complete the Call Option Transaction until the Commission is satisfied that the Call Option Transaction will not raise competition concerns in Australia and informs the merger parties in writing that it will not intervene in the Call Option Transaction pursuant to the Act; and
- (c) New Merck will not, otherwise, effect any transaction which would result in the combination of the New Merck animal health business with the Merck business in Australia until the Commission is satisfied that any such transaction will not raise competition concerns in Australia and informs the merger parties in writing that it will not intervene in any such transaction pursuant to the Act.

# Undertaking to the Australian Competition and Consumer Commission

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## 4. Obligation to procure

---

- 4.1 Where the performance of an obligation under this Undertaking requires a Related Body Corporate of either of the Parties to take or refrain from taking some action, the Parties will procure that Related Body Corporate to take or refrain from taking that action as the case may be.

## 5. Information

---

- 5.1 The Commission may direct the Parties in respect of their compliance with this Undertaking to:
- (a) furnish information, documents and materials to the Commission in the time and in the form requested by the Commission;
  - (b) produce information, documents and materials to the Commission within the Parties' custody, power or control in the time and in the form requested by the Commission; and/or
  - (c) direct its personnel, including its directors, contractors, managers, officers, employees and agents, to attend the Commission at a time and place appointed by the Commission to answer any questions the Commission (including its Commissioners, its staff or its agents) may have.
- 5.2 The Parties must comply with a direction of the Commission made under clause 5.1.
- 5.3 Information furnished, documents and material produced or information given in response to any request or direction from the Commission under clause 5.1 may be used by the Commission for any purpose consistent with the exercise of its statutory duties.
- 5.4 Any direction made by the Commission under clause 5.1 will be notified to Allens Arthur Robinson, in accordance with clause 9.2.
- 5.5 Nothing in this clause 5 requires the provision of information or documents in respect of which the Parties have a claim of legal professional privilege.

## 6. Confidentiality and disclosure

---

- 6.1 The Parties acknowledge that the Commission may:
- (a) make this Undertaking publicly available;
  - (b) publish this Undertaking on its Public Section 87B Undertakings Register; and
  - (c) from time to time publicly refer to this Undertaking.

## 7. No derogation

---

- 7.1 This Undertaking does not prevent the Commission from taking enforcement action at any time whether during or after the period of this Undertaking in respect of any breach by the Parties of any term of the Undertaking.

# Undertaking to the Australian Competition and Consumer Commission

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- 7.2 Nothing in this Undertaking is intended to restrict the right of the Commission to take action under the Act for penalties or other remedies in the event that the Parties do not fully implement and/or perform their obligations under this Undertaking or in any other event where the Commission decides to take action under the Act for penalties or other remedies.

## 8. Costs

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- 8.1 All costs incurred by the Parties in providing information to the Commission, in responding to Commission inquiries as required by this Undertaking and in complying with this Undertaking are to be paid by the Parties.

## 9. Notices

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- 9.1 Any notice, demand, consent or other communications given or made under this Undertaking to the Commission should be sent to:  
Attention: Executive General Manager – Mergers and Acquisitions Group  
Australian Competition and Consumer Commission  
23 Marcus Clarke Street  
Canberra ACT 2601

Fax +61 2 6243 1212  
Email: [mergers@acc.gov.au](mailto:mergers@acc.gov.au)

- 9.2 Any notice, demand, consent or other communications given or made under this Undertaking to the Parties should be sent to:

c/- Carolyn Oddie  
Allens Arthur Robinson  
Level 28  
Deutsche Bank Place  
Corner Hunter and Phillip Streets  
Sydney NSW 2000 Australia

Tel +61 2 9230 4203  
Fax +61 2 9230 5333  
Email: [Carolyn.Oddie@aar.com.au](mailto:Carolyn.Oddie@aar.com.au)

- 9.3 If the Parties or the Commission gives the other 3 Business Days' notice of a change to its address or fax number, any notice or communication is only given to the relevant entity if it is delivered, posted or faxed to the most recently advised address or fax number.

## 10. Definitions and Interpretation

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- 10.1 The meanings of the terms used in this document are as follows:

*Act* means the *Trade Practices Act 1974* (Cth).



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**Business Day** means a day on which all banks are open generally in Canberra, Australia but does not include a Saturday, Sunday or a public holiday.

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**Call Option Agreement** means the Call Option Agreement between Merck, Merck SH Inc., Merck Sharp & Dohme (Holdings) Limited, Schering-Plough Corporation and sanofi-aventis dated 29 July, 2009.

**Call Option Transaction** means the transaction the subject of the Call Option Agreement, which provides for the combining of New Merck's animal health business with the Merial business, if sanofi-aventis exercises the Call Option.

**Commission** means the Australian Competition and Consumer Commission.

**Merck** means Merck & Co., Inc, and its Related Bodies Corporate.

**Merger Agreement** means the agreement entered into by the Parties on 8 March 2009 in relation to the Proposed Transaction.

**Merial** means Merial Limited, a joint venture between Merck and sanofi-aventis governed by the Merial Joint Venture Agreement, and its Related Bodies Corporate.

**Merial Joint Venture Agreement** means the joint venture agreement between Merck and sanofi-aventis dated 23 May, 1997.

**New Merck** means the entity formed upon completion of the Proposed Transaction, and its Related Bodies Corporate.

**Parties** means Merck and SP.

**Proposed Transaction** means a cash and stock transaction under the terms of the Merger Agreement, which will be structured as a reverse merger.

**Public Section 87B Undertakings Register** means the ACCC's public register of s 87B undertakings, available at [www.accc.gov.au](http://www.accc.gov.au).

**Related Body Corporate** has the meaning given to that phrase by section 4A of the Act.

**sanofi-aventis** means sanofi-aventis S.A., and its Related Bodies Corporate.

**Share Purchase Agreement** means the Share Purchase Agreement between Merck, Merck SH Inc., Merck Sharp & Dohme (Holdings) Limited, and sanofi-aventis dated 29 July, 2009.

**SP** means Schering-Plough Corporation, and its Related Body Corporate.

**Undertaking** is a reference to all of the provisions of this document, including its schedules.

## Interpretation

10.2 In the interpretation of this Undertaking, the following provisions apply unless the context otherwise requires:

- (a) a reference to 'this Undertaking' includes all of the provisions of this document including its schedules;
- (b) headings are inserted for convenience only and do not affect the interpretation of this Undertaking;

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- (c) if the day on which any act, matter or thing is to be done under this Undertaking is not a Business Day, the act, matter or thing must be done on the next Business Day;
- (d) a reference in this Undertaking to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
- (e) a reference in this Undertaking to any company includes its Related Bodies Corporate;
- (f) a reference in this Undertaking to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced;
- (g) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Undertaking;
- (h) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
- (i) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- (j) a word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other genders;
- (k) a reference to the words 'such as', 'including', 'particularly' and similar expressions is to be construed without limitation;
- (l) a construction that would promote the purpose - or object - underlying the Undertaking (whether expressly stated or not) will be preferred to a construction that would not promote that purpose or object;
- (m) material not forming part of this Undertaking may be considered to:
  - (i) confirm the meaning of a clause is the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the competition concerns intended to be addressed by the Undertaking and the clause in question;  
or
  - (ii) determine the meaning of the clause when the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the purpose or object underlying the Undertaking, leads to a result that does not promote the purpose or object underlying the Undertaking;
- (n) in determining whether consideration should be given to any material in accordance with clause 1, or in considering any weight to be given to any such material, regard must be had, in addition to any other relevant matters, to:
  - (i) the effect that reliance on the ordinary meaning conveyed by the text of the clause would, have (taking into account its context in the Undertaking and whether that meaning promotes the purpose or object of the Undertaking); and
  - (ii) the need to ensure that the result of the Undertaking is to completely address any ACCC competition concerns;

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- (o) the ACCC may authorise the Mergers Review Committee, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under this Undertaking on its behalf and that authorisation may be subject to any conditions which the ACCC may impose;
- (p) in performing their obligations under this Undertaking, the Parties will do everything reasonably within their power to ensure that their performance of those obligations is done in a manner which is consistent with promoting the purpose and object of this Undertaking.
- (q) a reference to:
  - (i) a thing (including, but not limited to, a chose in action or other right) includes a part of that thing;
  - (ii) a party includes its successors and permitted assigns; and
  - (iii) a monetary amount is in Australian dollars.

# Undertaking to the Australian Competition and Consumer Commission

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**Merck & Co., Inc.**

By:



Name: Bruce N. Kuhlik

Title: Executive Vice President and General Counsel

**Schering-Plough Corporation**

By:

Name:

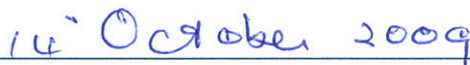
Title:

Accepted by the Australian Competition and Consumer  
Commission pursuant to section 87B of the *Trade  
Practices Act 1974*



Graeme Julian Samuel

Chairman



Date