OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 22 JANUARY 1974

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My Lords,

Introductory

In these actions, which are brought under Article 173 of the EEC Treaty, the Applicants challenge a Decision of the Commission dated 14 December 1972 which was addressed to them. That Decision was based, or purportedly based, on Article 86 of the Treaty and on Regulation No 17 of the Council, of 6 February 1962.

The facts as found by the Commission may be summarized as follows.

A group of companies headed by the Applicant in Case 7/73, that is Commercial Solvents Corporation, of New York, which I shall refer to as CSC, at present has a world monopoly in the production on an industrial scale of products derived from the nitration of paraffin. These products include 1-nitropropane which is the raw material for the production on an industrial scale of aminobutanol. Aminobutanol, apart from having limited uses as an emulsifier, is in its turn the raw material for the industrial production of ethambutol, a compound used in the treatment of pulmonary tuberculosis.

Although the master patents relating to the method of production of 1-nitropropane have expired, the CSC

group is able to maintain its monopoly by virtue of its know-how and because a newcomer in this industry would be faced with obstacles such as the high cost and complexity of the necessary equipment and the difficulty of finding outlets for the products other than 1-nitropropane that are derived from the nitration of paraffin, namely 2-nitropropane, nitromethane and nitroethane.

Up to the beginning of 1970 the CSC group supplied aminobutanol to customers in the EEC through subsidiaries and through independent distributors. In particular it supplied the Italian market through the Applicant in Case 6/73, Istituto Chemioterapico Italiano, of Milan, which I shall, like the Commission, refer to as 'ICI', without, I hope, thereby causing it to be confused with a more famous chemical company. ICI is an Italian company limited by shares, 51 % of which are owned by CSC. This gives CSC, among other powers, that of appointing the directors of ICI and of determining its policy. ICI has a board of ten directors, five of whom are executives of CSC. The chairman of the board is the president of CSC. Although this is not mentioned in the Decision, it is admitted on the pleadings that, as chairman, he has a casting vote. The executive committee of ICI consists of six members, three of whom are representatives of C.C. In its report for 1972 CSC referred to ICI as its subsidiary. In a previous report it had stated that ICI's laboratories were the base for CC's research in Europe.

Supplies of ethambutol in the EEC come from three main producers. These producers use part of their production for the manufacture of their own pharmaceutical 'specialties' and sell the rest. They are:

1. The CSC group, through ICI;

2. Cyanamid Italia, of Catania, which is a subsidiary of the American Cyanamid Company, of New Jersey; and

3. Another Italian company, Laboratorio Chimico Farmaceutico Giorgio Zoja SpA, which I shall call 'Zoja'. It was this company that triggered off the present proceedings, by making an application to the Commission against CSC and ICI under Article 3 (2) of Regulation No 17.

Zoja has been since 1966 the main customer of ICI for aminobutanol. During 1968 and 1969 there were abortive negotiations for a merger between ICI and Zoja.

In May 1969 ICI informed Zoja that CSC had decided to increase its price for aminobutanol. Zoja accepted this increase although its current contract with ICI made no provision for it. In November 1969, however, Zoja discovered that it could obtain aminobutanol more cheaply from other sources and it availed itself of these sources until the middle of 1970, cancelling, with the assent of ICI, a substantial part of its contract with that company.

In the second half of 1970 supplies of aminobutanol and of 1-nitropropane suddenly began to dry up on the market and, in a short time, they disappeared altogether. Zoja sought supplies from numerous sources, both within and outside the EEC, without success. Some of the firms to which it applied said that they had none because CSC had stopped delivery, others that they were forbidden to sell the products in question for pharmaceutical use.

In July and October 1970 ICI bought from a small producer of ethambutol, Bulciago, of Como, some 35 000 kg of 1-nitropropane which it re-sold as an emulsifier to various small manufacturers of paint, exacting from them an undertaking not to re-sell it for pharmaceutical use.

(My Lords, I would interpose here that this finding is said by ICI to be based on a misunderstanding by the Commission of something that was stated on behalf of ICI during the proceedings before the

Commission. According to ICI the undertaking exacted was that the 1-nitropropane in question should not be exported outside the EEC. As Your Lordships will see, I do not think that, at the end of the day, anything turns on this issue.)

In November 1970 Zoja asked ICI for a supply of 120 000 kg of aminobutanol for 1971. ICI said that it would have to refer the request to CSC. In January 1971 ICI informed Zoja that it had been told by CSC that CSC no longer had aminobutanol available for sale.

Subsequent attempts by Zoja during 1971 to obtain aminobutanol from sources in the EEC and elsewhere ended with the same negative result. Enquiries made from traders and through Italian embassies and through the Istituto per il commercio estero in every case led back to a single source of supply, CSC.

On 8 April 1971 Zoja lodged its application under Article 3 of Regulation No 17 with the Commission. In October 1971 it made a last request to ICI for a supply of aminobutanol or of 1-nitropropane. To this ICI replied that for some time it had been informed by its supplier, CSC, that CSC no longer had these products available for ICI.

The position at the time of the Commission's decision was that Zoja had up to then been able to continue production of ethambutol at a reduced rate but that it would have to cease production when its reserves of raw materials were exhausted unless it could in the meantime obtain a regular supply.

The Commission held:

(A) That CSC was able to exercise and did exercise such a degree of control over ICI that the two companies should be treated as forming, in their relations with Zoja and for the purposes of Article 86, a single undertaking;

(B) That this single undertaking, referred to by the Commission as the CSC-ICI group, held a dominant position, namely a world monopoly of the supply of 1-nitropropane and aminobutanol, which were the essential raw materials for the manufacture of ethambutol on an industrial scale;

(C) That the CSC-ICI group had abused its dominant position in ceasing to supply raw materials to one of the principal producers of ethambutol in the EEC, conduct which must lead to the elimination of that producer and so to a reduction in competition;

(D) That such abuse affected trade in ethambutol between Member States, in particular since Zoja exported it to France and to Germany.

In its Decision the Commission:

(By Article 1)

— declared that the cessation from November 1970 of the supply to Zoja of raw material for the production of ethambutol constituted an infringement by CSC and ICI of Article 86;

(By Article 2)

— required CSC and ICI to bring such infringement to an end and in particular:

(a) to supply at once to Zoja 60 000 kg of 1-nitropropane or 30 000 kg of aminobutanol at a price no higher than the maximum price that they charged for those products; and

(b) to submit within two months for the approval of the Commission proposals for the subsequent supply of Zoja;

(By Article 3)

— imposed on CSC and ICI jointly and severally a fine of 200 000 u.a. payable within three months; and

(By Article 4)

— imposed on them jointly and severally penalties of 1 000 u.a. per

day of delay in complying with either of the requirements as to the supply of Zoja.

Soon after the issue of the Commission's Decision CSC complied, albeit under protest, with the requirement as to the immediate supply to Zoja of 60 000 kg of 1-nitropropane or 30 000 kg of aminobutanol.

The applications originating these actions were lodged at the Registry on 17 February 1973 and were accompanied by Applications for a stay of execution of the Decision of the Commission pending the proceedings before the Court in so far as that Decision required the submission of proposals for the further supply of Zoja and the payment of the fine.

Soon after the proceedings were begun Zoja applied to intervene in them and that application was granted. I need not take up your Lordships' time with a detailed recital of the subsequent course of the proceedings, but I should mention that one result of them was the signature at Milan on 10 April 1973 of a contract for the supply of aminobutanol by CSC to Zoja. This contract is for a term of two years beginning 1 January 1973 and is to continue in force from year to year thereafter until cancelled by either party. Zoja is satisfied with its provisions as to quantities, price and so forth; and it has been approved by the Commission as meeting the requirements of its Decision. Following its signature Zoja applied for leave to discontinue its intervention. This, in the absence of any opposition, was granted.

My Lords, the Decision of the Commission is attacked by CSC and by ICI on many grounds and it is, I conceive, my duty to consider these grounds one by one.

Competence of the Commission

1. Are CSC and ICI a single 'undertaking'?

CSC contends that the Commission had no competence in the matter, so far as CSC is concerned, because CSC is a company established under the law of Maryland and having its principal office in New York. CSC's only relevant connexion with the EEC, it says, is that it once sold nitropropane and aminobutanol into the EEC fob United States ports and later made the policy decision to discontinue such sales. It denies ever having had that measure of control over ICI that would enable it and ICI to be treated for the purposes of Article 86 as a single undertaking. It cites in that connexion the decisions of this Court in Case 22/71 *Béguelin Import Co. v S.A.G.L. Import Export* (Rec. 1971, p. 949), in the 'Dyestuffs Cases' — Case 48/69 *Imperial Chemical Industries Ltd. v Commission* (Rec. 1972, p. 619), Case 52/69 *J. R. Geigy AG v Commission* (ibid. p. 787) and Case 53/69 *Sandoz AG v Commission* (ibid. p. 845) — and in Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission* [1973] E.C.R. 215.

What those authorities show to my mind is that the mere fact that a parent company and its subsidiary are separate legal persons does not mean that they are separate 'undertakings' for the purposes of Articles 85 and 86. Thus an agreement between them is not in general within the prohibition contained in Article 85 (that was the decision in the *Béguelin* case). Conversely the parent cannot shelter from the prohibitions contained in Articles 85 and 86 by saying that the only acts done within the Community were those of the subsidiary.

There are indications in the judgments in those cases that the position may be different where the subsidiary is allowed to manage its business autonomously, and it is upon those indications that the argument of CSC rests. That argument is that, in order for parent and subsidiary to be treated as a single undertaking, 'there must be (a) power of direction of the parent company over the subsidiary and also (b) the actual exercise of the parent's control to such an extent that

the subsidiary does not determine its behaviour on the market in an autonomous manner, but essentially carries out the instructions given to it by the parent company. 'The yardstick', it is said, 'is the complete absence in a subsidiary of the power to determine its own market behaviour. The possibility of control by the parent is not sufficient; what is needed is the actual exercise of such control to the extent that the subsidiary loses its *market* autonomy'. And, so the argument runs, it is for the Commission to show that those conditions exist. I can see, my Lords, that the judgments in the cases referred to could be open to that interpretation. But in my opinion such an interpretation of them would be erroneous.

One starts to my mind from this, that neither Article 85 nor Article 86 anywhere refers to 'persons'. In both Articles the relevant prohibitions are directed to 'undertakings', a much wider and looser concept. This indeed is what one would expect, because it would be inappropriate to apply rigidly in the sphere of competition law the doctrine referred to by English lawyers as that of *Salomon v Salomon & Co. Ltd.* [1897] A.C. 22 — i.e. the doctrine that every company is a separate legal person that cannot be identified with its members. Basically that doctrine exists in order to preserve the principle of limited liability. It is concerned with the rights of creditors in the context of company law. It has been applied, with more or less happy results, in other spheres, such as those of conveyancing, of contracts and of liability for tort. But to export it blindly into branches of the law where it has little relevance, could, in my opinion, serve only to divorce the law from reality.

Suppose, my Lords, that CSC had traded in Italy through a branch office. There could have been no doubt then that it was amenable to the jurisdiction of the Commission and of this Court. Could it have made any difference if CSC has chosen to trade in Italy through a wholly-owned subsidiary? The difference would have been one only of legal form, not of reality. Why then should it make any difference that it chose to trade in Italy through a subsidiary that it controlled by a 51 % majority rather than by a 100 % majority? What matters in this field, in my view, is control, not extent of beneficial ownership.

My Lords, I would respectfully adopt the words of Lord Denning M.R. when he said in *Littlewoods Mail Order Stores v. C.I.R.* [1969] 1 W.L.R. at p. 1254:

'The doctrine laid down in *Salomon v Salomon & Co.* [1897] A.C. 22, has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the courts follow suit.'

In his references to 'group accounts and the rest' Lord Denning was of course, in characteristic manner, compendiously describing a whole mass of 20th century legislative reaction against the consequences of an unbridled and unthinking extension of the doctrine of *Salomon v Salomon & Co.* into fields where it should be applied, if at all, only with caution. In this respect, the field of fiscal law is a notorious example. So is that of competition law. Thus for instance the very recent Fair Trading Act 1973 of the United Kingdom contains passim provisions for the treatment as 'one person' of the 'members of one and the same group of interconnected bodies corporate'. The drafting technique of that Act is very different from that of the EEC Treaty, but the underlying sentiment is manifestly the same.

My Lords, the law, if it is to retain respect, must accord with common sense and with reality. It should not, in my opinion, allow its own principles to be misapplied to the point where they

provide opportunities for the adoption of devices designed to defeat its own ends.

It is, my Lords, with these considerations in mind that I approach the argument of CSC in the present case. In my opinion those considerations import at least:

1. that there is a presumption that a subsidiary will act in accordance with the wishes of its parent because according to common experience subsidiaries generally do so act;

2. that, unless that presumption is rebutted, it is proper for the parent and the subsidiary to be treated as a single undertaking for the purposes of Articles 85 and 86 of the EEC Treaty; and

3. that the presumption can only be rebutted if it is shown affirmatively, by those concerned to rebut it, that the subsidiary in fact conducted its business autonomously. I confess that to my mind this must be a very difficult onus to discharge. I can conceive of its being discharged in such a case as that of (say) an insurance company, or of a company which is a trustee of a pension fund, acquiring by way of investment a controlling interest in a trading company, or in a case where what is at first sight the subsidiary of one company is shown to be in reality a joint venture between that and another company in unequal shares. But I would think it almost impossible to discharge in the ordinary case of a parent and subsidiary carrying on related businesses.

The arguments of CSC and of ICI as contained in their pleadings, consist in the main of mere assertion, unsupported by evidence, that CSC did not control ICI's 'behaviour on the market'. A number of pages in CSC's Reply are also taken up by an attempt to show that, in the law of none of the Member States, including Italy, does the control of a majority of the votes attached to shares in a company carry control of that company. This is plainly wrong.

CSC does point out, and it produces a certificate of Arthur Young & Company to substantiate the fact, that over 75 % of ICI's turnover is derived from the sale of products neither produced by CSC nor based on raw materials produced by CSC. This seems to me, with respect, inconclusive. Even less persuasive is the fact, relied upon by CSC, that the managing directors of ICI have remained unchanged since before 1962 when CSC acquired its 51 % interest in ICI. Lacking throughout is the slightest evidence that ICI was ever able or willing to negotiate at arm's length with CSC, in the way that an autonomous trader would. Indeed there is in the summary of the facts contained in CSC's application (at p. 4) a passage which seems to me significant in this connexion, albeit unintentionally so. It reads: 'Early in 1970 CSC decided, for commercial and technical policy reasons, that in principle it would no longer supply nitropropane and aminobutanol to the EEC, but would instead supply dextro-aminobutanol, an upgraded intermediate product which [ICI] would convert to bulk Ethambutol for sale in the EEC and elsewhere, and for the production of its own specialties.'

At the hearing Counsel for ICI stated, no doubt on instructions, that at the time of the purchase by CSC of its 51 % interest in ICI an agreement was entered into of which the purpose was to ensure that ICI 'would not lose its economic independence'. Your Lordships will find the terms of that alleged agreement at page 5 of the transcript of the hearing. I do not think that it would be right for me to take up time by reading them. There is no mention of this agreement in the pleadings, nor was any evidence adduced about it. We do not even know whether it is alleged to have been oral or in writing, let alone what was supposed to be its duration. Nor of course has the Commission had the opportunity of

affording us its considered comments on its significance. In my opinion, my Lords, this Court ought not in a case such as this, to be asked to found its decision on assertions made by Counsel, unpleaded and unsupported by any evidence.

In the result I am of opinion that CSC's challenge to the competence of the Commission and to the jurisdiction of this Court should be held to fail.

2. *The 'effects doctrine'*

That being so, it is, I think, unnecessary for me to express a concluded opinion on an alternative contention put forward by the Commission in its pleadings, though not in its Decision, on the question of its competence. This was that, even if it were held that CSC and ICI were independent undertakings, the Commission would still have jurisdiction over CSC because 'The behaviour at issue (namely restricting the supplies of nitropropane, aminobutanol and dextro-aminobutanol on the Italian market to the production requirements of ICI alone and at the same time preventing Zoja from obtaining supplies in other markets produces effects in the territory of the common market which are direct and immediate, reasonably foreseeable and substantial'. This is of course a reference to the 'effects doctrine' which was adopted by the Court in the *Béguelin* case and discussed by Mr Advocate-General Mayras in his Opinion in the *Dyestuffs* Cases (Rec. 1972, pp. 692-702).

The Commission cites also in this connexion a passage in the Judgment of the Court in the *Continental Can* case [1973] E.C.R. at pp. 242-243, but I am not sure that this is in point.

CSC seeks to distinguish the *Béguelin* case on the ground that it was concerned with the validity of a contract, a matter of private international law, whereas the present case is concerned with public international law. I confess that I find the distinction unsatisfactory. Articles 85 and 86 of the Treaty are not couched in terms such as to suggest that the prohibitions they contain are selective in this way. For the rest, CSC's arguments are in the main a repetition of those that were dealt with so fully by Mr Advocate-General Mayras with, perhaps, the addition of a citation of the judgment of the Cour d'Appel of Paris in *Société la Technique Minière v Maschinenbau Ulm GmbH* (Rec. Dalloz, Jurisprudence 1967, p. 681). That judgment was concerned, so far as relevant, with the interpretation of Article 37 (1) (a) of the French Ordinance No 45-1423 of 30 June 1945 about 'refus de vente' and there is undoubtedly, as CSC suggests, a close analogy between it and the present case. But it does not follow that Article 86 of the Treaty is to be interpreted in the same way as Article 37 (1) (a) of that Ordinance.

For the reason I have indicated I say no more about the possible application to this case of the 'effects doctrine'.

Did the 'CSC-ICI Group' have a relevant 'dominant position'?

1. *The relevant market*

Your Lordships will remember that in three cases, namely Case 40/70 *Sirena S.R.L. v Eda S.R.L.* (Rec. 1971, p. 69, at p. 84), Case 78/70 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG* (ibid. p. 487, at p. 501) and the *Continental Can* case [1973] E.C.R. at pp. 249-252, the Court has held that a position can only be 'dominant' within the meaning of Article 86 if it is dominant in a relevant market. As I understand those decisions a relevant market for this purpose is one in which the products available are substantially interchangeable.

My Lords, despite repeated suggestions made on behalf of CSC and of ICI that the Commission has in this respect shifted its ground from time to time, it appears to me, from a perusal of (i) the

Notice of Objections, dated 25 April 1972, served by the Commission on CSC pursuant to Article 2 of Regulation No 99/63/EEC, (ii) the Commission's Decision, and (iii) its pleadings, that the Commission has been throughout consistent in maintaining — as it maintained in the oral submissions made on its behalf at the hearing — that the relevant market in which, according to its view, CSC and ICI held a dominant position was that for 1-nitropropane and for aminobutanol as raw materials for the production of ethambutol. It may well be, as the Commission has pointed out, that CSC's and ICI's advisers were misled as to the Commission's attitude in this respect by an inaccuracy in a published unofficial translation of the Decision into English.

Be that as it may, I do not think that the question whether the market for the raw materials for the production of a particular compound is a relevant market can, logically, be divorced from the question whether the market for that compound is a relevant one. The consumer, after all, is interested only in the end product, and it is detriment to the consumer, whether direct or indirect, with which Article 86 is concerned — see the Judgment of the Court in the *Continental Can* case [1973] E.C.R. at p. 247. So it was legitimate, in my opinion, for CSC to seek, as it did, both in the proceedings before the Commission and in those before this Court, to establish that the market for ethambutol was not a relevant one, because, so it said, ethambutol was but one of a number of interchangeable anti-pulmonary tuberculosis drugs.

The Commission, in its Decision, held that this was not so. In a carefully worded paragraph (the one of which there was the unfortunate inaccuracy in translation to which I have referred) it said that, in determining the effects of the behaviour of CSC and ICI, the market for ethambutol could properly be considered a market in itself, because, among other things, ethambutol was used in combination with other anti-tubercular products and was a complement of them rather then their competitor.

Evidence was adduced before the Court in an attempt to discredit that finding. But to my mind that evidence, in so far as it touches the finding at all, in fact supports it.

Thus, in an article by Dr. Virchow, the Medical Director of a tuberculosis clinic in Davos, which is Annex IX to CSC's Application, the author emphasizes throughout the importance of using anti-tubercular drugs in combination and discusses the possible combinations of them that can be tried on a patient, considering 'their mode of action, cross resistance, side effects and compatibility'. He mentions combinations including ethambutol as appearing to him 'to be most suitable'. This hardly suggests that these drugs are substitutes for each other. Rather does it suggest that each has its own properties of which account must be taken in prescribing.

To the same effect is Annex X to CSC's application, which is a statement by the American Medical Association's Council on Drugs published in that Association's Journal on 17 April 1972. This statement is headed 'Evaluation of a New Anti-tuberculous Agent Rifampin (Rifadin, Rimactane)'. Its value as evidence is somewhat weakened by the warning that 'This statement is an initial assessment of a new drug evaluated on the basis of available evidence. It does not necessarily represent the final opinion of the Council on Drugs, nor does it imply approval, endorsement, or acceptance of the drug'. At all events, the statement contains this expression of opinion:

'Rifampin should be administered with one or preferably two other antituberculous agents (e.g., isoniazid, ethambutol, streptomycin) selected on the basis of bacterial sensitivity studies and knowledge that the patient had not received these agents previously.'

CSC and ICI also rely on certain statistics (set out in Annex XI to CSC's Application) which are designed to show that ethambutol-based products are not the most used of the anti-tubercular drugs. This, those statistics do show. But they also show that such products are in very substantial use.

I would therefore, my Lords, hold that CSC's and ICI's challenge to the validity of the Commission's Decision fails in so far as it is based on the allegation that the relevant market here is that for anti-tubercular drugs as a whole.

2. *Did the CSC-ICI group have a monopoly in the production and sale of 1-nitropropane and of aminobutanol?*

CSC and ICI next attack the finding of the Commission that they have between them a world monopoly of the production and sale of 1-nitropropane and of aminobutanol. This they do mainly on the ground that the Commission reached that finding without adequate investigation of the facts. In the proceedings before the Commission, CSC and ICI expressed doubts as to whether they had such a monopoly, but did not adduce any evidence on the point. This may have been because of the short time given to them by the Commission for the preparation of their cases, a matter to which I shall come. At all events, the Commission's finding was based, or so I understand, on the evidence tendered by Zoja as to the results of its world-wide enquiries for supplies of 1-nitropropane or of aminobutanol. Zoja's relevant correspondence is annexed to the Commission's Defence in Case 7/73 (Annex 2) and it makes very convincing reading. It is difficult to see how, in the circumstances, the Commission could have reached any finding other than that which it did.

In the proceedings before this Court CSC and ICI have produced expert evidence from Professors Pietra, Corbellini and Macchioni and from CSC's own Technical Consultant, Dr Martin, to the effect that it is possible to produce aminobutanol otherwise than from 1-nitropropane (see Annexes VI, X and XI to ICI's application and Annex XV to CSC's Reply). But this evidence is all about what has been shown to be possible on a laboratory scale. Despite assertions to the contrary by CSC and ICI in their pleadings, none of these experts states that aminobutanol is in fact being produced on an industrial scale by any of these other methods.

CSC and ICI have also produced a letter (this is Annex VIII to CSC's application) from an organization called International Business & Research, of Coral Gables, Florida, indicating that that organization 'has under development a new method of obtaining' aminobutanol. The letter expresses the 'belief that when this method is perfected it will in all probability be the most economical process on the market' and concludes that CSC 'might benefit greatly by working with' International Business & Research 'on the further development of this system'. I hardly think, my Lords, that any comment is called for on this piece of evidence.

Of more pertinence is the fact adduced by CSC and ICI that aminobutanol is produced industrially by an Italian company, Polifarm SpA. It seems however that this company does not market aminobutanol in significant quantities, its output being small and mostly reserved for an associated company which is a manufacturer of ethambutol.

In their replies, for the first time, CSC and ICI mentioned another manufacturer of 1-nitropropane and of aminobutanol within the EEC, namely the Société Chimique de la Grande Paroisse, of Paris. But they made no allegation, let alone did they adduce any evidence, about this manufacturer's output or when it began. The Commission states, in its Rejoinder, that according to enquiries it has made, the

Société Chimique de la Grande Paroisse has so far built only a pilot plant for the production of nitropropane which enables it to market a few kg at a time, and that only since very recently. The Commission says that it has a report substantiating this, which is at the Court's disposal, but which contains matter that might disclose trade secrets. I do not think, my Lords, that it is necessary to call for this report.

On the whole I find the allegations made and evidence adduced by CSC and ICI on this part of the case unpersuasive.

3. Were 1-nitropropane and aminobutanol essential raw materials for the manufacture of ethambutol on an industrial scale?

A crucial finding in the decision of the Commission was that ethambutol could not be manufactured competitively on an industrial scale from any raw materials other than 1-nitropropane and aminobutanol. This finding too is challenged by CSC and ICI on the ground that it was made without sufficient investigation.

Here again CSC and ICI rely on the expert evidence to which I have referred. They rely also on a statement in a letter to ICI from a company called Fallek Petrochemical (Europe) CV, of Amsterdam, to the effect that thiophenol is used in Eastern Europe as an intermediate in the production of ethambutol (Annex VIII to ICI's Application), on the fact that Polifarm SpA makes its aminobutanol by a process based on butanone and on a suggestion that Bulciago may be using the same process.

This evidence the Commission counters with, in the first place, the expert opinion of Professor Cardani to the effect that the production of aminobutanol from butanone is much more costly than its production from 1-nitropropane (Annexes 3 and 4 to the Commission's Defence in Case 7/73); secondly by saying that, upon being asked, Bulciago had declined to disclose the nature of its process but had confirmed that it was not yet competitive; and lastly by exhibiting some correspondence between Zoja and Fallek Petrochemical (Europe), subsequent in date to the latter's letter to ICI, which negatives the impression given by that letter (Annex 5).

Perhaps the best piece of evidence in favour of the Commission on this point lies in the fact that, admittedly, the three main producers of ethambutol in the Community produce it from aminobutanol or dextroaminobutanol derived from 1-nitropropane. At all events, weighing the evidence placed before the Court, I have, after some hesitation, come to the conclusion that on this point too CSC and ICI's attack on the decision of the Commission should be held to fail.

Did the CSC-ICI group abuse its dominant position?

Your Lordships will remember that, in its Decision, the Commission held that the abuse by the CSC-ICI group of its dominant position consisted in ceasing to supply the raw materials of which it held a monopoly to one of the principal producers of ethambutol in the EEC, namely Zoja, conduct which must lead to the elimination of Zoja as a producer of ethambutol and so to a reduction in competition. Implicit, I think, in that formulation of the charge is a finding that there was discrimination against Zoja.

My Lords, I have no doubt that, if an undertaking has a dominant position in the market for a raw material, that undertaking abuses that position if, without reasonable justification, it refuses to supply a particular user of the raw material. It may, I think, be different if, the raw material being itself a manufactured product that exists only thanks to the efforts in research and development of the dominant undertaking, that undertaking decides to sell it to no-one, but to maximize its profits by

itself supplying all the demand for the end product or for what has been referred to in this case as an 'up-graded' material. It seemed to me at one time that CSC and ICI might be able to avail themselves of a defence based on some such principle. After the close of pleadings questions were addressed to them by the Court designed to elucidate the true scope and nature of the decision that CSC said that it took early in 1970, and the commercial and technical reasons underlying that decision; and, at the end of the hearing, I sought further information from CSC on the matter, particularly with a view to ascertaining whether all the customers of CSC and of ICI had been treated in the same way or whether Zoja had been treated differently.

In my opinion, the answers given by CSC and by ICI to those questions fall far short of saying that there was no discrimination against Zoja. For instance they clearly allow it to be inferred that CSC supplies dextro-aminobutanol to Cynamid Italia, which the Commission says is the fact. It was suggested on behalf of CSC and of ICI at the hearing that the reason might be that Zoja never asked for dextroaminobutanol. But it was accepted that Zoja had never asked for bulk-ethambutol either, yet this was offered to Zoja. (See the transcript pp. 44-46).

The only defence really put up by CSC and ICI on this part of the case was, in essence, that they had not abused their dominant position because Zoja was merely a producer of ethambutol based 'specialties' and they were ready and willing to supply it with as much bulk-ethambutol as it wanted for the production of those specialties.

It is in issue between CSC and ICI on the one hand and the Commission on the other whether Zoja does sell only ethambutol-based specialties or also sells bulk-ethambutol. The Commission asserts that Zoja sells bulk-ethambutol and there is a finding to that effect in its Decision. CSC and ICI deny the fact. Neither side has adduced any evidence on the point. It would be open to the Court, even at this late stage, to invite the parties to adduce evidence on it: see Articles 60 and 61 of the Rules of Procedure. But I do not, for my part, think that this is necessary, for two reasons.

First, I think that the matter could be decided according to where the burden of proof lies. I think that, as the Court held in Cases 8 to 11/66, the *Cement* cases (Rec. 1967, p. 117), in administrative proceedings before the Commission under Article 85 or Article 86, the burden of proof is on the Commission in the sense that it is the duty of the Commission to make sure that all the facts are established which must exist for the Article in question to apply. But I think that when an applicant comes to this Court under Article 173 the burden must be on him to show that the decision of the Commission is ill-founded. If it is part of his case that a finding of fact by the Commission is wrong, it is in my opinion incumbent on him to adduce evidence to that effect, or to show that the finding was based on no evidence, or on insufficient or irrelevant evidence or, which is perhaps the same thing, on evidence which the Commission misinterpreted. Of course, if a fact is of such a nature that it must lie within the knowledge of the Commission rather than within that of the applicant, very little may be needed to shift the burden to the Commission. But here neither CSC nor ICI made the slightest attempt to substantiate their allegation that, contrary to the finding of the Commission, Zoja was a seller only of specialties.

Secondly, I do not think that the question whether Zoja was or was not a seller also of bulk ethambutol is really material. The crux is that it was a producer of ethambutol and that, that being so, it was unlawful for the monopoly supplier of raw materials for the production of ethambutol to deny it

a supply of any raw material for such production.

My Lords, I do not propose to take up a great deal of Your Lordships' time with a discussion of authorities bearing on this point. The matter is essentially one of interpretation of Article 86. Refusal to supply is not mentioned expressly in that Article, but, as the Court held in the *Continental Can* case [1973] E.C.R. at pp. 245-247, the abuses listed in that Article are only examples. The concept of abuse of a dominant position must be interpreted in the light of Article 3 (f) which requires expressly that competition in the common market is not to be distorted and therefore, a fortiori, by implication, that it is not to be eliminated. Moreover, paragraph (c) of Article 86 provides that such an abuse may in particular consist in 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. It must, a fortiori, be an abuse for a dominant undertaking to place another trading party at a disadvantage by refusing to supply to him a raw material which the dominant undertaking supplies to others in an equivalent position.

No authority was referred to by CSC or by ICI in support of their arguments on this part of the case. The Commission very helpfully referred to a Report on 'Refusal to Sell' made in 1969 by the Committee of Experts on Restrictive Business Practices of the OECD. This shows that in France any refusal to sell is unlawful unless justified on specific grounds recognized by the law. None of these grounds corresponds to those put forward by CSC and ICI in this case. In other member countries of the OECD there are legislative provisions of various kinds enabling action to be taken in the case of a refusal to sell by a monopoly or by an undertaking having a dominant position where such refusal operates against the public interest. These countries include Belgium, Denmark, Germany, the Netherlands and the United Kingdom. It is interesting to note that, in paragraph 33 of a Report on 'Refusal to Supply' made by the United Kingdom Monopolies Commission in 1970 (Cmnd 4372), that Commission cites the case of a vertically integrated supplier, not operating under reasonably competitive conditions, refusing to supply competitors, as one calling for investigation. Against that background, my Lords, I do not think that it is necessary to refer to authorities in other countries, such as the USA, to justify the view that there would be nothing startling in the Court upholding the interpretation of Article 86 on which the Commission rested its Decision in this case.

Did the CSC-ICI group's abuse of its dominant position affect trade between Member States?

CSC and ICI attack the Commission's finding to the effect that their action affected trade between Member States on two grounds. First they say (and I quote from CSC's application, p. 21):

'In the EEC, tuberculosis has become a very rare disease. The real markets for anti-tuberculosis drugs are the developing countries, where tuberculosis is still rampant. According to CSC's best estimate, Zoja sells only a small portion of its production in the EEC.'

My Lords it seems to me that this statement goes to the question of the extent to which CSC and ICI's action affected trade between Member States rather than to the question whether it affected that trade at all. I propose to deal with it when I come to the question of the propriety of the Commission's Decision in so far as it imposed fines on CSC and ICI and required them to resume supplies to Zoja.

The other ground on which CSC and ICI attack the Commission's finding, as to trade between Member States is expressed in CSC's Application (again at p. 21) as follows:

'Trade from Italy with the other EEC member states is blocked by patents, in those states held by American Cyanamid . . . Those patents of American Cyanamid exist everywhere in the EEC, except in Italy — where patents on pharmaceuticals are not available — and in Luxembourg — which being economically part of the Belgian market, is commercially uninteresting.'

I would reject this contention for two reasons.

First, I think that it is misconceived in principle. The mere fact that one concern is entitled to restrict the trade of another by the exercise of patent rights does not mean that a third is free to restrict it also by abusing a dominant position. The circumstance that a man is about to drown does not entitle another to shoot him. Moreover, the existence of patent rights does not necessarily lead to an absence of competition. For a vivid illustration of this see *Pfizer Corporation v Ministry of Health* [1965] A.C. 512, where the House of Lords held that, by virtue of s. 46 of the UK *Patents Act 1949*, the supply of drugs for the National Health Service in the UK could not be restricted by the exercise of patent rights. Even in countries where there is no such enactment there are generally provisions for compulsory licensing in certain circumstances. Indeed the situation is not unknown in which a patentee finds if financially advantageous voluntarily to license a competitor, with the result that products of the patentee and of the licensee compete in the market.

Secondly, the facts that have been placed before the Court — and they are mostly common ground — simply do not support the allegation that trade within the EEC is 'blocked' by American Cyanamid's patents. They evince only that Zoja and American Cyanamid are involved in world-wide litigation about their respective patents the outcome of which is uncertain. The position in France is that a decision of the Cour d'appel of Paris in favour of Zoja is under appeal to the Cour de Cassation. No-one can predict what the decision of the latter Court will be. In Germany several sets of proceedings seem to be in train, none of which has yet reached the stage of effective decision, though Zoja seems to have had the best of some interlocutory skirmishes. In the UK, patents have been granted to both Zoja and American Cyanamid, in each case on an application opposed by the other. Each of them has petitioned the Court for the revocation of the patent granted to the other. In each case the petition is still at an interlocutory stage. There are also proceedings under way in Japan and in Korea, in which it appears that Zoja has had some initial successes. CSC and ICI argue that the state of affairs in countries other than those which were Members of the EEC at the time of the alleged infringement of Article 86 is irrelevant. But I do not think it is, for it confirms the impression that American Cyanamid's patent position is far from unassailable.

Did the Commission have power to impose on the CSC-ICI group specific requirements for the supply of Zoja?

It is contended by CSC and by ICI that the Commission did not have power to order them to supply within a given time a given quantity of a given product at a maximum price. They concede that a power to make a specific order of that kind in competition cases is not unknown in the legislation of Member States — they instance Article 24 of the Netherlands Economic Competition Law — but they say that an express provision in a Regulation made by the Council under Article 87 of the Treaty would have been necessary to confer such a power on the Commission. They say that Article 3 (1) of Regulation No 17, on which the Commission relies, merely gives it power to make 'cease and desist' orders in general terms and that, if it were otherwise, many of the other provisions of Regulation No 17 would have been unnecessary.

My Lords, I cannot, for my part, accept this argument.

Article 3 (1) is in the following terms:

'Where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.'

In my opinion it is helpful in interpreting that provision to consider also the terms of paragraph 3 of the same Article. These are:

'Without prejudice to the other provisions of this Regulation, the Commission may, before taking a decision under paragraph 1, address to the undertaking or associations of undertakings concerned recommendations for termination of the infringement.'

It seems to me obvious that the recommendations made under paragraph 3 must be specific. A recommendation in general terms to cease and desist from the infringement would be pointless. My Lords, it would be odd indeed if specific recommendations made under paragraph 3 could not be followed up, where necessary, with specific requirements imposed under paragraph 1.

I would accept the argument of the Commission that the reason why Article 3 (1) was left in general terms was that infringements of Article 85 and 86 can take so many forms that it would have been impossible for the authors of the Regulation to provide a catalogue of the measures capable of being ordered by the Commission in order to bring such infringements to an end.

Moreover one must, I think, bear in mind that, as was pointed out by Lord Upjohn in *Morris v Redland Bricks Ltd.* [1970] A. C. 652 at pp. 666-667, it is in general unfair to a person to make an order against him requiring him to do something positive without specifying in the order exactly what he must do in order to comply with it. If in the present case the Commission had made an order in general terms requiring CSC and ICI to bring their infringement to an end, it would have meant of course that they must resume supplies to Zoja. But it would not have told them what quantities of what products they must supply to Zoja and at what prices in order to comply with the order. With default penalties running at the rate of 1 000 u.a. a day, such an order would have placed them in an intolerable position. I do not think there should be attributed to the authors of Regulation No 17 an intention that the Commission should have to place undertakings in such a position.

Was that power properly exercised by the Commission?

By the very terms of Article 86 an abuse of a dominant position is an infringement of that Article only 'in so far as it may affect trade between Member States'. It follows that the Commission had power to order CSC and ICI to resume supplies to Zoja only in so far as the cessation of such supplies might affect trade between Member States. CSC and ICI complain that the Commission disregarded this point in reaching its Decision. I have come to the conclusion, my Lords, that this complaint is well founded.

The Commission found as a fact that Zoja sold its products both in the EEC and in third countries, but it made no finding as to how much of those sales were made in the EEC and how much went to third countries. CSC and ICI say that, according to the best estimates they can make, not more than 10 % of Zoja's sales were made in the EEC, at least 90 % of its production going to third countries. They contend that the Commission should not have ordered them to supply more raw materials to Zoja than was necessary to sustain its trade in the EEC. They say indeed — and the Commission does not dispute this — that, during the course of the

proceedings before the Commission, they repeatedly offered to supply to Zoja enough aminobutanol for this purpose, but that their offers were rejected by the Commission.

The Commission accepts that it did disregard this point. The only paragraph in its Decision in which it sought to justify the order it was making as to the supply of Zoja reads as follows:

'Whereas, as regards the way in which an end is to be put to the infringement, it is necessary to provide for the immediate delivery to Zoja of a certain quantity of raw material capable, in the light of the last request made by Zoja, of meeting its most urgent needs; It is also appropriate, in order to ensure the maintenance of conditions of effective competition, that Zoja should be able to obtain longer term supplies.'

In its Defence in Case 7/73 the Commission explains that, in making the order that it did, it had in mind two considerations. The first was the urgency of throwing a 'life-line' to Zoja in the form of an immediate supply, the quantum of which would not be open to discussion. The second was, and I quote (from p. 38), 'that it was practically impossible for the Commission — even if admitting that it would have been legitimate to do this — so to involve itself in the details of the management of Zoja that it could evaluate, at the place of business of the undertaking itself, the volume of supply necessary to ensure an effective operation.' Because of these factors, the Commission continues, it fixed the 'life-line' supply on the basis of the average of the last annual supply that Zoja had received from ICI (i.e. 80 000 kg for 1969) and of the annual order placed by Zoja for 1971 (i.e. 120 000 kg) applied to a period of between three and four months. Having thus ensured the survival of Zoja, the Commission relied, for the longer-term supplies, on the presentation of proposals that would be open to discussion.

My Lords, I would say in passing, that, in the light of that explanation, I doubt if the Decision of the Commission strictly complies with the requirement of Article 190 of the Treaty that it should state the reasons on which it is based. That requirement has been interpreted by the Court as importing that the Commission must set out clearly in its Decision the facts and considerations on which its order rests, so as to enable both the parties and the Court to ascertain the essential steps in the Commission's reasoning: see Case 41/69 *ACF Chemiefarma NV v. Commission* (Rec. 1970, p. 692) and Case 55/69 *Cassella Farbwerke Mainkur AG v. Commission* (Rec. 1972, pp. 914-915).

Be that as it may, the crux is to be found in the following paragraph in the Commission's Defence in Case 7/73 (at p. 39):

'But, and this is the essential point, the criterion could not be based, as the plaintiff would have it, on a distinction between the actual sales of Zoja destined for the common market and those destined for third countries because this would ignore the necessity of guaranteeing the maintenance of Zoja as a viable undertaking. This is because an important decrease in Zoja's turnover could not occur without seriously affecting its competitiveness.'

My Lords, one is very familiar with the sort of case where it is said on behalf of an undertaking that its export trade is essential to the maintenance of its home trade, and vice versa, because the loss of either would so reduce its turnover as to render it uncompetitive; and if the Commission had found as a fact, on sufficient evidence, that this was so in the case of Zoja, and had recorded that fact in its Decision, the order it made might have been sustainable. But the absence of that vital finding, in my opinion, vitiates that order. I cannot accept the suggestion of the Commission that it was not practicable for it to obtain the relevant evidence from Zoja.

I would therefore, but for one circumstance, say that Articles 2 and 4 of the Commission's Decision ought to be annulled. That circumstance is, of course, that Article 2 has been fully complied with by CSC. As a result Zoja has received supplies that it cannot be asked to return and has acquired, in respect of further supplies, contractual rights that the Court cannot abrogate. That being so, to annul Articles 2 and 4 now would, it seems to me, be like closing the stable door after the horse has bolted.

The fine

In those circumstances, justice to CSC and to ICI demands, I think, that the Court should cancel the fine imposed on them by Article 3 of the Decision. I doubt if the order for payment of that fine could stand in any case. Article 15 (2) of Regulation No 17 requires the Commission, in fixing the amount of such a fine, to have regard 'both to the gravity and to the duration of the infringement'. It seems to me difficult for the Commission to assess the 'gravity' of an infringement of Article 86 without first determining the extent to which the conduct constituting that infringement may affect trade between Member States — and this is what, if I am right, the Commission omitted to do in the present case. At all events, Article 17 of Regulation No 17 confers on the Court an unlimited jurisdiction to review a decision of the Commission imposing a fine: the Court may cancel, reduce or increase the fine as it thinks fit. I do not doubt that in exercising that jurisdiction the Court is entitled to take into account considerations of common justice.

Procedural defects in the proceedings before the Commission

On that view, it is, I think, unnecessary for me to consider in detail the complaints that are made by CSC and by ICI about the procedure adopted by the Commission. With most of these, indeed, I have already dealt, expressly or implicitly, in what I have said on the points of substance.

There is however one matter that calls for comment, and that is the time-table adopted by the Commission. Your Lordships will remember that Zoja's application under Article 3 (2) of Regulation No 17 was lodged with the Commission on 8 April 1971. It was not till over a year later, namely on 24 April 1972, that the Commission sent notices of objections to CSC and ICI. Yet, in those notices, the Commission gave CSC and ICI only fifteen days in which to answer. It held an oral hearing on 15 May 1972 and finally issued its Decision on 14 December 1972. Between the latter two dates there was a good deal of correspondence between CSC and ICI on the one hand and the Commission on the other. Nonetheless the contrast between the time taken by the Commission to perform its tasks and the time it allowed CSC and ICI to prepare their cases is glaring.

Article 2 (4) of Regulation No 99/63/EEC requires the Commission, when giving notice of objections, to fix a time limit within which the undertakings to which the notice is addressed 'may inform the Commission of their views'. Article 3 entitles those undertakings to set out in their answers 'all matters relevant to their defence', to 'attach any relevant documents in proof of the facts set out', and to 'propose that the Commission hear persons who may corroborate those facts'. It is plainly implicit in Article 2 (4) that the Commission must fix a reasonable time limit enabling the respondent undertakings fully and effectively to exercise their rights under Article 3. In a case of this complexity to give only a fortnight for this purpose to undertakings one of which had its head office in Milan is, to my mind, patently unreasonable. The matter was made worse by the decision of the Commission to hold the oral

hearing three weeks after the service of the Notice of Objections.

The Commission has not really sought to justify this oppressive time-table, beyond saying first that matters were urgent because Zoja's supplies were cut off, and secondly that CSC and ICI were able to make written submissions for about six months after the hearing. My Lords, neither of these considerations in my opinion warranted the denial to CSC and to ICI of their rights to present their defences properly in the manner envisaged by Regulation No 99/63/EEC. If matters were urgent, it was for the Commission to hasten its own consideration of the case, not to adopt an improper procedure. The position here is quite different from that which obtained in Case 51/59 *Farbenfabriken Bayer AG v Commission* where the Court rejected a superficially similar complaint (see Rec. 1972, pp. 772-773), for there about a year elapsed between the service of the Notice of Objections and the hearing.

I have considered whether this procedural defect should be held to entail the annulment of Article 1 of the Commission's Decision. On the whole I think not, because that Article is purely declaratory, and the matter having now been fully investigated, it appears that the declaration it contains is right.

Costs

Both sides ask for costs. Article 69 (3) of the Rules of Procedure of the Court provides that where each party succeeds on some and fails on other heads the Court may order that the parties bear their own costs in whole or in part. My own view is that justice would not be done in this case if each party were left to bear its own costs. Having regard to all the circumstances, and not least to the procedural defects to which I have referred, I think that the Commission should be ordered to pay the applicants' costs.

I am therefore of the opinion that:

1. Article 3 of the Decision of the Commission should be annulled, but that the rest of its Decision should be allowed to stand;

2. The Commission should be ordered to pay the applicants' costs.