THE COURT

hereby:

1. **Dismisses the action as unfounded;**

2. **Orders the applicant to bear the costs of the action.**

Lecourt Monaco Pescatore

Donner Trabucchi Mertens de Wilmars Kutscher

Delivered in open court in Luxembourg on December 14 1972.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 29 NOVEMBER 1972[1]

Mr President,
Members of the Court,

I — Introduction

A — *Review of the facts*

You are already aware of the facts giving rise to these proceedings.
Upon the outcome of administrative proceedings instituted under the conditions laid down in Council Regulation No 17, Boehringer Mannheim, a member of the international quinine cartel, was fined 190 000 u.a. for infringement of the provisions of Article 85 of the Treaty of Rome, by a decision of the Commission of the European Communities dated 16 July 1969.
Shortly before that date, this undertaking had been the object of criminal proceedings for infringement of the anti-trust legislation in the United States of America. In September 1968 the Grand Jury of the Southern District Court of New York (a Federal court) had preferred a bill of indictment against it, containing five counts. In the first the undertaking was accused of having, between the end of 1958 and the summer of 1966, unjustifiably restricted, by means of a concerted infringement, the internal and external trade of the United States, and of having thereby violated the provisions of Section 1 of the Sherman Act.
In the second count it was accused of committing the same infringement, over the same period, for the purpose of monopolizing the internal and external trade of the United States, and of having thereby violated the provisions of Section 2 of the Sherman Act.
The other counts dealt with, in particular, the violation of the Wilson Tariff Act, and with fraud which was committed against

[1] — Translated from the French.

the United States by the concealment from the American authorities of the agreement for the purchase of the stocks of the American quinine reserves and constituted a violation of the provisions of Section 371 of Title 18 of the US Code.

In accordance with its right under American criminal procedure, Boehringer had its representative declare to the Federal court that it pleaded guilty to the first two charges and would offer no defence thereto (*nolo contendere* procedure). The remaining charges were withdrawn by the prosecution, and at the hearing on 3 July 1969, the Court fined the company $40 000 in respect of each of the first two charges, that is, a fine of $80 000 in all, which was paid on 11 July 1969.

On 3 September 1969 Boehringer informed the Commission of the European Communities of this fine, and requested that the amount paid in respect of the fine in America be set against that imposed upon it by the Commission.

On 26 September Boehringer also lodged before this Court a direct application for the annulment of the decision of the Commission (Case 45/69); alternatively, it requested the Court to reduce the amount of the pecuniary sanction imposed upon it under Regulation No 17 by an amount equal to the fine paid in New York.

In its judgment of 15 July 1970 in Case 45/69, this Court rejected the conclusions for annulment, but amended the decision of the Commission and reduced the amount of the fine imposed on the applicant to 180 000 u.a. However, this reduction was made for reasons which are of no relevance to the request to set the fine imposed in the United States against the later fine.

On this point, in fact it rejected the claims of the applicant on the following grounds:

'The applicant maintains that the fine of $80 000 which was imposed upon it by a court in the USA, arising out of the same facts, and which was already paid before the contested decision, should be deducted from the amount of the disputed fine.

These penalties were imposed in respect of restrictions on competition which occurred outside the Community.

Consequently there is no reason to take them into account in these proceedings.'

In this way the Court avoided making a decision upon the very principle of setting a pecuniary sanction already decreed by a court of a non-Member State against a fine imposed by the Commission of the European Communities.

In this the Court doubtless considered that in the first place it was for the Commission to pronounce, in the form of a reasoned decision, upon the request to set one penalty against the other submitted by the applicant undertaking.

However that may be, the Commission has, from that time, considered that it should examine that request to set one penalty against the other which Boehringer had in any case expressly confirmed to it on 3 November 1970. After hearing its representatives and receiving the opinion of the Consultative Committee on Cartels and Monopolies, the Commission, in a decision of 25 November 1971, rejected this request.

This is the decision now under challenge. The applicant requests you to amend this decision to the effect that the fine amounting to $80 000 imposed upon it by the judgment of the Southern District Court of New York on 3 July 1969 be set, by judgment of this Court, against the fine imposed upon it by the Commission of the European Communities the amount of which was fixed, in the judgment of this Court of 15 July 1970, at 180 000 u.a.; alternatively, the applicant concludes that the decision under challenge be annulled.

This is an area in which this Court has unlimited jurisdiction. It has complete discretion to assess the facts and to amend a Community decision, in particular by reducing the amount of the fine imposed. The conclusions of the applicant would, I think, have been more logically presented if they had consisted in requesting, first, the annulment of the decision under challenge, which Boehringer alleges to be based on erroneous grounds both in law and in fact, and secondly a decision reducing the fine, the amount of which was fixed in the judgment of this Court of 15 July 1970, by the amount of that decreed by the American Federal Court.

B — *Statement of the reasons for the decision under challenge*

There are two considerations stated as the reasons for the decision now before the Court. The first is general in scope, while the second relates to the particular facts of the case.

In the first place, the Commission contends that, in the absence of any express provision in the Treaty establishing the European Economic Community or in the implementing regulations on competition placing it under a duty to set against the amount of the fines imposed under Community law the amount of those decreed by national courts, such a duty is not based on a general principle common to the national law of the Member States; although, in its judgment of 13 February 1969 in Case 14/68, *Walt Wilhelm and others* v *Bundeskartellamt* [1969] ECR 1, this Court stated that, in dealing with illegal cartels, the Commission and Member States should take account of penalties already imposed in respect of the same actions, this duty would only arise in the event of a combination of penalties decreed under Community law on the one hand, and under the national law of the Member States on the other. It would be a different matter altogether in the event of a combination of penalties imposed under Community law and under the law of a non-Member State.

In the second place, and alternatively, it would only be necessary to set a previous fine against another if the actions which constitute the infringement of competition penalized by the courts of a non-Member State and by the Commission are the same. This condition is not fulfilled here, since the American court has penalized actions likely to affect or affecting competition in the United States, whereas the Commission has imposed a fine in respect of actions having as their object or effect the restriction of competition in the Common Market.

The applicant challenges both these arguments.

The first, which concerns the very principle of setting amounts one against another, must logically be examined first; the second will not arise unless the Court recognizes the existence of such a right to set one amount against another. Consideration of it will therefore only arise at a second stage.

II — The principle of *non bis in idem* and the rule for setting a previous fine against another

1. *The problem*

The Commission immediately concedes in favour of the applicant that the absence in written Community law of any duty to take account of a fine imposed by a national court in respect of the same actions which cause the Commission to impose a pecuniary sanction upon an undertaking whose actions were recognized to be in breach of Article 85 of the Treaty of Rome is not decisive.

The question is in fact whether, in the absence of any express provision, some general principle of law exists which, as a result, places the Community authorities under such a duty.

But it is still necessary to set out the problem clearly and to define precisely its legal framework.

It is therefore essential in the first place to distinguish between two concepts:

— The first, expressed by the maxim *non bis in idem*, is based on the principle of *res judicata* in criminal law; an action, or a set of wrongful actions giving rise to criminal liability, which have been the subject-matter of a definitive judgment of a court, that is, a judgment which has acquired the force of *res judicata*, can no longer give rise to further criminal proceedings or, *a fortiori*, a further conviction.

— The second concept which the applicant undertaking relies upon is different in nature; it is not based on *res judicata*, since it does not prevent a further penalty being imposed in view of a previous decision of a criminal court based on the same action or on the same criminal conduct; the concept finds expression only in that the previous

sentence imposed must be set by the court against the penalty which the latter imposes itself. It is a consideration of natural justice applied to the determination of the quantum of the sentence.

It is, secondly, to be noted that the principle of *non bis in idem* and the rule for setting previous sentences against other sentences arise primarily under criminal law, and are applicable, under conditions which in any case vary from one State to another, to offences as defined by domestic criminal legislation.

We are aware that Community cartel law implemented by the Commission provides for the imposition of pecuniary penalties of an administrative character. We shall therefore need to enquire whether these rules, which are strictly speaking of a penal nature, may and must be applied to this particular system for the punishment of offences.

Finally the operation of the *non bis in idem* rule and the rule for setting off sentences one against another must be considered in different situations:

— First, within a national legal system can there be cumulation of penalties or even plurality of prosecution on the basis of the same actions?

— Next, in relations between two separate legal systems, what are the consequences of a previous decision of a foreign criminal court upon proceedings based on the same actions before a national court?

— Finally, in relations between the Community legal system and that of a Member State on the one hand, and that of a non-Member State on the other, may the *non bis in idem* rule be applied? If not, must a previous penalty be set against another under a general principle of law?

The problem is clearly complex. In order to examine it, we require detailed explanations of the national law of Member States, the United States, and Community law and international criminal law.

2. *The* non bis in idem *rule in domestic law*

The applicant considered that it was possible to derive from the criminal law of Member States of the Community a common principle giving rise to the right asserted by it to set the amount which it had to pay in the United States against the Community fine imposed under the Treaty and Regulation No 17 on cartels.

There is no doubt that in the national legal system of each of these States the principle of *non bis in idem*, which is a consequence of *res judicata*, not only prohibits cumulation of penalties but also prevents any further criminal proceedings in respect of the same action.

This is the effect, in the case of France, of Article 6(1) of the Code of Criminal Procedure according to which: 'The right to bring a public prosecution is extinguished ... by *res judicata*'. The same rule is also found in the Dutch Criminal Code (Article 68), in the Italian Code of Criminal Procedure (Article 90), and also in the laws of Belgium and Luxembourg.

In the Federal Republic of Germany Article 103(3) of the Grundgesetz, which protects individual rights, states that: 'A person may not be punished several times under the general criminal laws for the same action'.

This is an established principle which goes beyond the duty to set any sentence previously against a later sentence and is an absolute bar to any further charge.

But it is of note, on the one hand, that this rule is only valid within each national legal system and, on the other, that it applies only to offences of a criminal nature.

Thus although this rule is common to the Member States and although in Germany it takes the form of a fundamental right to protection against double conviction, the prohibition which it lays down, guaranteeing that a person already punished or definitively acquitted will not be subject to further proceedings for the same action, is only effective where the previous judgment is one of a national court, with the one exception of Dutch criminal law, as we shall see.

In the Federal Republic of Germany, this

appears to me to be the position resulting from a judgment given on 17 January 1961 by the Federal Constitutional Court (Bundesverfassungsgericht), Bundesverfassungsgericht 12, p. 66 and whereby the prohibition upon fresh criminal proceedings in respect of actions upon which judgment has previously been given is only applicable when the judgment is delivered by a German court.

The *non bis in idem* rule, based on *res judicata*, is therefore only a bar to double conviction by the national courts.

As far as criminal offences are concerned, which are defined by provisions whose scope is strictly limited, the rule does not apply with the same force to other disciplinary proceedings, particularly in administrative law.

Certainly, it is generally accepted that, by analogy with criminal law, this rule applies to the system of discipline governing public employees, which is the case particularly in France and Germany. The same principle applies to officials of the European Communities, and upon the basis of a specific provision, Article 86(3) of their Staff Regulations, this Court applied that principle in a judgment of 5 May 1965, in Joined Cases 18 and 35/64, *Gutmann* v *Commission* ([1966] ECR 103).

The *non bis in idem* rule is, however, disregarded when the same action, which constitutes a disciplinary offence, is also punishable as a criminal offence; the sentence imposed by a criminal court is no bar to disciplinary proceedings, and vice versa. However, in Germany the rule that a previous disciplinary penalty must be set against a criminal penalty is permitted in certain conditions, as we shall see.

Cumulation therefore of an administrative penalty and a criminal penalty is always possible, unless it is expressly prohibited (to this effect, see Conseil d'État de France 1950, *Lalanne*, Recueil, p. 67).

This is brought about by the independence of administrative disciplinary systems from penal systems. In the same way, cumulation of administrative penalties incurred in respect of the same action by virtue of different laws is admissible for the same reason (Conseil d'État de France, 22 May 1946, *Magnaini and others*, Recueil, p. 142, and 18 November 1953, *Garrigue*, Recueil, p. 499).

Moreover, judgments of criminal courts which have acquired the force of *res judicata* are not binding upon the administrative authorities, except in so far as they establish that the facts which may justify an administrative penalty are not present in substance.

3. *The principle of* non bis in idem *in relations between different national legal systems*

We shall now consider if, and in what circumstances, the *non bis in idem* rule applies to relations between different national legal systems.

The national law of four of the six Member States at present recognizes, in principle, the preclusive power of *res judicata* which is such as to bar further proceedings in the case of foreign criminal judgments. But in three of these States, Belgium, France and Luxembourg, this principle only holds good if the offence, or at least the principal offence, has been committed exclusively abroad. In fact, the *non bis in idem* rule disappears where criminal jurisdiction is based on the principle of territoriality.

Thus Article 692 of the French Code of Criminal Procedure provides that: 'No prosecution shall take place if the person accused shows that final judgment was passed on him abroad, and, in the case of conviction, that he served his sentence or is time-barred from having to do so or has obtained a pardon'.

But there is established case-law to the effect that if the offence was also committed in France, no cognizance is taken of the foreign judgment. It is no bar to the institution of criminal proceedings before French courts or to a fresh conviction in respect of the same actions (Cour de Cassation, Chambre Criminelle, Judgment of 3 November 1970, Bulletin des Arrêts de la Cour de Cassation 1970, No 285).

The position under Belgian law is the same; conviction by a foreign court is no bar to fresh criminal proceedings in Belgium if the criminal acts were also committed in

that Kingdom (Cour de Cassation of Belgium, 20 February 1961, Pasicrisie 1961, I, p. 664).

Luxembourg law is to the same effect.

In Germany, the preclusive power of *res judicata* is not recognized in the case of foreign criminal judgments in the absence of an international convention binding the Federal Republic (Maurach, Rapport au Colloque de l'Association internationale de droit pénal, Freiburg im Breisgau, 1963).

Conviction in a foreign court does not therefore preclude fresh proceedings before a German court, provided at least that the offence is punishable under the domestic criminal law.

It is the same in Italy, by virtue of Article 7 *et seq.* of the Criminal Code.

In Dutch law alone is the *non bis in idem* rule applied without reservation, whether the acts were only committed abroad, or also in the Netherlands (Article 68(2) of the Criminal Code).

In the light of these facts, it can be stated that the preclusive power of *res judicata* is not recognized in any of these States, with the sole exception of the Netherlands, in the case of judgments passed by courts outside the domestic legal system, where the acts giving rise to criminal liability were also committed on the national territory.

This is an undeniable consequence of the territoriality of criminal law and the sovereignty of the States in an area in which it is most difficult to encroach upon that sovereignty, that of public order as protected by the criminal law.

Thus the *non bis in idem* rule, which is stated and applied in domestic law, is far from being accepted as a general principle of law in international relations.

This is borne out by the fact that the main result of the work carried out since the war under the auspices of the Institute of International Law or the International Association of Criminal Law on the international effects of criminal judgments has been to bring to light the differences between the rules applied by the various States and to reveal the practical difficulties in avoiding the cumulation of criminal penalties and in reaching a common concept with regard to the application of the *non bis in idem* rule.

It has, certainly, been possible to have resolutions adopted, for example, at the Ninth International Congress of Criminal Law at The Hague in 1964 (Resolution III A(1)(a) and (c)), whereby 'the preclusive effect of foreign criminal judgments *ought* to be recognized in the laws of every country ...'. It is clear however that these efforts have led only to the expression of resolutions inspired by considerations of justice and protection of individual interests; it is impossible to find therein a 'consensus' of the States or the recognition of a positive rule of law.

This situation may be regrettable, but nothing is gained by ignoring it. The problem could only be solved by one or more international conventions. (Spanjaard, Rapport au Coloque de l'Association Internationale de Droit Pénal, [1963] Revue Internationale de Droit Pénal, p. 156).

With regard to Europe itself it is necessary to recall that Article 6 of the European Convention on Human Rights which deals with procedural guarantees does not contain any prohibition against cumulation of penalties. The principle of *non bis in idem* is not even mentioned there. As for the Convention on the International Validity of Criminal Judgments, drawn up by the Council of Europe on 28 May 1970, Article 53 thereof does acknowledge that a person on whom final judgment has been passed in a Member State cannot be prosecuted for the same act in another European State, provided that the penalty, if any penalty was imposed, has been served, is time-barred or has been pardoned. The Convention does however qualify the principle of prohibition on all further proceedings with two exceptions which singularly limit its scope:

— on the one hand, it cannot be raised against the States in whose territory the offence was, or was alleged to have been, committed;

— on the other, it is also inapplicable when the public interest of the State, in the broad sense of the term, has been prejudiced by that offence.

There could be no better proof that the *non bis in idem* rule has hitherto remained without any binding effect in international law.

4. *Is the rule for setting a previous penalty against a later a general principle of law?*

The applicant company contends however that, in the absence of the prohibition on any further proceedings, the right to protection against cumulation of penalties ought to be protected by setting any previous penalty imposed on the basis of the same facts against a later.
For this view to be well founded, it would need to be shown in addition:

1. that this rule, which the applicant considers as a substitute for the *non bis in idem* precept, is itself on of the fundamental rights and forms an integral part of the general principles of law enforced by this Court within the Community legal system;

2. that, even supposing this to be so, that fundamental right, which concerns the protection of the individual under the criminal law, is also valid with regard to undertakings in the field of criminal proceedings against activities which prevent competition, a field in which, as you are aware, the penalties are only pecuniary sanctions based on public order in the economic sense and on consumer protection.

This is what we shall now consider.

A — Even as a matter of classical criminal law, it is doubtful, in my view, whether the rule for setting sentences one against another can be considered as a general principle of law.
It is, to be sure, recognized without qualification in the Strafgesetzbuch of the Federal Republic of Germany (Paragraph 60(3)), and in the Italian criminal code (Article 138). It was even applied by the Bundesverfassungsgericht in Karlsruhe when a prison sentence imposed under the military disciplinary code coincided with a similar penalty imposed in respect of the same acts by a criminal court. But it is evident that this solution was only adopted because the penalties imposed were identical in nature and because of the concern to protect the liberty of the individual (Judgment of 2 May 1967). But the rule for setting one sentence against another is not found in the laws of the other Member States of the Community with the exception of Belgium, where Article 13(2) of the Law of 17 April 1878 on criminal procedure provides that in the case of a fresh conviction in Belgium any prison sentence served abroad must be set against any similar sentence imposed by the national court. The obligation therefore only holds good with regard to sentences of imprisonment and not with regard to fines; moreover, according to well-established case-law it is not necessary to set a previous sentence against a later if the offence was committed not only abroad but also in Belgium, since the purpose of Article 13 of this law was to deal with the case of offences committed and tried abroad. Thus it is only in Italy and in Germany that there is an obligation upon the national court to set a previous against a later, even pecuniary, penalty. It is not a commonly held general principle. Moreover, should Paragraph 60(3) of the German Strafgesetzbuch be considered as a fundamental right, as the applicant claims?
Nothing supports this view: neither the reference to Article 103 of the Grundgesetz which, as we have seen, relates to the prohibition on fresh proceedings within the domestic legal system and which cannot be invoked in a case of cumulation of penalties imposed by courts belonging to different legal systems, nor the quotation by the applicant from a judgment of the Bundesgerichtshof (Federal Supreme Court) of 17 December 1970 on the cartel in the dyestuffs industry. This judgment is in fact concerned with a plea of *lis pendens* put forward by the undertakings against whom proceedings had been instituted before the Bundeskartellamt (Federal Cartel Office) on the ground that proceedings had been brought against them by the Commission of the European Communities in respect of the same cartel. After deciding that in

the case before it the prohibition on double proceedings was inapplicable, the Federal court adds, purely obiter, that it would be appropriate, in order to avoid a possible cumulation of penalties, to apply in that particular case the provisions of Paragraph 60 of the Strafgesetzbuch, that is, to take account of the penalty previously imposed when the subsequent fine is imposed.
The Federal Court adds that it is not necessary however to go more deeply into this point in the case before it. Consequently the question was not settled.
Moreover, although the views which the Federal Court felt that it had to express on this subject indicate a line of thought, or even an opinion, it cannot be inferred from this that the obligation to set one sentence against another is considered a fundamental right.
Finally, it is necessary to observe that the problem illustrated by this judgment concerned the possible cumulation of a Community penalty and a penalty imposed by a court of a Member State of the Community.

B — It was in fact in connexion with that same cartel in the dyestuffs industry that this Court delivered on 13 February 1969 a judgment on a question referred for a preliminary ruling in Case 14/68, *Walt Wilhelm and others* v *Bundeskartellamt* which the Boehringer company relies upon in support of its argument.
The Berlin Kammergericht (Kartellsenat), the tribunal for cartel matters in the Federal Republic of Germany, referred to this Court for a preliminary ruling the question whether, when proceedings have been brought by the Commission under Article 14 of Regulation No 17 on cartels, it is compatible with the Treaty for the national authorities to apply to the same facts the penalties contained in the relevant provisions of German law; the Kammergericht, mentioning also the risk of different conclusions being drawn from the same facts and the possibility that competition might be distorted in the Common Market to the detriment of persons governed by German cartel law, referred to Article 9 of Regulation No 17 and to Articles 5 and 85 of the Treaty establishing the European Economic Community and finally to the general principles of Community law.
It emerges clearly from the very wording of your judgment that Article 9 of Regulation No 17 only relates to the jurisdiction of national authorities in so far as they have the power to apply the provisions of Article 85 of the Treaty directly, in the absence of any action on the part of the Commission, and that consequently Article 9 is to be disregarded where those national authorities are only applying their own domestic law. The reason for this, you add, is that Community cartel law and national cartel law consider cartels from two different points of view:

— Article 85 considers them on the basis of the obstacles to trade between the Member States which may result from them and the adverse effects on competition in the territory of the Common Market;

— domestic legislations, which are based on the particular requirements of each State, on the contrary consider cartels only within the national context.

It is therefore possible in principle for the same cartel to be the subject of two parallel sets of criminal proceedings: one before the Community authorities under the Treaty and the other before the national courts under domestic law.
In this way you have recognized that the *non bis in idem* rule is not applicable to such a situation, since cumulation of proceedings is permissible. However, you are careful to state that the conflicts likely to arise from such a combination of Community rules and national legislations must always be resolved so that Community law prevails, which is obviously essential for the attainment of the objectives of the Treaty of Rome.
Having established these principles, you then had to decide a further question, in which the Kammergericht drew your attention to the risk that the same facts could give rise to two penalties, one imposed by the Commission and the other by the national court.

Having shown that, because of the particular system whereby jurisdiction is apportioned between the Community and the Member States, plurality of proceedings is permissible, you then referred, in the grounds of your judgment, to a general requirement of natural justice, as expressed in another connexion in Article 90(2) of the Treaty establishing the Coal and Steel Community, a requirement which implies that all previous decisions by a criminal court should be taken into account in the determination of any sanction.

But this ground certainly is not essential to and is not the basis of the operative part of your judgment of 13 February 1969 and can only, as I understand it, be interpreted within the actual limits of the questions referred to you under Article 177. The Court accepted the rule for setting one amount against another only because of the special situation resulting from the competing jurisdiction of the Member States and the Community organs with regard to cartels on the same territory, namely that of the common market. I do not consider that it is possible to infer from this a statement of a general principle of law which would also be obligatory in the case of a plurality of proceedings, and, possibly of a cumulation of penalties, imposed on the one hand by the Community and on the other by the authorities or courts of a third State. Because of the close interdependence of the national markets of the Member States and the common market this Court accepted that a rule for setting one sentence against another could be applied. However the situation is obviously quite different when a previous decision given in a State outside the Community is involved.

C — Since in this case the fine which you are requested to set against the pecuniary penalty decided by the Commission was imposed by an American court, it may interest you to know that in the United States parallel proceedings based, on the one hand, on State legislation and, on the other, on federal legislation may and in fact do lead to a cumulation of penalties in spite of the Fifth Amendment to the Federal Constitution, whereby 'Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb', that is, in spite of the constitutional principle prohibiting cumulation of penalties.

If the same conduct is a breach of the law in two different legal systems, namely that of the Union and that of one of the Federal States, under American case-law two distinct offences are found to have been committed. Therefore the requirement that the facts be identical, which is implied in the prohibition on cumulation of penalties, must be disregarded. Thus the Supreme Court of the United States has decided that 'Every citizen of the United States is also a citizen of a State or territory. He therefore owes allegiance to two sovereign States, and is liable to punishment for an offence against the laws of either State. The same act may be an offence against the laws of both. There is no doubt that either or both States may, if they see fit, punish such an offender. Yet it cannot be stated that the offender has been twice punished for the same offence; but only that *by one act* he has committed two offences, for each of which he is justly punishable. He may not therefore plead the punishment by one in bar to a conviction in respect of the other offence'.

This judgment dealt with the question whether a State law was unconstitutional because a further penalty under Federal law was not excluded.

In another case, *US* v *Lanza*, the Supreme Court decided that a conviction, which had acquired the status of *res judicata* under the law of a State, was no bar to further proceedings under Federal law, and did not prevent the cumulation of penalties.

The Supreme Court adopted the same solution in a case where a State court had passed sentence under the law of that State although the party concerned had already been punished in respect of the same conduct under Federal law.

Although dissenting opinions have been expressed, this case-law has been confirmed. Thus, when a conflict arises between the sovereignty of the Union and of the States on the one hand, and the principle of the prohibition on cumulation of penalties on

the other, the Supreme Court of the United States has decided in favour of sovereignty. The consequence of this is, as I agree with Professor Mestmaecker (study published in Der Betriebsberater, 1968, p. 1297), that a conviction under State antitrust law which has attained the status of *res judicata* in no way bars a further penalty imposed under Federal law, and *vice versa*. Only continuous cooperation between State and Federal authorities can ensure that in fact cumulation of penalties is avoided. From this it follows that even in a Federal system like that of the United States, the *non bis in idem* rule gives way to the principles of sovereignty and territoriality, without permitting the previous penalty to be set against a later.

D — Moreover, the argument of the applicant, based on concepts of pure criminal law, disregards in too general a manner the special features and indeed the independence *vis-à-vis* general criminal law of the system of penalties introduced by the Treaty of Rome with regard to competition.

While there can be no doubt that the Member States have transferred to the Community institutions the right to exercise certain of their sovereign prerogative powers in economic matters, it is equally certain that they had no intention of relinquishing their criminal jurisdiction.

Article 15 of Regulation No 17 states moreover that the fines provided for in the case of cartels are not criminal penalties.

They are imposed by the Commission after administrative adversary proceedings which are such as to ensure that the rights of the defence are observed and they fall into the category of administrative penalties.

This finding, which is in any case derived from the case-law of this Court (see the judgments of 15 July 1970 on the international quinine cartel and of 14 July 1972 on the dyestuffs cases) would not suffice however to place the system of Community fines completely beyond all rules of criminal law.

Although infringements of the competition rules are defined in very general terms in Article 85 and relate to a predominantly technical area, which leaves the Commission and this Court a particularly large margin of discretion, they are the subject-matter of a legal decision; they also contain a moral element, in so far as they must have been committed 'wilfully or through negligence' (Article 15(1) of Regulation No 17); and finally, they contain a physical element, in that the prohibitions provided for in Article 85 are applicable to agreements, decisions or practices evidence of which must be brought before the court.

As for the penalties provided for in Regulation No 17, they are restricted to determinable maximum and minimum amounts and are therefore governed by the principle of legality.

Thus it has been stated (Lambois, Droit Pénal International, Dalloz, 1971) that Community fines, which are administrative in form, are in substance in the nature of criminal penalties.

But they do contain original features and correspond to objectives which I consider are of decisive importance to the outcome of the present proceedings.

First, they are not directed against natural persons, but exclusively against the assets of undertakings, which are legal persons. The concern to protect the individual from proceedings under two different systems of criminal law, especially where prison sentences are involved, is of no relevance here.

Moreover the Community cartel rules in fact apply for the most part to multinational undertakings whose activity is spread not only over several national markets in the common market but also over the world market.

Although the Member States of the Community and the Community itself are so interdependent that it is possible to consider it contrary to the rules of natural justice that the same breach of the competition rules might, by giving rise to parallel proceedings, attract cumulative penalties, this consideration is no longer so persuasive when that same activity, whether it was expressed in agreements or simply existed as a matter of practice, affects at the same time the Community and the States or some of the States who are members of it on the one hand, and

States outside the common market on the other.

How could the objectives of the Treaty of Rome be effectively respected if it were accepted that any pecuniary penalty imposed by a court of a third country in respect of certain agreements should be deducted from the fine imposed by the Commission by reason of the same illegal cartel? Would this not place restrictions on the powers of the Community authorities, in the name of a principle of natural justice of which it cannot be said with any certainty that it would be reciprocally accepted by the third States concerned? Is it, for instance, conceivable that a court of the United States, seized of proceedings in respect of the same cartel against undertakings upon whom the Commission has previously imposed a fine under Regulation No 17, would agree to set that fine against that which it would itself decide?

Even supposing, and I do not consider this to reflect the current legal position, that the rule for setting one sentence against another were a general principle of law, it appears to be essential to give precedence to the objectives of the Treaty and the validity of the acts of the Community institutions. The fact is that the rule for setting one sentence against another, in relations with a third State, can only be based on the provisions of a treaty.

Secondly, the power granted to the Commission to deal with undertakings which have made cartel agreements contrary to Article 85 undoubtedly arises from the need to protect public order in the economic sense in the territory of the Community.

The fines which the Commission imposes are directed against agreements, decisions by associations of undertakings, or practices which, in the terms of Article 85, 'may affect trade between Member States and which have *as their object or effect* the prevention, restriction, or distortion of competition within the common market'.

It is therefore because of the damaging consequences that these agreements, decisions, or practices can or actually have had upon competition within the common market, that the penalty is justified. Thus the territorial effect, potential or real, is one of the ingredients of the infringement. Indeed it is an essential ingredient.

This consideration is essential if we are to exclude the rule for setting a previous penalty imposed by a court outside the Community against a later, because it results in a denial that in this situation there is any requirement as to identity of acts and leads to a recognition of the existence of two separate infringements, each one attracting its respective punishment in full in both the Community legal system and the legal system of the third State.

III — The absence of any requirement as to identity of acts

I am at one here with the Commission in the view that the concept of identity of acts giving rise to liability under the competition laws cannot be appraised in the same manner as in classical criminal law.

Criminal offences, whether they are offences against the person, such as murder, assault and battery, or against property, such as theft or fraud, possess, as far as their factual content is concerned, characteristics which are generally simple in nature; they are acts committed by one or more specific offenders, at a specific time and place; difficulty in establishing these facts only arises exceptionally, in the case of complex offences; but the court before whom the matter is brought always has the power to examine all the facts submitted to it and to interpret them in terms of criminal law.

Therefore, whatever the criterion as to identity of acts established in case-law, the court makes a general assessment of the facts before it.

In the field of international cartels, the problem presents itself in a very different manner from two points of view:

— The offence of restricting competition is brought about by a large number of acts committed over a long period (several months or even years) and in

the territory of several States; agreements made between undertakings are often diversified, according to the negotiations between the members of the cartel with their principal offices in different countries, and according to the purpose of these negotiations: agreements as to prices, territorial division of markets, export quotas, etc. The immediate result of this is that the court of one of the States which is affected by the cartel only entertains proceedings in respect of certain of the agreements or is only called upon to act against certain of the activities of the undertakings, or of certain of them.

— Secondly, by virtue of the principle of territoriality, legislations against activities in breach of competition rules limit their scope to the territory of the State in which the effects of those activities have been established; this is also the case in the Community: Article 85(1) of the Treaty of Rome is limited to acts likely to restrict competition in the Common Market; in the same way, American antitrust legislation, although it is directed as much against interference with both the external and the internal trade of the United States, is limited in its territorial scope; it is only directed against interference with competition which bears upon persons trading in the United States.

Therefore, even if the same undertakings were involved in proceedings before a Federal court and at the same time before the Commission of the European Communities, in respect of the same agreements, the facts constituting the infringement would necessarily be different in each case. In the United States court, unless it is exceeding its jurisdiction, the only acts which can be considered are those which come within Federal law and which are detrimental to the interests of the Union; similarly, the Commission in Brussels can only consider, subject to review by this Court, acts which, because of their purpose or effect, would adversely affect competition inside the Common Market. The fact that the agreements in question would be the same is not sufficient to establish that the acts are identical.

I therefore consider that little is to be gained by searching bodies of national case-law for a single criterion for the concept of the identity of acts. Nor is any guidance to be elicited from the judgment of this Court of 13 February 1969 since in referring preliminary questions to you the Kammergericht did so on the assumption that, in the dispute before it, it was a question of the '*same act*'. It was on the basis of those premises that you were asked to interpret Community law. You gave your judgment within the limits defined by the court hearing the main action without discussing, which in any case you had no power to do, whether those premises were well founded.

I could limit my opinion to the foregoing, because in the first part of our examination of this matter I considered that I could show that the rule for setting a previous penalty against a later is not a general principle of law which you would be bound to apply to a case of two pecuniary penalties in respect of cartels where one sanction was imposed by a court of a third State and the other decided by the Commission of the European Communities; secondly I considered that the decisive factor in the case of a cartel is its territorial effect, as the element constituting the infringement of the competition rules, and that this territorial effect is necessarily distinct when it concerns, on the one hand, the United States, a third country, and, on the other, the Common Market.

But, in order to do full justice to the applicant, I shall nonetheless examine the facts which emerge from the judgment delivered on 3 July 1969 by the Federal Court of the Southern District of New York, and from the judgment of this Court of 15 July 1970 in Case 45/69. This comparison will lead me fully to confirm my point of view.

What are these two decisions?

One is a Federal judgment, delivered under *nolo contendere* procedure, that is, a judgment given by a court of law, but one in which the court has done no more than to acknowledge the declaration of Boehringer accepting the facts set out in

the first two counts of the indictment and to impose the penalty on the basis of these uncontested facts.

If in these circumstances the facts in question cannot be regarded as having been definitively established, as would be the case on the outcome of the normal procedure, it is necessary at least to consider that only the charges brought under the first two counts of the indictment of the prosecution were taken into consideration and not those brought under the three other counts which were withdrawn by the prosecution.

On the other hand we should not consider the administrative decision dated 16 July 1969 whereby the Commission imposed a fine on Boehringer but the judgment of this Court of 15 July 1970, because there, in a case where you had unlimited jurisdiction, you gave judgment on all the charges brought against the applicant, upheld some and rejected others and partially amended the decision of the Commission; your judgment therefore replaces that decision.

What were the facts upon which you based your judgment?

You based yourselves not on the export agreement concerning trade with third countries, which was the first and the the essential agreement made between the members of the international quinine cartel, including Boehringer, but on the gentlemen's agreement governing the conduct of these undertakings in the Common Market.

Analysing this document, the existence of which was acknowledged by the applicant, and discovering that the parties had mutually declared themselves willing to abide by its provisions, you found that the gentlemen's agreement thereby constituted 'the faithful expression of the intention of the members of the cartel with regard to their conduct in the Common Market'; having moreover found that this agreement contained a provision to the effect that any breach would *ipso facto* constitute a breach of the export agreement, you then examined the conduct of the undertakings in the Community.

In this respect you held that the gentlemen's agreement guaranteed the protection of each domestic market for the producers in the various Member States and, having rejected the arguments of the applicant, you decided that this sharing out of domestic markets had as its object the restriction of competition in Common Market trade.

In connexion with the joint fixing of selling prices in the markets which were not shared out, that is, Belgium, Luxembourg and Italy, you found that this activity was capable of affecting trade between the Member States and seriously restricted competition within the Common Market. However at the same time the Court recognized that it had not been established that the applicant was, by mutual agreement with the other producers, maintaining uniform prices for its sales in those countries after May 1964.

The Court however rejected the allegation of the fixing of the sales quotas in the Common Market after 29 October 1962, in the absence of sufficient proof.

Finally, the Court held that the prohibition placed upon the group of French members of the cartel on manufacturing synthetic quinidine was illegal.

In conclusion, you found that these acts taken together, from the viewpoint of Article 85 of the Treaty, constituted a cartel prohibited by that provision, that is to say, a cartel having as its object or effect the prevention, restriction or distortion of competition within the Common Market; you accordingly fixed the amount of the fine at 180 000 u.a., taking into consideration on the one hand that Boehringer had exercised a major influence during the working out and implemantation of the agreement, in order to justify a heavier fine than that imposed on other undertakings, but, on the other, bearing in mind that you had excluded the allegations concerning the sales quotas for the period from November 1962 to February 1965 and the sales prices for the period from May 1964 to February 1965, and, on that ground, you reduced the fine imposed by the Commission.

It suffices to recall these findings, which have acquired the status of *res judicata*, to show that the Court only considered activity which had had or was likely to

have an effect on the conditions of competition within the Common Market. On the other hand, the facts on the basis of which the Federal Court of the Southern District of New York imposed a fine of $80 000 on the applicant, as can be inferred from the first two counts which were not contested, concern activity of the applicant which had effects on American territory, particularly by virtue of the agreement for exports to third countries:

— the fixing of prices of products extracted from quinquina bark at an artificial level on the domestic market of the United States, interference with competition between American importers and re-sellers, and obstacles to competition between producers in the domestic market in the United States;

— the effects of the agreement described as the stockpile agreement relating to the purchase of quinine from the American strategic reserves;

— finally, the agreements relating to the joint purchase of quinquina bark (bark pool).

It must be noted that these last two agreements, which concern purchasing policy within the cartel, were not the subject-matter of any charge brought before the Commission of the European Communities.

It is evident that only the effects upon American territory of the activity of the applicant are concerned. Consequently there is nothing to justify the assumption that, in imposing a fine on Boehringer, the American Federal court intended to penalize other interference with competition.

Indeed, this Court itself said, in its judgment in Case 45/69, that that penalty was imposed 'in respect of restrictions on competition which occurred outside the Community'.

I would add that the file contains no information as to whether, in order to determine the amount of the fine imposed on the applicant and upon the other members of the cartel against whom proceedings were also brought, the Commission took account of the financial benefits derived by these undertakings from their agreements within the Common Market alone or in the world market. No precise answer could be given on this point during the oral procedure. However it is established that the only activity which was penalized was that which had an effect on the Common Market and that the fines imposed on the undertakings concerned were in any case set at a level considerably below the maximum limit provided for in Regulation No 17.

It is also necessary to recall that in reply to a question asked in 1966 by the Bundeskartellamt, the representatives of Boehringer had replied that it was impossible for them to give any details on the exports of quinine to each of the principal purchasing countries since the agreements only obliged the members of the cartel to exchange information as to total exports and that the applicant company did not therefore possess data with regard to each purchasing country.

In these circumstances, I conclude that the application of Boehringer in Case 7/72 should be dismissed and that the applicant should be ordered to bear the costs.