In Case 51/69

FARBENFABRIKEN BAYER AG, having its registered office in Leverkusen, represented by its board of management, assisted by H. Axster, W. Decker, O. Axster, Advocates at Düsseldorf, with an address for service in Luxembourg at the offices of E. Graff von Carmer, Counsellor (First Class) at the German Embassy, 20–22 rue de l'Arsenal,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Advisers J. Thiesing, G. Marchesini and J. Griesmar, acting as Agents, assisted by Professor W. Hefermehl, with an address for service in Luxembourg at the Chambers of its Legal Adviser, É. Reuter, 4 boulevard Royal,

defendant,

Application for the annulment of the Commission Decision of 24 July 1969, published in the Journal Official L 195 of 7 August 1969, p. 11 *et seq.*, relating to proceedings under Article 85 of the EEC Treaty (IV/26.267—Dyestuffs),

THE COURT

composed of: R. Lecourt, President, J. Mertens de Wilmars and H. Kutscher, Presidents of Chambers, A. M. Donner, A. Trabucchi (Rapporteur), R. Monaco and P. Pescatore, Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Statement of the facts

The facts may be summarized as follows:
On the basis of information supplied by trade associations of the various industries using dyestuffs, the Commission made inquiries as to whether increases in prices for these products which had occurred since the beginning of 1964 in the countries of the Community were made by mutual agreement between the undertakings concerned.
As a result of these inquiries the Commission found that three uniform price

increases had taken place. An increase of 15% affecting most aniline dyes took place between 7 and 20 January 1964 in Italy, the Netherlands, Belgium and Luxembourg and on 1 January 1965 it was extended to Germany. On that same day almost all producers introduced, in Germany and the other countries already affected by the increase of 1964, a uniform increase of 10% on dyes and pigments not covered by the first increase. Finally on 16 October 1967 an increase of 8% on all dyes was introduced by almost all producers in Germany, the Netherlands, Belgium and Luxembourg. In France this increase amounted to 12%; in Italy no such increase was introduced at all.

On 31 May 1967 the Commission decided upon its own initiative to commence proceedings under Article 3 of Regulation No 17/62 of the Council for presumed infringement of Article 85 of the Treaty against the undertakings, including in particular the undertaking Farbenfabriken Bayer AG, which had participated in a concerted practice for the purpose of fixing prices for dyestuffs.

By letter of 11 December 1967, the Commission informed the abovementioned undertaking of this decision. This letter was accompanied by a notice of objections made by the Commission against the undertakings which had participated in the abovementioned increases. There were sixty recipients of the said letter and notice. They were producers of dyestuffs established both inside and outside the Community, and their subsidiaries and representatives established within the Common Market.

In the notice of objections the Commission declared that within the Common Market the price increases had been introduced by the following producers, and by their subsidiaries or representatives:

— Azienda Colori Nazionali Affini S.p.A. (ACNA), Milan (Italy),
— Industria Piemontese dei Colori di Anilina S.p.A. (IPCA), Milan (Italy),
— Fabbrica Lombarda Colori Anilina S.p.A. (FLCA), Milan (Italy),
— Industria Electro-Chimica Bergamasca, Bergamo (Italy),
— Farbenfabriken Bayer AG, Leverkusen (Federal Republic of Germany),
— Farbwerke Hoechst AG, Frankfurt am Main (Federal Republic of Germany),
— Badische Anilin- und Soda-Fabrik AG (BASF), Ludwigshafen (Federal Republic of Germany),
— Cassella Farbwerke Mainkur AG, Frankfurt am Main (Federal Republic of Germany),
— Société Française des Matières Colorantes SA (Francolor), Paris (France),
— Fabriek van Chemische Produkten Vondelingenplaat NV, Rotterdam (Netherlands),
— Ciba SA, Basel (Switzerland),
— Sandoz SA, Basel (Switzerland),
— J. R. Geigy SA, Basel (Switzerland),
— Fabrique de Matières Colorantes Durand et Huguenin SA, Basel (Switzerland),
— Imperial Chemical Industries Ltd (ICI), Manchester (United Kingdom),
— Yorkshire Dyeware and Chemical, Leeds (United Kingdom),
— E. I. Du Pont de Nemours Company Inc., Wilmington, Del. (United States of America).

By letter of 10 April 1968, in reply to this notice of objections, the undertaking Farbenfabriken Bayer AG submitted to the Commission its written observations the purpose of which was to refute the objections raised against it.

On 10 September 1968, that undertaking delivered its oral observations in the presence of representatives of the Commission and of the Member States.

At its meeting on 24 July 1969, the Commission adopted a decision ordering Farbenfabriken Bayer AG to pay a fine of 50 000 u.a. for infringements of the provisions of Article 85(1) of the Treaty, which it had allegedly committed as a participant with other undertakings in concerted practices for the purpose of fixing the amount of price increases and the circumstances in which these increases were to be introduced in the dyestuffs industry in 1964, 1965 and 1967.

For the same reasons the decision ordered that fines of 50 000 u.a. be paid by:

— Badische Anilin- und Soda-Fabrik AG,
— Cassella Farbwerke Mainkur AG,
— Farbwerke Hoechst AG,
— Société Française des Matières Colorantes SA,
— Ciba SA,
— J. R. Geigy SA,
— Sandoz SA,
— Imperial Chemical Industries Ltd.

and that a fine of 40 000 u.a. be paid by Azienda Colori Nazionali Affini S.p.A.
Farbenfabriken Bayer AG lodged an appeal against this decision at the Court Registry on 3 October 1969.

II — Conclusions of the parties

The *applicant* claims that the Court should:

(a) Annul the defendant's decision of 24 July 1969 (Case IV/26.267-Dyestuffs), notified to the applicant on 28 July 1969, in so far as it concerns the applicant;

(b) Order the defendant to bear the costs of the action.

The *defendant* contends that the Court should:

(a) Dismiss the application as unfounded;

(b) Order the applicant to bear the costs.

III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

A — Submissions as to form

1. *General considerations*

The *applicant* observes as a preliminary point that, unlike similar procedures found in national systems of law, the Community procedure for fixing and levying fines is governed by only a few, very general provisions, and by the general principles of law. Therefore the protection of the rights of the parties concerned renders it indispensable that the Commission should scrupulously respect all the rules as to procedure and all the general principles of law applicable to the subject.
The *defendant* objects that the procedural rules found in Regulations Nos 17/62 and 99/63 must not necessarily be considered as rules relating to the application of the Treaty within the meaning of Article 173; for it such were the case infringement of procedural requirements laid down in the regulations would always constitute, unlike procedural requirements set out in the Treaty, grounds for instituting proceedings within the meaning of that article.
In its reply, the *applicant* observes that the concept of infringement of rules of law relating to the application of the Treaty, which constitutes a ground for instituting proceedings for annulment, is not to be applied restrictively. Article 173 of the Treaty means that only provisions which have a purely administrative character, which are not intended to protect the rights of those concerned, can be considered as non-essential procedural requirements.
Finally, the applicant stresses the importance of the principle of the rights of the defence, which, in Germany, has been written into the constitution, and accordingly stresses the importance of requiring that the few procedural provisions to be found in Community law upholding this principle be applied rigorously.

2. *Complaints concerning the commencement of the procedure*

The *applicant* observes that on 31 May 1967 the Commission commenced a procedure under Article 3 of Regulation No 17, but that by imposing a fine the defendant took a decision on the basis of Article 15(2) of Regulation No 17. The two provisions mentioned above concern two different types of decision, not only in respect of their subject-matter and their effects, but also in that the conditions to

be fulfilled and the formalities to be satisfied are different in the two cases. It is argued that because of these fundamental differences, when the Commission wishes to go beyond the procedure leading to a mere cease and desist order, to a procedure leading to the imposition of a fine it must commence that procedure formally by taking the requisite decision and by sending a notice of objections to the interested party, stating that the purpose of the procedure is to impose a fine.

The *defendant* objects that the decision of 31 May 1967 whereby the administrative procedure was commenced was taken in application of Regulation No 17 as a whole, not solely on the basis of Articles 3 and 9. The fact that that decision referred 'especially' to Article 3 of Regulation No 17 was intended to forestall the future application of the concurrent jurisdiction of the national authorities to apply Article 85(1).

The *applicant* argues that the defendant cannot set up against it the text of the decision relating to the commencement of the procedure since it did not receive a true copy thereof.

The *defendant* observes that in the relationship between undertakings and the Commission it is the notice of objections and not the decision to commence the procedure which determines the scope of that procedure, as appears from Article 19(1) of Regulation No 17 and from Articles 2 and 4 of Regulation No 99. In part 5 of the notice in question it is stated that the infringement resulted at the least from serious negligence, such that the requirements for the imposition of a fine appear to have been fulfilled.

3. *Failure to inform the applicant of the essential elements of fact alleged against it*

The *applicant* argues that academic writers, and the case-law of the Court of Justice (Judgment in Joint Cases 56 and 58/64, *Grundig-Consten*), require that the Commission must, in application of Article 85 of the Treaty, inform those concerned, who are party to the procedure, of all the facts necessary for establishing the objections stated, in accordance with the principles set out in Article 19(1) of Regulation No 17. This information must be provided in writing, or, where applicable, by permitting those concerned to have access to the documents mentioned in the notice of objections. It is argued that it is of no importance that some of the elements of fact on which the Commission has based its objections may have been known to the applicant, since the purpose of Article 4 of Regulation No 99/63 is to ensure that those concerned are informed that the defendant intends to allege certain facts against that party and to consider them as evidence of an infringement.

The applicant cites a number of conclusions in the notice of objections which, it claims, are not supported by elements of fact, so that the applicant was not given the opportunity of submitting its observations on the factual data allegedly in the possession of the Commission in respect of those conclusions. The applicant asserts that this infringement of the rights of the defence was all the more unjustified in that the applicant specifically informed the Commission on several occasions that it required to see the text of the letters sent by the various producers which allegedly contained coincidences, and asked permission to consult the file in appropriate cases. The Commission refused.

The *defendant* replies that according to the judgment in the Grundig-Consten case, it is not necessary for the entire content of the file to be made available. It is sufficient for the Commission to inform the interested parties of the elements knowledge of which is necessary to ascertain which objections were taken into consideration. This is what it did in the present case in the second section of the notice of objections. Furthermore, it would have been wrong, because of the risk of betrying business secrets, to allow those concerned to consult the files or to sent them the full text of the circulars sent by them to their subsidiaries or representatives.

In its reply the *applicant* observes that consulting the file was only one way of informing it of the charges laid against it. Instead of generalizing, the defendant

ought, during the administrative procedure, to have made available the documents from which it draws conclusions concerning alleged similarities in wording and in dates, as it has done during the course of the judicial proceedings. This failure to make information available prevented the applicant from defending itself during the administrative phase as regards the objections based on those documents.

The justification which the defendant claims to draw from the need to preserve business secrets is entirely without foundation, because since then it has made these documents available without even asking the undertakings if they had any objection. Furthermore, the risk of betrying business secrets is not a reason for refusing an interested party the right to be heard, for Article 20(2) of Regulation No 17 provides expressly that the prohibition on disclosing business secrets is without prejudice to the provision of Article 19 which protects the rights of the defence.

The *defendant* objects that the applicant is confusing the obligations which Article 19(1) of Regulation No 17 imposes on the Commission during the administrative procedure with the obligations upon it in its capacity as defendant before the Court of Justice.

4. *Complaints concerning the communication of the notice of objections before the inquiries were concluded*

The *applicant*, after pointing out that persons duly authorized by the Commission obtained information from the applicant itself or from its sales companies on the subject of the 1967 increase on dates falling between 19 December 1967 and 15 April 1969, argues that the Commission acted in a way incompatible with the very nature of the notice of objections, which must constitute the final act of the inquiry, in that the Commission arbitrarily drew up its notice of objections at some point during its investigation and not at the end of it, as it should have done according to Regulation No.17 and Regulation No 99. If the Commission thought it necessary to undertake further measures of inquiry after the notice of objections had been communicated to those concerned, it should have sent them an adequate supplement to the notice of objections in respect of that further investigation.

The *defendant* replies that the sole purpose of the inquiries in question was to check the accuracy of certain statements made by those concerned either orally in the presence of officials of the Commission or in written statements in reply to the notice of objections. Some of the undertakings claimed that every time there was a general increase prices slid quickly downwards as a result of discounts given to certain customers. It was this particular point upon which the checks in question were made.

As an alternative argument the defendant claims that neither Article 19 of Regulation No 17 nor Regulation No 99 was infringed because the inquiries to which the applicant refers (those of 13 December 1967, 25 January 1968 and 6 February 1968) all took place before the meeting of 10 December 1968 organized for the very purpose of enabling the undertakings concerned to submit their oral observations on the objections as a whole. In any event, the contested decision was not based on any objection other than those set out in the notice of 11 December 1967.

The *applicant* observes that those inquiries led the Commission to add to and make considerable alterations to the statement of the facts which had already been sent to it. It stresses on this point that the notice of objections did not contain any evidence of the existence of a concerted practice as regards the increase of 1967, but simply asserted that those concerned had agreed on that increase. But in the contested decision, relying on such matters as the Geigy announcement and the findings of the Bundeskartellamt, which only came to the Commission's knowledge afterwards, the defendant referred to a concerted practice.

The *defendant* is opposed to this interpretation of the notice of objections, in which it never spoke of agreements, but always of concerted practices even as regards the increase of 1967. On this point, it cites in particular point 12 of page 9 of that notice, where reference is also made to the meeting at Basel in August 1967.

5. *Complaints concerning the hearing*

The *applicant* claims that since, for the reasons set out above, it had not been informed of certain essential elements on which the Commission based its conclusions contained in the notice of objections, all it could possibly do at the hearing was to repeat the protests which it had already made previously in writing. Furthermore, since there were doubts in the applicant's mind as regards the factors on which in December 1968 the defendant intended to base its decision, the two weeks' notice on which it was invited to appear was too short for it to prepare itself sufficiently, a point which it made during the administrative procedure.

No answer to these complaints is given in the statement of defence. They are further developed by the applicant in its reply.

The *defendant* states, in its rejoinder, that the complaint as to insufficient notice is a new submission which cannot be considered to be admissible under Article 42(2) of the Rules of Procedure.

Furthermore, notice of not less than 3 weeks, such as was given to the applicant, cannot be considered insufficient.

6. *Complaint concerning the minutes of the hearing of 10 December 1968*

The *applicant* observes that by letter of 27 June 1969 the defendant sent the draft minutes to it, giving it until 15 September to agree to that draft by sending back a copy signed by its representative together with suggested alterations if any. Yet the contested decision was taken on 24 July of the same year, that is to say, six weeks before the expiry of the period given to the applicant, without the applicant's ever having informed the defendant that it agreed the text of the minutes of the hearing. It is argued that therefore no lawful hearing ever took place, which means that there is no point in looking at the contents of the defendant's draft minutes, in respect of which in fact the applicant did not fail to use its right to ask for alterations, especially with a view to deleting inaccuracies in the record of what its counsel said.

The *defendant* denies that minutes may only be used when expressly approved by the persons heard. In any event the applicant's failure to approve the minutes is of no importance at all in this case, because the contested decision did not use any of the statements made by the applicant's counsel at the hearing of 10 December 1968. The text of the letter of 27 June to which the applicant refers, and which was sent by the defendant to the applicant with the text of the draft minutes of the hearing, was in fact only a draft which, because of a mistake made by officials of the Commission, was sent to the applicant's counsel instead of the letter which was in fact sent to the applicant.

As regards the applicant's complaints to the effect that the statements of its counsel were recorded inaccurately, the defendant produces as an annex to its statement of defence the complete text of the two statements made by the applicant's counsel during the hearing of 10 December 1968.

As regards the date when the minutes were sent to the members of the Advisory Committee, the defendant states that this occurred as early as 19 June 1967.

In its reply the *applicant* states that the defendant wrongly attributes only secondary importance to the minutes. It is argued that approval of the minutes by those concerned is indispensable, regardless of whether the Commission uses or does not use statements made by those concerned against them. The purpose of the hearing ought not to consist solely in enabling the Commission to use statements made by those concerned against them; it should also be the purpose of the hearing to guarantee the rights of the defence, to give those concerned the opportunity of establishing their innocence and to discuss doubtful questions with the Commission. As for the mistake in notification made by the defendant, the applicant is of the opinion that the defendant should bear the consequences of this. Besides, the original of the accompanying letter addressed to the applicant did not set a different time-limit from that given in the text described as a 'copy' addressed to the applicant's counsel. The original simply asked for the minutes to be agreed to 'as soon as

possible'. In those circumstances, since the applicant did not approve the minutes and since there was no reason why it should have approved them before the date given to it, the hearing did not fulfil its purpose as regards the applicant.
Quite apart from the above, the procedural defect consisting in the fact that the draft minutes were sent to the Advisory Committee on 19 June 1969 before they had been submitted to those concerned is in contradiction, it is argued, with the rule contained in Article 9 of Regulation No 99.
The *defendant* replies that all the parties present at the hearing were in agreement that the minutes would only be drawn up and sent to them for their approval later, by reason of the length and complexity of the statements made in the various languages, and because of the time necessary for drafting. As to the mistake of communication, the defendant observes that it was only the original letter asking for the applicant's agreement as soon as possible which could be valid, not an unsigned copy.
The fact that no statement made by those concerned was used against them also takes all weight away from the fact that the minutes were sent to the Advisory Committee before being submitted to those concerned for their approval.

7. *Complaint that the decision contains new arguments of fact*

The *applicant* argues that a whole series of essential arguments of fact appears for the first time in the decision. The matters in question are as follows:

— the time at which, in January 1964, those concerned allegedly sent instructions to raise prices to the Italian subsidiaries;

— the alleged similarity in the messages sent by Telex;

— the alleged intention of the applicant also to introduce an increase in Italy in the Autumn of 1967;

— the fact that ACNA is said to have prevented this from taking place;

— the meetings for information between the producers, especially in Basel and in London;

— the minutes of the meeting at Basel on 18 August 1967;

— the examination of the prices of dyestuffs and the announcement of the increase made by Geigy;

— the decision of the Bundeskartellamt and the findings made by it.

The *defendant* replies, as regards the matters that the contested decision takes into consideration in favour of the ACNA company, that these cannot in any way affect the position of the other undertakings, since the decision taken against them was not based in any way on the considerations concerning the conduct of ACNA. The meeting in Basel during August 1967 was mentioned at page 9 of the notice of objections. The meeting in London was mentioned only in order to introduce the facts set out in the third paragraph. Furthermore, the decision taken does not find against those concerned on the basis of their contacts for information
The statements relating to the decision of the Bundeskartellamt were superfluous in the context of the contested decision. In any event there was no reason why it should not have been referred to in the decision, particularly since it seems undeniable that Geigy announced an increase, as the Kammergericht Berlin also held in its decision of 28 August 1969, which overruled the abovementioned decision of the Bundeskartellamt for reasons of substance relating to German law.
The *applicant* claims that the Commission's assertion to the effect that the contested decision did not take into consideration against Bayer its participation in an alleged concertation in October 1967 with a view to increasing prices in Italy is shown to be untrue by the fact that the fine imposed on ACNA was reduced for

the very reason that that undertaking did not take part in that increase. Yet this charge was not brought to the attention of the applicant in the notice of objections. Even in the case of facts which are not denied, the applicant ought to be able to refute the conclusions which the Commission believes it can draw from them. Therefore these facts should be brought to its attention in any event.

The applicant states that the Kammergericht Berlin did not overrule the decision of the Bundeskartellamt for reasons of substance relating to German law, but for reasons of fact.

The *defendant* objects that the contested decision expressly states that the price increase of October 1967 did not cover Italy. In the notice of objections, the meeting in Basel in August 1967 was set out as one of the facts from which the concerted nature of the 1967 increase appears. The question whether a certain conduct found to exist as a fact constitutes a cartel or a concerted practice is not an element of fact but a problem of legal assessment. The sole purpose of the reference to the judgment of the Kammergericht Berlin was to confirm the finding that the undertakings concerned met in Basel on 17 August 1967. Furthermore, the defendant stands by its assertion that the Kammergericht overruled the decision of the Bundeskartellamt of 28 November 1967 for reasons based on German substantive law. Article 1 of the German Law in question on which the Bundeskartellamt based its decision does not cover the concept of a concerted practice, and the Kammergericht came to the conclusion that the existence of an agreement between those concerned had not been established with a sufficient degree of certainty.

B — The period of limitation in relation to the facts of 1964 and 1965

The *applicant* observes that since the principle of periods of limitation is accepted in all the Member States, it also constitutes a principle of Community law, even if it is not enshrined in any express provision.

The limitation periods for commencing proceedings against administrative infringements are not longer than three years in any of the Member States in any case. Since infringements of Article 85 of the EEC Treaty are not criminal in nature, analogous criteria should therefore be applied. In order to stop time running, the competent authorities must at least take a measure of a nature such as to produce legal effects. In the present case no such measure occurred until the decision taken on 21 May 1967 to commence the procedure. Proceedings against the increases of 1964 and 1965 should therefore be considered to be inadmissible as being out of time.

The *defendant* objects that the three uniform increases of January 1964, January 1965 and of October 1967 were the result of a continuous concerted practice which extended over the whole period from January 1964 to October 1967. Therefore the problem of limitation does not arise in the present case.

Secondly, the defendant observes that in the absence of provisions governing time-limits in the law in force, the Commission retains complete authority as part of its duties and in exercise of its discretionary power to determine more precisely, subject to review by the Court of Justice, the limitation periods which appear appropriate as regards proceedings against infringements. To apply national law to a fact pertaining to Community law in cases where Community legislation is silent would render it impossible to apply Community law on a uniform basis.

The laws of the Member States have in common only the principle that there should be a limitation period. However, as regards putting that principle into practice there are important differences. In view of this disparity the Commission reaches the conclusion that it is impossible to discern any precise criteria, and that therefore as regards limitation periods for infringements of the provisions of Article 85 of the Treaty it is the needs of Community law alone that should be taken into consideration.

Even if it were accepted that each of the three successive price increases occurred by

reason of a new concerted practice, this would not mean that the limitation period had expired because it has been suspended on several occasions since 1964 by written requests for information made under Article 11 of Regulation No 17 and by investigations carried out by officials of the Commission under Article 14 of Regulation No 17 at the premises of several undertakings, including those of the applicant.

The defendant is of the opinion that, taking into account the legal and practical difficulties of the question, a limitation period of even three years cannot be considered as appropriate in cases of infringement of the Community's rules on competition.

The *applicant* denies that there was a continuous link between the different increases, because it never committed itself to following in the future any increase introduced by other undertakings concerned. In its view it is unthinkable that an undertaking should tie its pricing policy so tightly to possible individual decisions taken by some of its competitors. The right claimed by the Commission to set limitation periods in each particular case contradicts the requirement of legal certainty which is the whole purpose of limitations. In the absence of a Community limitation period, the applicability of the two-year period laid down by German law is confirmed by the right and duty of the Commission to carry out its activities in collaboration with the national administrations competent in matters concerning cartels. For it is paradoxical to require national administrations to perform their duties according to EEC law in cases where they no longer have the power to act under national law. The period laid down by German legislation is also valid if it is wished to apply a uniform period to the whole of the EEC, the reason being that Germany is the only Member State possessing legislation on competition comparable to that of the Community system.

As for the suspension of the period of limitation, the applicant observes that the investigations carried out by officials of the Directorate-General for Competition cannot be looked upon as formal measures of the Commission. The activities which took place in this case were of a purely preparatory nature with a view to a possible formal measure on the part of the Commission. The principle that the rights of the defence must be respected requires that only formal measures may suspend the period of limitation.

The *defendant* replies that in order to justify the proposition that there was a continuous concerted practice, it suffices that as from the price increase of 1964 each of the undertakings concerned was in a position to expect that the other undertakings would behave in the same way upon the occurrence of new general increases. Because of individual price concessions made by the undertakings they had a permanent and collective interest in moving away from a relatively low level of market prices to a high level, by mutually foregoing the practice of undercutting each other which they usually follow on the market.

The defendant asserts that the application of the time-limit laid down by German law is contrary to the requirement of a uniform application of Community law. Furthermore, in the absence of common principles governing the length of the limitation period, it is unacceptable to apply the period laid down by the law of one of the Member States to the whole Community.

Even if a limitation period of two years were accepted, this period was suspended, first by the investigations of July 1965 and then by the commencement of the procedure on 31 May 1967.

The distinction maintained by the applicant between the activity of the Commission and that of its officials is contrary to the tenor of Regulation No 17. The Director-General for Competition is empowered to take the measures provided for by Article 14(1) and (2) of Regulation No 17 by virtue of a delegation of powers by the Commission. It was in the exercise of these powers that the officials who undertook the abovementioned investigations were given that task. So far as the suspension of the limitation period is concerned their activity does not differ in any way from duties which they carry out on the basis of a given formal decision.

C — Substantive submissions

1. *Complaint concerning the criterion of the effect on trade between Member States*

The *applicant* maintains that the defendant has not demonstrated that the practice which has been prohibited is of such a nature as to deflect patterns of trade between Member States from their normal and natural routes, and that it has done no more than assert that imports would only have increased if there had existed a sufficiently large difference in prices between the Member States, without however establishing that such a difference would have been possible in the absence of the alleged concertation and that it would in fact have intensified trade between Member States. The fact that quantities delivered at the frontiers increased, as appears from statistics of the OECD for the period 1963 to 1968, constitutes, according to the applicant, clear evidence that the increases did not affect the pattern of inter-State trade. Furthermore, it is argued that the Commission does not have the power to regulate the level of prices in the various Member States, but only to eliminate barriers to trade between Member States.

The *defendant* replies that in the light of the case-law of the Court the requirements of Article 85 as to the effect on trade between the Member States of the restriction on competition are met in this case because the concerted practice covered the territory of several Member States.

2. *Complaints concerning the understanding of the special characteristics of the market in the products in question*

The *applicant* complains that the Commission did not take into account the special characteristics of the market in the products in question, and that this prevented it from taking into account the fact that certain similarities in the conduct of the undertakings concerned resulted from independent decisions which those undertakings were prompted to take on the basis of information arising from the market. For the purpose of making this complaint clear, the applicant sets itself the task of describing the more important characteristics of the market in dyestuffs.

According to the applicant the world market in dyestuffs is characterized by the fact that the important producers are relatively few in number, but that on the other hand the range of products offered is very wide, (about three thousand one hundred products in the applicant's case). Almost all of these products can be replaced by a product from another undertaking, but only to a certain extent because of the enormous number of shades and other technical characteristics. This great diversity in the properties of dyestuffs has the effect of preventing prices being known on the market, which means that the user is permanently in a position to force the producer to grant individual price concessions. In this situation, each producer can only learn about price reductions granted by his competitors for each dyestuff and for each customer to who he is called upon to make a competitive offer (the applicant states that it has never claimed to know the prices charged by its competitors, as is wrongly alleged in the contested decision). This practice of individual concessions brings about a slow but constant erosion of prices of dyestuffs at the international level, as is shown by the fact that on the whole average prices charged by the applicant on the world market in 1967 were below those charged in 1958.

In this situation, the producer who wishes to improve the level of his prices and profits cannot do so by putting up each price at which he sells each of his dyestuffs. The large number of dyestuffs makes it impossible to make separate price adjustments for each dye in the case of a general increase in prices. Individual action at the level of each customer involving an increase in price would obviously be unacceptable for the customer. It is for these reasons that an increase can only take the form of a general and global rate of increase. Global solutions are also applied in other sectors of the economy, as for example in cases of collective pay agreements, even if, from a theoretical point of

view, it is more desirable to take individual productivity into account. When a producer has announced an increase in his prices on the market, his competitors cannot for long increase their sales at the expense of that producer by refraining from introducing the same increase because the latter is not in a position to maintain those new prices if he is not followed by his competitors. Such is the position notwithstanding the opinion expressed in the notice of objections according to which a producer can increase his share of the market by refraining from action. The Kammergericht Berlin, in its decision of 28 August 1969, expressly held that producers of dyestuffs are forced to align themselves on the lowest prices of their competitors in order not to lose a part of the market.

A producer contemplating an increase has a chance of success with his decision to increase his prices without its being necessary for him to enter into concertation with his competitors in cases where he is of the opinion that by reason of their equivalent size and of their pattern of production competing producers have preoccupations identical to his own after a long period of price erosion.

Individual conduct remains possible in relation to a lowering of prices both as regards the various dyestuffs and as regards each customer, by reason of the fact that the market is not transparent. On the other hand, in the case of price increases producers cannot do otherwise than let their tactics be known and they are therefore forced to adopt a uniform course of conduct, either because the other producers decide to follow the one who takes the initiative in introducing an increase, or because they prefer not to follow him and thus force him to withdraw that measure.

The *defendant* objects that although parallel conduct alone does not amount to concertation, the parties concerned need not, on the other hand, necessarily have drawn up a common plan with a view to adopting a given course of behaviour. It is enough that they let each other know beforehand what attitude they intended to adopt, so that each of them could regulate his conduct, safe in the knowledge that his competitors would act in a similar fashion.

The defendant maintains that the price increases in question cannot be explained by the oligopolistic structure of the market. In referring to what is expected to happen in such a market in theory, the applicant has failed to consider the postulates of price theory employed in the analysis of parallel conduct. These factors are not applicable in the case of the dyestuffs industry.

The defendant observes that the modern theory of oligopolies starts from the principle that in the oligopoly situation there are many ways of arriving at prices, and that it would certainly not be right to equate the oligopoly situation with consciously parallel conduct by participants. The theorists accept that undertakings knowingly adopt parallel conduct only in respect of oligopolies involving a very high degree of interdependence between undertakings, such that one undertaking cannot take a measure without its competitors being immediately and considerably affected and reacting in consequence. In this latter situation an undertaking only increases its prices when it expects that the others will also do so. It is mainly with reference to their marginal costs, taking into account their demand curve, that undertakings decide whether and to what extent they will follow a price increase. Therefore, even when the degree of interdependence is very high, the uncertainty in which an undertaking increasing its prices is placed as to whether the others will follow does not automatically disappear. In order for there to be conscious parallelism it is necessary for a certain number of factors to be present. These include: a limited number of sellers, high fixed costs, high mobility of demand, homogeneity and transparency of prices, ability to adapt capacity at short notice, little elasticity of demand compared with supply from all competing undertakings, technical obstacles to announcements of alterations to prices and customer resistence to frequent variations in prices. Another condition should also be added; it is that the market should be in a period of stagnation such that the interdependence

of the sellers is not affected by notable increases in demand.

In America both the textbook writers and the case-law attribute a leading role to *homogeneity of products* in deciding if conduct is consciously parallel. According to several writers, when the products are diversified the effects of changes in prices are much slower and much less foreseeable. Furthermore, even in the case of homogeneous products, where the prices actually charged usually differ from the prices publicly quoted, conduct can no longer automatically be absolutely parallel.

The High Authority of the ECSC also adopted the principle that homogeneity of products is not of itself a bar to supposing that a uniform increase in prices made by several undertakings constitutes a concerted practice within the meaning of Article 65(1) of the ECSC Treaty, as appears from the fines which it imposed on certain steel works by a decision of 4 February 1969, which has not been contested by the parties concerned.

If the criteria elaborated by the textbook writers concerning conscious parallelism are applied to the dyestuffs industry it will be seen that no such parallelism is possible.

Competition between undertakings on the dyestuffs market cannot in any way be considered as covering similar products; this is clear from Report No 100 of the National Board for Prices and Incomes on the dyestuffs industry, dated 21 January 1969, annexed to the statement of defence, from the opinion of Professors Bombach and Hill, annexed to the statement of defence, from documents produced during the preparatory inquiries by the undertakings ICI, Geigy and Sandoz, and from various statistical data produced by the Commission (Tables annexed to the statement of defence).

The market for the products in question covers about six thousand different products. Each of the undertakings concerned manufactures from 1 500 to 3 500 products and these, at least in part, display various qualities, mixtures and physical forms. The differences in strength, shade, fastness and solubility are such that when the products of various manufacturers are compared it is rare to find two dyes that are perfectly identical. The degree of similarity varis considerably: it runs from a fairly high degree of comparability in standard dyestuffs to the existence of near monopolies, often protected by patents, for products having special characteristics. Furthermore, the competitive position of the various dyes and the extent to which one can be substituted for another are constantly undergoing rapid change because of technical progress. A notable feature of the market for the products in question is a low level of transparency mainly owing to the large number of products involved, the differences between them and the variety of users (textile, leather, paper, food, rubber and synthetic materials industries and manufacturers of paints, ink, cosmetics and so on). A further reason is the fact that technical services are provided for purchasers, which differ in degree according to the customer. It follows that there is no single, standard price for each dye since prices are negotiated individually with each customer, with considerable differences between one purchaser and another. The result of this practice is that the prices calculated for each product by each undertaking are not known, in most cases, to the other undertakings, nor even amongst the purchasers themselves, as ICI has itself agreed. Therefore changes in prices introduced by one manufacturer are only imperfectly known on the market or only become known long after the event.

As for the *rate of expansion of the market*, which constitutes another test for deciding whether conscious parallelism can exist, it appears that on the whole the dyestuffs industry is expanding at a fast rate, approximately corresponding to that of expansion in the chemicals industry as a whole.

As for *mobility of demand*, according to Professors Bombach and Hill price competition on the market in question is particularly intense and purchasers are inclined to change supplier if more favourable terms are offered to them.

This tendency seems to have increased during the course of the last few years, according to the abovementioned Report of the National Board for Prices and

Incomes, at page 5. This mobility is rendered easier by the fact that normally purchasers only maintain low stocks and only buy in small quantities.

Since purchasers carry low stocks, manufacturers must themselves maintain *large stocks* as this makes it easy for them to adapt themselves to changes in demand. Because competition between manufacturers is intense and undertakings are constantly trying to increase their share of the market, they find it necessary to build up their stocks in such a way as to be able to take advantage of all chances of selling their products. It is relatively easy for them to adapt themselves in the medium term by changes in the production programme because the production plant can be used for many different purposes.

In view of the particular conditions on the market, the situation of manufacturers differs from one undertaking to another. It follows that some undertakings have much more success than others in obtaining the prices at which they aim to sell their products.

The respective rates of expansion and the fluctuations in these rates are different for undertakings in the various Member States. Thus German manufacturers are benefiting from the constant increase in the value of goods produced, according to information supplied by Cassella and Hoechst, whereas, for example, the Italian company ACNA is going through a crisis (declining work force between 1964 and 1967, closure of one of its factories).

This disparity between undertakings means that there are important differences as regards *costs*.

This necessarily results in *differences in profits*. The widest profit margins are obtained with speciality products, so long as they remain so. Profits vary in relation to the level of prices for the different products on the market. The volume of sales has an influence on profits: thus for example, ACNA can only begin to make a profit on its production of special dyestuffs if the quantity produced reaches a volume higher than that of present demand in Italy.

Taking into account these characteristics of the market in dyestuffs and of the criteria drawn from the theory of oligopolies, one is forced to conclude that it is inconceivable for undertakings on the dyestuffs market to behave with conscious parallelism.

Since *several of the products* in question *are not interchangeable* or only to a small extent, an undertaking putting up its prices cannot assume that its competitors will follow suit, at least for the products in question. The price increases at issue were introduced indiscriminately for all products and this cannot possibly be explained by the *pressures of the market* and by the logic of the oligopoly situation.

Moreover, the defendant argues that an analysis of conditions on the dyestuffs market shows that on that market, which is characterized by a high rate of expansion and rapid rechnical progress, a general alignment of price increases, announced without prior concertation, would not be possible for *interchangeable products*. The defendant refers to the example of the ACNA company, which for the most part manufactures standard types and which, after eight of the ten undertakings in question had announced a general increase in prices of pigments and had begun to apply this increase as from 1 January 1965, did not fall in line with this increase in prices, so that thereafter the other undertakings withdrew their increases. This shows, in the Commission's view, that even in the case of products towards which sellers react in a sensitive way, interests are so varied on the dyestuffs market that parallel action does not take place automatically.

In these circumstances it is inconceivable that one undertaking would decide unilaterally on a large general increase in prices without first consulting its competitors. Supposing that there were unilateral, independent increases on the part of certain undertakings, each of the other undertakings would have been able, by setting different prices and by taking account of the position occupied on the market by the various products being manufactured by it, to attempt to obtain the best results. In order to prevent competitors from immediately withdrawing their increase, each undertaking would at the most have had to tell the purchasers of

totally interchangeable products that it was falling in line with this increase as regards these products, but this would not have been necessary for all the other products since, because of the lack of transparency of the market for those products, the various purchasers would not immediately have been able to react to the new prices.

The *applicant* in its reply, asserts that the defendant's argument based on the idea that the price increases in question were not compulsorily determined by market forces is not relevant. The decisive question in this case is whether the uniform conduct in question resulted from prior concertation or whether it was solely the result of an independent decision taken by the applicant. In order that uniform, independent and deliberate conduct of this sort be possible without prior concertation it is not necessary, in the applicant's view, that it be the result of compulsion. Supposing that the undertakings had had different interests, this alone would not mean that they would necessarily have had to behave differently. Even if it is admitted that the applicant could have conquered a larger proportion of the market by not raising its prices, it could have obtained a better financial result by raising them, aligning its conduct on that of the other undertakings. Individual increases in relation to certain customers could only usefully be put into effect in the case of products of a particular technological interest. In the applicant's case, this condition was met only as regards some ten products representing only 6 to 7% of its turnover in the dyestuffs sector. But it considered it more in accordance with its interests, particularly in order to simplify its administrative work, to introduce a general price increase. It would be wrong to confuse, as the defendant does, the apparent *possibility* of introducing individual price increases with the existence of a *compulsion* to introduce such increases.

As for the possibility of introducing different rates of increase on the various markets, the applicant observes that such diversified conduct is possible, but that it is highly probable that a uniform increase in prices introduced on a given market will extend beyond it because of the international nature of the market in dyestuffs. The applicant also observes that as soon as any fluctuation in prices becomes known on the market—which is not the case for small alterations in prices asked of a given customer—each competitor has to determine its own pricing policy with reference to the lowest known prices. The events in Italy in 1965 confirm this interdependence of reaction of producers of dyestuffs, and they also show that any undertaking which takes the lead exposes itself to the risk of not being followed by its competitors. This is the reason why for many years each producer drew back from the decision which had to be taken.

On an oligopolistic market each producer has to determine his attitude with reference to the presumed individual decisions of his competitors, which is unlike the situation of automatic reaction existing on a market comprising a large number of producers, on which competition is atomized. The term used in this context is 'conjectural elasticity', the undertakings' conjectures concerning the future conduct of their competitors being the only factor which can upset the unstable balance existing on this type of market. In order for this conjectural elasticity to exist certain conditions set out by Shubik must be fulfilled.

As to *similarity of products*, the applicant says that the defendant has not properly understood the result of the economic analysis. It is argued that the defendant mistakenly quotes various authors, such as Shubik, Clark and Machlup, in asserting that interdependence of reaction can only exist in respect of similar products. Those same authors state that the decisive factor concerning such interdependence is cross-elasticity of demand. The extent of this elasticity depends on the degree to which the products are interchangeable, and it certainly cannot be said that there is no such interchangeability in the case of an oligopoly covering heterogeneous products. According to Kantzenbach, where the oligopoly covers homogeneous products, the potential intensity of competition is at its highest and, therefore, the real intensity of competition is generally at its lowest. On the other hand, it is in a heterogeneous oligopoly that the real

intensity of competition is at its highest. Basing itself on quotations from Kantzenbach and Shubik, and also on reference to Machlup and Schneider, the applicant comes to the conclusion that it is precisely in the context of a heterogeneous oligopoly (covering different products which are nevertheless largely interchangeable), characterized by an interdependence of reaction, that the existence of conscious parallelism of conduct without prior concertation becomes particularly plausible.

The degree to which dyestuffs are interchangeable is variable. It is high for standard dyes which account for the greater part of the market, those products being homogeneous to a large extent. As Professors Bombach and Hill have pointed out, interchangeability is reduced by a certain lack of transparency on the dyestuffs market. However, the provision of technical services draws the attention of customers to the possibilities of substitution. Furthermore, each customer possesses a 'colour index' classifying dyestuffs by categories and informing the technician of possible substitute products. If differences in prices are minimal the pressures towards identical conduct on prices are nil, but if the differences in prices known on the market become large enough to overcome the preference of customers for a product or for a given supplier, demand is directed to the least expensive producer.

As to *transparency of the market*, the applicant observes that this phenomenon, which occurs when a price increase is announced, leads to a conjectural structure, which in turn leads to the interdependence of the oligopoly.

As for the *rate of expansion of the market*, the applicant argues that the market in dyestuffs is a stagnant market considered from the point of view of the economy as a whole. For the ratio between the value of dyestuffs produced and the total turnover of the chemicals industry remained practically constant between 1958 and 1968. The volume of the market in dyestuffs depends exclusively on the demand for products manufactured by customers, and the producer of dyestuffs has no influence on that demand because of the very small part played by the cost of dyestuffs in the prices of those products. Therefore the total demand for dyestuffs is almost wholly devoid of elasticity, notwithstanding the fact that it follows the fluctuations in the demand for products manufactured by customers. Therefore any individual initiative by a producer can only have the result of *altering the direction* of demand. The result is a conjectural structure characterized by high interdependence.

As for the other conditions defined by Shubik in particular, the applicant observes that they are indisputably fulfilled.

The *defendant* replies that it spoke of the pressures of an oligopoly only in order to deny that the conditions for such a situation were present on the dyestuffs market. Such pressure exists when the undertakings, acting with reference to economic criteria, practise parallel pricing policies by reason of the structure and conditions proper to the market in which they operate. In order to explain the three price increases in question, it is not enough to accept the theoretical possibility of parallel conduct on the dyestuffs market if that corresponds to irrational conduct in terms of economics. The defendant argues that it was in the interests of the undertakings and in accordance with their interests to adopt different methods, which is indeed what they did in other cases, as has been shown by tables joined to the statement of defence. Since the applicant throws doubt on the content of these tables in its reply, the defendant proposes to prove their accuracy by producing the original documents, and copies of the invoices on the basis of which these tables were established.

As regards the rate of expansion of the market in dyestuffs, the question is not what is the share of each manufacturer of the turnover of the chemicals industry or of the national product, but what is the possibility of increasing its turnover. In a period of expansion several undertakings could increase their turnover with the sales of their competitors being affected, and this would have the effect of loosening the interdependence of the undertakings.

As to cross-elasticity of demand, the defendant observes that it has already stressed the importance of this fáctor in its defence. It was precisely with this in mind that it

studied the conditions on the market. The defendant opposes the assertions and conclusions concerning an oligopoly covering heterogeneous products, arguing that the applicant's reasoning on this subject is contrary to all aspects of economic experience and to the findings of textbook writers and of the case-law. It is true that, as the applicant says, the real intensity of competition reaches its maximum in a heterogeneous oligopoly. Interdependence is sufficiently weak and the structure of the market is sufficiently broad to enable undertakings to take individual measures with a view to obtaining the best results for themselves. On the other hand intensity of competition is in reality weak when by reason of a high degree of interdependence and similarity of interests undertakings voluntarily adopt parallel conduct in a situation where there is an oligopoly for homogeneous products. In these circumstances, the defendant does not see how the applicant can assume conscious parallel conduct on a heterogeneous market characterized by a high degree of intensity of real competition. After each increase, the normal forces of the market reasserted themselves as before and prices were again eroded. It is therefore obvious that parallel conduct and a high degree of effective competition are mutually exclusive.

3. *The concept of a concerted practice*

In its reply the *applicant* asserts that the defendant is now alleging, in contrast to the concept of a concerted practice which it put forward throughout the administrative procedure, that the existence of a concerted practice does not imply that those concerned have established a common plan with a view to a given conduct on the market but that it is enough that the undertakings should inform each other as to their future competitive conduct. The American case-law which the defendant prays in aid of these two conclusions is diametrically opposed to its proposition: up until now no decision of the American courts has condemned parallel conduct when the latter was not accompanied by a plan drawn up in common. The applicant quotes several American decisions in this context. When the possibility cannot be excluded that voluntarily parallel conduct may be the result of pure business logic, without implying the existence of a plan drawn up in common, the American courts take the view that the evidence for a concerted practice is insufficient.

Furthermore, all the textbook writers on the EEC rules of competition are unanimous in requiring the existence of an element of cooperation for the criterion of concerted practices to apply. Some authors even require proof of the existence of an agreement or of a gentlemen's agreement. The mere exchange of information between undertakings on the conduct which they intend to adopt does not constitute cooperation and does not amount to the surrender of independence on the part of those undertakings.

The *defendant* argues that the concept of a concerted practice is not equivalent to the American concept of 'concerted actions'. A concerted practice under Article 85(1) of the EEC Treaty is one of the constituent elements of the infringement listed in the provision, whereas 'concerted action' constitutes a particular case, elaborated by American case-law, of 'conspiracy' as forbidden by the Sherman Act, which presupposes that the undertakings concerned are acting with a common will. This notion of 'concerted action' has decided advantages as regards proof, and it is not based on a substantive and clear definition of an 'agreement', that is to say, the common will necessary for 'concerted actions'. According to the defendant, in order for this agreement to exist for the purposes of 'concerted action' it is enough that there exists conscious and purposeful cooperation between several undertakings, without its being necessary that there be a common plan consisting in prior consultation.

The citations from American case-law supplied by the applicant allegedly prove that the question whether a given business action is taken pursuant to a common will is a question of evidence, and that a uniform action constitutes a sufficient indication of the existence of such a

common will when that conduct is not the necessary consequence of the structure of the market. On the concept of a concerted practice, the defendant also refers to an article by Tolksdorf.
Even in an oligopoly, in so far as the sellers have differing interests, the fact of several decisions being taken independently by the various undertakings does not necessarily lead to similar conduct on the market. This is why, in an oligopoly also, where sellers are acting in parallel there is a presumption of fact as to the existence of a concerted practice, unless the particular structure of the market is such as to create economic constraints causing the various undertakings to behave in a uniform way. Such is the position in American case-law. As for Community law on competition, the factors constituting a cartel prohibited under Article 85 are not based on the legal concept of 'conspiracy'. Nor is the concept of an 'agreement' the right term to apply to cooperation between several undertakings by way of concerted practices. There is a concerted practice within the meaning of that article every time the conduct of several undertakings on the market proceeds from a common will on the part of the interested parties, whether that common will is the offspring of reciprocal action or arises because of the action of a third party. There is a common will not only when the undertakings come to an understanding as to their conduct on the market but also when they deliberately ensure that there can be no lack of knowledge about their future conduct by keeping each other informed and, in so doing, they coordinate their conduct. The element of cooperation consists in the fact that, by reason of the common will, each of the participants can rest assured that the others will adopt either a uniform or a different course of conduct according to an allocation of roles worked out in advance. Therefore it is not necessary to show that concertation has taken place or that a common plan has been drawn up in order to argue that there exists a concerted practice for the purposes of Article 85. In the present cases the Commission has proved that as regards prices the dyestuffs manufacturers in question behaved in a uniform way. This means that it has adduced sufficient proof that concerted practices existed. Furthermore, it has shown that the structure of the market for the products in question was such that there is no explanation of this uniform conduct other than that alleging concerted practices. Moreover, the Commission has even pointed out a series of facts constituting indications of concertation.

4. *Complaints concerning the evidence put forward by the defendant*

The *applicant* argues that in the light of the considerations that it has set out above, the data which the Commission has taken into account as evidence that prior concertation took place are to be explained quite differently.

(a) *Concerning the increase of January 1964*

The *applicant* criticizes the evidence put forward in the contested decision in favour of the alleged concerted nature of the increases.
As regards the identity of the rates of increase, the applicant asserts that this was parallel conduct constituting the logical consequence of the structure of the market. The applicant did no more than follow Ciba in order to make up for the erosion of its profit-margins. The identity of the rate of increase across several national markets is to be explained by the consideration that the increase in the costs of production affects the producer as regards his whole output and that therefore he attempts to recover it from his sales as a whole. The applicant asserts that this uniformity of rate did not exist from the moment when the producers informed their customers of the increases which they had decided to introduce, but that it was the consequence of the play of market forces. The differences between the increases announced and the real results of the price movement, and the fact that the products which the different producers excluded from the increase were not identical prove that there was no concertation,

and that the uniformity of conduct which finally occurred on the markets resulted from the pressures of the market itself.
As to the alleged coincidence in the timing of the sending of the instructions to the Italian subsidiaries, the applicant asserts that this complaint was not mentioned in the notice of objections. Therefore the contested decision infringes Article 4 of Regulation No 99/63 on this point.
Alternatively, the applicant stresses that the aligning of the instructions which it gave to its Italian subsidiary on the points of detail relating to the increase introduced by Ciba, which occurred following the latter's announcement of 7 January 1964 that it intended to increase its prices, only took place later, for the information which the applicant received on 8 and 9 January from its Italian subsidiary about Ciba's decision was neither complete nor pertinent.
As to the alleged similarity of content of the orders to increase prices, the applicant asserts that the text of these orders has never been communicated to it and that therefore it has not been in a position to submit its observations on this point in an appropriate manner. Furthermore, the orders which it sent to Italy on 9 January, once it had become aware of the content of Ciba's circular and of the points of detail in the measure taken by that undertaking, went beyond that circular. The applicant also asserts that it never declared that those concerned copied from each other their instructions destined for Italy, as the defendant alleges in the contested decision.
The applicant concludes that the evidence upon which the Commission has relied as proving the existence of concertation is proof of nothing but the existence of conscious parallelism.

(b) *Concerning the increase of January 1965*

The *applicant*, having pointed out that as regards this increase the defendant does no more than allege in the contested decision that those concerned engaged in parallel conduct, asserts that this increase was fundamentally different from the 1964 increase, which was introduced with immediate effect by each of the undertakings, for it was decided upon and announced long before the date on which it was to have taken effect. Therefore the competing producers did not need to act so rapidly, and their parallel conduct was not simultaneous, as is shown by the fact that customers were informed on widely differing dates.
The applicant also argues that the defendant does not raise any new facts pointing towards the conclusion that concertation existed as regards the increase of 1 January 1965.

(c) *Concerning the increase of October 1967*

The *applicant* asserts as regards this also that the only argument put forward by the defendant as evidence of the existence of prior concertation between those concerned is that of their parallel conduct. The assertion that they had decided, in the context of their concertation, to introduce an increase on the Italian market in Autumn 1967 and that they did not do so because the refusal of ACNA prevented them from putting it into effect is an assertion found for the first time in the decision. Therefore it cannot validly be put forward in justification of that decision.
The meetings between the producers for the exchange of information, in particular those at Basel and London, cannot constitute evidence as to the existence of prior concertation. The Commission cannot validly rely on this fact because the notice of objections does no more than assert that the increase was decided upon by all the producers at a meeting held at Basel in August 1967 upon Geigy's initiative, without mentioning the existence of minutes, or of their contents, or of the decision of the Bundeskartellamt which asserts that Geigy went so far as to speak of an increase of 8% with effect from 16 October 1967. Thus the applicant had no opportunity to evaluate the evidence apparently in the defendant's possession, and thus the rights of the defence were infringed.
The applicant asserts that it did not take its decision to increase its sales prices by

8% on 16 October 1967, but only after Francolor, which itself aligned its own position on that of Geigy, announced an identical price increase on the market, since this fact seemed to announce a general price movement.

In short, the applicant asserts that the decision nowhere states why any given instance of uniformity could not be a consequence of the oligopolistic structure of the market. The decision merely asserts at several places that that in 'unbelievable', or that it is 'inexplicable' or that there exists 'no doubt that such was not the case'. Justice requires that matters such as these cannot condemn those concerned.

As against the arguments put forward and set out above concerning the 1964 price increase, the *defendant* produces the text of the instructions to increase prices sent in 1964 to Italy and Belgium by the undertakings concerned by the contested decision. It stresses the fact that certain passages are the same almost word for word. As for the increases of 1965 and 1967, the defendant states that the undertakings were careful to avoid obvious similarities.

The *applicant* maintains that examination of these documents supplied by the defendant shows that the alleged similarity of content of the producers' orders do not correspond to the reality. The applicant invites the Court to refer to a synopsis of the texts of the different written orders which it sent out.

As regards, in particular, the detailed rules accompanying the increase, the applicant observes that since the increase carried out by Ciba on 7 January 1964 in Italy took effect immediately, the detailed rules intended to bring about this immediate entry into force were also laid down. For a businessman it is obvious, in the applicant's view, that such detailed rules must be taken into account in the case of an immediate increase in prices.

The *defendant* asserts that the applicant is wrong in attempting to deny that the price increases covered substantially the same dyestuffs by resorting to a comparison between the orders to increase prices sent by the various undertakings. This comparison is not conclusive because producers frequently use certain fanciful or trade names for the dyes they produce, as is confirmed by an extract from the 'colour index'. In fact the 1964 price increase covered the same categories of dyes, in so far as the undertakings concerned manufactured them. Should the Court consider this matter important, the defendant submits that the Court should allow it to put in an expert's report as evidence.

As regards the detailed rules accompanying the orders to increase prices sent out by the various producers, the defendant observes that 13 of the 14 orders require the increase to be put into effect at once; cancellation of pending sales is found in 12 of the 14 letters; the prohibition on the issue of antedated bills is found in 8 of the 14 letters, this number being explained by the fact that this prohibition was already implicit in the order to make an immediate and general increase.

Finally, according to the defendant, it is necessary to take into account the fact that in many cases the letters in question merely confirmed instructions already given by telephone.

5. *Complaints concerning the fine*

The *applicant* asserts that the defendant should have taken into account the fine imposed on it by the Bundeskartellamt for the same matter by its decision of 28 November 1967, even though this decision was annulled by the Kammergericht. It is argued that this obligation is clear from the judgment of the Court in Case 14/68.

The defendant objects that those concerned appealed against the abovementioned decision of the Bundeskartellamt and that later the Kammergericht Berlin, by its decision of 28 August 1969, annulled the said decision of the Bundeskartellamt. Since the decision of the Bundeskartellamt was not definitive at the time when the contested decision was adopted, there was no danger of concurrent penalties.

IV — Procedure

The procedure took the following course.

By order of 11 December 1969 the Court decided that the defendant should lodge separate statements of defence without reference to the other cases pending on the subject of dyestuffs.
By order of 8 July 1970, the Court, having regard to the report of the Judge-Rapporteur and the views of the Advocate-General, ordered as follows:

1. An expert's report shall be obtained in respect of the following questions:

   (a) Taking into account the characteristics of the dyestuffs market in the European Economic Community, especially during the period 1964 to 1967, would it have been a practical possibility, according to normal commercial criteria, for a producer acting independently who wished to increase his prices to do so otherwise than by a general uniform and public increase, by fixing different rates for each product in his individual relationships with each customer?

   (b) For a producer acting independently, what advantages and disadvantages result from effecting a general and linear increase in prices, as compared with an increase differing in respect of each customer, product and market? The answer to this question is to be given both on the hypothesis that the producer is taking the initiative in making an increase and on the hypothesis that the producer is faced with a general and uniform increase announced by a competitor.

   (c) Taking into account in particular the degree of transparency of the market, are dyestuffs other than speciality dyes practically interchangeable and, if so, to what extent? What is the approximate proportion of speciality dyes compared with the total production of dyes for each of the undertakings concerned?

2. The parties may, by agreement between themselves, propose the name of an expert to the Court before 1 October 1970.

By order of the same date the Court joined Cases 48/69, 49/69, 51/69, 52/69, 53/69, 54/69, 55/69, 56/69 and 57/69 for the purposes of the expert's report.
By order dated 13 November 1970 the Court, having regard to the proposal made by common agreement between the parties on the names of two experts, instructed Horst Albach, Professor of Business Management at the University of Bonn, and Wilhelm Norbert Kloten, Professor of Political Economy at the University of Tübingen, to prepare the report jointly.
The experts' joint report was lodged at the Court Registry on 23 April 1971. The experts summarized the result of their report in the following terms:

— Question (a) should be answered in the affirmative; according to normal commercial criteria a producer of dyestuffs acting independently could *in principle* have increased his prices on a variable basis in relation to each customer and each product.

— An affirmative answer may also be given to the question whether it would have been a *practical* possibility for such a producer to increase his prices on a variable basis in relation to each customer and product, subject to the following proviso: the average increase in prices that a producer acting independently could have achieved by means of a policy of differentiated prices in a given field would probably have been lower than the average increase in prices achieved by a general and uniform price increase.

— A general and linear increase in prices involves opportunities and risks both for the producer who takes the initiative in putting prices up and for the producer of dyestuffs who has to fall in with a general and uniform increase announced by a competitor. Both as regards the producer who determines

the price and as regards those who follow him, the conclusion to be drawn is that during the period in question the advantages to be obtained from a general and uniform increase in prices were greater than the disadvantages.

— The appropriate answer to Question (c) is that the degree of interchangeability of dyestuffs varies: it ranges from products which are perfectly interchangeable to products for which to all intents and purposes there is no substitute. If, for the purposes of the question asked, speciality dyestuffs are those which are not interchangeable for practical purposes, it can be said that the proportion that they represent of the total production of dyestuffs in each of the undertakings concerned is very low. However, the results of the study show that the distinction is of but little use in assessing the facts envisaged.

Observations on the experts' report were lodged at the Court Registry on 3 July 1971 by the applicant and on 21 June 1971 by the defendant.

On 28 September 1971 the experts named by the Court took the oath in accordance with Article 49(6) of the Rules of Procedure.

The parties presented oral argument at the hearings on 28, 29 and 30 September 1971 and on 2 May 1972.

During the course of the procedure Mr Advocate-General Mayras replaced Mr Advocate-General Dutheillet de Lamothe, deceased. He delivered his opinion at the hearing on 2 May 1972.

Grounds of judgment

1 It is common ground that from January 1964 to October 1967 three general and uniform increases in the prices of dyestuffs took place in the Community.

Between 7 and 20 January 1964, a uniform increase of 15% in the prices of most dyes based on aniline, with the exception of certain categories, took place in Italy, the Netherlands, Belgium and Luxembourg and in certain third countries.

On 1 January 1965 an identical increase took place in Germany.

On the same day almost all producers in all the countries of the Common Market except France introduced a uniform increase of 10% on the prices of dyes and pigments excluded from the increase of 1964.

Since the ACNA undertaking did not take part in the increase of 1965 on the Italian market, the other undertakings did not maintain the announced increase of their prices on that market.

Towards mid-October 1967, an increase for all dyes was introduced, except in Italy, by almost all producers, amounting to 8% in Germany, the Netherlands, Belgium and Luxembourg, and 12% in France.

2 By a decision of 31 May 1967 the Commission commenced proceedings under Article 3 of Regulation No 17/62 on its own initiative concerning the increases for presumed infringement of Article 85(1) of the EEC Treaty against seventeen producers of dyestuffs established within and outside the Common Market, and against numerous subsidiaries and representatives of those undertakings.

By a decision of 24 July 1969, the Commission found that the increases were the result of concerted practices, which infringed Article 85(1) of the Treaty, between the undertakings

— Badische Anilin- und Soda-Fabrik AG (BASF), Ludwigshafen,
— Cassella Farbwerke Mainkur AG, Frankfurt am Main,
— Farbenfabriken Bayer AG, Leverkusen,
— Farbwerke Hoechst AG, Frankfurt am Main,
— Société Française des Matières Colorantes SA, Paris,
— Azienda Colori Nazionali Affini S.p.A. (ACNA), Milan,
— Ciba SA, Basel,
— J. R. Geigy SA, Basel,
— Sandoz SA, Basel, and
— Imperial Chemical Industries Ltd., (ICI), Manchester

It therefore imposed a fine of 50 000 u.a. on each of these undertakings, with the exception of ACNA, for which the fine was fixed at 40 000 u.a.

3 By application lodged at the Court Registry on 3 October 1969 Farbenfabriken Bayer AG has brought an application against that decision.

Submissions relating to procedure and to form

The submissions concerning the administrative procedure

(a) *The complaint relating to the commencement of the administrative procedure*

4 The applicant complains that the defendant took a decision imposing a fine, on the basis of Article 15(2) of Regulation No 17/62, although it had only commenced a procedure with a view to a finding of an infringement on the basis of Article 3 of this regulation.

Furthermore, it is argued, the defendant could not rely as against the applicant on the text of the decision to commence the procedure because it failed to sent it a true copy.

5 It is the notice of objections alone and not the decision to commence proceedings which is the measure stating the final attitude of the Commission concerning undertakings against which proceedings for infringement of the rules on competition have been commenced.

That notice, which was sent to the applicant, expressly stated that fines might be imposed.

6 This submission is therefore unfounded.

(b) *The complaint relating to a failure to inform the applicant of essential elements of fact*

7 The applicant complains that during the administrative procedure the defendant did not inform it of all the elements of fact relied on in support of the conclusions contained in the notice of objections.

It is argued that this failure to provide information, despite the repeated requests of the applicant, prevented it from defending itself during the course of the administrative procedure.

8 During that procedure, the undertakings concerned must be informed of the essential elements of fact on which the Commission bases its objections against them.

However, it is not necessary for the contents of the file to be made available in their entirety.

The Commission's notice of objections, sent to the applicant by letter of 11 December 1967, sets out all the facts necessary for determining the objections taken into consideration.

9 This submission is therefore unfounded.

(c) *The complaint relating to a continuation of inquiries following notification of the objections*

10 The applicant asserts that the Commission, in continuing its inquiries following communication of the notice of objections, conducted itself in a manner incompatible with the very nature of that notice, which must constitute the final measure of inquiry.

It is asserted that these inquiries led the Commission, in connexion with the contested decision, to amplify and make considerable alterations to the statement of the facts already sent to the applicant, particularly as regards the evidence for the existence of a concerted practice on the occasion of the 1967 increases.

11 The Commission has the right and where appropriate the duty to institute fresh inquiries during the administrative procedure if it appears from the course of that procedure that additional investigations are necessary.

Such inquiries would render it necessary to send an additional statement of objections to the undertakings concerned only if the result of the investigations led the Commission to take new facts into account against the undertakings or to alter materially the evidence for the contested infringements.

The rights of the defence of the undertakings are not infringed by such inquiries if the decision terminating the administrative procedure does not hold against the undertakings concerned any facts other than those set out in the notice of objections.

Additional evidence for the facts taken into consideration and amendments concerning the precise course of the facts included in the contested decision in the light of information furnished by the undertakings concerned to the Commission during the course of the administrative procedure does not in any way constitute an infringement of the rights of the defence.

12 This submission is therefore unfounded.

(d) *The complaint concerning the hearing of the undertakings concerned*

13 The applicant argues that the period of two weeks given to it for the purpose of appearing before the Commission was not long enough to enable it to prepare an adequate defence.

14 Taking into account the time which had elapsed following communication of the notice of objections, it does not appear that the abovementioned period of notice was of a nature such as to jeopardize the defence of the undertakings concerned.

Furthermore, there was nothing to prevent the applicant from setting out its point of view in writing at a later date and submitting it to the Commission.

15 This submission is therefore unfounded.

(e) *The complaint relating to the minutes of the hearing of the undertakings concerned*

16 The applicant argues that the hearing of 10 December 1968 was irregular because the contested decision was taken six weeks before the expiry of the period which the Commission had allowed it for the submission of observations on the draft minutes of the hearing, such that Article 9(4) of Regulation No 99/63 was infringed.

It is also alleged that the minutes do not contain an accurate record of the statement's made by the applicant's counsel.

17 Article 9(4) of Regulation No 99/63 of the Commission provides that the essential content of the statements made by each person heard shall be recorded in minutes which shall be read and approved by him.

The purpose of this provision is to assure the persons heard that the minutes contain a true record of the substance of what they have said.

Notwithstanding the failure to observe the time-limit of which the applicant complains, this irregularity could only affect the legality of the decision if the record of statements made at the hearing were inaccurate in a manner such as to give rise to misunderstandings on essential points.

Such is not the case as regards the statements of the applicant's counsel, the record of which in the minutes is alleged to be inaccurate.

18 This submission is therefore unfounded.

The submission as to the limitation period

19 The applicant argues that the contested decision is contrary to the Treaty and to the rules relating to its application because the Commission, in commencing on 31 May 1967 proceedings concerning the price increases of 1964 and of 1965, exceeded any reasonable limitation period.

20 The provisions governing the Commission's power to impose fines for infringement of the rules on competition do not lay down any period of limitation.

In order to fulfil their function limitation periods must be fixed in advance.

The fixing of their duration and the detailed rules for their application come within the powers of the Community legislature.

Although, in the absence of any provisions on this matter, the fundamental requirement of legal certainty has the effect of preventing the Commission from indefinitely delaying the exercise of its power to impose fines, its conduct in the present case cannot be regarded as constituting a bar to the exercise of that power as regards participation in the concerted practices of 1964 and 1965.

21 Therefore the submission is unfounded.

Substantive submissions as to the existence of concerted practices

Arguments of the parties

22 The applicant complains that the Commission has not proved the existence of concerted practices within the meaning of Article 85(1) of the EEC Treaty in relation to any of the three increases mentioned in the contested decision.

23 That decision states that *prima facie* evidence that the increases of 1964, 1965 and 1967 took place as the result of concerted action is to be found in the facts that the rates introduced for each increase by the different producers in each country were the same, that with very rare exceptions the same dyestuffs were involved, and that the increases were put into effect over only a very short period, if not actually on the same date.

It is contended that these increases cannot be explained simply by the oligopolistic character of the structure of the market.

It is said to be unrealistic to suppose that without previous concertation the principal producers supplying the Common Market could have increased their prices on several occasions by identical percentages at practically the same moment for one and the same important range of products including speciality products for which there are few, if any, substitutes, and that they should have done so in a number of countries where conditions on the dyestuffs market are different.

The Commission has argued before the Court that the interested parties need not necessarily have drawn up a common plan with a view to adopting a certain course of behaviour for it to be said that there has been concertation.

It is argued that it is enough that they should previously have informed each other of the attitude which they intended to adopt so that each could regulate his conduct safe in the knowledge that his competitors would act in the same way.

24 The applicant argues that the contested decision is based on an inadequate analysis of the market in the products in question and on an erroneous understanding of the concept of a concerted practice, which is wrongly identified by the decision

with the conscious parallelism of members of an oligopoly, whereas such conduct is due to independent decisions adopted by each undertaking, determined by objective business needs, and in particular by the need to increase the unsatisfactorily low rate of profit on the production of dyestuffs.
It is argued that in fact the prices of the products in question displayed a constant tendency to fall because of lively competition between producers which is typical of the market in those products, not only as regards the quality of the products and technical assistance to customers, but also as regards prices, particularly the large reductions granted individually to the principal purchasers.

It is also argued that the large number of dyestuffs produced by each undertaking makes it impossible in practice to raise prices product by product.

A further argument is that different price increases for interchangeable products either could not produce economically significant results because of the limited level of stocks and of the time necessary for adapting plant to appreciably increased demand, or would lead to a ruinous price war.
Furthermore, it is said that dyestuffs for which there are no substitutes form only a small part of the producers' turnover.

Taking these market characteristics into account and in view of the widespread and continuous erosion of prices, each member of the oligopoly who decided to increase his prices could, it is argued, reasonably expect to be followed by his competitors, who had the same problems regarding profits.

Finally, it is argued, if it were possible to apply different rates of increase on different markets, it is nevertheless probable that a uniform price increase introduced on a given market would have repercussions outside it because of the international character of the dyestuffsmarket.

The concept of a concerted practice

25 Article 85 draws a distinction between the concept of 'concerted practices' and that of 'agreements between undertakings' or of 'decisions by associations of undertakings'; the object is to bring within the prohibition of that article a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.

By its very nature, then, a concerted practice does not have all the elements of a contract but may *inter alia* arise out of coordination which becomes apparent from the behaviour of the participants.

Although parallel behaviour may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings and the volume of the said market.

This is especially the case if the parallel conduct is such as to enable the persons concerned to attempt to stabilize prices at a level different from that to which competition would have led, and to consolidate established positions to the detriment of effective freedom of movement of the products in the Common Market and of the freedom of consumers to choose their suppliers.

26 Therefore the question whether there was a concerted action in this case can only be correctly determined if the evidence upon which the contested decision is based is considered, not in isolation, but as a whole, account being taken of the specific features of the market in the products in question.

The characteristic features of the market in dyestuffs

27 The market in dyestuffs is characterized by the fact that 80% of the market is supplied by about ten producers, very large ones in the main, which often manufacture these products together with other chemical products or pharmaceutical specialities.

The production patterns and therefore the cost structures of these manufacturers are very different and this makes it difficult to ascertain competing manufacturers' costs.

The total number of dyestuffs is very high, each undertaking producing more than a thousand.

The average extent to which these products can be replaced by others is considered relatively good for standards dyes, but it can be very low or even non-existent for speciality dyes.

As regards speciality products, the market tends in certain cases towards an oligopolistic situation.

Since the price of dyestuffs forms a relatively small part of the price of the final product of the user undertaking, there is little elasticity of demand for dyestuffs on the market as a whole and this encourages price increases in the short term.

Another factor is that the total demand for dyestuffs is constantly increasing, and this tends to induce producers to adopt a policy enabling them to take advantage of this increase.

28 In the territory of the Community, the market in dyestuffs in fact consists of five separate national markets with different price levels which cannot be explained by differences in costs and charges affecting producers in those countries.

Thus the establishment of the Common Market would not appear to have had any effect on this situation, since the differences between national price levels have scarcely decreased.

On the contrary, it is clear that each of the national markets has the characteristics of an oligopoly and that in most of them price levels are established under the influence of a 'price-leader', who in some cases is the largest producer in the country concerned, and in other cases is a producer in another Member State or a third State, acting through a subsidiary.

According to the experts this dividing-up of the market is due to the need to supply local technical assistance to users and to ensure immediate delivery, generally in small quantities, since, apart from exceptional cases, producers supply their subsidiaries established in the different Member States and maintain a network of agents and depots to ensure that user undertakings receive specific assistance and supplies.

It appears from the data produced during the course of the proceedings that even in cases where a producer establishes direct contact with an important user in another Member State, prices are usually fixed in relation to the place where the user is established and tend to follow the level of prices on the national market.

Although the foremost reason why producers have acted in this way is in order to adapt themselves to the special features of the market in dyestuffs and to the needs of their customers, the fact remains that the dividing-up of the market which results tends, by fragmenting the effects of competition, to isolate users in their national market, and to prevent a general confrontation between producers throughout the Common Market.

It is in this context, which is peculiar to the way in which the dyestuffs market works, that the facts of the case should be considered.

The increases of 1964, 1965 and 1967

29 The increases of 1964, 1965 and 1967 covered by the contested decision are interconnected.

The increase of 15% in the prices of most aniline dyes in Germany on 1 January 1965 was in reality nothing more than the extension to another national market of the increase applied in January 1964 in Italy, the Netherlands, Belgium and Luxembourg.

The increase in the prices of certain dyes and pigments introduced on 1 January 1965 in all the Member States, except France, applied to all the products which had been excluded from the first increase.

The reason why the price increase of 8% introduced in the autumn of 1967 was raised to 12% for France was that there was a wish to make up for the increases of 1964 and 1965 in which that market had not taken part because of the price control system.

Therefore the three increases cannot be isolated one from another, even though they did not take place under identical conditions.

30 In 1964 all the undertakings in question announced their increases and immediately put them into effect, the initiative coming from Ciba-Italy which, on 7 January 1964, following instructions from Ciba-Switzerland, announced and immediately introduced an increase of 15%. This initiative was followed by the other producers on the Italian market within two or three days.

On 9 January ICI-Holland took the initiative in introducing the same increase in the Netherlands, whilst on the same day Bayer took the same initiative on the Belgo-Luxembourg market.

With minor differences, particularly between the price increases by the German undertakings on the one hand and the Swiss and United Kingdom undertakings on the other, these increases concerned the same range of products for the various producers and markets, namely, most aniline dyes other than pigments, food colourings and cosmetics.

31 As regards the increase of 1965 certain undertakings announced in advance price increases amounting, for the German market, to an increase of 15% for products whose prices had already been similarly increased on the other markets, and to 10% for products whose prices had not yet been increased. These announcements were spread over the period between 14 October and 28 December 1964.

The first announcement was made by BASF, on 14 October 1964, followed by an announcement by Bayer on 30 October and by Cassella on 5 November.

These increases were simultaneously applied on 1 January 1965 on all the markets except for the French market because of the price freeze in that State, and the Italian market where, as a result of the refusal by the principal Italian producer, ACNA, to increase its prices on the said market, the other producers also decided not to increase theirs.

ACNA also refrained from putting its prices up by 10% on the German market.

Otherwise the increase was general, was simultaneously introduced by all the producers mentioned in the contested decision and was applied without any differences concerning the range of products.

32 As regards the increase of 1967, during a meeting held at Basel on 19 August 1967, which was attended by all the producers mentioned in the contested decision except ACNA, the Geigy undertaking announced its intention to increase its selling prices by 8% with effect from 16 October 1967.

On that same occasion the representatives of Bayer and Francolor stated that their undertakings were also considering an increase.

From mid-September all the undertakings mentioned in the contested decision announced a price increase of 8%, raised to 12% for France, to take effect on 16 October in all the countries except Italy, where ACNA again refused to increase its prices, although it was willing to follow the movement in prices on two other markets, albeit on dates other than 16 Ocrober.

33 Viewed as a whole, the three consecutive increases reveal progressive cooperation between the undertakings concerned.

In fact, after the experience of 1964, when the announcement of the increases and their application coincided, although with minor differences as regards the range of products affected, the increases of 1965 and 1967 indicate a different mode of operation. Here, the undertakings taking the initiative, BASF and Geigy respectively, announced their intentions of making an increase some time in advance, which allowed the undertakings to observe each other's reactions on the different markets, and to adapt themselves accordingly.

By means of these advance announcements the various undertakings eliminated all uncertainty between them as to their future conduct and, in doing so, also eliminated a large part of the risk usually inherent in any independent change of conduct on one or several markets.

This was all the more the case since these announcements, which led to the fixing of general and equal increases in prices for the markets in dyestuffs, rendered the market transparent as regards the percentage rates of increase.

Therefore, by the way in which they acted, the undertakings in question temporarily eliminated with respect to prices some of the preconditions for competition on the market which stood in the way of the achievement of parallel uniformity of conduct.

34 The fact that this conduct was not spontaneous is corroborated by an examination of other aspects of the market.

In fact, from the number of producers concerned it is not possible to say that the European market in dyestuffs is, in the strict sense, an oligopoly in which price competition could no longer play a substantial role.

These producers are sufficiently powerful and numerous to create a considerable risk that in times of rising prices some of them might not follow the general movement but might instead try to increase their share of the market by behaving in an individual way.

Furthermore, the dividing-up of the Common Market into five national markets with different price levels and structures makes it improbable that a spontaneous and equal price increase would occur on all the national markets.

Although a general, spontaneous increase on each of the national markets is just conceivable, these increases might be expected to differ according to the particular characteristics of the different national markets.

Therefore, although parallel conduct in respect of prices may well have been an attractive and risk-free objective for the undertakings concerned, it is hardly conceivable that the same action could be taken spontaneously at the same time, on the same national markets and for the same range of products.

35 Nor is it any more plausible that the increases of January 1964, introduced on the Italian market and copied on the Netherlands and Belgo-Luxembourg markets, which have little in common with each other either as regards the level of prices or the pattern of competition, could have been brought into effect within a period of two to three days without prior concertation.

As regards the increases of 1965 and 1967 concertation took place openly, since all the announcements of the intention to increase prices with effect from a certain date and for a certain range of products made it possible for producers to decide on their conduct regarding the special cases of France and Italy.

In proceeding in this way, the undertakings mutually eliminated in advance any uncertainties concerning their reciprocal behaviour on the different markets and thereby also eliminated a large part of the risk inherent in any independent change of conduct on those markets.

The general and uniform increase on those different markets can only be explained by a common intention of the part of those undertakings, first, to adjust the level

of prices and the situation resulting from competition in the form of discounts, and secondly, to avoid the risk, which is inherent in any price increase, of changing the conditions of competition.

The fact that the price increases announced were not introduced in Italy and that ACNA only partially adopted the 1967 increase in other markets, far from undermining this conclusion, tends to confirm it.

36 The function of price competition is to keep prices down to the lowest possible level and to encourage the movement of goods between the Member States, thereby permitting the most efficient possible distribution of activities in the matter of productivity and the capacity of undertakings to adapt themselves to change.

Differences in rates encourage the pursuit of one of the basic objectives of the Treaty, namely the interpenetration of national markets and, as a result, direct access by consumers to the sources of production of the whole Community.

By reason of the limited elasticity of the market in dyestuffs, resulting from factors such as the lack of transparency with regard to prices, the interdependence of the different dyestuffs of each producer for the purpose of building up the range of products used by each consumer, the relatively low proportion of the cost of the final product of the user undertaking represented by the prices of these products, the fact that it is useful for users to have a local supplier and the influence of transport costs, the need to avoid any action which might artificially reduce the opportunities for interpenetration of the various national markets at the consumer level becomes particularly important on the market in the products in question.

Although every producer is free to change his prices, taking into account in so doing the present or foreseeable conduct of his competitors, nevertheless it is contrary to the rules on competition contained in the Treaty for a producer to cooperate with his competitors, in any way whatsoever, in order to determine a coordinated course of action relating to a price increase and to ensure its success by prior elimination of all uncertainty as to each other's conduct regarding the essential elements of that action, such as the amount, subject-matter, date and place of the increases.

In these circumstances and taking into account the nature of the market in the products in question, the conduct of the applicant, in conjunction with other undertakings against which proceedings have been taken, was designed to replace the risks of competition and the hazards of competitors' spontaneous reactions by cooperation constituting a concerted practice prohobited by Article 85(1) of the Treaty.

The effect of the concerted practice on trade between Member States

37 The applicant argues that the uniform price increases were not capable of affecting trade between Member States because notwithstanding the noticeable differences existing between prices charged in the different States consumers have always preferred to make their purchases of dyestuffs in their own country.

38 However, it appears from what has already been said that the concerted practices, by seeking to keep the market in a fragmented state, were liable to affect the circumstances in which trade in the products in question takes place between the Member States.

The parties who put these practices into effect sought, on the occasion of each price increase, to reduce to a minimum the risks of changing the conditions of competition.

The fact that the increases were uniform and simultaneous has in particular served to maintain the *status quo*, ensuring that the undertakings would not lose custom, and has thus helped to keep the traditional national markets in those goods 'cemented' to the detriment of any real freedom of movement of the products in question in the Common Market.

39 Therefore this submission is unfounded.

The fine

40 The applicant claims that the contested decision did not take into account the fines which had been imposed upon it by the Bundeskartellamt by its decision of 28 November 1967.

41 Since the decision of the Bundeskartellamt has been annulled, this submission has become devoid of object.

Therefore it is not necessary to examine the substance of it.

42 In view of the frequency and extent of the applicant's participation in the prohibited practices, and taking into account the consequences thereof in relation to the creation of a common market in the products in question, the amount of the fine is appropriate to the gravity of the infringement of the Community rules on competition.

Costs

43 Under Article 69(2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

The applicant has failed in its submissions.

Therefore it must be ordered to bear the costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 85 and 173;
Having regard to Regulation No 17/62 of the Council of 6 February 1962;
Having regard to Regulation No 99/63 of the Commission of 25 July 1963;
Having regard to the Protocol on the Statute of the Court of Justice of the European Communities;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

hereby:

1. **Dismisses the application;**

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

Lecourt Mertens de Wilmars Kutscher
Donner Trabucchi Monaco Pescatore

Delivered in open court in Luxembourg on 14 July 1972.

A. Van Houtte — **Registrar**

R. Lecourt — **President**

OPINION OF MR ADVOCATE-GENERAL MAYRAS
(Se Case 48/69, p. 000)