# OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 2 MAY 1972[1]

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*Mr President,*
*Members of the Court,*

## Introduction

### A — *The facts*

Pursuant to information supplied by various trade associations of the industries using dyestuffs, and after having made inquiries of the producers and their subsidiaries, the Commission of the European Communities found that in the period between January 1964 and October 1967 three general and uniform price increases in those products had been put into effect in the Common Market:

— Between 7 and 20 January 1964 an increase of 15% in the price of most aniline dyes took place in Italy, the Netherlands, Belgium and Luxembourg and in certain third countries;

— On 1 January 1965 this first increase was extended to Germany; on that same date almost all the producers introduced a new uniform increase of 10% on the price of dyes and pigments excluded from the first increase into Germany and into the countries already affected by the 1964 increase; however, since the ACNA company refused to introduce this increase on the Italian market, the other undertakings withdrew their price increase on that market;

— Finally, in mid-October 1967, an increase of 8% for all dyestuffs was introduced by most producers in Germany, the Netherlands, Belgium and Luxembourg.

In France, where the increases of 1964 and 1965 had not been introduced, the rate of this increase in prices was 12%. However, there was no increase in Italy because of the conduct of ACNA.

On 31 May 1967 the Commission commenced the procedure under Regulation No 17/62 of the Council for presumed infringement of Article 85 of the Treaty of Rome against the undertakings which took part in these price increases. On the following 11 December it informed those of the undertakings which it considered guilty of a concerted practice involving price-fixing of the objections laid against them. After certain written observations had been made by these companies in response to the notice of objections and after some of their representatives had been heard on 10 December 1968, the Commission took, on 24 July 1969, a decision in application of Article 15 of Regulation No 17/62.

The Commission took the view that the price increases introduced between 1964 and 1967 were attributable to concerted practices under Article 85(1) of the Treaty between the following undertakings. Badische Anilin- und Soda-Fabrik (BASF), Ludwigshafen, Cassella Farbwerke Mainkur AG, Frankfurt am Main, Farbenfabriken Bayer AG, Leverkusen, Farbwerke Hoechst AG, Frankfurt am Main, Française des Matières Colorantes SA, Paris (Francolor), 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), London. It therefore imposed a fine of 50 000 u.a. on each of these companies, with the exception of ACNA for which the amount of the fine was limited to 40 000 u.a.

The undertakings mentioned, except for Ciba, have brought nine separate applications before you against this decision.

## B — *The procedure*

Two experts' reports having already been produced, the first by Professors Bombach and Hill, at the request of the applicant undertakings, the second by Professor Kantzenbach, at the request of the Commission, the Court itself, at the unanimous suggestion of the parties, asked Professors Kloten and Albach to undertake a third experts' report dealing more particularly with questions laid down in its Order of 8 July 1970. On the same day the Court joined the cases for the purpose of this experts' report.

Following the exchange of very voluminous written pleadings and oral arguments of unusual length, the information gathered in these cases has been as complete and as detailed as possible, with the collaboration of international experts of unequalled authority and unrivalled intellectual ability and integrity. Thus at the moment when I appear on the scene you already have such a thorough knowledge of the dispute that it appears to be superfluous to go into a detailed analysis of the papers which my predecessor, Advocate-General Alain Dutheillet de Lamothe, had studied with the conscientiousness and clarity of mind which you knew in him.

Permit me at the moment of delivering, on these cases, my first opinion before the Court, to pay respectful tribute to his memory.

## C — *The context of the problems*

The applications before you call for a judgment on four questions or categories of question.

The first is fundamental, in the sense that

it is on the answer that you give to it that the other questions will either turn or become devoid of object.

This question is: Are the linear price increases, of uniform percentages, which were introduced on the dyestuffs market inside the Common Market between January 1964 and October 1967, attributable to one or more concerted practices prohibited by Article 85 of the Treaty of Rome and by secondary Community law?

If your answer to the first question is yes, then:

1. You will have to decide, for the first time so far as I know, the important question whether undertakings whose registered offices are outside the Community (in these cases, Imperial Chemical Industries in the United Kingdom, Geigy and Sandoz in Switzerland) can be fined in application of Regulation No. 17/62 for their participation in concerted practices detrimental to competition put into effect inside the common Market;

2. You will have to examine whether formalities or essential procedural requirements were disregarded during the administrative procedure, thereby vitiating that procedure, and whether such irregularities mean that the fines resulting from the procedure are void;

3. Finally, you will have to pass judgment on the fines imposed and in particular you will have to say whether, even though no limitation period has yet been written into Community law, the lapse of a given period between the time when the facts occurred and the time when the Commission commenced the procedure with a view to putting a stop to them is not a bar to any possibility of penalizing the practices at issue.

I ought to say that as regards these two letter points, some indications for a solution are to be found in your previous case-law.

*Part I*

*Existence of concerted practices within the meaning of Article 85(1) of the Treaty of Rome and of secondary Community law*

## Section I

### The concept of a concerted practice

A — One of the basic objectives of the Treaty of Rome is to create one market, common to the Member States, in which producers must be able to exercise and develop their activity freely and consumers, for their part, must be able to seek out products and services freely and to make their choice with reference to the prices proposed to them and to the quality offered to them. In order to guarantee this freedom, the action of the Community authorities is directed in particular at 'the institution of a system ensuring that competition in the Common Market is not distored' (Article 3(f) of the Treaty).

In this context Article 85 of the Treaty declares that: 'The following shall be prohibited as incompatible with the Common Market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices ...'

Thus Article 85 is directed at actions or behaviour which restrict competition and which, in the terminology usually followed, are described by the generic name 'cartels', and it distinguishes three form or three aspects of these cartels: agreements, decisions by associations of undertakings, and concerted practices, the common factor being that there is more than one participant.

I shall leave 'decisions by associations of undertakings' out of the discussion for they do not come into the dispute, and I

shall concentrate in the first place on trying to distinguish between concerted practice and agreements.

Up till now, the Court has only had to consider the application or interpretation of Article 85 in relation to *agreements* between undertakings, that is to say, contracts made between producers or between producers and sellers, whatever the form or legal structure of those agreements, since evidence for such agreements cannot, *a priori*, reside in any specific factor.

To cite only a few examples, such agreements can be exclusive dealing agreements: 12 December 1967, Case 23/67, *Brasserie de Haecht*, [1967] ECR 407; 30 June 1966, *Technique Minière* v *MBU*, Case 56/65, [1966] ECR 235; 16 July 1966, *Grundig*, Joined Cases 56 and 58/64, [1966] ECR 299; or agreements fixing prices or partitioning the market: 15 July 1970, *Chemiefarma, Buchler and Böhringer*, Joined Cases 41, 44 and 45/69 [1970] ECR 661. The Court bordered on the concept of a concerted practice on this latter occasion. As regards the international quinine cartel, Mr Advocate-General Gand asked in effect whether evidence of a concerted practice ought to be seen in an unsigned document headed 'gentlemen's agreement' the intention of which was to extend to the Common Market an agreement on price fixing, delivery quotas and export restrictions, concluded for use in third countries, between the principal producers of quinine and of quinidine in the Community. He had to give a negative answer to this question, but only because this gentlemen's agreement was too closely modelled on the properly drafted agreement made with a view to exports to third countries to be dissociated from it. The Court accepted that that document 'amounted to the faithful expression of the joint intention of the parties to the agreement with regard to their conduct in the Common Market'. This means that the dividing line between an agreement and a concerted practice cannot easily be determined, the reason being that cooperation between undertakings comes in a multitude of guises and degrees.

This also means that as regards the concept of a concerted practice your case-law must be built up from first principles. It would certainly be out of character in relation to your approach to legal questions for you to tie yourselves down for the future by a general and abstract definition. Rather it is progressively and by dint of examination of the cases brought before you that your case-law can be both built up and given various shades of meaning.

B — Although in constructing this case-law, it cannot be claimed that any directly applicable knowledge can be drawn from it, there is doubtless some interest in looking at how, within or even outside the Common Market, national laws and national case-law have attempted to delineate the concept of a concerted practice. The historical origin is evidently to be found in the 'concerted action' of American anti-trust law. The concept of 'conspiracy' covered by the Sherman Act has been applied to the case where there is proof of a concerted action between several undertakings pursuing a common aim which is contrary to the law.

Thus in *US* v *Hamilton Watch Co.*, and *US* v *Elgin National Watch Co.* (DC NY 1942) 47 F. Supp. 524 it was held: 'No formal agreement is necessary for the formation of a conspiracy. It may be shown by concerted action among the conspirators, all working together for a common purpose'.

Similarly, in the decision in *Wisconsin Liquor Co.* v *Park and Tilford Distillers Corp.* (CA-7; 1959) 1959 Trade Cases/69 363, it was held that 'to establish the existence of a prohibited agreement, no proof of a formal or specific agreement is necessary ...'.

But although this American case-law does not give a definition of a concerted action, it insists on the necessity of the existence of a common plan.

The said case-law also states that although conscious parallelism is not enough of itself for it to be said that there has been an infringement of the Sherman Act, such conduct can constitute a presumption of fact on the basis of which the court, taking into account other circumstances of the

case, can conclude that a conspiracy exsist. Such was the case in *Morton Salt Co.* v *US* (CA-10; 1956) 1956 Trade Cases/68 412, in which the court held that 'the existence of parallel behaviour does not conclusively establish the existence of an agreement or of a Sherman Act offence, but such behaviour is an item to be weighed heavily in the determination'.

Certain decisions also stress that uniform conduct on the part of different undertakings as regards prices is generally a more or less decisive element of proof.

On this point let me quote the judgment in *Pittsburgh Plate Glass Co.* v *US* (CA-4; 1958) 1958 Trade Cases/69 157: 'A manufacturer of plateglass mirrors participates in a conspiracy to fix prices when the manufacturer's "conscious parallelism" in announcing a price-increase identical with that announced almost simultaneously by its competitors in the light of the manufacturer's apparent close connexion with the climax of the conspiracy reasonably permits one to infer that the manufacturer's action was taken pursuant to an agreement with some or all of the conspirators'.

Similarly in the *Morton Salt* case already quoted the court expressed itself as follows '... the presence of only a few friendly sellers and the stable demand for the product present a great opportunity and temptation to combine to maintain prices at an artificially high level profitable to all'. Finally one can note a similar meaning in the decision in *Safeway Stores* v *F.T.C.* (366 F 2 d 795 - 1966, Trade Cases 71/891), in which it is said: 'Evidence that bakers met on an association basis and discussed, among other subjects, prices, together with identical price increases, was sufficient to support a Federal Trade Commission finding that the bakers conspired to fix prices'.

But it would be rash to make a systematic rapprochement between American law and Community law. The anti-trust law of the United States, enacted since the end of the last century, is mainly of a criminal nature. The criminal courts have jurisdiction, and the rules of American criminal procedure apply as regards the burden of proof. American anti-trust law is also very rigid in that it has laid down as a principle, at least originally, that any cartel is harmful and therefore prohibited. The case-law has, to be sure, softened this rigid position somewhat, and has attempted, in view of economic developments, to introduce a certain flexibility into the application of the law, particularly by the judicial creation of the concept of workable competition, but it remains a fact that the American system proceeds from a conception which is in many ways different from that adopted by Community law. The latter, which is essentially preventive, is enforced by the Commission. Even when it involves the application of certain pecuniary sanctions it is administrative and not criminal in type. Furthermore, it is much more flexible in that it accepts that certain cartels may be excluded from prohibition. In spite of these differences however, American case-law displays points of comparison and offers food for thought, particularly when it is concerned with assessing the circumstances in which a concerted practice may be found in an oligopolistic market.

C — Amongst the national laws of the Member States of the Community, only French law, up till now, has expressly included the concept of a concerted practice. But the decisions of the courts, still few in number, seem to have been mainly concerned with agreements.

The German Law of 1957 does not contain this concept. It is doubtless in part to fill this gap that the Federal Government has recently introduced a bill, certain provisions of which are intended to strengthen control over the abuse of dominant positions for which Article 22 of the Law makes provision, and draw upon the concept of a contested practice. In particular, this bill provides that it is to be presumed that there is no competition between a number of undertakings when they behave in a uniform manner in their pricing policy over a long period. Thus the repetition of parallel conduct as regards prices would constitute an infringement on the ground of abuse of a dominant position, a concept which is contained in Article 86 of the Treaty of Rome. In this

respect none of the decisions of the competent German administrative bodies or courts concerning proceedings brought against the German producers involved in the dispute before this Court can be of much assistance to you. Attempts were made at the hearing to turn these decisions to advantage in one way or another. In my opinion this is not possible, more especially because the German courts, knowing that proceedings were pending before you on the basis of Article 85 of the Treaty, wisely refrained, in giving the reasons for their decisions, from making any statement which have given the impression of prejudging the question before you.

D — While the information which it is thus possible to extract from the national legal systems is not without pertinence to the study of the present case, it is obvious that it cannot override the text itself of Article 85 of the Treaty, the meaning of which has been clarified by our case-law and with the help of commentators.

I shall first of all point to the *consequence of the express distinction which Article 85 makes between agreements and concerted practices*. To give this latter concept so limited and so narrow a meaning that it would be reduced to nothing more than a particular application of the concept of an agreement would, quite undoubtedly, be in conflict with a general principle of interpretation which you have often adopted. According to this principle, full effect is to be given to each of the provisions of the Treaty and they are all to be given full scope. Even if it is accepted that a concerted practice in fact conceals an agreement and at the same time reveals it through the appearance of some co-ordinated conduct, there is to my mind no doubt that in making a separate 'category' for concerted practices, the authors of the Treaty intended to forestall the possibility of undertakings' evading the prohibitions of Article 85 on activities inimical to competition by so conducting their affairs as not to leave any written document which might be called an agreement, even while conducting a common policy in accordance with an established plan.

Such an interpretation, which takes practical account of the distinction made in Article 85, is of obvious interest as regards evidence for the existence of a concerted practice which, even though it implies that the will of the participating undertakings is somehow apparent, nevertheless cannot be sought using the same methods as for proof of an express agreement.

However, an objective criterion, which is basic to the concept of a concerted practice, must also be met. This is that the participating undertakings must *in fact* have acted in the same way. This is the first difference of principle from the concept of an agreement in that, according to your case-law, an agreement, provided that its existence is established and that it has as its object an adverse effect on competition within the Common Market, is prohibited under Article 85 without its being necessary to consider the *real effect* of the said agreement on competition. Thus it seems to me that one cannot dissociate the idea of a certed practice from the real effect that it has on the competitive situation within the Common Market.

However, one obviously cannot say that there is a concerted practice within the meaning of Article 85(1) merely because common, parallel or similar conduct between undertakings is occurring on the Market. One must be able to go further and say that this conduct is not the consequence or at least not the *principal consequence* of the structure and of the economic conditions on the market.

There must also be, as I have said, the will on the part of those concerned to act in common, and accordingly it must be possible to establish some link of cause and effect between this common will and the conduct which has in fact occurred. However, this common will can be deduced, and this is not so for agreements, from all the elements of facts gathered together on the conduct of the undertakings, depending on the case; for example, instructions given to representatives, relationships with buyers, alterations to conditions of sale, decisions taken more or less simultaneously, contacts between managing bodies and so on.

## Section II

### The arguments put forward

After these preliminary observations, what are the opposing arguments regarding the existence of a concerted practice in this case?

In its decision of 24 July 1969 the Commission concluded that the price increases of 1964, 1965 and 1967 were the result of some kind of concerted practice because of the uniformity of the rates of increase introduced by the producers concerned in each country, because with very rare exceptions the increases applied to precisely the same dyestuffs, and because the increases were put into effect on approximately or even precisely the same date. It took the view that, taking these findings into account as a whole, the price increases in question could not be explained by the structure of the dyestuffs market alone, and declared, in perhaps rather fortright language, that 'it is *beyond the bounds of possibility* that without detailed preparation in advance the principal producers supplying the Common Market should on several occasions have increased by identical percentages the price of the same large range of products practically at the same moment in several countries where the market conditions are different'. However, this assertion is supported by a detailed description of the factual circumstances in which the price increases were decided upon, announced and introduced. It is also supported by a reference to the precise text of the instructions sent by the producers to their subsidiaries or representatives on the different markets; as regards the increase of January 1964, in the Commission's opinion the similarity of wording of these instructions is striking. Finally, the Commission also mentions the meeting held at Basel on 18 August 1967 at which all the producers concerned were represented except ACNA. During this meeting the representative of Geigy announced the intention of that undertaking to increase its selling prices to customers before the end of 1967.

The contested decision adds that these increases affected selling prices to all users since the distribution of dyestuffs is carried out through the sales divisions of the producers themselves where deliveries on their own national market are involved, and through the intermediary of their exclusive retailers, who are strictly tied to the producers' instructions, in the case of sales on foreign markets. The Commission deduces that these practices restricted the forces of competition, which thus became limited to quality or to after-sales service. Finally, it finds that these concerted practices, the effects of which extended to several countries of the Common Market, are capable of affecting trade between Member States.

Thus the contested decision deduces the existence of concerted practices as prohibited by Article 85 both from the circumstances in which the price increases were decided upon and introduced, and from the fact that these increases could not be explained by the structure of the dyestuffs market alone. The representatives of the Commission have maintained this dual line of reasoning before the Court, while going into more detail in answer to the applicant's case..

The applicants, on the contrary, base their case mainly on an analysis of the oligopolistic structure of the dyestuffs market, arguing that producers have merely behaved in the same way, and that this is explicable by market conditions alone. They say that such behaviour cannot be treated as a concerted practice. They take the view that the price increases are the result of independent decisions taken by each of the undertakings, determined by business needs, particularly the need to increase the insufficient return on production. The fact that the price increases were the same is the result, they say, of the fact that the producer who takes the initiative as regards prices, the 'price-leader', is necessarily followed in his decision by the other members of the oligopoly.

Such, in outline, are the arguments between which you must choose.

## Section III

### Concertation

I now propose to go back over the argu-

ment of the parties and examine the two following points in succession:

— was there parallel conduct?

— is that conduct explicable by the economic conditions on the market alone or is it the consequence of a concerted policy on prices?

A — *Existence of parallel conduct*

As I have already said, the first objective factor characterizing a concerted practice consists necessarily in the appearance that the undertakings concerned have behaved in a similar, parallel, or comparable way. In this respect, the facts set out in the contested decision are sufficient to establish the existence of such conduct in this case, and furthermore the applicant companies do not dispute this, at least in principle. It is established that both in 1964 and in 1965, and then again in 1967, the undertakings decided upon and then introduced, on dates which were very close to each other and sometimes identical, linear basic-price increases applicable to the dyestuffs sold by them or their subsidiaries for the same very wide range of products and at identical rates of increase. On this, the applicants only dispute the statements in the contested decision on secondary matters, or let us say as to detail: that the list of dyestuffs affected by the increases does not absolutely reflect the reality, that the Commission did not explain with perfect accuracy how orders already given were dealt with. But apart from these divergences, to which I shall come back in due course because they contribute to the refutation of the whole idea of concertation, one really must admit that the parallel nature of the conduct of several producers on the same market is clearly shown by the facts themselves; that this did not happen by chance, but perfectly consciously, is not denied. Therefore the first element of a concerted practice exists. It is a necessary one without being sufficient.

B — *Origin of and reasons for the parallel conduct*

The second element is to be found, a point which I have already made, in *the existence of a certain common will.* In order to establish this element it is not necessary to show express and precise evidence that there was a meeting of minds amounting to a veritable agreement, that is to say to a binding legal instrument having the force of law, but I think that it is necessary at the least to show:

— first, that the conscious parallel behaviour is not exclusively or even mainly due to economic conditions or to the structure of the market;

— secondly, that, where there is no express meeting of minds, sufficiently clear, unequivocal presumptions lead to the conviction that the parallel conduct was the result of concertation, of a coordinated policy.

Such concertation can exist even if some of the undertakings have taken a preponderant part as regards initiating this policy and putting it into effect, while all that others have done, their means of action being doubtless not so great, is to take part in the concertation. We must therefore look into whether such indications or presumptions are present in this case. Taking into account the unlimited jurisdiction that Article 17 of Regulation No 17/62 of the Council gives you in this matter, as Mr Advocate-General Gand said in his opinion on the quinine cases ([1970] ECR 704), the dispute as a whole is brought before the Court, which has full power to consider the facts and is empowered to form its own judgment as to the existence and character of any infringement of Article 85(1). As is to be seen from your case-law, you do not judge the facts *in abstracto* but in relation to information pertaining to the market in question.
Thus the question whether there was concertation can only be decided by a consideration first of the characteristics of the dyestuffs market and secondly of all the evidence noted in the contested decision and confirmed by an examination of the file.

1. *The characteristics of the dyestuffs market*

(a) The applicants seek to explain and justify their behaviour concerning prices exclusively with reference to the structures and mechanisms of the dyestuffs market. Truth to tell, their representatives have emphasized this point to such an extent that they have perhaps even gone so far as to give the impression that the characteristics of this market, in which supply is controlled by a small number of producers, are such that Article 85 of the Treaty is in some way inapplicable to it.

Such a conclusion would obviously be wrong. Article 85 applies just as much to oligopolistic markets as to 'atomized' markets. However, it must be recognized that the Treaty does not prohibit oligopolies as such and that Article 85 cannot mean that undertakings whose activity covers markets of this kind are under obligations such as would prohibit that activity or lead to a complete transformation of the structures of the trade.

(b) Having made this observation, what objective findings may be made, particularly on the basis of the descriptive survey of the market given by Professors Kloten and Albach?

On the world market, more than 300 undertakings sell dyestuffs and pigments, but this market is dominated by less than a dozen of them.

In the period which is of interest to us, 80% of the European market was held by ten producers. These, with the exception of Francolor, do not only make dyestuffs, but also produce synthetic materials, pharmaceutical and phytopharmaceutical products, and chemical products. This is particularly true of Bayer, Hoechst and BASF. Others, such as ACNA or Cassella obtain their supplies of intermediate products from the big chemical groups.

Production structures therefore display important differences and consequently production costs are also very different.

The number of dyestuffs produced is considerable: 6 000 are sold on the market; each undertaking manufactures from 1 500 to 3 500 and often buys others from other producers in order to supplement the range offered for sale.

Between 1956 and 1966, more than two thousand new dyestuffs appeared on the market, replacing discontinued products. These products are more or less interchangeable. Although on this subject, it is possible to make a distinction between *standard dyestuffs* for which the degree of interchangeability can be considered as fairly high, and *speciality dyestuffs* for which it is very low and sometimes non-existent, nevertheless the dividing line between these two categories seems difficult to determine with precision.

Production techniques are such that in general at least ten different chemical changes are necessary in order to manufacture dyestuffs from the raw materials, and therefore the production chain stretches over three to twelve months.

Furthermore, the size of the production batches varies from 500 to 5 000 kg but the average size of orders does not exceed 50 kg. It should be said that demand has been expanding rapidly and vigorously. From 1958 to 1968, the sale of dyestuffs practically doubled (indexed at 100 in 1958 it rose to 198 in 1968). This demand is very varied both as regards products and national markets and as regards categories of buyers. Demand as a whole is largely determined by the expansion of the textiles industry and, to a lesser extent, by the expansion of the polish and paint industries and that of the processing of synthetic materials.

The producers supply both their national markets and certain foreign markets, but their situations in this respect display marked differences. Some, such as the Swiss or the Germans, export 75 to 90% of their production, whereas the French and the Italians sell but little abroad.

It should be noted that according to the export statistics, the producers supply dyestuffs to their subsidiaries or agents abroad, and it is these who give technical assistance to local customers.

These customers, particularly in the textile and tanning industries, set great store, because of changes in fashion, by rapidity and certainty of supplies and also by technical assistance given to them, even

more than by the level of prices. This fact is less definite for other categories of buyers, such as makers of paints and polishes.

Because of the very slight incidence of the prices of dyestuffs on the finished products, especially for textiles, the elasticity of *general demand* is minimal. But this fact does not prevent lively competition existing between suppliers. This individual competition is facilitated by the fact that no official price lists are published for the market as a whole, only internal lists sent by each producer to his distributors in each country.

Price concessions, in the form of discounts, are granted individually, particularly to customers giving the largest orders, for sellers try to attract these interesting customers by offering them the most advantageous terms. The variations in pricing policy are also to be explained by the very varied services that each seller offers to his customers. All this means that there is a lack of transparency on the market regard-in the real prices of dyestuffs, this lack of transparency being a necessary condition for the practice of price erosion on the part of the sellers. This policy can only bring about important commercial advantages if competitors do not realize that concessions have been made or decide not to take retaliatory measures themselves.

Still on the subject of prices, the experts whom you appointed have stressed that the real prices of dyestuffs differ to a great extent, not only from one year to another but also from one country to another (see Tables 5 and 6).

Finally, from the point of view of the general trend in the business, one can note that there is a general tendency for the prices of dyestuffs to be eroded and there is no doubt that towards 1963/1964, this situation was of lively concern to all producers, and played a decisive part in the decisions to make a general increase in prices.

The experts appointed by the parties have not in any way contradicted the findings thus made by Professors Kloten and Albach, which can be summarized as follows:

— There is an oligopoly situation on the dyestuffs market; it is controlled by a small number of producers.

— It is an imperfect, heterogeneous market, particularly because of the wide variety of products sold.

— It is a market which is walled off; Professor Kantzenbach even describes it as 'cemented'.

— It is a market on which the customer is only in direct contact with the producer when the latter is a national producer; he is never in direct contact with a foreign producer, only with its subsidiaries, representatives or agents.

— Finally, it is a market on which in practice there is no transparency with regard to prices.

2. *The opinion of the experts*

(a) Given these facts, the experts nevertheless come to diametrically opposed conclusions. Professors Bombach and Hill take the view that the fact that the price rises were simultaneous is to be explained by the particular structure of the market and add that in this imperfect market prices are not a decisive factor because support services to the customer and delivery terms are of particular importance. Therefore, they say, the price structure remains flexible, even after uniform increases, thanks to the competition which has not ceased to exist on the market.

Professor Katzenbach, on the contrary, approves the conclusion of the Commission according to which the increases are only explicable by concertation between the undertakings and concludes his report as follows: 'Inside the European Comimunity, sellers of dyestuffs compete in an oligopoly situation on several quite distinct markets. Since these markets are imperfect, no constraint imposes uniform conduct as regards prices'.

The conclusions of the experts whom you appointed will lead me, for my part, to suggest that you should rule that the price increases at issue cannot be explained by the structures and mechanisms of the market.

(b) You asked Professors Kloten and Albach three questions.

You first asked them whether, taking into account the characteristics of the dyestuffs market in the European Economic Community, especially during the period 1964 to 1967, it would have been possible, according to normal commercial criteria, for a producer acting independently who wished to raise his prices to proceed *otherwise* than by a general uniform and public increase, by fixing different rates of increase depending on his particular relationships with different customers and depending on each product.

The experts have answered this question in the affirmative, saying that a producer acting independently, according to normal commercial criteria, would, in principle, have had the possibility of increasing his prices on a variable basis depending on each customer and product. But what is important to my mind is that they have also said that in *practice* it would have been possible for such a producer to increase his prices on a variable basis, the only proviso to this reply being that the average increase in prices that a producer acting in this way could have obtained 'would probably have been lower than the average increase in prices achieved by a general and uniform increase'.

You then asked the experts what advantages and what disadvantages there are in proceeding to a general and linear price increase compared with a variable one.

To this second question they replied that while a general and linear increase involves opportunities and risks, both for the producer who takes the initiative on this increase and for those who must fall in line with it, *on balance* the advantages to be gained from a general and uniform increase outweigh the disadvantages.

This answer seems to me even more significant than the first.

Of less interest is the third question, relating to how far dyestuffs other than speciality products are interchangeable. I agree with the experts that this distinction is of no great importance in assessing the facts at issue. The extent to which dyestuffs are interchangeable appears to me to be a secondary factor in a market where demand is highly differentiated and which is, above all, divided up on a territorial basis by the producers, which even makes it difficult for users in one country to turn to sellers in another country in order to obtain a better price, even on products which are interchangeable.

3. *Conclusions to be drawn from the experts' reports*

What is to be thought of these opinions, which contain some subtle shades of meaning? For my part they leave me with the impression that one cannot explain the uniform price increases introduced during the period at issue *by reference to the characteristics of the dyestuffs market alone.*

Without going so far as to consider, as does the Commission, that these increases can therefore only be the result of concertation, I think that the following conclusions should be drawn:

— that the structure of the market certainly did not render such uniform increases necessary, but that on the contrary the demands of competition between sellers, if such competition had been free, would have led them to make, individually, differentiated price increases;

— that on the other hand the interests of the producers explain why they decided and applied increases of an identical percentage for all products sold, thus forcing their subsidiaries and representatives to pass on these increases to the customers. The principal feature of these interests was, and I shall come back to this, that having regard to the partitioning of the national markets in Europe, and especially in the Community, in the eyes of the producers uniform increases presented the advantage of not upsetting a balance, and indeed the allocation of geographical areas, which ought to have been swept away by the establishment of the Common Market.

4. *Arguments drawn from the economic theory of oligopolies*

However, before leaving economic matters and in order to do justice on this point to the applicants, I must also devote some thought to the arguments which they claim to draw from a close and as it were necessary relationship between the oligopolistic nature of the market and the similarity of their conduct. The applicants say that such similarity of conduct is natural and even typical of an oligopoly. The Commission rightly answers them that this line of reasoning fails to take into account the particular characteristics of the market in question.

Most economists agree that the functioning of an oligopoly implies deliberate parallelism. Such a market is one in which the producers are closely interdependent so that none can take a decision concerning competition, particularly as regards prices, without the others' being immediately affected, being aware that this is case and being bound to do something about it.

In such a situation the price leader will only decide upon an increase if he is reasonably convinced that his competitors will be induced to fall in line with that increase. However, according to economic theory, no such interdependence is to be found unless, quite apart from the ordinary tests applied to oligopolies, two decisive elements are present on the market: the products must be homogeneous, and the market must be transparent as regards prices. Such is not the case on the dyestuffs market on which there is a large variety of products which are in fact only marginally interchangeable and on which there is in practice no transparency of prices.

Moreover, turning from theory to the case-law, one finds that apart from exceptions explicable by very particular considerations, the concept of conscious parallel conduct has only been accepted where the goods produced or sold on the market are homogeneous, such as oil, wood, salt, cement, tobacco and so on:

American *Column and Lumber*, ref. 257 US 377 (1921)
Socony *Vacuum*, ref. 310 US 178 (1940)
American *Tobacco*, ref. 328 US 781 (1946)
*Cement* Institute, ref. 333 US 683 (1948)
Morton *Salt*, ref. 235 F. 2 d 573 (10th Cir. 1956)
Gulf *Oil*, ref. 164 A. 2 d 656 (1960)

Admittedly, these are decisions delivered by American courts and I refer to them only for the sake of comparison in the examination of the present case; even so, as regards the point that I am at present considering, these decisions take on a certain prominence.

To these considerations I should like to add one remark:

The argument to the effect that a change in prices by all the participants can be explained by the pressure exerted on an oligopolistic market is an argument which can seem convincing when the price change is downwards. But in the case of an increase the pressures of the market are less forceful. The experts have agreed that a differentiated increase would have been possible. The applicant BASF has by implication accepted this in its letter of 13 October 1967 to the Bundeskartellamt: 'From the point of view of calculating the cost price a higher increase (than that of 8%) was necessary in October 1967'.

Likewise, the logic of the system of pressures in the oligopoly situation described by the experts, whereby on a given market the producer who takes the initiative always has the largest share of that market, leads to the conclusion that it is always the strongest undertaking on the market, that is to say the one which is on its own national market, that takes the initiative in making the increase. Yet, at least in one case, in 1964, it was not the undertaking which was on its own national market, ACNA, which took the initiative in making the increase in Italy, but Ciba. ACNA only fell in line a little later. This shows that while a common alignment downwards can usually be explained on an oligopolistic market by parallel behaviour without concertation, it is on the other hand extremely doubtful whether a parallel alignment upwards can be explained without the idea of concertation between the undertakings concerned, particularly when a large increase is involved.

*C — The factual circumstances in which the price increases were introduced*

I do not think therefore, in the final analysis, that the characteristics proper to the dyestuffs market can furnish a rational and satisfactory explanation. On the contrary, I think that the existence of a concerted practice is confirmed by an examination of the factual circumstances in which the increases at issue were introduced.

1. I shall begin with the last two increases. They reveal the existence of a mechanism which is common to them. In both cases the course adopted was the same:

(a) To start with, one producer lets it be known that he intends to proceed to a linear increase on one or several national markets at a given rate for a stated and very wide range of products. This was the case with BASF in 1965, and with Geigy in 1967. Whether the date on which the proposed increase is to take effect is specified, incorporating a certain period for implementation (two months in 1967), or is not specified, everything happens as if the price leader intended to give the other producers a period for reflection.

(b) Then the other undertakings are informed of the intention, be it in their capacity as subsidiaries or as customers, or by some other means. The mere fact that they were informed does not seem to have been disputed.

(c) Finally, in most countries of the Common Market the producers give the necessary instructions to put the increase into effect, and the said increase thus takes effect on the same date; this happened both in 1965 and in 1967.

If however on a given market one of the producers refuses to fall in line—which was what happened with ACNA on the Italian market in 1965 and in 1967—the others decide not to proceed to the implementation stage on that market.

Thus we have an initial decision by a price leader, announced in advance, followed, depending on the case, by agreement or by total or partial refusal by the other undertakings, this refusal being accepted by other competitors who take the requisite action.

Without its being necessary to consider how to describe this operation in relation to the law of contract, for we are not dealing with an 'agreement', it seems to me that it in fact implies convergence of wills. There is the will of the price-leader, which is not the manifestation of a purely unilateral will because his decision can only be put into effect if it is accepted by the other producers. Then there is the will of each of the latter who adhere, at least tacitly, to the price-leader's initial decision, or who oppose it and prevent its being followed through, or at least limit its scope.

These facts appear to me to be sufficient to establish the element of concertation required by Article 85(1). To require a more obvious, more explicit manifestation of the common will would lead to disregarding the distinction which that provision of the Treaty makes between an agreement and a concerted practice. It would therefore mean not giving the concept of concertation the realistic meaning which, in my opinion, should be given to it.

Concertation does not amount to an agreement. It is not set out in a document which has the purpose of determining the respective obligations of the parties. Nor is it necessarily a 'conspiracy' methodically organized in meetings at which differences of opinion may be expressed or interests confronted. It can consist, and it consisted in the present case, in common but coordinated conduct starting from apparently unilateral decisions which can only be carried out if the participants cooperate.

There is certainly an objection to this way of thinking, and at the oral hearing some of the representatives of the applicants, and in particular Professor Von Simson, did not fail to advance it brilliantly.

The objection is that if one only looks at the relationships between the price-leader on the one hand and each of the other producers on the other, one is labelling as

concertation bilateral relationships which, in an oligopolistic market, have a natural explanation in the self-interest of each undertaking, subjected to the pressures of such a market and to the pre-eminent power of the price-leader. The operation could therefore perhaps be regarded, so we are told, as an abuse of a dominant position on the part of the price-leader, within the meaning of Article 86 of the Treaty, but not as a concerted practice falling under Article 85; for that article requires not only agreement with the decision of one of the producers, but real concertation amongst all producers.

It seems to me that Professor Von Simson's objection is unfounded. For if a real agreement had been concluded between the price-leader and each of the other producers, such as to give expression to the adherence of that other producer to the decision, there is no doubt that such a bilateral agreement, even if it had remained isolated, would have been of a kind such as to justify the application of Article 85(1) without its being necessary to consider whether other identical agreements had been concluded or whether links had been made between the parties to those different agreements. Yet can more be required in respect of a concerted practice than of an agreement?

In the second place the objection made against this line of reasoning would only apply—as is made clear by the general trend of the applicants' arguments—if the market was a typical oligopoly, which presupposes close interdependence between producers of homogeneous products. But, as I have said, an analysis of the dyestuffs market leads to the view that the specific characteristics of that market differ from the typical kind of oligopoly on more than one point. Is it not striking to note that for the increases of 1965 and 1967 the price-leader is different in each case: BASF for the first, Geigy for the second? May it not therefore be supposed that the initiative concerning a decision on prices was so arranged that first one and then another of the producers precipitated the increase in turn? Such a way of proceeding, if it were established, would without doubt of itself constitute concertation; but the evidence does not show that. Or alternatively, should one not rather seek the explanation of these changes in leadership on prices in the fact that since the national markets were partitioned off it was natural for the price-leader to be one of the undertakings exporting a large part of its production to neighbouring markets, which is the case both with BASF and with Geigy?

Admittedly, the documents on the Court file do not incontrovertibly support this second proposition any more than the first. But I think it is the more likely one, taking into account the general context of the case.

In any event, you will not have to adopt it if I have been able to convince you that the very machinery of the increases of 1965 and 1967 reveals, of itself, the existence of concertation. If you still have any doubt on this point, the particular factual circumstances in which the increases were applied also provide telling evidence. The most numerous indications and those which most agree amongst themselves are those relating to the increase introduced in 1967. Let me remind you of them: on 18 August 1967, a meeting took place at Basel at the registered office of Sandoz. Representatives of all the applicant undertakings except ACNA were present at this meeting. We clearly do not have the verbatim report of that meeting, but one thing is certain: Geigy's representative announced the intention of that undertaking to increase the prices of soluble dyestuffs based on aniline before the end of the year, and it appears from the documents on the Court file that this intention was stated in precise terms: there was to be an increase of 8% with effect from 16 October 1967.

The representatives of Bayer and of Francolor announced that their undertakings were also considering an increase.

To be sure, there is nothing that formally establishes that these declarations were followed by a discussion during which reciprocal commitments were entered into. However, it seems hard to imagine that there was not at least some discussion on this point, since at the time the problem of the price of dyestuffs and of the profitability of undertakings was seriously worrying all producers.

Immediately after the Basel meeting there began for each of the companies a period a view of intense activity with to putting the proposed increase into effect. The representatives of the undertakings present at the Basel meeting reported to their respective directors on the situation. Two particular cases were disposed of during this period: the case of France, where Francolor, which was not able to take advantage of the increases of 1964 and 1965 because of the price controls in force, decided to catch up by making a further 4% increase over the general 8% increase; and the case of Italy, where, taking into account the recession on the internal market, ACNA opposed the increase but nevertheless declared itself prepared to apply it to other markets, particularly the Belgian and French markets.

Thus the increase, initially envisaged as a uniform 8% on all the markets of the Community, was adapted to the special cases of France and Italy.

It also seems that BASF, which apparently wanted a larger increase, finally agreed to the rate of 8%.

At all events, on 19 September 1967 all the undertakings which had been represented at Basel one month earlier announced an increase of 8% with effect from 16 October 1967. This increase was raised to 12% by Francolor.

Finally, in almost all cases this increase was put into effect, except of course in Italy, on the date which had been announced at Basel and confirmed on 19 September, namely on 16 October.

Could such perfect synchronization in the unfolding of the operation be explained by a simple mutual exchange of information which, moreover, the undertakings concerned do not deny? For my part I think that the operation could not have taken place in such circumstances without real concertation.

Thus these circumstances contain sufficient indications, in my opinion, to establish the existence of such concertation not only as between Geigy and each of the other undertakings concerned but also as between those undertakings themselves, both as regards the decision which they took in respect of the intention announced by the price-leader and as regards the manner in which they rallied to his decision.

The case of Italy is, in this respect, significant. ACNA having refused to join the arrangement, the Italian market was spared the increases and the other undertakings acted in pursuance of this refusal. However, ACNA agreed to increase its prices on the French and Belgian markets.

Turning to the increase of 1965 which, I would remind you, consisted of extending the increase of 1964 to Germany and increasing by 10% the price of products not affected by the increase of 1964, which basically meant non-soluble pigments, the way in which it was brought into effect is comparable in many ways with what happened as regards the increase of 1967. It was announced long in advance by BASF, as early as 14 October 1967. Bayer made known the same intention on 30 October, and Casella on 5 November. The increase was only finally decided upon and was only put into effect after the expiry of a period comparable to the period which, in 1967, ran from the meeting at Basel to the date when the increase was put into effect. In fact all those companies took the decision only on 28 December and it came into effect on 1 January 1965. During November and December two special cases were settled: first, the opposition of ACNA had the consequence that the Italian market was, for the first time, excluded from the increases envisaged for the other markets; secondly, as we know, the price freeze in France prevented the application of any increase in that country. Finally, as for the 1967 increase, the synchronization was perfect; there was not the slightest disparity or difference in the way the increase was introduced. Therefore, for reasons similar to those which I have already put forward, I think that the increase of 1965 came about through concertation similar to that of 1967.

2. *The increase of 1964*

The reason why I have not followed the chronological order of the successive increases is that the Court file does not

contain so much information on the first of these, which took place in January 1964, as it does on those which followed it.

Our information relates only to the circumstances in which this increase was put into effect between 13 and 20 January. We also know that it was started by Ciba which, probably at the end of 1963 or during the first days of 1964, gave its Italian subsidiary an order to increase by 15% the price of most dyestuffs based on aniline, except for certain products, particularly pigments.

On the other hand we do not know when and in what circumstances the price-leader announced this increase, nor do we know what the reactions of the other producers were. We only know that they followed the movement except on the German and French markets.

So it is not possible to confirm that the mechanism which we have already seen working in the latter cases was already set in motion for this first operation.

But this lack of information will not lead me to reject the complaint that there was concertation as regards the 1964 increase. Let it be noted in passing that the gap in the file results clearly from the fact that at that time the Commission had not been alerted, and therefore obviously it was not in a position to obtain information. When inquiries were later made, it would no doubt have been difficult to conduct a successful search for evidence of concertation which must presumably have taken place during the last months of 1963.

It is therefore solely on the basis of the facts shown by the documents in the file that I shall attempt to convince you.

What are these facts?

*As regards the dates when the increase was put into effect*, it is established that on 7 January Ciba-Italy put into effect as from that day an increase of 15% for dyestuffs based on aniline, other than pigments, food colouring and cosmetic colourings. The other producers took two or three days to react. On 9 January ICI-Holland announced the increase and put it into effect. On the evening of the 9th all the other producers gave instructions for the increase to their representatives in Italy. On that same day Bayer ordered its Belgian subsidiary to increase the price of the same products by the same amount and it did so on 10 January. It was also on 10 January that ACNA decided on the increase for Italy; on 13 January it applied it to Belgium. Finally, it was on 13 January that Sandoz-Switzerland gave to Sandoz-Italy the instructions necessary for applying the increase, having notified it on 9 January of the possibility.

*As to the details:* the same percentage increase was applied; it covered almost exactly the same categories of products. Although, as has indeed been pointed out by two of the applicants, Bayer and Geigy, differences have been found both as regards the products which were to be affected by the increase and as regards the details of its application to customers, these differences are minor and cannot seriously cast doubt on the clear and in many places striking similarities to be found in the instructions sent by certain parent companies to their subsidiaries or representatives. The Commission sees in these one of the proofs of concertation. Without completely sharing this opinion, it must certainly be admitted that the almost word for word similarity of some of those Telex messages, not only as to dates, rates of increase and categories of products covered, but also as to the conduct to be followed in relations with customers, constitutes considerable additional evidence. It is inconceivable, says the defendant, that the parties could so rapidly have put a uniform increase into effect if they had not come to an arrangement beforehand. This argument is not without substance, but it may be objected that the very rapidity with which the undertakings reacted could support the contrary argument that there was no concertation, which necessarily calls for a certain amount of time.

However, there is nothing to exclude the idea that the instructions to the subsidiaries and to the representatives were merely the culmination of an operation which, there are good reasons for thinking, began several weeks earlier. Whereas for the increases of 1965 and 1967 all the stages of concertation stand revealed, for the increase of 1964 all that is to be seen is the tip of the ice-

berg. This can also be explained by the fact that the method of concertation was, so to speak, 'run in' with time, and only reached its perfect form with the last increase in 1967.

3. *Evidence of concertation*

But I shall not spend any more time on these points, which are certainly secondary ones. It is another consideration which I regard as proof of the existence of concertation effected before the 1964 increase took place. For I think that this increase cannot be dissociated from those which followed it and that they are all elements of a general strategy in which the producers participated in full knowledge of the consequences. Is it not an undeniable fact that in 1965 it was the 15% increase of 1964 which was extended to Germany, spared a year earlier? Is it not established that again in 1965 the increase of 10% was applied to those dyestuffs and pigments which had been excluded from the first price increase, such that it consisted in widening the scope of the increase? That in 1967 it was a second rise in prices of all dyestuffs that was decided upon, including on this occasion the French market which had been excluded from the increases because of the price-stabilization plan?

This continuity in the process convinces me that the concertation proceeded from an overall plan. Consequently, the divergent elements, which at any rate are minor ones, detected in the method of operating do not put in question the unity and continuity of this plan.

Furthermore, is it not in the nature of things that when increasing prices producers proceed by successive and graduated steps, if only to avoid the brutal application of an excessive rate of increase all at once, so as to attempt to lessen the reactions of customers, and also to make sure that before proceeding with the execution of the plan the first stage of the increase has indeed achieved the objectives anticipated and has not given rise to any undesirable consequences?

I therefore advise in the strongest terms that you hold that one and the same concerted practice existed for the three increases of 1964, 1965 and 1967.

It remains for me to examine two other questions so as to show that this concerted conduct was of such a kind as to justify the contested decision.

## Section IV

## The adverse effect on competition

### A — *The application of Article 85(1) of the Treaty to a concerted practice*

For Article 85(1) of the Treaty to apply it is also necessary that agreements between undertakings or concerted practices should 'have as their object or effect the prevention, restriction or distortion of competition within the Common Market'.

As regards agreements, you have interpreted the expression 'object or effect' as meaning that the condition is fulfilled if they merely have this *object*, without its being necessary to go into the real effects which an agreement may have had on the competitive situation (judgment of 13 July 1966, Joined Cases 56 to 58/64, *Consten and Grundig*, [1966] ECR 299).

However there are some academic writers who say, attaching particular importance to objective factors in defining the concept of a concerted practice, that to fall under Article 85 such a practice must actually and concretely have had the effect of altering the conditions of competition.

In his opinion on the Chemiefarma case, Mr Advocate-General Gand seemed to take the same view. He said that although 'for the purposes of the application of Article 85 there is no need to take account of the concrete effects of an agreement ... it is no doubt otherwise in the case of a concerted practice which, according to the prevailing view, presupposes that the agreement is actually carried out so that it is necessary to establish the actual conduct of the undertakings concerned and the existence of a link between such conduct and a prearranged plan' ([1970] ECR 714).

I have already given you to understand that

my opinion is not very far removed from that expressed in those words.

Would it be possible to go further and to take into consideration not the result, the actual effect of the practice, but also its *potential effect*? There can be no doubt that it would seem curious for a concerted practice which has not had any material effect on the competitive situation, despite the intention of the participants and because of circumstances beyond their control, to escape the application of Article 85. I should be tempted to say that in such a case merely to attempt or to initiate execution would be enough to justify the application of Article 85(1).

B — *The consequences of the concerted practice with respect to competition*

However, if you share my point of view, you will not have to give a ruling on this question for, in the present case, the concerted practice at issue has had both as its objects and as its concrete effect the restriction or distortion of competition within the Common Market.

What in fact were the consequences of the increases in the prices of dyestuffs?

If one accepts the applicants' evidence, there were no consequences at all because of the very structure of the dyestuffs market and because of the practices current concerning sales to users. This assertion follows naturally from the general line of reasoning which we have already met as regards the explanation of the parallel conduct of the undertakings. Yet it may seem surprising here because at the same time most of the applicants are saying that there was lively competition between sellers on the market. Even so, this contradiction is only apparent. Drawing upon the experts' reports, the applicants argue that the level of prices is not the only—not even the main—factor in competition between distributors. This statement is not inaccurate; Professors Kloten and Albach have themselves made the point. Capacity and delivery times, the quality of products, after-sales technical assistance and guarantees given to customers, even extending to insurance against any damage caused by the use of dyes the quality of which turns out to the inadequate, all constitute factors which the buyers, the user industries, seriously take into consideration. This factor is not denied by Professor Kantzenbach. But may I be permitted to point out that these competitive factors continue to exist whatever the general level of prices, at least when the variations between prices are of general application and at uniform rates. These factors concerning competition would only play a decisive role in the event of varying increases.

This is indeed what the applicants seek to show in arguing that since no basic price lists are published, competition involving selling prices takes place by means of discounts granted individually to certain buyers. They say that therefore a price increase by an identical percentage cannot affect this form of competition because in reality prices remain different. It is argued that linear increases therefore have no effect on real prices, and that this is shown by the tendency towards erosion of real prices which is found on the global market in dyestuffs, despite the fact that linear increases took place during the period from 1964 to 1967. Faced with this line of argument, one might ask why the producers made the increases if real selling prices are, as they claim, determined in most if not all cases by discounts granted by distributors in order to keep or gain a customer.

However, it seems to me that this argument does not stand up:

First of all, is the practice of discount selling as widespread as we are told? There is nothing in the documents on the Court file to confirm this. On the contrary, it seems that in most cases a subsidiary, which is of course a distributor, cannot grant a discount without permission from the parent company. At least this appears to be the position from certain instructions sent by Telex. It is hard to see how such a system can be applied to all or nearly all sales.

Furthermore, figures are available for certain undertakings: this is so with Bayer, and it has been calculated that the number of individual discounts granted annually by that undertaking is 1 500 (report of Professors Kloten and Albach, p. 29, No

50). As for ICI, 689 requests for discounts were received in 1967 and only 429 were granted (ICI's memorandum on the dyestuffs industry in Europe, p. 14). These figures seem very low compared with the global volume of sales made by these very companies. Bayer has about 5 000 customers in the Common Market (Kloten and Albach, p. 30, No 52). Making allowance for the fact that certain customers are habitually given discounts, the number of customers receiving discounts is less than a third of the total. As for ICI, one can see the minimal importance of the discounts granted when one considers the size of that company.

In any event, whatever the relative importance of discount sales, the fact remains that discounts can only be granted on the basis of a reference price, a basic price. It follows therefore that price increases, even uniform as to percentage, cannot fail to have an influence on real prices on a non-transparent market on which it is impossible to determine discounts by considering those that a competitor might grant. Let me add that as regards the buyer, a uniform increase cannot fail to have a dissuasive effect, in that it discourages him from demanding the discount that had previously been granted to him; nor can it fail to persuade, in that it prepares him psychologically for accepting a reduction in that discount.

Finally, although the linear increases, uniform as to percentage, did not have the effect of eliminating *all competition*, it is undeniable both that it was their object and that it has been their effect to *contain competition within its previous limits*. The producers have obtained a sort of insurance against the risk that this competition might develop, and more especially that positions acquired and balance achieved on the partitioned-off national markets might be upset.

Thus this analysis leads me to the view that the linear increases have had a concrete effect on competition, which varied price increases introduced without concertation would not have had. I think, furthermore, that a confirmation of this view can be found in the special situation prevailing on certain markets.

C — *The particular case of the ACNA company*

A small exchange which took place during the oral hearing between one of the agents of the Commission and one of the representatives of the applicant companies led to important clarifications on this point. The representative of the Commission stated that the turnover of ACNA on the German market increased considerably during the months which followed the increase of 1 January 1965 in which that company had refused to take part. Its turnover on that market amounted to Lit 64 million for the year 1964. Yet for the first four months of 1965 it came to Lit 97 million, and the Commission estimates that for the whole of the year 1965 ACNA's trade with Germany came to almost Lit 300 million. It was found that the same thing happened after the increase of 1967.

The applicants did not reply to this line of argument. They did no more than say that the Commission was not entitled to draw upon an argument during the oral hearing without having mentioned it in the pleadings. This plea that the argument is inadmissible cannot be accepted.

It was not the Commission but one of the applicants which raised an argument during the oral hearing which had not been mentioned in its written pleadings and which was intended to show that ACNA did not obtain any advantage from not taking part in the increase of 1965 as regards the volume of its sales. And it was in answer to this new argument that the representative of the Commission produced the factual data that I have just mentioned. The Commission, the defendant in the proceedings, was certainly entitled to put forward any point which seemed to it relevant so as to counter a new argument from the applicants.

The material accuracy of the facts thus put forward has not been formally denied. As regards the increase of 1965, the Commission observed that the statement which it had made appeared in the shorthand note of the declarations made by the commerical director of ACNA in July 1965 to one of the Commission's investigators. For the increase of 1967, the Commission

offered to submit evidence to the same effect. It seems to me that the information thus supplied should be taken as correct. Now in my opinion this information has great importance in an assessment of the effects of the concerted practices on competition. If the only undertaking which did not introduce certain increases was able to increase its sales on a market on which the other companies had raised their prices in a uniform way, this is because the conduct of those other companies tended to contain competition within certain limits and they did not intend to go beyond them. ACNA's conduct and the advantage that it obtained from it are particularly significant and confirm my opinion as to the real effect of the concerted practice.

## Section V

### The effects on trade between Member States

I must now consider whether this concerted policy was capable of affecting trade between Member States as required by Article 85(1). This question should receive an affirmative answer.

First of all, it is established that the concerted practice covered the markets of several Member States, in fact every Member State of the Community with the exception of France until 1967, of Germany for the increase of 1964 and of Italy for that of 1967. Is this state of affairs of itself enough to show that the concerted practice was capable of affecting trade between Member States? The Commission thinks so, thus adopting the view that the word 'affect', which is a neutral word, has no other purpose than to set a boundary on the scope of Community competition law in relation to national competition law. However, it seems to me to follow from your decision in the *Grundig* case that your interpretation is more subtle. Certainly, the fact that an agreement is capable of having effects or that, *mutatis mutandis*, a concerted practice has effects in several Member States is a necessary condition for it to be regarded as affecting trade between those States. But is this condition sufficient? To quote the words of your *Grundig* judgment it is also necessary to examine whether the agreement 'is capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between States'. As regards this, the applicants argue that no common market in dyestuffs existed, but only national markets, clearly delimited and separated, between which goods moved along '*cemented* channels of distribution' (Kantzenbach's report, p. 14, No 18). Users obtain their supplies exclusively from national retailers who are subsidiaries or representatives of the producers. Therefore, since the dyestuffs market was already strictly partitioned off before the price increases of 1964, the fact that these increases took place, and consequently the fact of the concerted practice, which I take as proven, could not have had the effect of affecting trade between the Member States.

My reply to this argument is of the same order as that which I gave about the effects on competition: while it may well be admitted that the partitioning of the market in dyestuffs was not created by the concerted policy of the producers, nevertheless it remains a fact that the concerted price increases maintained this state of affairs, which a non-concerted approach might have upset. The practice at issue thus fulfilled, on this point also, the role of an insurance policy intended to cover the producers against the risk of the creation of new intra-Community trade patterns and the disturbance of an artificial equilibrium. Again, the special case of ACNA confirms this: by refusing to take part in the general increase of 1 January 1965, this company was able to increase the volume of its deliveries in Germany. Thus the general and uniform increase in prices did affect trade between Member States because the very fact that one of the producers did not take part in it had the result of increasing, in this particular instance, trade in dyestuffs between Italy and Germany, thereby threatening the wide disparity in prices which existed between those two countries.

The concerted practice resulted in preventing the creation of a single market in dyestuffs in the Community.

The conclusion to be drawn from the above is that all the requirements set out in Article 85(1) of the Treaty are met in this case.

I might well call a halt here to my remarks on the concept of a concerted practice, but I feel that I should make two more observations:

1. As I have already said, I think that there was in fact one and the same concerted practice and that the various price increases through which this practice was apparent cannot be dissociated from a general plan. On this point you may think that in saying that there was one concerted practice I am straying somewhat from the reasons given for the contested decision, because the Commission took three distinct increases into account. But I think that the unlimited jurisdiction vested in the Court is such that you are entitled to adopt this reasoning and that if the facts can be interpreted in the way in which I have attempted to interpret them there is nothing to prevent you from adopting this approach.

2. Since I am wholly persuaded that as a matter of law the Commission was quite right to apply Article 85, taking it as established that there existed a concerted practice prohibited by that article, I shall give a short answer to some of the objections of a general nature that the applicant companies put forward against the dangerous consequences which such a solution would have for their business and even for their survival.

They say that any economically rational prices policy would become impossible:

— How could a price-leader prevent other undertakings from following his decision to increase prices?

— How could those other undertakings be compelled not to do so?

— Would they have to choose to limit their own price increases to a lower level?

I do not think that these questions are relevant, and these fears strike me as ill-founded.

Let me point out that the applicant's objections brush aside the conclusions of Professors Kloten and Albach who, as I have reminded you, think that *in practice* varying price increases, decided upon independently by each undertaking, are possible.

Without going back over this matter, I would point out that if the producers had doubts as to whether price increases envisaged by them were legal under the Treaty would stop them in practice from seeking the benefit of Article 85(3), thereby entering into a dialogue with the Commission, as a preventive measure, which might lead to a solution which was both acceptable to them and compatible with the rules on competition. For you have already had occasion to point out how economic conditions on an oligopolistic market can coincide with the provisions of the Treaty. The principles set out in your judgments of 18 May 1962, *Geitling and Others*, and 15 May 1964, *Government of the Netherlands*, on price agreements on the coal and steel market could doubtless be transposed or adapted to other markets in due course.

Finally, I was not shaken by the efforts made at the oral hearing to convince you that to accept the application of Article 85 in this case would mean sanctioning a degree of economic planning contrary to the principles of the Treaty. I am certainly not saying that the existence of oligopolistic markets and the mechanisms whereby they function are condemned either by way of Article 85 or by the general rules of the Treaty. Even so, let me say frankly that it is in these economic sectors that certain abusive practices are capable of working seriously against the interests of consumers in the Common Market. Yet is it not the case that one of the fundamental objectives of the Community consists in 'the constant improvement of the living ... conditions', and does not this objective necessarily include the protection of consumers?

It is therefore absolutely right for the Community authorities to take a particular

interest in markets the structure and working of which can facilitate the materialization of such a risk, and to keep those markets under close scrutiny.
In this context, the complaint put forward by BASF that there was a misuse of powers, in that the Commission wanted to 'influence pricing policy' by using the provisions concerning the suppression of unlawful cartels or concerted practices whereas the Treaty does not confer on it any power to pursue a pricing policy, seems to me, after the discussion which I have devoted to the existence of such a practice in this case, to be utterly misconceived.
If the applicant is merely expressing the opinion that the Commission's decision (supposing that you hold it to be in conformity with Article 85) is capable of preventing future price rises decided upon and implemented in similar circumstances, it must be admitted that the fines imposed have achieved their purpose as regards both prevention and cure.
If the applicant is imputing to the Commission a disguised motive which is in fact to force prices down on the dyestuffs market, I would merely observe that no misuse of powers appears from any of the documents on the Court file and that the truth is that this allegation is nothing other than a very free interpretation of the thinking of the Commission, responsibility for which must lie with the applicant.

*Part II*

*The jurisdiction of the Commission to impose fines on companies whose registered offices are outside the Common Market*

Amongst the undertakings producing dyestuffs which have, as I have made every effort to make clear, taken part in a concerted practice prohibited by Community law, three—and by no means the smallest—are companies established outside the Common Market:

— the first, Imperial Chemical Industries (Case 48/69) is a British company whose registered office is in London;

— the other two: Geigy (Case 52/69) and Sandoz (Case 53/69) have their registered offices in Basel and were incorporated under Swiss law.

On the subject of the Commission's jurisdiction regarding them the reason given in the contested decision is as follows:

'Whereas this decision is applicable to all the undertakings which have participated in the concerted practices, whether established within the Common Market or outside it'.

The Commission then draws from the very wording of Article 85(1) of the Treaty the conclusion that the rules on competition set out therein are applicable to all restrictions which produce, within the Common Market, the effects prohibited by Article 85 and concludes that 'it is unnecessary to examine whether the undertakings which have caused these restrictions on competition have their registered offices inside or outside the Community'.
Using somewhat similar arguments, although not identical in every respect, Imperial Chemical Industries on the one hand and Geigy and Sandoz on the other formally deny that the Commission has any jurisdiction over them. They maintain that the contested decision is contrary both to the national laws of the Member States of the Community, to the Treaty of Rome itself and to commonly accepted principles of public international law.
According to the applicants, who say that infringements of the rules of competition are criminal in character, there is no support for the assertion that in order to justify the application of Article 85(1) to undertakings outside the Common Market it is enough that their conduct *produces effects* inside that market. They argue that the 'effects' doctrine, invoked as justification for an enforcement juristiction, has been repudiated by the internal laws of the States, and that furthermore several of them have adopted legislative measures for the purpose of protecting themselves and their nationals against the extra-territorial application of coercive measures,

injunctions and even mere orders to submit evidence emanating from foreign authorities on matters of competition.

They say that the Treaty of Rome did not confer and could not have conferred power on the Community authorities to take preventive and repressive decisions against undertakings outside its territorial scope, at least when those undertakings are not carrying on any activity within the Common Market. The contested decision wrongly applies or at least oversteps the mark in applying the 'effects' doctrine, in violation of international law.

Drawing on the opinions given by two eminent specialists in public international law, Professor R. Y. Jennings of the University of Cambridge and Professor Hans Huber, a member of the Swiss Constitutional Commission, the British and Swiss companies have put forward arguments which reach the same conclusions although they proceed somewhat differently.

The argument put forward by Imperial Chemical Industries is that in the letter sent to it on 22 January 1968 by the Director-General for Competition, that high-ranking official attempted to justify the application of Article 85(1) by the conduct of the applicant within the Common Market. ICI's answer to this is that its activity in fact consisted in supplying dyestuffs to its subsidiaries in the Common Market under cif contracts. These contracts are governed by English law and the activity resulting from the conclusion of them takes place in the United Kingdom. Furthermore, in its decision the Commission does not impugn anything more *than the mere effects* within the Common Market of the conduct of Imperial Chemical Industries. The latter maintains that jurisdiction over acts committed abroad but producing effects within a given territory, in this case the Common Market, cannot be exercised purely on the basis of the area in which effects have been produced, unless the activity complained of and its effects are generally recognized as the constituent elements of a criminal offence according to the law of States with reasonably developed legal systems. It appears from the textbooks that competition law is not unanimously considered capable of giving rise to the application of this system, and the contemporary practice of States is against attempts to give extra-territorial application to legislation on cartels. Furthermore, the Community does not enjoy 'inherent jurisdiction' but only the jurisdiction granted to it. No provision in the Treaty allows it to exercise extra-territorial jurisdiction. On the contrary, Article 85 only applies to trade between Member States.

Geigy and Sandoz adduce the same arguments in the field of international law, but add that even supposing that the 'effects' theory could be used as an alternative justification of the Commission's jurisdiction over them, it would at least be necessary to show that there has been a substantial effect and that the facts of the case show that there exists a reasonable linking factor between the conduct of the companies and the disturbances caused to competition within the Common Market.

## Section I

### National legislation and national case-law Community law

I shall first examine whether there is to be found in the substantive law of States both within the Common Market and outside it a criterion for the applicability of laws on competition such as to justify the jurisdiction of national authorities to forbid or suppress interference with competition, the effects of which arise in their territory, irrespective of the nationality or place of residence of those committing infringements.

A — (a) *The German Law* of 1957 contains, in Article 98(2), a very clear provision as to its field of application. It applies 'to all restrictions on competition which have an effect (sich auswirken) in the territory where it is applicable (namely the territory of the Federal Republic of Germany) *even if such restrictions result from acts committed outside that territory*'. Even though one must, it seems, interpret

this rule as applying only to effects *directly* affecting competition on the German market, the principle is none the less there.

(b) In France, the Order of 30 June 1945 on prices and the Order of 25 September 1962 on the maintenance of fair competition make a distinction between a dominant position characterized by a monopoly situation or by an obvious concentration of economic power, which must exist on the internal market, and the prohibition on cartels for which no limitation of this nature is laid down. The Technical Commission on cartels, which the Minister of Economic and Financial Affairs must consult before commencing legal proceedings, has often applied the law to foreign undertakings:

— opinion of 26 May 1956, cartel involving manufacturers of electric light bulbs;

— opinion of 5 November 1960, Franco-Belgian cartel involving road construction material, relating to an agreement partitioning the market;

— opinion of 17 December 1960, cartel involving importers of timber from the north; this concerned a reciprocal exclusive dealership agreement between the French Import Federation, which controls four-fifths of the internal market, and the Union of Exporters of timber from the North and America, a Swedish body;

— opinion of 20 March 1965, cartel involving manufacturers of ceramic facing tiles; this concerned an agreement between all the French producers of this product and a foreign producer.

Thus, the applicability of French law depends on the localization on the French market of the effect inhibiting competition or economic freedom.
Furthermore, the Technical Commission on cartels is careful never to state the place where the agreement is made, and this implies that it does not consider this to be a determining factor. On this point I should also mention the second opinion of the Commission dated 22 April 1966 on the cartel in the electric light bulb industry, which held that the conduct of the Netherlands company Philips on the French market was an abuse of a dominant position, although in the main the decisions giving rise to this conduct necessarily took place in the Netherlands.

(c) Both as regards cartels and abuse of dominant positions comparable provisions are found in the laws of other Member States. The criterion of territorial effect is applied by the Belgian Law of 27 May 1960 against the abuse of economic power. Article 1 of that law is based on the exercise of economic power 'within the territory of the Kingdom', an expression which is interpreted by Van Reepinghen and Waelbroeck as follows:

'It is the exercise, in Belgium, of a preponderant influence which serves as the linking factor with Belgian legislation. The nationality of the persons holding the economic power, the place where the cartel is agreed upon or the seat of the central instruments of the cartel are irrelevant in this respect'.

Article 1 of the Netherlands Law on economic competition of 16 July 1958 seems less clear. It reads as follows: 'For the purposes of this law a dominant position shall mean an economic situation in fact or in law which gives one or more proprietors of undertakings a dominant influence on a market in goods or services in the Netherlands'. However, this provision has been interpreted, in the light of the preparatory stages of the law, as follows:

'To avoid all doubt, it should be pointed out that the nationality of the members of a cartel operating in the Netherlands or of those who hold a dominant position on the Netherlands market is irrelevant' (Mulder and Mok, Kartellrecht, 1962).

B — Outside the Common Market, other States have also laid down the scope of the territorial application of their legislation on competition.

(a) In Great Britain, for example, various laws adopted between 1948 and 1965 define the extent of their application very widely; in particular, the Resale Prices Act of 1964, which applies to agreements or other practices whose purpose is to set a minimum resale price on goods in the United Kingdom, regardless of where the producer undertakings carry on business, is indisputably based on the criterion of the effect on the British market. Similarly, the Monopolies and Restrictive Practices Act of 1948 applies, as appears from Article 3, to goods supplied in the United Kingdom or in a substantial part of the territory thereof in any way as to prevent or restrict competition. Article 4 applies the same criterion to the application of any process to goods. Admittedly, the 1956 Act applies to agreements made between undertakings carrying on business in the United Kingdom in the production, processing or supply of goods. But it remains the case that neither the nationality of those undertakings nor the location of their registered offices is taken into consideration, but only the carrying on of 'business' in Great Britain, the principal evidence for which is the fact that the commercial agreements are made in the United Kingdom.

(b) The Swiss Federal Law of 20 December 1962 on cartels has been applied in the same way to a contract dividing up the market accompanied by an exclusive dealership contract concluded between French and Swiss undertakings to regulate the distribution of newspapers in the Confederation. The Federal Court took the view that:

'Although the Law of 20 December 1962 does not contain any express provision as to its scope in international matters, it applies equally to restrictions on competition occurring abroad which produce their effects in Switzerland'.

Article 7(2)(b) of that law permits an action to be brought in Switzerland against foreign companies involved in cartels producing unlawful results in Switzerland under Article 4 of the law, wherever those agreements were made. Clearly this provision is intended to suppress restrictions on competition from whatever source as soon as they have a direct effect on the forces of competition within Swiss territory. Thus the Federal Court uses a criterion for jurisdiction based solely on the economic effects produced on Swiss territory by practices or acts committed abroad.

(c) Naturally it is in American anti-trust law and especially in the case-law summarized in the 'Restatement of Foreign Relations Law' that one finds the clearest and most fully elaborated material concerning the criterion of the territorial application of competition law.

The Sherman Act of 1890 applies indisputably to international cartels, even though the law does not define the criterion for such application. The Clayton Act undeniably applies the 'territorial effects' doctrine for it says that price discrimination shall be unlawful 'where the commodities are sold for use, consumption or resale within the United States ... or any other place under the jurisdiction of the United States' (Article 2), and this wording also appears in Article 3 on exclusive dealership agreements.

Furthermore, the Webb-Pomerene Act of 10 April 1918 exempts from the prohibition on cartels agreements made for the purposes of export trade, but on condition that such agreements are not in restraint of trade *within the United States*, and provided that they do not contribute to artificially enhancing or depressing prices within the United States. The place where the agreements are made is not relevant, but only the place where their effects are felt.

The case-law reaches the same conclusion. The judgment delivered in the *Alcoa* case (*US* v *Aluminium Company of America*, 148 f 2 416, 1945), abundantly commentated on both by the applicants and by the defendant, illustrates the approach clearly. By declaring in this case, on proceedings commenced against a Canadian company controlled by Alcoa, that 'it is settled law ... that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within

its borders ...' judge Learned Hand did not hesitate to assert that the Sherman Act applies to a foreign undertaking by reason of the effects of its conduct on competition within the United States.

The judgment delivered in the case of *US* v *Imperial Chemical Industries* (145 f suppl. 215 SD NY 1952) goes further. The case concerned an agreement dividing up the world market between the British company, the American company Du Pont de Nemours and other undertakings. The judgment very clearly asserts that a coalition for dividing up territories, even foreign ones, which affects American trade infringes the Sherman Act. But it was in the action brought in the 'Swiss Watch Makers' case (*US* v *Watch Makers of Switzerland Information Center*, Trade Cases/70 600 SD NY 1962) that the application of American law to foreign undertakings was taken to its most extreme consequences. That case concerned agreements made between the Swiss Federation of Watch Makers and various undertakings or associations of undertakings of Swiss, American and other nationalities concerning the production, sale and export of watches or parts for watches.

The court did not merely hold that those agreements fell under the Sherman Act; it also ordered the Swiss Federation to annul certain contracts made in Switzerland and governed by the law of that State, and to put an end to all restrictions on exports to the United States, although these restrictions were in conformity with the regulations issued by the Swiss authorities. It ordered that certain clauses of agreements made with English, German or French producers be annulled or at least rendered unenforceable in the United States.

The judgment even includes orders directly addressed to the Federation of Swiss Watch Makers requiring it to forbid its members on pain of fines to do anything prohibited by the court, and to incorporate some of the provisions of the judgment in the text of its articles of association.

That judgment went beyond the mere application of American law; it constituted *coercive measures* intended to ensure by way of compulsion that the judgment was executed outside American territory. So the intervention of the Government of the Swiss Confederation was understandable, and after negotiation the judgment was revised and a less draconian solution was adopted.

Even so the principle is firmly and squarely stated in the definitive judgment which reaffirms 'the jurisdiction [of the American courts] to review the activities of foreign undertakings and their agreements with foreign third parties, even made outside the United States, if they affect the internal or external trade of the United States'.

Although, as the applicants have stressed, this case-law no longer exactly reflects the present state of American law, they themselves cite the text of paragraph 18 of the American Restatement of Foreign Relations Law, according to which a State has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory if the conduct and its effects are generally recognized as constituent elements of a crime or tort under the law of States that have reasonably developed legal systems; if the effect within the territory of the State in question is substantial; if it occurs as a direct and foreseeable result of the conduct in question.

While therefore the Swiss Watch Makers case may not be settled law, I think that the text which I have just quoted is a significant indication of the acceptance of the 'effects' doctrine in international law.

C — Let me now turn to Community law, which I find clearly applies this principle, at least as regards the Treaty of Rome.

Article 85(1) makes, as I have said, a distinction as to its territorial scope:

(1) By requiring that trade between Member States must be affected, the main purpose of the authors of the Treaty was to determine the frontier between the application of the national laws of the States, which are internal laws covering cartels the effects of which are limited to one country, and the implementation of Community law

as soon as trade between at least two of these countries is concerned.

(2) There is no denying that Article 85 is based only on the criterion of adverse effects on competition in the Common Market, without taking into consideration the nationality of the undertakings responsible for infringements of competition or the location of their registered offices. The same is true of Article 86 on abuse of a dominant position. So as regards the Treaty of Rome there are none of the difficulties of interpretation that arise in connexion with the Treaty of Paris establishing the Coal and Steel Community. Article 65 of the latter forbids agreements, relating to the products concerned, which tend to 'prevent, restrict or distort ... competition', but Article 80 of the same defines the undertakings concerned as meaning those 'engaged in production in the coal or the steel industry *within the territories referred to in the first paragraph of Article 79*', that is to say in the Community, and undertakings 'regularly engaged in distribution' in those same territories. Most academic writers lean towards a restrictive interpretation of these provisions, saying that Article 80 limits the application of Article 65 to undertakings whose registered office is situated in the Common Market or which, at least, have a secondary establishment there.

Without adopting an attitude to this proposition let me note that in any event it could not possibly be advanced in relation to the provisions in the Treaty of Rome concerning competition.
The Court has in fact already held, in connexion with a reference from the Tribunal de Commerce, Nice, that the fact that an undertaking which is party to an agreement covered by Article 85 of that Treaty is situated in a third country does not prevent the application of that provision once the agreement produces effects on the territory of the Common Market (judgment of 25 November 1971, *Béguelin Import Co.*, [1971] ECR 949).

## Section II

### International law

To conclude these preliminary remarks, one may thus say that the effect of a cartel or of a restrictive practice on the internal market of a State is, in most national legal systems, regarded as justifying the jurisdiction of that State to apply its internal law to undertakings, even foreign ones, which have taken part therein, irrespective of geographical location.
Should this power which the States have taken upon themselves be denied to the Community?

A — This is the question raised by Imperial Chemical Industries, relying on the opinion of Professor Jennings. An examination of it brings me immediately into the field of international law.
There is no denying that the European Economic Community has legal personality by virtue of Article 210 of the Treaty. Equally, its personality on the level of international law follows from Articles 113 and 114 of the Treaty on the negotiation of commercial agreements, and from Articles 228 and 238 on the conclusion of international agreements in general, as also from the existence of diplomatic legations to the Community. You have yourselves held that the Treaty of Rome has created a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community (judgment of 15 July 1964) *Costa* v *ENEL*, [1964] ECR 585).
Of course, all this does not turn the Community into a State, but there are many other bodies amenable to international law which differ from States in the nature and extent of their powers, in so far as these are necessarily adapted to the aims and particular purposes assigned to such bodies.
The same is true of the European Economic Community, whose legal personality and capacity are determined in relation to the

objectives and functions defined by the Treaty of Rome.
Thus it cannot exercise all the powers that a State possesses, but only those powers vested in it which are necessary for it to carry out its tasks. Where such powers have been granted to it—and this includes the field of cartels—the Community possesses just as much power as a State, provided that cartels affecting competition in the Common Market are concerned.
That said, when the Community exercises such power it must comply with international law. But the applicants complain that it has wrongly applied principles which, they say, are accepted in public international law, or has at least given them excessive application:

— wrongly applied, because, says Imperial Chemical Industries, the criterion of territorial effects is not applicable to the suppression of activity inimical to competition;

— excessive application, assert the three applicants, because the contested decision contains an interpretation of the 'effects' doctrine which dangerously extends it.

B — I must now first of all consider whether the jurisdiction of the Commission could reasonably be justified by the conduct of foreign producers *inside the Common Market*: for such is the Commission's first line of defence. Basing itself simply on economic reality, the Commission argues that such conduct is to be found in the fact that the parent companies gave mandatory instructions to their subsidiaries established in the Community to increase their selling prices to customers. In the Commission's opinion they thus 'influenced the conduct' of those subsidiaries, a further point being that the latter had no independent power of decision and acted, despite their independent legal personality, as mere executants. This reasoning does not entirely convince me, even though it follows the logic of the contested decision which states that 'evidence of the existence of concerted practices has been found as against the various producers and not as against their subsidiaries or representatives' and that 'the orders to increase prices were of a mandatory nature'.
This reasoning implies, in effect, that the subsidiaries were in a position of complete and exclusive dependence on the parent companies and that they could not have refused to obey their instructions. Taken to an extreme, this argument would amount to denying any substance to the legal personality of the subsidiaries, which would remain to be proved, but which the Commission does not prove. Furthermore, this argument sets too little store by the arguments adduced by Imperial Chemical Industries, according to which that company has not, for its part, carried on any activity on the territory of the Common Market of which the law could take cognizance, since the contracts for the supply of dyestuffs were both made in the United Kingdom and governed by British law. The Commission sees in this argument merely an 'unforgivable legalism'.
To my mind, the position of the Commission is somewhat uncertain on this point.
Therefore I shall not adopt it, particularly since it seems to me to indicate hesitation, if not a certain unwillingness, to entertain the proposition that the actual effects of the conduct of parent companies which directly affect competition in the Common Market are in themselves enough to justify the Commission's jurisdiction over them.
For my part I have no hesitation in saying just that, and accordingly I base my opinion on the 'effects' doctrine, which the Commission has only raised as a secondary point in its arguments.

C — I have stated, in reviewing national legislation, that the principal criterion for the applicability of laws on competition is the territorial effect. But I do not myself believe that this criterion should be accepted unless its *conditions* and *limits* are specified in relation to international law.

1. *The conditions for the application of the criterion of territorial effect*

(a) I think that the first condition lies in

the fact that the agreement or the concerted practice must create a *direct and immediate* restriction on competition on the national market or, as here, on the Community market. In other words, an agreement only having effects at one stage removed by way of economic mechanisms themselves taking place abroad could not justify jurisdiction over participating undertakings whose registered offices are also situated abroad.

I would suggest that the American Restatement of Foreign Relations Law should be interpreted in this way in so far as it states that jurisdiction over conduct occurring abroad may be admitted when the effect occurs as a *direct result of that conduct.*

(b) Secondly, the effect of the conduct must be *reasonably foreseeable*, although there is no need to show that the effect was intended.

(c) Thirdly and lastly, the effect produced on the territory must be *substantial.*

Would it be right to say that in addition the effect within the territory must constitute a *constituent element of the offence?* Is it appropriate to borrow this concept from international criminal law and particularly from the judgment of the International Court of Justice delivered in 1927 in the famous 'Lotus' case to which both the applicants and the defendant have referred at length? The International Court said that it is common ground 'that the courts of many countries ... interpret criminal law in the sense that offences the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if *one of the constituent elements of the offence, and more especially its effects*, have taken place there'.

In analysing these words one might in fact argue that greater weight is given to the need for effects than to the need for a constituent element of an offence, or even that effects are of themselves enough to justify extra-territorial jurisdiction. However, as I have already said, competition law is not a creature of traditional criminal law, and is it not the case that in competition law the effect of the offence is in fact *one of its constituent elements* and probably even *the essential element?* Such is the opinion that I have formed and I think it is the only one that fits an analysis of the facts.

It is indeed the case that Imperial Chemical Industries argues that agreements or practices which adversely affect competition are not universally considered to be offences. Therefore, it is argued, the solution adopted by the International Court of Justice is of no relevance at all in this field. Even so, although the Restatement of Foreign Relations Law renders the application of the 'effects' doctrine subject to the condition that the conduct from which those effects flow must be generally recognized to be reprehensible under the law of States which 'have reasonably developed legal systems', I do not think that this condition is unfulfilled as regards conduct interfering with competition. For in most developed and industrialized countries substantive law forbids and suppresses, either by penal or by administrative means, agreements or practices which adversely affect competition.

This is indeed the case, as I have pointed out, in the United Kingdom and in Switzerland, and who would have the temerity to suggest that they do not have 'reasonably developed' legal systems?

### 2. *The limits to the extra-territorial application of competition law*

Having defined the circumstances in which competition law may apply extra-territorially, its *limits* now remain to be specified.

For I am not unaware of the fact that on several occasions such application has brought forth strong reactions both from Governments and in the courts, particularly in Europe. Nor am I ignorant of the fact that it has given rise to conflicts and led several States to adopt 'counter-legislation', examples of which have been furnished by the applicants.

But what were the protests really about? And what was the purpose of the legislative counter-measures?

First of all, it will be observed that the objections of the Governments were raised against the extended concept of extra-territorial jurisdiction, considered to be abusive, as sometimes applied by certain courts of the United States. I have already noted this with regard to the Swiss Watch Makers case. Similar protests were made in the United Kingdom against the judgment in *United States* v *Imperial Chemical Industries*, in certain parts of which the court took it upon itself to order that company to relicence certain British patents to the Du Pont de Nemours company although exclusive licences for these patents had been granted to another company, a British one. This led the Court of Appeal of the United Kingdom to state that 'it is not competent for the courts of the United States ... to make orders, observance of which by our courts would require that our courts *should not exercise* the jurisdiction which they have and which it is their duty to exercise'.

It should also be noted that the main intention of the counter-legislation adopted in France, as in the Netherlands and in other countries, is to forbid their own nationals to submit to inquiries, supervision and orders emanating from foreign authorities.

These facts lead me to adopt the distinction made in international law by the Commission and by academic writers between 'prescriptive jurisdiction' and 'enforcement jurisdiction', or between *jurisdictio* and *imperium*.

Whether it be criminal law or, as in the present cases, administrative proceedings that are involved, the courts or administrative authorities of a State—and, *mutatis mutandis*, of the Community—are certainly not justified under international law in taking coercive measures or indeed any measure of inquiry, investigation or supervision outside their territorial jurisdiction where execution would inevitably infringe the internal sovereignty of the State on the territory of which they claimed to act.

On the other hand, it must be recognized that those same authorities are competent to prohibit an agreement or practice which produces direct, foreseeable and substantial effects inimical to competition on their own territory and thus, in this case, in the Common Market, and that they are even competent to impose sanctions, even pecuniary ones, by judicial or administrative decisions.

Might it not nevertheless be objected that to impose a fine is *ipso facto* in the nature of an enforcement jurisdiction?

I think not, for two reasons:

— The imposition of a pecuniary sanction, the purpose of which is to suppress conduct interfering with competition, and also to prevent its continuance or renewal, should be distinguished from the recovery of a fine imposed which could only be effected, should the undertaking penalized refuse to pay, by means of forcible execution.

— It is also necessary to distinguish, I think, between the imposition of a fine and a true injunction which would result, for example, from a decision for the production, under pain of *periodic penalty payments*, of certain documents, or which would constitute a means of applying pressure to obtain the revocation of certain clauses considered illegal.

In my opinion the Commission was competent to take the contested decision in relation to the undertakings outside the Common Market, without its being necessary to consider the fact that there are no legal means available to it to ensure that its decision is in fact implemented.

In this case the conditions which I consider to be necessary for the exercise of this jurisdiction are in fact met:

— The linear and uniform increases in the selling prices of dyestuffs to users, decided upon by the applicants, were *directly* and *immediately* applicable in the Common Market, and in the first part of my opinion I said that they had the concrete effect of distorting competition on that market. In these circumstances it is unnecessary to consider whether, as an economic fact, their subsidiaries could or could not have disobeyed the instructions of the parent companies; it is an undoubted fact

that they complied with them. In any event, it is hard to see how they could have avoided passing on to their customer the price increases to which they were themselves subjected, notwithstanding their independence at law and the power to take their own decisions conferred by their legal personality.

— The effect of these practices was not merely direct; it was obviously *foreseeable*, and we know that it was intended and deliberate because it was the fruit of concertation; I shall not go back over that.

— Finally, the effect was *substantial*, because of the rate of the increases, because they were applied to dyestuffs as a whole, and because of the fact that the producers control four-fifths of the dyestuffs market.

So it is without hesitation that I advise you to reject the submission raised by Imperial Chemical Industries, Geigy and Sandoz as to the jurisdiction of the Commission. Let me nevertheless make a final observation, which follow on from one which I made at the beginning of my address to you.

Just as it would be quite wrong to reduce the concept of a concerted practice to so narrow a meaning that it would no longer connote anything more than a particular expression of the concept of an agreement, the obvious risk being that Article 85(1) would not be given the effective scope intended by the authors of the Treaty, so —subject to a reservation concerning powers of enforcement—that article would be drained of a large part of its meaning and at any rate its force would be dissipated if the Community authorities were denied the use in relation to any undertaking outside the Common Market of the powers that that same Article 85 confers on them.

Surely the Commission would be disarmed if, faced with a concerted practice the initiative for which was taken and the responsibility for which was assumed exclusively by undertakings outside the Common Market, it was deprived of the power to take any decision against them? This would also mean giving up a way of defending the Common Market and one necessary for bringing about the major objectives of the European Economic Community.

It remains for me to examine very briefly two submissions, one being that insufficient reasons were stated in the contested decision concerning the extra-territorial jurisdiction of the Commission, the second being the fact that notice of the contested decision was not given to the three companies established outside the Common Market.

On the first point, which we will come across again in another form a little later, suffice it to remind you that contrary to what the applicants assert the Commission was under no obligation at all to reply point by point to the arguments concerning the Commission's alleged lack of jurisdiction which they put forward in their written and oral observations in reply to the notice of objections.

Sufficient reasons are given, in law, in the contested decision by the short but, I think, correct explanation of Article 85 of the Treaty which it gives on this point. In fact, as I have said, it imputes responsibility for the existence of a concerted practice to the producers alone and not to their subsidiaries or representatives, the reason being that the orders sent to the latter were mandatory. I have suggested to you a slightly different reason for deciding this, but I believe that the unlimited jurisdiction of the Court allows you thus to reinterpret the facts and, by way of consequence, the reason stated.

My reply on the second point is that although notification of the decision intended for Imperial Chemical Industries, Geigy and Sandoz was not served at the registered offices of those companies themselves, the reason for this being their refusal to receive it, but on their subsidiaries established in the Common Market, the alleged irregularity of this notification does not in any event affect the legality of the contested decision, since notification is a formality subsequent to the decision. Here, then, it is not necessary to adopt the Commission's reasoning according to which these sub-

sidiaries, which are entirely controlled, it tells us, by the parent companies, are part of the 'internal structure' of the latter. Nor, therefore, is it necessary to refer to your decision in the *ALMA* case (judgment of 10 December 1957, Case 8/56).
Let me just say that the only effect of the irregularity of this notification of a decision, of which in any case the applicants do not deny having had full knowledge, would doubtless have been to prevent time for lodging an appeal from running against them. However, they have exercised their right to bring an appeal before your Court prior to the expiry of the limitation period; therefore the question does not arise.

*Part III*

*Submissions as to form and procedure*

After these doubtless somewhat lengthy considerations, I can now turn to an examination of the submissions as to procedure and as to form raised by the applicants.
In your *Grundig* judgment, you held that in principle proceedings commenced under Regulation No 17 of the Council are of an administrative nature. Furthermore, in your judgments in the *Chemiefarma, Buchler and Böhringer* cases 15 July 1970 you decided certain questions as to the implementation of the Commission's power to impose fines relating to prohibited cartels. The present cases will lead you to confirm this case-law and to clarify how implementing Regulation No 99 adopted by the Commission on 25 July 1963 is to be interpreted.
The applicant companies say in effect that the Commission has applied these two regulations improperly.
I shall attempt to collate their arguments while following the chronological progress of the administrative procedure. As you know, this starts with a decision to commence the procedure. Then there is the notice to the undertakings of the objections held against them. Thirdly, their representatives are heard, and minutes of this hearing must be submitted to them for their approval. Finally, before taking its decision the Commission must consult the appropriate Advisory Committee on matters of competition policy.

Section I

The commencement of the procedure

The applicants complain that on 31 May 1967 the Commission commenced proceedings against them solely on the basis of Article 3 of Regulation No 17, the first paragraph of which states: 'Where the Commission upon application or upon its own initiative, finds that there is infringement of Article 85 or Article 86 of the Treaty, it may be decision require the undertakings or associations of undertakings concerned to bring such infringement to an end'.
It is argued that the Commission had not made it clear to the applicants that they were liable to suffer pecuniary sanctions when it imposed fines on them under Article 15 of the same regulation.
This submission fails on the facts. It is common ground that the decision of 31 May 1967, whereby proceedings were commenced, refers to Regulation No 17 as a whole and '*especially*' to Article 3, a form of words which cannot be regarded as laying down limits.
Two further observations should be made about this submission:

(a) Article 3(3) of Regulation No 17 provides: '*Without prejudice to the other provisions of this regulation the Commission may* ... address to the undertakings ... recommendations for termination of the infringement'. Thus that provision certainly does not exclude the possibility that the presumed infringement may give rise to fines under Article 15.

(b) I think, furthermore, that so far as the implementation of the procedure is concerned it is the notice of objections to the undertakings in question which is decisive because it is the first step of a contentious nature. In the present case this notice, sent on 11 December 1967 to each of the

undertakings concerned, includes at its conclusion an express reference to Article 15 of the regulation and states that the concerted practice at issue is of such a nature as to justify the imposition of fines on the undertakings having participated in it.

## Section II

### The notice of objections

As regards this notice of objections several submissions have been formulated, and it would appear from them that the applicants, without regard to your decision in the *Grundig* case, have reasoned as if the procedure before the Commission were judicial and not administrative. The conception which they display regarding the rights of the defence obviously goes beyond the requirements of a procedure which is merely administrative.

(a) But before coming to that I must put aside a submission to the effect that the letter by means of which the notice of objections was sent to them was signed *ultra vires* by the Director-General for Competition acting under a delegated power. They say that no document whereby such power is delegated appears on the Court file, and in any event such delegation is illegal. However, no delegation of powers is involved. This is simply a matter of the signature of a letter by the Director-General for Competition in place of the Member of the Commission responsible for examining problems concerning competition. Such delegation is in order because it is an internal measure relating to the smooth running of the Commission and its departments and was taken in accordance with Article 27 of the provisional Rules of Procedure which was itself adopted under Article 16 of the Merger Treaty, that is to say the Treaty establishing a single Council and a single Commission of the European Communities of 8 April 1965.

(b) As to the contents of the notice of objections itself, the applicants claim that it was incomplete and insufficiently clear. They also say that this notice did not enable them to submit their observations adequately; they further claim that the contested decision deals with facts which had not been brought to their attention. On this point you held in the *Grundig* case that it is enough for the undertakings concerned to be informed of the basic elements of fact on which the objections are founded, without its being necessary for everything on the Commission's file to be communicated to them. You held that this is the correct answer where the Commission imposes fines on the basis of Article 15 of Regulation No 17. Perusal of the notice of objections is sufficient to show that the facts stated therein, that is to say the uniform price increases of January 1964, January 1965 and finally January 1967 were clearly and completely set out. Moreover, the Commission clearly stated the circumstances as to time and place in which the increases were announced and put into effect, and it even mentioned the undertakings which received instructions to increase their prices and the means whereby those instructions reached them.

The fact that these circulars, Telex messages and other instructions were not enclosed with the notice of objections seems to me to have no effect on the regularity of the procedure, especially since the undertakings concerned were in a position to take cognizance of them. Thus the contested decision does not refer to any material fact which was not previously brought to the attention of the applicants. The most that can be said is that as regards the meeting at Basel, expressly mentioned on page 9 of the notice of objections, the contested decision includes a simple rectification compared with the text of the notice in that it says that during the course of this meeting Geigy announced that it 'intended to increase its selling prices to customers before the end of the year', without repeating the conclusion which the notice of objections drew from this when it stated that 'the 1967 increase in prices *was decided upon by all the producers* in question during a meeting which

took place at Basel during August 1967'. Similarly, while the contested decision refers to the decision of the Bundeskartellmat of 28 November 1967, from which it appears that Geigy announced 'that it would increase the price of its dyestuffs by 8% with effect from 16 October 1967', this is not a reason for the contested decision, but a factual reference to the decision of the Bundeskartellamt.

(c) The applicants also argue that the notice of objections was sent before the Commission's inquiry into the facts at issue was completed; investigations were made subsequent to this notification. This is true, but I do not think that this way of proceeding was irregular. There is no provision which forbids the Commission, upon learning of certain agreements or conduct which appear to it to be contrary to Article 85 of the Treaty, to pursue its examinations, inquiries and investigations, even after serving on the undertakings concerned a notice of the facts already taken into consideration against them.
Furthermore, the Commission explains that the only reason for continuing inquiries was to examine certain statements made by a number of undertakings either in reply to the written notice of objections, or verbally. In any event, this would only constitute an infringement of the rights of the defence if, further to these investigations subsequent to the notice of objections, the Commission had taken new facts into account against the applicants and had based its decision on these facts without previously communicating them to the undertakings, that is to say without allowing the undertakings to put forward their observations on these facts. Yet such was not the case because, as I have said, the contested decision does not set out any fact which had not been brought to the attention of the applicants in the notice of 11 December 1967.
Finally, upon receipt of the notice of objections, the applicants should have been given a reasonable time for presenting their written observations. On this point the eight weeks which the Commission gave them for putting forward their point of view was, in my opinion, sufficient. Furthermore, they had the possibility of requesting, in their written observations, that their representatives be heard orally in application of Article 7 of Regulation No 99/63 of the Commission. We know that the hearing of the representatives of the undertakings only took place on 10 December 1968, that is to say one year after the notice of objections was sent. This means that the applicant companies had a considerable period of time in which to put forward their views on these objections. Therefore there was no failure to respect the right of the defence.

(d) Finally, according to the applicants Geigy and Sandoz, the notice of objections sent to them by registered letter at their registered offices in Basel constituted an 'official measure of a coercive character by a foreign authority'. Swiss law does not allow such a measure to be carried out on the territory of the Confederation except where there is a reciprocal agreement or where the Swiss authorities have granted permission. The argument is that since notice was effected in disregard both of Swiss law and of the general principles of international law it is void and of no effect.
So the applicants, acting on instructions from their national authorities, returned this notice to the sender. Furthermore they did not take part, as such, in the hearing of December 1968.
Therefore they say that they were deprived of the right to be heard, in violation of Article 19 of Regulation No 17, and Articles 2 and 4 of Regulation No 99/63.
I shall do no more than point out, as does the Commission, that the notice of objections does not of itself have any coercive force: it is intended simply to enable the undertakings concerned, first, to take cognizance of the basic facts held against them, and secondly to express their point of view during administrative proceedings which may lead to the imposition of a fine. In these circumstances it seems to me at least doubtful whether the principles of international law can usefully be invoked. The Commission did not infringe them in sending the notice of objections directly to the registered offices of the Swiss com-

panies. However that may be, there is no denying that in fact the said companies did receive full knowledge of the objections made against them and were in reality placed in a position where they could have made any observations which they might have thought useful for the defence of their interests.
Therefore this submission must be rejected.

## Section III

### The hearing of the representatives of the undertakings concerned

As regards the hearing of their representatives, certain applicants (Bayer and Hoechst) have argued that they were summoned to attend only shortly beforehand. In fact a summons to attend was sent to them on 20 November 1968, that is to say nearly three weeks before the date fixed for the hearing. Here again I think that this period was sufficient, especially since the companies had had notice of the facts put forward against them for more than eleven months.
As regards this hearing, BASF complains that the officials of the Commission who were required to conduct it refused to allow BASF to be represented, as it had requested, by counsel, since Article 9(2) of Regulation No 99/63 only authorizes undertakings summoned to appear in the person of their legal representatives or of representatives authorized by their constitution. This provision is not contrary to the Treaty or to Regulation No 17 of the Council, and Article 24 of this latter regulation gives the Commission power to adopt implementing provisions concerning hearings. The provision is also justified by the fact that the legal representatives or representatives authorized by the constitution of the undertakings are in principle the persons who are the best informed and best able to discuss the objections. Furthermore, although it could not be *represented* by counsel, there was nothing to prevent BASF from asking counsel to *assist* its legal representatives.

## Section IV

### The minutes of the hearing

Finally, some of the applicants say that they were not given the opportunity of approving the minutes of the hearing and that because of this fact the procedure was invalid.
According to Article 9(4) of Regulation No 99/63 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 reason for the observation of this formality is to provide the Advisory Committee and the Commission with complete information on the essential content of the statements made at the hearing of the parties (Case 44/69, judgment of 15 July 1970, [1970] ECR 733). If this formality has been omitted but it is otherwise proved that the statements of the interested parties were not set down inaccurately and that they were not held against them, it is hard to see how this omission could have caused them material prejudice.
It is not denied that at the hearing of 10 December 1968 it was agreed that the minutes of this hearing would only later be drawn up and submitted for approval to the persons heard. It is equally established that the draft minutes were sent to the undertakings represented by letter of 27 June 1969 which asked them to signify their approval 'as soon as possible'. Although it is true that as regards Bayer an unsigned copy was, due to an oversight, transmitted to its representative with the statement that that undertaking had until 15 September 1969 to approve the said minutes, it remains the case that on the same day the said undertaking received a signed original requesting it, like the other applicants, to approve the draft minutes as soon as possible. So, with a little application, it would have been in a position to send in its approval of the minutes and, if it so chose, its observations in good time. Bayer has never made the slightest attempt to exercise its right to call for amendments with a veiw to eliminating any possible inaccuracies in the record of what its representative said, and for good reason.

The Commission has produced the complete recording of the statements of Bayer's representatives. It appears that they gave hardly any explanation as to the substance and that, essentially, all they did was to state that the notice of objections had not been sufficiently clear to convey to their minds the points on which they ought to have offered explanations. Now this assertion is not new; it was put forward by Bayer from the very beginning (see the letter of that company to the Commission of 9 December 1968), and it was entirely stated afresh and developed in the minutes, at pages 16 and 24. Therefore the text thereof was not 'drawn up in such a way as to be misleading in a material respect' (judgment of 15 July 1970 in Case 44/69, *Buchler*, [1970] ECR 733).

## Section V

### The formal statement of reasons for the contested decision

Finally, some of the applicants (BASF, Sandoz, Cassella and Hoechst) complain that the Commission did not formally state sufficient reasons in its decision on the subject of the existence of a concerted practice.

Although under Article 190 of the Treaty the Commission is indeed required to state reasons for its decisions, you have held that this requirement is met when the reasons state clearly and in a coherent way the essential elements of fact and of law on which the decision is based, without the Commission's being required, amongst other matter, to go over all the points which have been discussed during the administrative procedure.

In the present case, as I have said, no essential point is made in the grounds of the contested decision which was not made known to the applicants in the notice of objections. That decision sets out clearly and completely all the facts taken into consideration in justifying the finding of the existence of a concerted practice. Furthermore, the Commission took care to state legal reasons for its decision as regards each of the conditions required by Article 85(1) in respect of a concerted practice, with particular reference to the effects that such a practice must have on competition and to the effects on trade between Member States. The Commission was not required, it seems to me, to impute to each of the undertakings concerned the facts which were held against it in particular, because in the final analysis the primary objection made against them all was that they participated in that concertation. Even so, in the grounds for its decision the Commission made individual references to certain companies, although this was no doubt unnecessary in the context of one common procedure concerning the same infringements committed in similar circumstances by several undertakings.

Finally, the same applicants maintain that in its decision the Commission ought to have replied to the written or oral arguments which they put forward during the administrative procedure. They thus raise the very questions with which the Court is concerned in this case, which are tightly bound up with the very existence of the infringement at issue. Therefore they could only usefully be dealt with in the procedure before the Court.

## Section VI

### Publication of the contested decision

The applicant Francolor complains that the Commission published the contested decision in the Official Journal of the Communities although Article 21 of Regulation No 17, which provides for the publication of certain decisions, does not include those taken in application of Article 15 of the said regulation, that is to say decisions whereby a fine is imposed.

But the Commission rightly answers that the publication of the contested decision after notification thereof could not as such render the decision void. The only thing which matters is the notification of the decision: it is the date of that notification which counts for calculating the period within which an appeal must be lodged and it is the text which is notified

to the addressee which alone is authentic. Moreover, on 15 July 1970 you decided in your judgment in the *Chemiefarma* case that although the Commission was not obliged to publish a decision whereby a fine was imposed, 'there is nothing in the letter or the spirit of ... Article 21 to prevent it from publishing it since this did not amount to divulging the undertakings' business secrets' and that 'The publicity thus given to the decision may even contribute to ensuring the observance of the rules of the Treaty on competition'.

*Part IV*

*The fine*

Finally, I come to the questions relating to the fines imposed.

As was pointed out by Mr Advocate-General Gand in his opinion on the cases relating to the international quinine cartel, decisions imposing a fine are based on Article 15(2) of Regulation No 17, which states that the Commission may impose fines on undertakings where, either intentionally or negligently, they infringe Article 85 of the Treaty. It provides that in fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

You yourselves held in your judgment in those cases that for the purpose of fixing the amount of the fine, the gravity of the infringement is to be appraised by taking into account in particular the nature of the restrictions on competition, the number and size of the undertakings concerned, the respective proportions of the market controlled by them within the Community and the situation of the market when the infringement was committed. You added that the individual situation and individual conduct of each undertaking and the importance of the part which it played in the cartel may be taken into consideration in fixing the amount of an individual fine.

I propose to follow the guidelines which thus emerge from your judgments. But first I must examine a submission already made in connexion with the international quinine cartel and based on limitation periods for infringements.

Section I

Limitation of actions

In the present cases the applicants argue that in the absence of a limitation period for infringements, no such period having been laid down in Community competition law, the principle existing in similar legislation in the Member States should be applied. They maintain that proceedings against infringements resulting from price increases in 1964 and even in 1965 are out of time because those increases took place too long before the administrative procedure was commenced by the Commission on 31 May 1967.

Put in this way, the question seems to me identical to that which you decided in your judgments of 15 July 1970, *Chemiefarma and Others*, [1970] ECR 661. After noting that 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, you drew to mind the point that 'In order to fulfil their function of ensuring legal certainty limitation periods must be fixed in advance', and you held that 'The fixing of their duration and the detailed rules for their application come within the powers of the Community legislature'. In saying this you rejected, by implication but unquestionably, the argument that a common principle found in national law should apply to Community law, taking the view that that principle is inseparable from the provisions governing its application.

I have no intention of questioning what you have thus already decided, particularly since, if my information is correct, a proposal from the Commission dealing with this problem of limitation of actions may well be submitted to the Council in the near future.

But the applicants' line of argument leads me to wonder whether at least as regards the 1964 increase the Commission did not tacitly give up its right to take action.

Counsel for the ACNA company in fact pointed out that the unlimited jurisdiction of the Court in relation to appeals against pecuniary sanctions empowers it to consider whether the period which elapsed

between the facts and the occurrence of the first measure by which the Commission exercised its right to commence proceedings is not tantamount to the abandonment of that right. Whilst I agree that this Court has, as the result of its unlimited jurisdiction, power to undertake such a consideration, I do not think that this argument is well-founded. It is common ground that in the present state of Community rules the Commission has the right to commence or to refrain from commencing proceedings concerning cartels. It is also true that if it decides to commence proceedings it may do so at any time. This is an application of the general principle of discretion, which is doubtless applicable in this field.

However, first:

— what was the measure whereby the Commission made it clear that it intended to commence proceedings?

and secondly:

— what is the period beyond which the right to commence proceedings ought, unless a new act intervenes, to be held to have been abandoned?

These two questions lead me back inexorably to the field of the limitation of actions.
In reality, the first question involves identifying the first measure which interrupted a period of limitation which, of course, does not exist in Community law. However, reasoning as if this question did arise, I should say that in my opinion the measures of investigation carried out in June and July 1965 by officials of the Commission pursuant to Regulation No 17 upon written authority, as required by Article 14 of that regulation, ought to be looked upon as measures of inquiry having the effect of interrupting the period of limitation. The applicants' proposition, that the first measure whereby action was taken was the decision to commence proceedings (31 May 1967) is thus, already on this point, highly debatable.
The second question, on the abandonment of the right to commence proceedings, calls for the following answer: any authority which has power to bring proceedings against infringements and to suppress them has only two means of abandoning proceedings which are already under way:

— either to do so by express renunciation, which clearly is not the case in the present instance;

— or to let time run without taking any measure of a nature such as to interrupt the limitation period until it has expired. But this again means coming back to the theoretical supposition that there is a limitation period although no such period exists in Community law.

Let me add that in the present case the period which elapsed between the first investigations of June 1965 and the decision to commence administrative proceedings on 31 May 1967 was too short, in any event, to justify the idea that the right to take action was renounced by implication. Finally, as I have said, the increases in question, which constituted a concerted practice, cannot be dissociated one from another. In terms of criminal law, one could therefore say that this concerted practice constituted a continuing offence.
Therefore, no matter how it is interpreted, the complaint relating to the limitation of actions can only be rejected.

## Section II

### On whether the fine imposed by the national authorities should be taken into consideration

Three of the German applicant undertakings, Bayer, Cassella and Hoechst, complain that the contested decision did not take into account the fine which had been imposed on them by the Bundeskartellamt in its decision of 28 November 1967 concerning the increase of 1967, although, so they say, in your judgment in

the *Walt Wilhelm* case of 13 February 1969, you approved the principle that penalties should not overlap.

Without wishing on the present occasion to examine the interpretation which these applicants claim to extract from your judgment, I consider it enough to reply, as does the Commission, that the administrative decision in question was never executed because execution was stayed by the appeals brought against it, and that in any event it was subsequently annulled by the German courts.

## Section III

### The amount of the fine

If you adopt the views which I have ventured to put forward, you will finally confirm the total amount of the fines imposed by the Commission.

The repeated increases in prices of dyestuffs proceeded in effect from a general plan which reveals a deliberate intention. The gravity of the infringement seems to me to be equally established. Admittedly, the increases remained in force for a relatively short time because of the working of 'price erosion', but the amount of the fine, which all in all is moderate taking into account the size of the undertakings concerned, seems to me to take this consideration sufficiently into account.

In particular, the very light fine imposed on ACNA seems to me to fit exactly the particular conduct of that undertaking: for while it in effect prevented the 1967 increase from taking place on the Italian market by not following the movement, it fell in with the 1964 increase and, at least as regards the 1965 increase of 10% on pigments, it took part in this on the Benelux markets.

I am therefore of the opinion that:

— the applications in Cases 48, 49 and 51 to 57/69 should be dismissed;

— the costs should be borne by the applicants.