take action against an agreement in accordance with their national law even when an examination of the position with regard to that agreement from the point of view of its compatibility with Community law is pending before the Commission, subject however to the condition that the application of national law must not prejudice the full and uniform application of Community law or the effects of measures taken or to be taken to implement it;

2. **Article 7 of the EEC Treaty prohibits Member States from applying their laws on cartels differently on the ground of the nationality of the parties concerned, but it is not concerned with disparities in treatment resulting from divergences existing between the laws of Member States, so long as these affect all persons subject to them in accordance with objective criteria and without regard to nationality.**

Lecourt Trabucchi Mertens de Wilmars

Donner Strauß Monaco Pescatore

Delivered in open court in Luxembourg on 13 February 1969.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 19 DECEMBER 1968[1]

Mr President,
Members of the Court,

The reference on which I am to give my opinion today concerns problems which have arisen with regard to the competition law of the EEC Treaty. For this purpose it is necessary to know the following facts.

The four German undertakings—Badische Anilin- & Sodafabrik AG, of Ludwigshafen, Farbenfabriken Bayer AG, of Leverkusen, Farbwerke Hoechst AG, of Frankfurt-am-Main-Hoechst, and Casella Farbwerke Mainkur AG, of Frankfurt-am-Main-Fechenheim manufacture, *inter alia,* coal-tar dyes and mineral colours. According to the Bundeskartellamt in Berlin, representatives of these undertakings meet from time to time the representatives of other undertakings—French, English and Swiss—which manufacture coal-tar dyes and pigments, in order to try to establish a uniform behaviour with regard to prices. One such meeting took place in August 1967. All the undertakings represented decided subsequently (before 19

1 — Translated from the German.

September 1967) to increase the prices of coal-tar dyes by 8% from 16 October 1967. The increase was notified to the customers and to the other interested undertakings which they supply in part. Following that, several customers filed complaints with the Bundeskartellamt.

The latter considered that the conduct which had been brought to its attention constituted an agreement which was contrary to paragraph 1 of the German Law against Restraint of Competition (Gesetz gegen Wettbewerbsbeschränkungen) and therefore void. Furthermore, it considered that by passing on the price increases to their customers, the parties had intentionally disregarded the nullity of the contract and had consequently committed an administrative offence under paragraph 38 of that law. That is why, by an order of 28 November 1967, the Bundeskartellamt imposed fines of varying amounts upon the four German undertakings mentioned above, upon two of their directors and upon one of their sales managers.

As a consequence of this and in accordance with paragraph 54 of the German Law on administrative offences (OWG—Gesetz über Ordnungswidrigkeiten) the parties sought to have the matter decided in court by the Kammergericht in Berlin on the basis of paragraph 82 of the GWB. They denied that there was any agreement within the meaning of paragraph 1 of the GWB and at the same time claimed that because the case was already under consideration by the EEC Commission the Bundeskartellamt had no jurisdiction to apply German law.

In fact, following a decision of 31 May 1967, proceedings are in progress before the Commission under Article 9(3) and Article 3 of Regulation No 17; they are directed against the four abovementioned German undertakings and against other manufacturers of dyestuffs from Member and third countries. These proceedings relate, first, to the increases in the price of coal-tar dyes of January 1964 on markets outside the Federal Republic of Germany, and second to the increases in price for coal-tar dyes on the German market which came into effect on 1 January 1965 (and which were also the subject of other proceedings before the Bundeskartellamt for the imposition of fines which had to be abandoned because of difficulties in obtaining proof). Finally, the proceedings before the Commission also relate to the increases in price on 16 October 1967 condemned by the Bundeskartellamt. We learn this from the list of objections communicated to the undertakings in question in December 1967 as required by Article 19 of Regulation No 17, in conjunction with Article 2 of Regulation No 99/63. The Commission has in the meantime heard the parties on 10 December 1968, but has not yet given its final decision.

Given these facts, the Kammergericht has admitted the possibility of a conflict between the Community law on competition and the national law on cartels. That is why, at the request of the parties concerned, it stayed proceedings and, by order of 18 July 1968, referred to this Court the following questions under Article 177 of the EEC Treaty:

1. Is it in accordance with Article 85(1) and (3) of the EEC Treaty and Article 9 of Regulation No 17 of 6 February 1962, and with the prevailing general principles of Community law, to apply concurrently to a situation capable of fulfilling the conditions set out in Article 85(1) of the EEC Treaty not only the prohibition prescribed by that Article but also the restrictive provisions contained in the cartel law of a Member State, in this instance paragraph 1 together with paragraph 38(1) (i) of the GWB (the German Law against Restraint of Competition), when the Commission of the

European Communities has already asserted its jurisdiction under Article 3 of the EEC Treaty through action taken under Article 14 of Regulation No 17 (on cartels) (Case No IV/26.267/EI of the Commission of the European Communities)?

2. Or is this impossible because of the risk of its resulting in a double sanction imposed by the Commission of the European Communities and by the national authority with jurisdiction in cartel matters—in this case, the Bundeskartellamt?
3. Does Article 5 of the EEC Treaty, in conjunction with Article 3 (f) of the EEC Treaty and with Article 9 of Regulation No 17 (on cartels) make this impossible in particular because Member States must refrain from applying their own law regarding competition when the uniform legal assessment of a case would otherwise be placed at risk and or when there would thereby result a distortion of competition in the common market to the detriment of those subject to that law?
4. Does Article 7 of the EEC Treaty make this impossible, in particular when the national authority with jurisdiction in cartel matters—in this case the Bundeskartellamt—addresses its measures exclusively to the nationals of its own state and thereby may place them at a disadvantage in comparison to the nationals of other Member States in a comparable situation?

In accordance with Article 20 of the EEC Protocol on the Statute of the Court of Justice the addressees of the decision imposing the fines, the Governments of the Federal Republic of Germany, the French Republic and the Kingdom of the Netherlands, and the Commission of the European Economic Community (sic), submitted written observations. They also presented oral observations at the hearing on 27 November (except for the French and Netherlands Governments).

On the basis of the arguments thus put forward I shall try now to propose *answers to the questions posed.*

I — Admissibility

There is no difficulty as to the admissibility of the reference, I think. It is true that the question is asked whether the application of national provision of law is compatible with Community law. But in reality this is not intended to mean that this Court should apply Community law to a particular case (to the measure taken at the national level) or examine whether the national law is compatible with Community law, which would not be possible in the light of past decisions of this Court. On the contrary the court making the references is only concerned to procure from an interpretation of Community law the principles whose application in the proceedings at national level will enable a specific problem relating to the law on cartels to be solved. In doing this, we can also, of course, interpret secondary Community law (such as Regulation No 17) and take into account or elucidate general principles of Community law.

After these preliminary remarks, we can pass directly to the reply to be given to the questions asked.

II — The answers to the individual questions

Basically, from the point of view of Community law, the facts with which we are faced raise but one question: is the application of the prohibitory rules of the national law on cartels excluded when certain conduct is capable of meeting the conditions set out in Article 85(1) of the EEC Treaty and when the

Commission has already taken the initiative, that is to say, started proceedings? The Kammergericht considers that the solution of this problem depends on several points of view, and it is these latter which find expression partly in the first question and partly in the subsequent questions.

But this conclusion does not prevent us from examining the matter along the lines of the scheme adopted by the Kammergericht, and that it what I propose to do now.

1. *The first question*

In the opinion of the Kammergericht, it is necessary to examine first whether Article 85(1) and (3) of the EEC Treaty, Article 9 of Regulation No 17 and the general principles of Community law say anything which might permit the relations between the Community law and national law to be clarified.

On this subject the parties concerned have quite different opinions.

The first, second, third, fifth, sixth and seventh plaintiffs in the main action consider that within its field of application Article 85 applies exclusively.

The opinion held by the fourth plaintiff, that the national laws should give way when a situation is entirely covered by prohibitions decreed by the EEC Treaty in the field of cartels (that is to say, when the national prohibitions are not more extensive than the Community prohibition), seems to go a little less far.

Conversely, the governments concerned in the case, although not entirely in agreement on points of detail, are opposed to the argument that the agreements covered by Article 85(1) should be examined exclusively on the basis of Community law and support the view that Community law and national law apply side by side and that consequently they could to a large extent be applied concurrently to one and the same set of facts of restraint of competition.

Finally, the Commission adopts an intermediate position: in its opinion there is no objection in principle to a concurrent application of prohibitions of Community law and national law. But this should in no case be allowed to threaten the uniform application and implementation of the Community law. That is why national proceedings (except for conservatory measures) should at least be stayed until completion of the proceedings before the Commission.

The range of opinions on our problem is thus quite wide and that suffices to show that we are concerned with a difficult question. The large number of technical publications dealing with this subject from different angles confirms that impression. To be sure, one finds that the dominant opinion in these writings favours the so-called 'double barrier' theory (Zweischrankentheorie), which says that competition agreements are only lawful if they meet the requirements laid down both by national law and by Community law and that it is also possible for the consequences of the prohibitions to be applied concurrently. However it must on the other hand be admitted that the particular difficulties of the present case, difficulties which relate to the possibility of a *double sanction*, have not been analysed quite so deeply and the technical commentaries on this question are not very helpful. That is why we cannot avoid making a thorough analysis of the case.

If we first try to obtain an answer from the wording of the Treaty and its implementing provisions (I do not think there is much point in examining the first working documents such as the Spaak Report) we find that there is nothing in the provisions cited by the Kammergericht to indicate that national cartel law is *displaced* when the conditions set out in Article 95(1) are

present or that there exists a legal situation analagous to that in force in the ECSC where, as is well known, agreements concluded by coal and steel undertakings can only be examined under Article 65 of the ECSC Treaty.

In particular, Article 9(3) of Regulation No 17 cannot support the argument that Article 85 applies exclusively within its field of application. As you know, under Article 9 the authorities of the Member States remain competent to apply the provisions of Article 85(1) and Article 86 *as long as* the Commission has not initiated any procedure under Articles 2, 3 or 6. But it is clear that the provision was intended thereby merely to define the limits of jurisdiction of the different authorities for the application of one and the same law, *Community law,* and not to define the relationship between different legal systems. This conclusion, namely, that Article 9 does not stipulate a *total* suspension of the national proceedings involving problems of Community law, could conversely even allow the inference to be drawn that Regulation No 17 is itself based on the idea that Community law and national law are to be applied *concurrently.*

Article 87(2)(e) of the EEC Treaty also points to this, as certain of the parties concerned have rightly emphasized and as the Commission itself admits. Article 87 provides that the Council shall adopt any appropriate regulation or directives to give effect to the principles set out in Articles 85 and 86, in particular any designed to 'determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article'. Of course, when one tries to interpret that provision one cannot deny the possibility that, as has been emphasized by various parties, it would still have a meaning even if one conceded the exclusive applicability of Community law in certain competition situations. One thinks, for instance, of *procedural* rules intended to avoid a conflict of jurisdiction in cases of purely national cartels, to which Community law does not apply but to which, of course, the national cartel law does. But it cannot be denied that given the wording of the provision in question a much more plausible inference is that it is based on the idea of an *overlapping* of two legal orders (that of Community law and that of national law), that is to say, that the two legal orders are simultaneously applicable to the same situation. In fact, the provision talks of *determining the relationship* between national laws and Community law ('définir les rapports entre les législations nationales et les dispositions de la présente section . . .'). But this is really a reference to the *substantive* legal provisions, and there is apparently no question of a *fixed* relation between the two which only requires to be governed by a set of procedural rules.

Article 88 of the EEC Treaty also points in this direction. According to that Article, until the entry into force of the provisions adopted in pursuance of Article 87, the authorities in Member States shall rule on the admissibility of agreements, . . . in accordance with the law of their country and with the provisions of Article 85 . . . and of Article 86. Whilst that Article is concerned with deciding 'in accordance with the law of their country', it does not seem quite logical to consider solely the *formal* framework, the formalities and procedures of the national law, as some writers do. In particular, since at the beginning (before the adoption of Regulation No 17) there were no procedural rules in existence under Community law, the fact that Article 88 grants the national authorities a general power of decision could of course only mean that those authorities should follow their national law of procedure. Consequently, if one wishes to

give that Article a content beyond this self-evident meaning, national *substantive* law must necessarily be taken into consideration, in so far as it existed at all and in so far as it was *not contrary* to the principles of Article 85 (which can be said of the law in force in a number of Member States and which is based on the concept of misuse of powers). But that means that Article 88, too, is based in principle on the idea of the simultaneous application of national law and Community law. Since, moreover, that Article 9 of Regulation No 17 also refers to Article 88, it can be deduced that Regulation No 17 does not constitute a regulation signalling the end of the transitional period provided for in Article 88, but that on the contrary, for this purpose it is necessary to adopt provisions in pursuance of *Article 87 (2)(e)* (as the oft-quoted Economic Policy Committee of the Bundestag seems to have thought).

Thus, there is no doubt that the wording of the Treaty does supply powerful arguments in favour of the legal position adopted by the governments concerned. Added to this is the fact that if one accepts the opposite theory (namely, that Community law applies exclusively within its field of application) one is obliged to fall back, in defining the field of Community law as opposed to purely national law, on a very unreliable, fluid and changeable criterion: the harm caused to interstate trade. However, it would be premature to attempt an answer to the question solely on the basis of these findings.

Indeed, however justified the 'double barrier' theory may be when the national law requires an examination of supplementary criteria (for example, when a set of facts contains certain elements not covered by Community law, but by national law), it may rightly be wondered whether it is possible to apply to one set of facts two essentially similar prohibitions, that is to say, whether, as seems to be the case here, one situation can be examined by two authorities in the light of essentially identical criteria. I shall anticipate the answer: I see in fact no need to make any restriction in this direction. In saying this, I am aware that it is not altogether correct to rely on the difference between the interests protected by Community law on the one hand (competition in interstate trade) and by national law on the other (competition in internal commerce) because the harm caused to competition between the States also affects the market situation of at least one Member State, so that conversely Community competition law is necessarily designed to protect internal competition, too. It is, rather, another consideration which is decisive. It must be admitted that even supposing such an overlapping of the protected areas, the application of the Community prohibition does not coincide perfectly with the application of the prohibition of the same nature imposed by the national law. The reason is simple: on the one hand, we have the Community competition policy which develops gradually through the efforts of the Community institutions and, on the other, forming an integral part of the national economic policy, the continued existence of a national competition policy, of greater or lesser individuality, with regard to which the Treaty stipulates only duty of *coordination*. The variety of fundamental conceptions may therefore lead to completely different evaluations of one and the same situation, even if essentially the same situation, even if essentially the same rules of prohibition are applied. One need only consider the concept developed by the Commission of a 'perceptible' adverse effect on competition, which can occur for instance when international agreements do not exceed a certain turnover; or cases which seem, from the Community point of view, of

little interest because the adverse effect on competition shows itself mainly on the national level, while its effects on international trade are of secondary importance. It may happen in such cases that the national criteria are the more severe, that is, the national prohibitions apply when the Community provisions do not.

As for the extent to which these divergences can be accepted as the consequence of differing competition policies, the reply to that question must now depend solely on whether a real *contradiction* between Community law and national law exists. That would be so if the implementation of a Community prohibition clashed with the authorization of a cartel by a national authority, which of course even those supporting a concurrent application of Community law and national law do not admit. However, such a contradiction does not exist when the national cartel law applies stricter rules, for that implies, as the French Government justly emphasizes, that the national cartel law operates to the *same effect* as Article 85(1), *in keeping with the meaning of* that provision, that is, that it perfects the conditions of competition.

Whether there would be a real danger of contradiction if national prohibitions were applied despite the likelihood of an exemption's being granted by the Community executive under Article 85(3) is a question which can be left open at this stage of the case; this is because the agreement (or the concerted practice) was not notified, but also apparently because—as the parties are agreed—the nature of this particular restriction on competition rules out the possibility of the Commission's granting any exemption. Consequently, we may say with the Netherlands Government that the question is not necessary for a decision in the national proceedings. Should one nevertheless not wish to avoid the question, for example because some of the parties remarked that paragraphs (1) and (3) of Article 85 constitute one entity, a coherent whole, or because a judgment on Article 85(3) by the national authorities often cannot be given with such certainty as in this case—if, then, we also take into account Article 85(3) —we must, in agreement with the governments concerned, deny in principle the existence of a conflict, even if the exemption under Community law is thwarted by the application of national cartel prohibitions. What really happens at the Community level? Properly understood the explanation is simply that certain positive aspects of an agreement may prevail over the Community prohibition and that the application of Article 85(1) is *waived*. As the German Government has stressed, the freedom of action which Article 85(1) initially retricted is thus restored. But, within the framework of that freedom of action, the national authorities with competence in cartel matters must themselves be able to take into account the interests of national competition policy, that is, to consider aspects which it is not possible to take into account in the same way in the context of Community law, either procedurally (in spite of Article 10 of Regulation No 17) or substantively (because of the special criteria of Article 85(3)). If they act in this manner, if the national authorities in effect thwart the Community exemption through the application of a national rule of prohibition, they no more threaten the objectives of the Treaty than do the parties to an agreement when they refrain from applying it, which can occur at any time. This conclusion applies as a general rule because in principle cartels cannot be considered as instruments for the organization of the common market. However, if, in the rare exceptional case that the Commission's evaluation of the determining factors should establish the existence of a

balance on the side of the Community interest and reveal that an agreement *serves* or even *promotes* the *objectives* of the Treaty (for example, owing to an intensification of competition), then—and here I agree with the Federal Government—the risk of conflict with decisions on cartels taken at national level would seem to be rather hypothetical, given that it is possible to harmonize the concepts through permanent contacts at the administrative level. At most, for the purpose of providing a *legal* guarantee of the exemption granted by the Commission, it is possible in such cases to imagine the issue of a provision under Article 87(2)(e), that is, of a special measure governing the relationship between Community law and the national provisions on competition.

Without going into the American law which is concerned with related problems, this brings me, after all the foregoing considerations, to the conclusion that the first question put by the Kammergericht should be answered in the affirmative.

2. The second question

The second question concerns the point whether the danger of the same conduct's attracting a double sanction imposed by the national authorities and by the Commission prevents the concurrent application of national law and Community law.

The governments concerned reply in the negative with various arguments, while the plaintiffs in the main action are of the contrary opinion. For its part, the Commission considers that the national authorities should stay the national proceedings at least until the conclusion of the proceedings pending before it.

The nature of the facts and the arguments of the parties incline me to think that here lies the heart of the conflict of interpretation.

Before going into details, I should emphasize that the risk of a double sanction only exists for some of those concerned, namely the *undertakings*. *Natural* persons, on the other hand, who were fined under the decision of the Bundeskartellamt, need have no fear of a punitive decision of the Commission since the power to impose sanctions conferred on the latter by Article 15 of Regulation No 17 is limited to undertakings.

Taking this limitation into account, the first question which arises in the opinion of the plaintiffs in the main action is whether the fact that the Commission has *initiated* a procedure automatically excludes the opening of proceedings at national level. In that respect, they invoke the principle 'non bis in idem' which is applied in all the Member States and which is consequently part of Community law and which in their submission also means that a further procedure may not be initiated for the same purpose as that already begun. That question cannot be left unanswered on the pretext that the date when the procedure was initiated is open to doubt (as you know, the infringements complained of by the Bundeskartellamt were only included in the proceedings before the Commission at a very late stage). Indeed, the manner in which the Kammergericht has formulated its question shows that it apparently assumed that the Commission exercised its jurisdiction *before* the Bundeskartellamt itself took action.

On closer inspection, however, it transpires that the argument of the plaintiffs is invalid. I do not in fact share the objection of the Netherlands and French Governments that these sanctions are of a different legal nature according to whether they operate on the national or on the Community level (criminal penalties on the one hand, administrative sanctions on the other), for, even if that is a correct view of the scope of domestic

law in those States, it does not apply to the facts in the present case. In fact, it would appear to be indisputable that the administrative fines provided for by the Law against Restraint of Competition (GWB) and which in the German view fall within the law concerning administrative offences are of the same legal nature as those provided for in Article 15 of Regulation No 17. However, I think that in the sense understood by the plaintiffs, the principle 'non bis in idem' is applicable only within the framework of a particular *legal system;* it does not apply with respect to the relationship between national law and Community law. On this point, case-law has already held on several occasions that these are two distinct and independent legal orders. So long therefore as the Communities do not constitute a federal legal order, it seems more reasonable to approximate the acts of the Community institutions to acts of sovereignty committed by foreign powers and to apply to the exercise of the power of sanction the rules in force in relationships between different legal systems. It follows, however, that the mere fact that the Commission has *initiated* a procedure cannot of itself compel the national authorities to surrender their power of sanction.

Here one can add a second consideration which derives from the manifestly obvious notion that one act cannot be the subject of a double sanction based on substantially identical legal aspects. Basing themselves on the idea that—in the eyes of national law—the fine imposed by the Commission should be regarded as one issuing from a foreign legal order, the supporters of this view attempt to discover a principle which might be applicable to the relationship between the Community's power to impose penalties and that of the Member States. In this connexion they state that two Member States recognize the principle that an act for which a penalty has been imposed by a foreign court is no longer liable to a new penalty under national law. Applying the argument that the legal protection given by Community law should be equivalent not to the lowest but to the highest level known to the Member States, they plead for the recognition of this principle as an integral part of Community law. But if that is so, they go on to infer, the penalty imposed by a national authority would prevent the Commission from exercising its powers of sanction. In order to prevent what is a usurpation of Community law by national law and in order to preserve the precedence of Community law, the only solution remaining is for the national authorities not to exercise their powers when the Commission is seised of a case concerning the law on cartels.

No one will deny that these are impressive deductions. But in the end they, too, prove untenable.

The first objection that could be made to them is that the right to impose punitive sanctions could only be exhausted (in other words, any fresh criminal proceedings would be excluded) if the *jurisdiction* of the Court first seised of the case is unlimited, if it possesses the power to judge the case in all its legal aspects. According to the German Government that is not the case in the relations between the national authorities which have jurisdiction in cartel cases and the Commission. When the Commission has initiated proceedings, the national authority may only deal with those aspects of the case which are illegal under national competition law, while the task of judging the aspects of the case according to Community law falls to the Commission. Further, it must not be forgotten that while it may be true that two Member States (France and the Netherlands) observe the principle that a sanction imposed abroad excludes any further proceedings under their national law,

that principle was elaborated in the context of *criminal* law. It seems doubtful whether it can apply equally in *administrative* law. In any case, it is noteworthy that the written observations of the French and Netherlands Governments allude to the possibility that the Commission may *make allowance for* sanctions already imposed on the national level. This could certainly not have been the case if the principles which have just been mentioned were applicable to the field with which we are concerned. If we seek to ascertain on this basis what is the decisive principle applicable to the relationship between Community law and national law in the field of the law relating to fines then it seems that for reasons of fairness it is more appropriate to give more attention to the system which exists in Italian, German, Belgian and Luxembourg law whereby it is possible to take into account foreign punitive sanctions (even if the methods of doing so are different). I think it may also be said—and this is an essential consideration to take into account in any attempt to fill the gaps in Community law with the aid of comparative law—that it is the *progressive* principle which would thus be applied. The second paragraph of Article 90 of the ECSC Treaty already provides an analagous procedure, whereby the High Authority (now the Commission) must take account of decisions given on the national level in determining any penalty which it imposes under Community law. On the other hand, although the law of the ECSC Treaty *on cartels* does not contain such a provision, the only reason is that Article 65 is applicable *exclusively*—as we have seen—and consequently any concurrent application of that article with national law is excluded.

One is thus led to conclude that a fine imposed under national law does not automatically exclude the exercise of the powers of sanction provided by Community law and that therefore no usurpation of the latter occurs which runs counter to its precedence. The Commission is obliged at all events to take into account the sanctions imposed by the national authorities in proceedings prior to its own.

At the same time, this argument also avoids the danger of serious inconveniences which would result at national level—as we have been shown—from increased difficulties of proof or from the effect of periods of limitation if the national courts were obliged to suspend their proceedings until the Commission had completed its own.

I therefore sum up on the second question by saying that even the risk of a double punitive sanction does not prevent the application (even provisionally) of the provisions of the national laws on cartels.

3. *The third question*

The third question raises the problem whether Article 5 of the EEC Treaty, in conjunction with Article 3(f) of the same Treaty and Article 9 of Regulation No 17, as well as the necessity of exercising uniform judgment in cases relating to cartels and that of avoiding distortions of competition, can constitute a sufficient justification for declining to apply national competition law.

Here, too, the parties have different views (where indeed they have expressed an opinion, which not all have done). Let us see what conclusion we must reach.

The Commission's opinion is particularly striking. It attributes decisive importance to the second paragraph of Article 5 of the Treaty which requires the Member States to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty. The reasoning upon which it relies in this respect is as follows. When Article 85(1) is applicable, the pro-

visions of Regulation No 17 present the Community executive with a number of options. It may content itself with formulating recommendations under Article 3 (some of the plaintiffs in the main action have emphasized the importance of this means of action in giving a positive form to the structure of competition); it may also take decisions requiring an end to the infringement of Article 85 and refrain from imposing sanctions when the decision is complied with; finally, it may impose fines for infringement of Article 85(1). But, says the Commission, if it were possible at the same time for national authorities to take action under the national competition law and to impose fines, the procedure initiated by the Commission could be seriously disrupted. That would jeopardize the uniform implementation and concrete realization of the Community law on competition, and this would be incompatible with the intention of Article 5.

Although seductive, this argument nevertheless does not appear to me to be fully convincing. The essential point of departure for our considerations, which I was led to make on the first question, that the Treaty itself (clear arguments drawn from its wording support this idea) admits the idea of a *concurrent* application of the Community and national laws of competition and thus does not exclude the application of national law, at least in so far as the two legal orders do not really conflict with each other. Article 5 alone is not enough to invalidate this proposition which is what in fact the Commission tries to do so when it says that the measures which it takes in application of Article 85(1) cannot be corrected by measures adopted on the national level and that in particular a national court may not impose a financial penalty when the Commission wishes to restrict itself to requiring the parties to alter a given course of conduct. In fact there is no conclusive argument to be derived from Article 5 of the Treaty in the present case. First, it must not be forgotten that that article has as its sole object the avoidance of prejudice to the *objectives* of the Treaty. But, as the governments rightly point out, this could not arise in a case of application of a national cartel law stricter than Community law, because such application is really respecting one of the fundamental principles of the Treaty, the increase of competition. Again, there is nothing in Article 5 which even enables proceedings to be suspended at least on the national level, that is to say, it contains no instructions of a procedural nature. As the German Government rightly stresses, a fundamental prerequisite is missing: the direct applicability of the provision. There can in fact be no denying that Article 5 is drafted in such general and vague terms so far as it refers to the aims of the Treaty, which for their part are not formulated with absolute clarity and which it is designed to prevent from being jeopardized, that the uncertainty which its direct applicability would involve is wholly unacceptable. Nor does Regulation No 17 yield any different conclusion. Although it is true that according to its preamble, Articles 85 and 86 are to be applied uniformly, what is important is that *the wording of its operative part* contains no provision compelling the national authorities to stay proceedings before them, when the national competition law is involved. Article 9(3) of that regulation indeed suggests the contrary conclusion, for it provides simply a jurisdiction rule for applying the provisions of Articles 85 and 86.

Finally, it does not seem to me that the reference to Article 3(f) of the EEC Treaty can support the argument of the Commission. According to that article, the activities of the Community include 'the institution of a system ensuring that

competition in the common market is not distorted'. As the wording of this provision shows, its object is to define one of the manifold tasks which the Community is to accomplish in conformity with other provisions of the Treaty and following their time-table, that is, progressively. As the French Government, in particular, emphasizes, it is thus merely a statement of principle and one cannot see what degree of uniformity it requires of the conditions of competition. On the other hand in no case could it have as its object the removal of existing distortions of competition by permitting the Community competition law to displace (even temporarily) national provisions in its field of application.

From another point of view, however, it cannot be denied, and none of the parties has done so, that in the long run such a legal situation is unsatisfactory. By application of the principle that an agreement is subject to the law of the country on whose territory its effects occur (Wirkungsstatut), it implies in certain cases that the strictest national cartel law is given effect to a large extent within the Community and may thus cause loss to the undertakings to which it applies. However, to put an end to that situation which is at present inevitable for cartels the effects of which are confined to the national level, I am convinced that the only means is that of *legislative* action, that is, either by the Council issuing regulations governing the relationship between Community law and national law under Article 87(2)(e) of the Treaty, or, if it is considered that Article 87 does not permit far-reaching intervention in the field of the national law of the Member States, by harmonization of the latter on the basis of Articles 100 to 102 of the EEC Treaty. But it would be incompatible with the principle of legal certainty to seek to attain that end by means of an implied usurpation of national law.

Thus, the arguments expounded in connexion with the third question in no way change the conclusions to which I have already come.

4. *The fourth question*

Finally there remains to be examined in connexion with the fourth question whether there is anything in Article 7 of the EEC Treaty which stands in the way of the application of the national cartel laws. I can be relatively brief on this subject.

With the Commission, I am first of the opinion that it is correct to say that Article 7 applies directly, and consequently that the prohibition of discrimination on grounds of nationality is directly applicable, and that it is so independently of the rules laid down in pursuance to the second paragraph. Further, it seems to me possible to admit that Article 7 is also intended for the protection of Member States' own nationals. The status of a national of a State is determined according to the law of the State in question and it extends also to legal persons.

The consequences which can be drawn in this case are, however, not very clear, for the question put allows several interpretations.

If it seeks to determine (which its wording seems to suggest) whether the national authorities should restrict themselves to acting against their own nationals, although, having regard to the rules in force concerning jurisdiction on the basis of where cartels produce their effects, the national law permits them to exercise a wider jurisdiction (see paragraph 98 of the GWB), that is to say, if the question asks whether it is permissible to apply the national economic laws of a country differently according to the nationality of the parties, the reply would not here be

in doubt: such behaviour would be incompatible with the principles set out in Article 7 of the Treaty, unless it were proved that serious grounds existed for making such a differentiation (such as, for example, difficulties of proof with regard to foreign parties or the fact that their behaviour was of little importance in view of their small share of the market).

If, however, the substance of the question is whether one must regard as discriminatory treatment under the Treaty the fact that the Federal Republic applies a stricter competition law than other Member States (which could be unfavourable to agreements producing their effects within the Federal Republic) the reply would certainly have to be negative. As several of the parties rightly point out, the only purpose of the prohibition against discrimination is to avoid the existence within one and the same Member State of different systems dependent upon the nationality of those subject to them. On the other hand the prohibition does not have as its function the prevention of the unfavourable consequences of the territorial limitation of the sovereignty and laws of the State, that is to say, to bring about the harmonization of laws within the Community. The latter objective is covered in any case, as we have seen, by Articles 100 to 102 of the EEC Treaty; the harmonization of competition law could therefore not take place at the lowest national level (which would be the case if the prohibition against discrimination were applied).

Thus the reply to be given to the fourth question does not contribute any decisive factor to the problem of the application of the national cartel law to the situation which is currently being examined by the Commission.

III—Conclusion

I propose therefore to reply to the questions as follows:

None of the aspects mentioned by the Kammergericht prevents the application of prohibitions of cartels under national law (with the consequences which flow therefrom under national law) to situations capable of falling under Article 85(1) of the EEC Treaty and in respect of which the EEC Commission has initiated a procedure with a view to prosecuting an infringement of Article 85.

Article 7 of the EEC Treaty is a directly applicable rule of law and it prohibits the national authority from applying economic laws in a way which varies according to the nationality of the parties to an agreement.

I have nothing to say as to the costs in the proceedings: in so far as the parties to the main action are concerned, the costs will be decided upon as part of that action.