OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 19 SEPTEMBER 1978 [1]

Mr President,
Members of the Court,

The proceedings with which we are concerned today involve a decision adopted by the Commission of the European Communities on the basis of Article 86 of the EEC Treaty on the ground of "abuse of a dominant position within the common market".

The applicant in the proceedings is the parent company of the Hoffmann-La Roche group which operates world-wide, has its registered office in Basle and has subsidiary companies in almost all the Member States of the Community except Luxembourg and Ireland. Hoffmann-La Roche — I shall henceforth refer to it as "Roche" for short — manufactures *inter alia* bulk synthetic vitamins. Some of this production was started as early as the 1930s and 1940s; in the meantime the patents applicable thereto appear to have expired. Roche has approximately 5 000 customers in the Common Market who are engaged in the field of the manufacture of pharmaceuticals, foodstuffs and animal feeding-stuffs. In the period from 1963 to 1973 agreements for the supply of requirements were concluded with an number of those customers — 22 customers who are in business as manufacturers and sellers in the Common Market — and it will be necessary to examine later on the contents of those agreements which are in some cases rather different. According to the Commission's statement their purpose was to bind the chief purchasers of vitamins to the applicant either by means of express undertakings to purchase in respect of the whole or the major part of their requirements or by means of fidelity rebates or preferential prices, which took different forms.

The Commission considers that these agreements — the obligations are said to have lasted until the end of 1974 — are contrary to Community law. In fact it believes that it can establish that Roche has a dominant position on a number of vitamin markets and takes the view that such agreements are capable of hampering the freedom of choice and equality of treatment of purchasers.

The applicant does not share this view. However, as it assured this Court, it set in motion the amendment of the agreements complained of after the first visit of officials from the Commission in the autumn of 1974. Those agreements had already been annulled or amended before the adoption of the contested decision. New outline agreements were apparently sent to the Commission for appraisal in January 1975. In addition, fresh versions of the agreements to be concluded with the Merck undertaking, one of the customers involved, were submitted to the Commission for review, apparently in June 1975.

In July 1975 however competition proceedings were nevertheless commenced against Roche in respect of the sales system previously employed. When the applicant and the parties to the agreements had presented their observations on the complaints lodged by the Commission, the parties had been heard

1 — Translated from the German.

and replies had been given to the requests for information sent to both the applicant's customers and its subsidiary companies within the Common Market, those proceedings were concluded on 9 June 1976 with the adoption of a decision.

In that decision the Commission declared that the applicant held a dominant position in the Common Market in seven vitamin markets (vitamins A, B_2, B_6, C, E, H and pantothenic acid). It stated that in view of the fact that a number of the applicant's customers were bound to it in various ways and that they were accorded different treatment it was possible to complain that the applicant was guilty of an abuse within the meaning of Article 86 of the EEC Treaty. Accordingly, in Article 2 of the decision Roche was enjoined to terminate the conduct complained of forthwith. In addition, a fine was fixed under Article 15 (2) of Regulation No 17 on the ground that the infringement of Article 86 was intentional or at least negligent, but in that connexion however only the period from 1970 to 1974 was taken into account. This fine, which was payable within three months of the date of notification of the decision, amounts, according to Article 3 of the decision, to 300 000 units of account and was converted in the decision to DM 1 098 000 because the applicant has a subsidiary company in the Federal Republic of Germany.

Roche brought an action against that decision on 27 August 1976. It claimed principally that the above-mentioned decision should be annulled in its entirety. Alternatively, Roche claimed that only Article 3 of the above-mentioned decision, in other words the fixing of the fine, should be annulled.

Following comprehensive discussion of the dispute in voluminous pleadings — the parties submitted in addition a large number of supplementary statements on an extensive list of questions put by the Court of Justice — and following a thorough discussion at the hearing on 31 May 1978, I shall now give my opinion as follows.

I — It was uncertain for some time whether the important factor as far as the applicant was concerned was merely the annulment of the fine imposed upon it, in other words of Article 3 of the decision, or the annulment of the whole decision. In this connexion there are now no doubts, in particular following express statements made in the oral procedure. The applicant also maintains its principal claim concerning the annulment of the finding that the applicant has a dominant position on several vitamin markets which it abused by the form of the supply agreements which it had earlier concluded.

II — The examination must therefore begin with the rather controversial question whether the applicant held a dominant position during the period in question, in particular from 1970 to 1974. Following that I shall examine whether the concluding of the above-mentioned supply agreements must be held to be an abuse of a dominant position within the meaning of Article 86 of the EEC Treaty, and only then shall I deal with the remaining conclusions, if they have not been dismissed in the meantime, such as the objection that the Commission wrongly imposed the fine in the currency of a Member State, in other words in breach of Article 18 of Regulation No 17.

1. There is already a certain body of case-law on the expression "dominant position" contained in Article 86 of the EEC Treaty.

On that basis, it is necessary to speak of a dominant position if competition is substantially fettered (Case 6/72, *Europemballage Corporation and Continental Can Company Inc.* v *Commission of the European Communities,* judgment of 21 February 1973 [1973] ECR 215), if an undertaking — as stated in the judgment in Case 78/70 *(Deutsche Grammophon Gesellschaft mbH* v *Metro—SB-Großmärkte GmbH & Co. KG,* judgment of 8 June 1971 [1971] ECR 487) — has the power to impede effective competition over a considerable part of the relevant market. In examining this question it is in particular necessary to consider — this also follows from the above-mentioned judgment — whether there are manufacturers which market similar products and what their position on the market is.

The famous Sugar Case (Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, *Coöperatieve Vereniging "Suiker Unie" UA and Others* v *Commission of the European Communities,* judgment of 16 December 1975 [1975] ECR 1663) spoke *inter alia* of market shares in relation to Article 86. It may be concluded from that judgment that in a case in which the shares are very high in certain definable markets (85%, 90% or 95%) and imports are very limited it may be assumed straight away, in other words without additional inquiries, that it is possible for the undertaking concerned to impede effective competition.

There ia also an important supplementary explanation in the judgment in Case 27/76 *(United Brands Company and United Brands Continental B.V.* v *Commission of the European Communities,* judgment of 14 February 1978), to which the Commission has above all referred. The general statement from that judgment, that it is characteristic of an undertaking in a dominant position on the market that to a certain extent it does not need to pay heed to competitors, customers and consumers, is important. In addition, the judgment emphasized that a dominant position derives in general from several factors; on the one hand it is necessary to examine the structure of the undertaking concerned and on the other the situation of the market as far as competition is concerned. With regard to the first aspect, a whole series of factors was important in the judgment in Case 27/76, such as marked vertical integration, the existence of its own means of transport, technical knowledge, effective advertising of the brand name which induced customers to show a preference for the product, the limited number of customers and the keeping of products in short supply. As regards the situation in respect of competition on the market — it can be argued that some of the factors which have already been mentioned relate thereto — importance was attached to the applicant's market share, which amounts to between 40% and 45%. However, it was found in addition — only subsequently did the Court of Justice accept that the applicant was in a dominant position — that the applicant was the most important banana group; in addition, inquiries were made as to the number and strength of its competitors and it was established that in spite of repeated and very fierce competition on individual markets, which the applicant was able to resist, no shift in the market shares resulted. Another very important factor was that access to the market is made difficult because of the need for extensive investments and

that for that reason new competitors are not expected to appear on the market, whilst considerations of profitability and of the power to fix prices were not considered to be important.

2. A brief glance at the national legal systems which recognize the concept of market domination seems to me to be useful. According to the doctrine and practice which has developed in those legal systems it is in fact possible to gain the impression that the judgment in the above-mentioned Banana Case is based on an approach which is generally considered correct, as regards the relevant market shares and the requisite additional inquiries.

It is thus of interest that in France market shares of 50% are often regarded as material, as are further considerations, such as the strength and size of other competitors, technical and commercial organization and suchlike (see R. Collin in "La Réglementation du Comportement des Monopoles et Entreprises Dominantes en Droit Communautaire", Semaine de Bruges 1977, p. 244 *et seq.).* In German law too market shares of such size are significant (see the decisions of the Bundesgerichtshof of 3 July 1976 and 16 December 1976, Wirtschaft and Wettbewerb 1976, p. 783 and 1977, p. 255). In addition, however, detailed examinations of the situation are necessary with regard to competition, for example the position of competitors, the structure of the market, market development and the conduct of the undertakings concerned; the financial and technical resources of a market leader are also taken into consideration. A similar situation seems to apply to the Scandinavian countries (see "La Réglementation du Comportement des Monopoles et Entreprises Dominantes en Droit Communautaire", Semaine de Bruges 1977, p. 301 *et seq.).* Thus in Finland a dominant position is spoken of if over 50% of the market is controlled. In so far as market shares of 25% or of between 25% and 50% are sufficient in other legal systems (Norway, Denmark and Sweden), it must be borne in mind that in those countries the relevant market is very narrowly interpreted. Finally, the situation in the USA, where there is wide practical experience of monopoly law, is almost the same. The characteristic features of that situation are accurately given in a synopsis of the case-law by Holley on p. 174 *et seq.* of the above-mentioned publication of the Semaine de Bruges 1977. According to that synopsis, if 90% of the market is controlled, further arguments are unnecessary. Where there is a 74% market share this already applies no longer; in that case it is necessary to take other factors into consideration in addition, although there is such a strong presumption of market domination that that presumption is difficult to refute. Where there are smaller market shares (60 to 70%) the importance of the factors which must in addition be taken into consideration becomes greater; if the market shares are merely a little over 50%, strong evidence of another kind must indicate a dominant position on the market, and in the case of market shares of less than 50% there is under US law evidently a very heavy burden of proof as to the existence of a dominant position on the market.

3. In beginning the examination of the present case in the light of those facts, it is necessary first to recall that the Commission assumed that the applicant had a dominant position on the market above all in view of the size of its market shares of the various vitamin markets and in view of the position of the manufacturers next in size. However, the Commission also considered important the fact that the applicant is the largest manufacturer of vitamins and has at its disposal corresponding flexibility and financial power, that it can offer a very large range of vitamins of its own manufacture and that it has technological and commercial advantages over its competitors, in which connexion it is necessary to recall the applicant's technical knowhow and strongly developed distribution network.

The applicant objected to this, first, that the Commission took inaccurate values as its starting-point; in fact the applicant has smaller market shares in the case of the individual vitamins. Moreover, certain additional factors turned to account by the Commission — the applicant's wide range of vitamins and its financial strength — are negligible as regards the market power of the applicant when the situation of competitors is considered. In addition, the Commission incorrectly failed to take into consideration other factors. In this connexion the applicant has in mind the examination of the state of the market and conduct on the market over a very long period of time and in this respect it is in particular important that the vitamin market is very much in a state of expansion; nor does the applicant have the power to fix prices: on the contrary, the trend in prices is decided by pressure from other competitors, also from potential rivals. Besides, the Commission did not take into consideration access to the supply markets where the applicant, in contrast to its chief competitors, has difficulties because it is dependent on other manufacturers for primary products.

4. Accordingly, it is appropriate first to examine the market shares of the applicant in the case of each individual vitamin. In this connexion there is agreement that the vitamin markets must be examined separately because special production installations are necessary for each vitamin and the vitamins are not mutually interchangeable. When the Commission had revealed the sales figures of the applicant's competitors it was also possible to reach agreement in the proceedings with regard to several values, as appears from the joint observations of the parties on the list of questions put by the Court of Justice. In so far as points remain in dispute, I shall examine them when dealing with each individual vitamin market.

(a) So far as vitamin A is concerned I can be relatively brief. In this connexion the applicant states that the figure quoted by the Commission in the contested decision — a 47% market share in the Community — must be regarded as correct and may be considered representative for the years 1970 to 1974.

The applicant merely considers — and this relates to all the vitamins to be discussed — that the Commission should not have disregarded the fact that in sections of the market — the applicant quoted figures for Denmark and Belgium and for the years 1971 to 1974 — in some cases considerable variations could be seen. It is difficult — this applies to all vitamins equally — to regard this point as important, not only in those cases in which, as in the case of vitamins B_3 and B_6, only an *increase* in the market shares in the above-mentioned areas can be established. On the one hand the causes of the variations are not explained; it is above all possible, that they are attributable to a certain market strategy. However, even if it is assumed that the variations are the expression of competition on the market, the finding in the above-mentioned judgment in the banana case is important: it states that even the existence of competition in sections of the market does not preclude the assumption that the undertaking is in a dominant position if — in this connexion the stabilizing of the market share in relation to the whole of the Common Market is an indication — it appears that the undertaking in question was able successfully to resist the efforts of any competitors.

It can accordingly be stated with regard to vitamin A that the share of the market is of a size material for the purposes of Article 86 and that it must be regarded as an indication of the existence of a dominant position.

(b) The situation in the case of vitamin B_2 is also fairly straightforward. According to the information contained in the joint observations the applicant's market shares between 1972 and 1974 — when the quantities sold are used as the starting-point — were between 74.8% and 84.5% and — when the value of supplies is used as the basis — between 80.6% and 87%. On the other hand, the applicant considers that for 1971 a share of approximately 70% at most is correct. We can certainly rely upon these values, which are surely also of sufficient size. In fact it is impossible to see any valid objections to the figures quoted. This applies first to the reference made by the applicant to the share of Roche on the world market which is allegedly smaller. Naturally, this cannot prove by itself that the figures established by the Commission in the first place are, as the applicant considers, excessive. This also applies to the applicant's reference to fermentation installations, apparently situated principally in the USA, which have been closed down and which are expected to be put into operation again when prices rise. In the calculation of market shares the determining factor is obviously only what reaches the market and not potential competition. Such competition must be examined only in another connexion.

(c) The picture is very similar in the case of vitamin B_6. According to the information contained in the joint observations the market shares of the applicant in the years 1972 to 1974, calculated on the basis of the quantities sold, were between 84.2% and 88.4%. We can also adhere to these figures since the applicant, in support of its view that lower values are relevant, was able solely to refer to its submissions as to the size of its share on the world market.

On the other hand, for the previous period it may be considered correct that, as the applicant has estimated, its share was approximately 68%. Even taking this figure as the starting-point, if we are guided by the values which can be deduced from the case-law of this Court and from national practice, it is still a very large share which is definitely material with regard to market domination within the sense of Article 86.

(d) The parties agree, so far as vitamin H (biotin) is concerned, that until 1970 the applicant had a complete monopoly and that its market share until 1974 fell to 93%.

It is merely doubtful in this respect — quite apart from the importance of the marketing stage which must be considered later on — whether importance can be attached to the fact that this product, as the applicant has maintained, can be replaced by other products in the fermentation industry. In this connexion — I shall in principle have to deal with the problem of interchangeability later on in the case of vitamins C and E — it seems to me in principle that the Commission's objection that the applicant's information is too imprecise and in particular, as regards the extent of the interchangeability, which the Commission disputes, has not been proved beyond doubt, is justified. Finally, a deeper examination of this question may be dispensed with at present simply because even if the values quoted by the applicant are accepted — it considers that its market share is thus reduced by approximately 15% — there would still remain an extremely large share of the market which is quite comparable to the values quoted hitherto and therefore material for the purposes of Article 86.

(e) In the case of vitamin C the calculation of the market share presents no difficulties in so far as both parties assume that, taking only the vitamin into consideration, the applicant had a share of between 63% and 64.4% from 1972 to 1974, calculated by quantity or a share of between 64.8% and 66.2%, on the basis of the sales values. The applicant's shares for 1970 and 1971 are said to have been 1% or 2% lower, according to its statements, but this obviously makes no difference to the material size.

The problem in this connexion is, however, as I have already indicated, that of how it is necessary to regard the competition from substitute products claimed by the applicant. In this respect, it stated that vitamin C is to a considerable extent — the applicant assumes that 30% of its sales are involved (it was unable to quote precise values) — put to technological uses, in other words used not on account of its biological and nutritional properties but on account of its chemical and physical properties, in particular as a so-called antioxidant. In this role it can be replaced by other products. If this is however included in the relevant market — in this respect also the applicant relies upon estimates — its share in relation to 1974 falls to 46% to 47%.

So far as this special problem is concerned, it is possible to leave undecided the question whether the applicant in fact, as the Commission considers, bases its argument on excessive figures and whether for that reason alone it is necessary to correct its calculations. As the Court is aware, in this respect the Commission has in mind

the substitute product of citric acid which has a large (60%) share in the applicant's calculations. I shall merely observe in this connexion that although citric acid is not regarded as an antioxidant in Community Directives Nos 70/357 and 70/524, which were already in force at that time, it might however be taken into consideration in this respect because according to Directive No 70/357 it increases the antioxidant effect of other substances and can therefore in some cases replace vitamin C. In addition, it must be borne in mind that in its calculations the applicant only took into account about one quarter of the total quantity of citric acid which reaches the market.

The question how the concept of "interchangeability" must be interpreted in competition law is in fact very important. In this respect I am convinced that the Commission is right when it recognizes interchangeability only in cases in which, from the point of view of the buyer and of the use to which he puts a product, it is possible to state that another product satisfies the same needs. In this connexion reference can be made to the case-law of the American Supreme Court and its concept of "reasonable interchangeability"; the same also applies under German competition law, as follows from the above-mentioned decision of the Bundesgerichtshof of 3 July 1976 and from the observations contained therein on functional interchangeability from the view-point of consumers. In my view it is however extremely doubtful whether it is possible to speak of such interchangeability in relation to vitamin C and other antioxidants. This is in fact only partial interchangeability, since in the case of vitamin consumers who envisage using them for biological and nutritional purposes there is obviously no question of replacing them by other antioxidants. In such circumstances — in this connexion the concept of limited interchangeability used in the judgment in the banana case may also be borne in mind — it certainly does not seem justifiable to define the market in the way which the applicant considers correct and to ascertain its share thereof accordingly, in other words after the inclusion of pure antioxidants.

At most, it might be possible to envisage leaving out of consideration the proportion of vitamin C which might possibly be used for technological purposes — although its use cannot be precisely checked and its intended purpose can be changed at will. If one does this, however, the result is scarcely any alteration in the market shares in the sense claimed by the applicant. In fact, and in this it is necessary to agree with the Commission, it must be assumed that the applicant's competitors — clarification of this point is evidently extremely difficult — also supply a corresponding proportion of their sales for such intended uses. This is also indicated not least by the applicant's submission in Annex 3 to the joint observations on the questions put by the Court of Justice; it is stated therein that the stated proportion (30% of the sales of vitamins is said to be intended for technological use) is representative of the total sales of vitamin C in the Community.

Finally, reference might also be made to the fact that even if the applicant's arguments with regard to the problem of interchangeability were accepted and all the estimates which it has quoted were considered as correct, a market share would still remain which, compared with the sizes given in the judgment in the banana case, would have to be described

as definitely material for the purposes of Article 86. The only question which would arise would then be — and it must in any case be examined later on — whether the additional inquiries made by the Commission are sufficient to enable it to speak of a dominant position occupied by the applicant on this market, and whether supplementary considerations put forward by the applicant could cast doubts on a provisional judgment of that kind.

(f) In the case of vitamin E, in which the same problem arises, the applicant's market share, leaving out of account competition from substitute products, amounts, according to the uncontested information supplied by the Commission, to 50% to 60% in the years 1972 to 1974, if the quantities sold are used as the starting-point, and 54% to 64% on the basis of the value of sales. According to the information supplied by the applicant for 1970 and 1971 the market share was approximately seven points lower than for 1972; it is therefore necessary to assume a 43% share if the share is calculated by quantity and a 47% share if calculated by value.

If one concurred on this point with the applicant's view as to the interchangeability with other products and if one accepted the calculations in this respect — 60% of sales are said to be intended for technological use — provided that the quantities assumed by the applicant in this connexion are right, the market share for 1973 and 1974 would in fact still not fall outside the order of magnitude which has already been quoted repeatedly, since a reduction of 14%, as the applicant considers correct, would still leave a market share of between 40% and 44% for 1974 and between 46% and 50% for 1973. With regard to the previous period that would, however, hardly apply since for 1972 shares of only 36% or 40% and for the previous years a share of 29% or 33% would result.

Nevertheless, what has been stated with regard to interchangeability in the case of vitamin C also applies in this connexion. In addition, the deduction by the applicant that because the vitamin E content required by the law on animal feeding-stuffs is already covered by the natural content of mixed feeding-stuffs it must be assumed that at the most 20% of the added vitamin E is for biological and nutritional purposes and that therefore 80% is used on account of the antioxidant effect which could also be obtained by other substances, seems unconvincing. Moreover, the Commission was able rightly to refer to publications of the applicant according to which it is more advantageous for customers to employ vitamin E instead of other antioxidants as vitamin E also has other properties which indicate its use in livestock breeding.

If it is however, as in the case of vitamin C, considered permissible if need be to leave out of account sales of vitamin E for technological uses, the picture of the market share drawn by the Commission would not change fundamentally in this respect either. Indeed, the fact that a corresponding proportion of the sales of the applicant's competitors is likewise intended for technological uses also applies to vitamin E — this may be deduced from the above-mentioned observations submitted by the applicant.

It can therefore also be stated in the case of vitamin E that the applicant possessed

a market share during the whole period of interest in this connexion of such a size that it is, there is no doubt, material for the purposes of Article 86.

(g) With regard to the market in vitamin B_3 a market share of a size material for the purposes of Article 86, according to the information provided by the parties in the joint overservations, is shown only for 1974, in which year the applicant's share is said to have amounted to 41.2% if it is calculated by quantity and to 51% if calculated by value. On the other hand, lower figures were quoted for the previous years: 23.4% or 34.9% for 1973 and 18.9% or 28.9% for 1972; in addition, the applicant's market share in 1970 and 1971 is once more said to have been six points lower. On the other hand the calculation of the market share, in so far as it is based upon the value of sales, is, in contrast to the case of the other vitamins, considerably higher than that based upon quantities sold.

The conclusion may be drawn from this information that it is possible to speak of an indication that there was a dominant position on the market only with regard to 1974 and that even this seems doubtful if one adheres to the calculation based on quantities sold and if that calculation should still be corrected, as the applicant considers right. So far as this issue is concerned, the Commission takes the view that the calculation according to the value of sales is more reliable because vitamins are sold in different concentrations and for that reason, as shown precisely by imports from Switzerland, there exist very considerable differences in price. On the other hand, the applicant favours the authority of the calculation according to quantities sold, as it claims that when the calculation is made according to the value of sales the picture is distorted in that in the case of its sales final selling prices are taken as the basis whereas in the case of imports duty-free import prices which are 30% less than the final selling prices are taken as the basis. In addition, it considers with regard to the calculations according to quantities sold made by the Commission that the fact that some of the imports cannot be ascribed to the applicant and that in some cases supplies from Switzerland were movements within the group of companies of goods which did not reach the market has wrongly been left out of account.

In my opinion the calculation based on the quantities sold should in principle be preferred. It seems to me that better comparability exists in this case — the conversion of goods with different degrees of concentration should not present any inordinate difficulties — and the Bundesgerichtshof, as may be deduced from both the above-mentioned decisions, also seems to have proceeded primarily in that way. I have doubts, however, as to whether it is really necessary to make substantial corrections to the Commission's calculations based on the quantities sold. There is at most reason to do so in so far as 10 tonnes of the imports from Switzerland were allegedly wrongly attributed to the applicant. To the extent to which the applicant claims that the Commission also wrongly brought into account 23 tonnes of shipments purely internal to the Roche group, reference may certainly be made in this respect to Annex 1 to the joint observations of the parties on the questions put by the Court of Justice, from which it appears that imports from Switzerland were attributed

to Roche and were therefore no longer taken into consideration under the heading "Imports" which is important with regard to the calculation of the shares of the market.

This point, which also remained in dispute at the hearing, does not, however, ultimately need to be examined more deeply and it is also possible to leave undecided the question whether the reduction made in Annex 2 to the joint observations in the case of 45% goods, which was considered necessary for the conversion into 100% goods, is sufficient for the purpose of correcting the import figures. Even if it is accepted that the calculation on the basis of the quantities sold provides an indication of the existence of a dominant position in relation to 1974, this should be irrelevant in the present case merely for the reason that the supply agreements, as we have heard, came into being in 1973 at the latest, in other words at a time at which the applicant did not yet have a dominant position on the market in vitamin B_3 and because immediately after the first visit by officials of the Commission in the autumn of 1974 the applicant did everything necessary to terminate the agreements.

In the light of these facts it is indeed possible to say, with regard to the market in vitamin B_3, that it was wrongly taken into consideration in the contested decision for the application of Article 86.

5. Following these observations on the market shares, on the basis of which it is an established fact that in the case of vitamins B_2, B_6, H and C the question of market domination hardly requires additional inquiries of any weight — it is otherwise only in the case of vitamin A and of vitamin E as regards part of the period to be examined here — I shall now turn to the factors which the Commission expressly mentioned in addition in its decision in order to see whether the provisional judgment concerning the applicant's dominant position on the market can be confirmed.

(a) In the first place the market shares of the applicant's competitors are important.

In this connexion, in relation to 1974 it emerges that in the case of vitamins B_2 and B_6 and biotin the next largest competitors have shares of merely 8%, 3% and 7%. In the case of vitamin C the applicant is followed by a competitor with a 15% market share and after that by another with a 7% share. In the case of vitamin A the corresponding figures are 27% and 18%, in that of vitamin E 16% and 6% and in that of vitamin B_3 23% and 3%.

Accordingly the impression must remain, so far as the vitamins still of interest are concerned, that the applicant definitely has a commanding market position which enables it to have a considerable influence on the market and provides scope for independent conduct. Nor can there be any doubt about this in the case of vitamin A, where there is a financially powerful and aggressive competitor, BASF, which has obtained for itself the above-mentioned market share within a few years of entering the market (1970). Nevertheless, the applicant was in fact able to maintain its position and managed to keep its market share practically unchanged. The same applies to vitamin E, where BASF is said to have entered the market in 1971. The applicant's market share from 1970 to

1973 even increased appreciably here and in 1974 too it was still of such a size that it can be stated that the applicant is definitely able to defend its position on the market.

On the other hand, in the case of vitamin B_3 a strong competitor, a Japanese company, had an even larger share of the market in the previous years, in other words 30.3% in 1973 and as much as 43% in 1972.

(b) In addition, the Commission considered as important the fact that the applicant manufactures a wide range of vitamins and that it is the only undertaking which produces all the essential vitamins. It took the view that this exerts a draw on consumers who need many different vitamins and that this fact is therefore capable of strengthening the applicant's market position.

In contrast to this, the applicant points out that the same is true with regard to a number of its major competitors, since the determining factor is not the manufacturing programme but the sales programme. In addition, it claims that its range of vitamins is meaningless for most customers as only a few vitamins are of interest for them. An important factor to bear in mind is that the chief purchasers of vitamins are manufacturers of foodstuffs and animal feeding-stuffs. Many different additives are important to them and only a few vitamins, in the case of foodstuffs probably only vitamin C, which constitute only a small proportion of the additives. The few vitamins required, however, are also put on sale by the applicant's chief competitors who have in addition the advantage over the applicant that they can also supply all the essential additives.

It is necessary to observe first of all with regard to these arguments put forward by the applicant that those major competitors of the applicant do not, if I understand correctly, *manufacture* all vitamins and are far from being in a position to supply the quantities which the applicant can offer. These are, however, certainly both factors which are important with regard to the position on the market and which justify speaking of a certain advantage in the case of the applicant.

As regards the argument that most of the applicant's customers only purchase a few vitamins, so that for example in 1977 589 out of 815 German customers had purchased only one, two or three vitamins, the number of customers cannot matter but only the size of the turnover. In this connexion, according to the submissions of the Commission in its observations on the applicant's replies to the questions put by the Court of Justice, it is an established fact that the customers of the applicant with whom the agreements of interest in this case were concluded — there is no doubt that they form a significant circle of customers — as also other customers mentioned buy without exception a large number of vitamins from the applicant.

It is indeed necessary to acknowledge, as regards the other additives in the case of manufacturers of foodstuffs and feeding-stuffs, who account for a large proportion of the sales of vitamins, that the availability of additives in the range of goods offered by competitors — in particular if substances in short supply or even monopoly situations are involved —

is important for the purpose of assessing the market position. On the other hand, however, I am of the opinion that this factor is not so significant. This may be said first because, in the field of animal feeding-stuffs too a very large number of vitamins are necessary and not, as the applicant claims, only a few: in fact, according to the information supplied by the Commission the customers of the applicant in business in the sector of animal feeding-stuffs have without exception purchased a greater number of vitamins. Secondly, it seems obvious that the draw exerted by the additives in the range of goods offered by competitors is more likely to be significant for smaller and medium-sized undertakings, whereas important manufacturers of animal feeding-stuffs who purchase large quantities and in particular the so-called "pre-mixers" (Vormischer) definitely purchase the materials which they require from various sources if it seems to them to be profitable.

Altogether, the fact that the applicant can offer all the important vitamins in large quantities and of its own manufacture, even if certain other additives are lacking, is indeed an aspect of importance for the purpose of assessing market power. In any case — the applicant itself describes the wide range of vitamins offered by it as an advantage in its market reports of August 1971 — it is not fully offset by the fact that the applicant is at a certain competitive disadvantage in certain sales fields and as regards certain customers because other additives are lacking in the range of goods which it offers.

(c) Moreover, in its decision the Commission regarded as relevant the fact that the applicant is the largest manufacturer of vitamins in the world and that its turnover exceeds the combined turnover of all the other manufacturers. The Commission proceeds from this commanding position on the world market to the conclusion that Roche needs take less heed of competition in the common market because it is better able to absorb market fluctuations.

In my opinion the applicant was also unable to counter that statement with any decisive argument. Since what is involved in this connexion is not simply the financial power of undertakings, its reference to the combined turnover and capital power of competitors who also manufacture vitamins, who however have only a relatively small share on this market, cannot be convincing. Since, moreover, only the market position on the vitamin market is decisive, the fact that certain major competitors are able to spread the risks with other products is surely only of little interest. In addition it is no doubt correct that major undertakings of that kind which compete with the applicant on several markets often manage their individual branches in a decentralized manner which restricts the possibility of spreading the risks; it is also interesting that in the case of the applicant itself the vitamins form merely approximately a quarter of its total turnover.

(d) In so far as the Commission also subsequently refers to the applicant's technological and commercial advantages, it means that the applicant, as a pioneer in the field of the synthesis of vitamins and their use in industry, even if the patents for the processes have in the

meantime expired, has more extensive and more profound know-how than its competitors. With that, reference is made secondly to the applicant's strongly developed and highly specialized sales network which, with trained staff, makes possible the rapid and regular supply of fresh vitamins in large quantities and a valuable customer advisory service.

In this connexion my impression is, after the hearing, that the applicant was not really able to cast doubts as to the material nature of these factors.

(aa) As regards, first, the applicant's technological advantage, it is possible to leave undecided at present the question whether the reference made by the Commission at the beginning to the applicant's time-sharing service, for which payment is required — the preparation of computer programmes for manufactures of animal feeding-stuffs — really indicates an important factor. The applicant was nevertheless able to observe in this connexion that the equivalent can be found in many other undertakings, that this service is only very limited in its case and that the service — this was established by means of internal documents — is as good as meaningless to customers.

It is also possible to leave undecided the question of the weight of the applicant's objection that there are many inventions for vitamin manufacturing processes and that vital manufacturing processes for five other vitamins are in the hands of other undertakings. In fact only certain vitamins are involved here and of those (vitamins A, B, B_2, B_3, B_6, E and H) there is certainly no question but that the applicant has carried out vital pioneer work and has achieved enormous success on the market. In these circumstances however it is no mere supposition when the Commission states that the applicant is, by reason of its many years of experience in large-scale production, able to offer better quality and an excellent customer service with corresponding technical advice. In addition, in this respect it is possible to refer not only to the applicant's experience in the industrial use of vitamins in the manufacture of foodstuffs and animal feeding-stuffs; this is also indicated by the applicant's statements in its publications to the effect that the applicant was able to hold its ground on the market by developing new fields of application, for example in so far as the "improvement of manufacturing methods" is discussed, when its technical know-how is pointed out or emphasized. This is doubtless sufficient in order to accept that it has a technological advantage.

(bb) As regards the Commission's statement concerning the applicant's sales network, there is certainly no question that the applicant possesses an excellent distribution system. In most Member States the vitamins are manufactured by subsidiary undertakings. Warehouses stocking fresh vitamins are maintained there, in proximity to customers, and a customer advisory service is provided; the applicant moreover itself refers thereto in its publications.

At the hearing the applicant claimed merely that two major competitors (BASF and AEC) had an even denser

distribution network and that in any case they had better access to customers in the animal feeding-stuffs sector because they had at their disposal a sales system for fertilizers and pesticides. They claimed that the fact that almost all vitamins can be stored for a long period is also important.

However, I do not have the impression that the Commission's considerations can be invalidated or their importance substantially lessened by this. To that end, it is certainly insufficient to refer to the sales system of two competitors whose sales of vitamins are far behind those of the applicant and who, in contrast to the applicant, cannot be said to specialize in vitamins.

(e) Finally, the Commission referred in its decision to the difficulties of entering the markets in vitamins connected with the need for large and specialized investment and long-term programming of capacities. The Commission states that it must be concluded from this that "at present" the entry onto the market of new competitors would not have any appreciable effect on the applicant's position.

In this respect too, the impression must be gained that it is impossible to call in question the substance of the finding reached by the Commission. Because special installations are necessary for each vitamin and the capacities are organized according to long-term requirements large sums of money are required, at any rate for the construction of new installations — the situation may be different in the case of expansion investment — and these sums can be raised only by powerful undertakings, in particular the large chemical concerns. A very long period generally elapses between planning and production, including the initial period and the experimental period, as is made clear precisely by the example of BASF's entry to the market. It is therefore not erroneous to assume that it is impossible to expect a substantial change in the production and market situation, in particular in the case of the whole range of vitamins, within a short period. This is indicated *inter alia* by the fact that BASF and AEC limit themselves to the manufacture of a few vitamins and that Hoechst has not emerged from the experimental stage. The applicant itself also stated when it was heard by the Commission that the large chemical concerns are more interested in other lines of production; moreover, it is not in dispute that all over the world surplus capacities are available for the manufacture of vitamins. On the other hand, when the applicant quotes examples of impending expansion of capacity (application, p. 59), it is of course impossible to attach decisive importance to them simply for the reason that they obviously relate above all to countries outside the Community and to vitamins other than those of interest here. In addition, they only affect the future and therefore cannot influence the appraisal of the applicant's market power during the period crucial in the present case.

(f) At the end of this section I can accordingly state that the Commission's additional considerations, as regards the

applicant's market power, are definitely significant. This is sufficient in order to accept that the findings reached by the Commission are correct, as regards vitamins which have a very large market share, such as vitamins B_2, B_6, H and C and — for some of the relevant period — vitamin E too.

6. As the examination of the market shares has however in some fields (vitamin A and in some cases vitamin E; vitamin B_3 may for other reasons be disregarded) only resulted in values which are on the border-line of the material sizes and as in this connexion very thorough additional examinations of various kinds were made in the above-mentioned judgment in the Banana Case I shall now go on to examine the factors quoted by the applicant which are supposed to justify the doubts as to its market power.

(a) In this respect the applicant considers that considerations relating to market results and conduct on the market are of foremost importance, in particular the trend in prices on the relevant markets. In this respect, it claims, it becomes clear that it has no power to fix prices; in no way is it able to fix the prices of vitamins at its discretion; it has to base itself on market prices. It is in particular strange that in some cases considerable falls have occurred in the prices of vitamins in spite of general increases in costs and a growth in demand.

(aa) One can immediately call in question the accuracy of the argument that according to the conception of the EEC Treaty a dominant position on the market can be assumed only if there is power to fix prices. Nor can the reference to the ECSC Treaty and the case-law thereon (Case 13/60, *Ruhrkohlen-Verkaufsgesellschaften "Geitling", "Mausegatt" and "Präsident"* v *High Authority of the ECSC*, judgment of 18 May 1962 [1962] ECR 177) support that argument. On the other hand, the finding contained in the above-mentioned judgment in the Banana Case seems to me to be important; it states that questions of profitability and of power to fix prices are not of decisive importance and that even the existence of competition does not exclude the presumption of a dominant position if other sufficiently strong evidence indicates this. In any case, in my view the power to fix prices should not matter if, as here, a case of abuse of a dominant position is involved which relates not to the field of price policy but to the consolidation of the structure of competition and to the entry onto the market of other competitors.

(bb) If, however, the trend in prices is nevertheless taken into consideration as well, it is necessary to emphasize at the outset that it would not be appropriate to adhere to the diagrams in the application which are said to reflect the trends in volume and price on the world market. These are of little value in the present connexion, not only because they merely concern trends, but also because the choice of various indicators of price and volume leads to a distorted picture. It is nevertheless interesting that increases in

price can also be deduced from them. This applies to the period from 1970 to 1974 in the case of vitamins C and B_2 and in the case of vitamins A, B_6, E and B_3 price rises may be noted at least during the years 1972 to 1974.

(cc) If one accepts the other tables produced in the proceedings which were drawn up on the basis of average prices in the Community for the most important sales forms, which constitute approximately 70% of the turnover, the following findings result in detail:

In the case of *vitamin A* prices fell from 1970 to 1972, then rose again and in 1974 almost reached the 1971 level. In the case of *vitamin E* prices also fell from 1970 to 1972 but then rose again and in 1974 were above the 1971 level. In the case of *vitamin C* — here the starting figure is that for 1971 — prices rose from 1971 to 1972 then fell until 1973, subsequently rising again above the 1971 level. In the case of *vitamin* B_2 prices rose sharply from 1970 to 1971, then dropped somewhat, but not to the 1970 level, and the level of prices in 1974 was considerably, in fact approximately 50 %, above the 1970 level; in the case of *vitamin* B_6 prices fell from 1970 to 1972, then however rose again and in 1974 too were 6 % higher than the 1970 level. In the case of *vitamin H* prices dropped a little from 1970 to 1971, then rose slightly in 1972, to fall again subsequently. Finally, in the case of *vitamin* B_3 where it is possible to assume that the applicant was in a dominant position at least for 1974, prices clearly rose from 1973 to 1974 but afterwards fell again considerably.

It follows, first, from this description that the trend in prices was by no means uniform, not even on markets with regard to which the applicant, as in the case of vitamins A, E and B_3 mentioned particularly aggressive competitors.

Secondly, it is also important to include in the examination the development of the applicant's market shares and that of its production and turnover. It is already known, as regards the market shares, that in some cases they underwent virtually no change (vitamins A and C), that in some cases they even became larger (vitamins B_3 and B_6) or that at most certain by no means spectacular falls can be seen (as in the case of vitamin E in 1974, in which an increase in price must be noted, in the case of vitamin B_2 in 1973 and in the case of vitamin H, if the years 1970 and 1974 are compared).

The development of the applicant's sales volume and turnover figures during the period in question in the common market is even more interesting. The sales volume clearly increased in 1970 and 1974 in the cases of vitamin A (43 %), vitamin E (150 %), vitamin C (54 %), vitamin B_2 (33 %), vitamin B_6 (100 %), vitamin H (186 %) and vitamin B_3 (25 %). According to the uncontested statements of the Commission (see its observations on the applicant's replies to the questions put by the Court of Justice, p. 9) it was possible to increase the value of sales of vitamins A and E, in the case of which there was claimed to be

especially keen competition, in all Member States. In view of these facts — it is worth observing for example the growth in the market share of vitamin B_6 while prices fell at the same time and there was an alleged temporary shortage; the situation in the case of vitamin E is similar — it is in fact impossible to dismiss the assumption that the trend in prices was decided by the applicant itself in the interests of the expansion of sales, in other words that it is by no means attributable solely to competition, in which connexion it is possible to refer, for example as regards BASF's entry to the market in vitamin A, to a management memorandum of the applicant from the year 1970. In any case, it is impossible to conclude from the discernible market and competition situation that the applicant was not, although it successfully defended its market shares, in a dominant position.

(b) Moreover, the applicant refers to the potential competition which, it states, the Commission disregarded, although in the judgment in the Continental Can case (Case 6/72, judgment of 21 February 1973 [1973] ECR 215) it was described as an important factor. It claims that such competition may also exert pressure on the market so that in spite of large market shares there is no dominant position.

I am convinced that even this consideration and the arguments put forward in detail in relation thereto can hardly cast doubt on the finding reached by the Commission.

So far as the unused fermentation capacities which are said to be situated above all in the USA are concerned, in relation to the market in vitamin B_2 it is thus important that they obviously did not affect the trend in prices since it is possible to determine a 50 % price increase from 1970 to 1974 precisely in the case of vitamin B_2.

No more detailed information was put forward as to the surplus capacities for the manufacture of vitamins which exist all over the world. In addition — assuming that they had affected market behaviour and results — reference may be made in this connexion to the fact that the applicant in any case was able to maintain for years its position on the markets in vitamins which are of interest in these proceedings.

It is, finally, of interest as regards the possibility for large chemical groups to begin the production of vitamins at any time, if they do not already manufacture vitamins, that this has hitherto only occurred on a few markets without upsetting the applicant's position. In this respect the above-mentioned surplus capacities and the finding reached in the proceedings that basically the interests of those groups are differently directed may have played a part. In any case, it seems to me highly unlikely — not least because a long period of time is needed for investment programmes to be realized — that it would thereby be possible actually to exert pressure on market prices and that the statement that in spite of considerable market shares the applicant does not have an overriding influence on the market could thereby be justified.

(c) It is also important, in the applicant's view, to take into

consideration the stage of development of the market under investigation. It claims that it is characteristic of the markets in vitamins that it has been possible for many years to ascertain very strong expansion which is still continuing. In such a situation, however, large market shares are of less importance than in the case of a stagnating market, as the market is sufficiently open for all interested parties and gives all participants enough latitude.

It is certainly not possible to deny that there is any justification for this view, even if in the case of vitamins, apart from biotin, it is more logical to speak of a culminating stage, since it has been successfully manufactured synthetically for a long time. Ultimately, however, it hardly justifies denying in the present case the existence of a dominant position held by the applicant.

In this connexion in my opinion the opportunity to make it impossible or considerably more difficult for other competitors to enter the market is not of decisive importance. Even if other manufacturers are definitely in a position to be active on the market it is, rather, decisive that the applicant was able for many years to maintain its overriding position in a strongly expanding market and that it successfully countered competition from newcomers; it is very likely that the exclusive supply agreements, which must subsequently be appraised, also contributed in this respect.

With regard to biotin in particular, it is indeed correct to say that a market has only developed recently. It can be deduced from the documents produced by the applicant that it started to manufacture biotin at the end of the 1940s and began to sell it in the mid-1950s and that a number of Japanese competitors also appeared on the market only a few years ago. I would, however, in this respect too and regardless of the fact that the turnover of all participants in the market is increasing sharply, consider it decisive that the applicant was able almost to maintain its monopoly position existing at the outset, since even after four years of competition it still has a 93 % market share. The fact that it reacted with fidelity contracts to the entry of competitors onto the market may well have contributed to this; in this connexion moreover — here I would refer to the record of a European Bulk Managers Meeting produced as Annex 7 to the application — the fact that the applicant's products have advantages which those of the competitors lack also seems to be important.

(d) The applicant finally claims — by reference *inter alia* to Article 22 of the German Gesetz gegen Wettbewerbsbeschränkungen (Law against Restrictions on Competition) — that in assessing the market position it is also necessary to take into consideration access to supply markets, which the Commission likewise omitted to do. It states that from this point of view the situation is characterized by the fact that the applicant's chief competitors, large chemical groups, themselves manufacture primary and intermediate products for the manufacture of vitamins, whilst the applicant is, in respect of the raw materials, almost totally dependent upon third parties and in the case of some raw materials even reliant upon supplies from competitors. Thus it purchases raw materials for the manufacture of vitamin

B_6 to a large extent from BASF, Hoechst and an undertaking in the AEC group, obtains raw materials for the manufacture of vitamin A to a large extent from BASF and will obtain those for the manufacture of vitamin E in the future to a large extent from BASF. In addition, raw materials for the manufacture of vitamin C come from a French undertaking which has a close connexion with the AEC group, and from an American undertaking.

On closer consideration it is apparent that this point of view cannot be decisive in the present case.

It is significant that it is a question not of materials which are naturally available only to a limited extent, but of products which can be manufactured as required. Access to them is available not only to those who themselves manufacture them (which the applicant as a chemical undertaking could obviously do itself), but also to anyone who can obtain them without difficulty on the market. It was not mentioned in the proceedings that the applicant has any such difficulties.

As regards the applicant's relationship with certain of its competitors, it appeared in the proceedings that the manufacturers of the products from which vitamin B_6 is produced do not manufacture the vitamin themselves and that Hoechst, *one* manufacturer of the basic product for vitamin A, likewise does not manufacture this vitamin itself. Only in relation to vitamin A can there be said to be competition, because basic products for this are supplied by BASF, which itself manufactures vitamin A. This fact alone, without further particulars as to any problems of delivery, certainly does not justify its being claimed that the applicant is not in a dominant position and there is even much to be said for its being in a dominant position in relation to vitamin A.

7. In view of all this it may be assumed that the Commission rightly found in the contested decision that the applicant has a dominant position on the markets in vitamins A, B_2, B_6, C, E and H. Only in respect of vitamin B_3 is a different conclusion justifiable. Although in 1974 the applicant also had a share of the market for this product of the order material for Article 86, in view of the size of the competitors' shares of the market and the price trend for that vitamin, and in particular because the relevant contracts were entered into at the latest in 1973, this partial market should be disregarded.

III — It is now necessary to consider whether the applicant in fact abused its dominant position.

The Commission considers there to be such an abuse in the conclusion of 26 contracts with 22 customers of the applicant spread over the years 1963 to 1973. It is alleged that these contracts in different ways tied the customers to Roche as regards the supply of particular vitamins or all the vitamins required by the particular customer. Moreover, they gave the customers various advantages unrelated to Roche's savings in costs.

Since in this way the customers' freedom of choice was limited, competition between manufacturers of vitamins restricted and the access of other manufacturers to those customers blocked, there could be said to be an infringement of the principle of Article 3 (f) of the EEC Treaty requiring that competition should not be distorted. Moreover, there is disregard for the principle of equality of treatment within the meaning of subparagraph (c) of the second paragraph of Article 86.

The applicant claims that there cannot be said to be a uniform system of sale; in particular, the agreements with Unilever and Merck have characteristics justifying separate examination. It is further significant that the contracts were not entered into on the basis of a dominant position, that is, are not determined by any position of power and moreover must be regarded as commercially quite normal. At least in judging them it is proper to weigh up the interests involved and in particular to have regard to the fact that the so-called "English" escape clause contained in the contracts left sufficient room for competition. As far as regards the differences referred to by the Commission, they are at least partially justified by the difference in the costs involved for Roche. In no instance are they of such importance as to prejudice the customer's competitiveness. Finally, the effects of the contracts on the market should be borne in mind. If the contracts which must be regarded as unexceptional are disregarded, then in no way can it be said that competition and trade between Member States was *appreciably* affected.

1. In considering this dispute I shall begin with certain general arguments put forward by the applicant.

(a) The applicant is certainly right in objecting to its being said that there is a uniform system of contracts. Even superficial consideration of the contracts reveals great diversity concerning their material and local scope, when they were entered into, their duration and other subject-matter. For a legal assessment, however, in my opinion this is not decisive. In such a case as the present it is not a condition of Article 86 that contracts for supply should be part of a uniform concept and represent altogether a coherent system. All that is important is whether the effects of the contracts, which must be judged according to their wording, can be classified altogether under the relevant abuse. This will have to be considered subsequently in detail. For the present I will add only that the Commission does not seem in fact to be in error in stressing that there is a dominant theme in the contracts, namely that of the maintenance of the share of the market and protection against undesired competition. In this respect reference may be made to internal documents of the applicant which it has produced in the proceedings, namely a

circular dated 8 May 1971, management memoranda and annexes thereto, together with a report on a European Bulk Managers Meeting.

(b) Two observations will suffice as to the applicant's further claim that contracts such as the present are normal in the trade.

First, this has not been shown to be true of the market in vitamins. The few examples mentioned in the proceedings certainly do not suffice. Further, assuming such contracts to be common, it cannot be assumed that what is permissible for undertakings which are faced with competition applies to the same extent to undertakings in a dominant position. In the first case existing competition is restricted only to a certain extent by the conditions of supply. In the second case, on the other hand, an undertaking has the possibility of preventing effective competition and in consequence of reinforcing the relationship between supplier and customer, leading to the consolidation and strengthening of an already dubious position of dominance on the market.

(c) Further, it is not possible to uphold the applicant's view to the effect that the conduct of the undertaking occupying the dominant position within the market which is open to objection under Article 86 must be said to be "determined by a position of power" (machtbedingt). The applicant stresses that this element is absent in the present case because the conclusion of the contracts did not depend on the applicant's power in the market; in particular, the "English" clause was not forced on purchasers, but was often due to the power of demand on the part of customers.

Although such an interpretation of the concept of "abuse" may apply to certain situations covered by Article 86, such as the matter of imposing unfair prices (subparagraph (a) of the second paragraph of Article 86), it certainly does not apply in general to Article 86. This was made clear in the judgment in the *Continental Can* case (Case 6/72 *Europemballage Corporation and Continental Can Company Inc.* v *Commission of the European Communities* [1973] ECR 215), which was concerned with the acquisition of an important competitor by a dominant undertaking. It was stressed there that the criterion is not the exercise of market power but that there is abuse where an undertaking in a dominant position influences the structure of competition by its acts. The present case shows a certain similarity in so far as basically it too concerns the influencing of the market structure by the binding of purchasers. Here too in the same way it is possible to assume an objective concept of abuse. Further, however, I would take the view that the same is true of the complaint of unequal treatment of purchasers. That also in no way presupposes the exercise of market power, since it is alleged to have taken place in a market which in this respect lacks transparency.

2. In considering the case further I shall first deal with the tying of purchasers to the applicant. The contracts with Unilever and Merck, on the basis of

the applicant's submissions, must provisionally be left out of account because apparently they have special characteristics which in any event require them to be judged differently.

There are two kinds of ties to be met with in the contracts: on the one hand, express obligations in respect of supplies bound up with rebates and, on the other hand, ties which are based only on fidelity rebates, if the advantages granted may be so described for short.

(a) Let us begin with the contracts which contain *express obligations in respect of supplies.* These relate to total requirements, a particular percentage of requirements (varying between 70 and 90%) or the greater part of the requirements of the particular purchaser and apply to *all* vitamins, all vitamins relevant to these proceedings or particular vitamins which are individually listed. Under these heads fall the contracts with Afico, Dawe's, Organon, Provimi, Purina and Upjohn (total requirements), the contracts with Cyanamid (at least 90% of requirements), Animedica (at least 80% of total requirements) and Guyomarc'h (at least 70% of total requirements), and the agreements with Nitrovit and Isaac (relating to the greater proportion of transactions).

In this respect certainly the Commission is right in stating that such obligations in respect of supplies, if the supplier has a dominant position, are incompatible with the competition rules of the Treaty. They take away the purchaser's freedom of choice in purchasing and exclude other competitors from these markets and thus serve to reinforce competitive relationships and to strengthen the dominant position in the market which already exists. It makes no difference whether the total requirements or only a part of the requirements must be met by the party occupying the dominant position on the market, at least in so far as it is a question, as here, of the greater part of requirements. Nor does it matter whether all the vitamins which the purchaser requires or only certain vitamins are covered, since Roche has a dominant position in all the markets with which the proceedings are concerned (apart from vitamin B_3).

At most it is necessary to consider first whether it is significant that certain agreements are limited to a year or contain clauses providing for termination, that is, that the obligations which they impose are limited or may be waived within a relatively short time and on the other hand whether the existence of the "English" escape clause in any way alters the essential view to be taken.

(aa) In particular on the first issue the applicant (if I understand the position correctly) put forward the argument of the *weighing-up of the interests involved.* It bases the relevance of that view on the GEMA decision of the Commission (Journal Officiel 1972 L 166). In addition, it refers to the judgment in Case 127/73 *(Belgische Radio en Televisie and Société Belge des Auteurs, Compositeurs et Editeurs* v *SV/SABAM-and-NV Fonior* [1974] ECR 313) in which in relation to Article 86 it was stressed that the decisive factor is whether an exclusive obligation clause exceeds the permissible limits, taking account of the interests of the parties, which must form a balanced relationship. In this respect in the present case it is

significant that the purchasers themselves had an interest in the contracts. The latter permitted a rationalization of purchasing at favourable prices and ensured security of supplies, without disturbance by temporary shortages, in a market which was in some respects chaotic. Many purchasers moreover attach importance to a guarantee of consistent quality, namely in so far as premixes are seldom changed and special factory plant permits no change in the products purchased. The interest of the supplier was to have reliable knowledge of the volume of sales in order to plan production appropriately; moreover, it could not be expected to assume unilateral obligations to supply without a guarantee of purchase. Finally, the interests of third parties, like the interests of purchasers, are assured by the conclusion of contracts for a fixed term and by the inclusion of the "English" escape clause, whereby more favourable offers by third parties may be considered.

As far as this question is concerned, it must be admitted that in the judgment in Case 127/73 the idea of a weighing-up of the interests involved is indeed suggested. In addition, it is true that such considerations are also mentioned by writers (cf. Von Gamm, "Das Kartellrecht der EWG", p. 81, who talks of the necessity of weighing the relevant interests and according to whom abuse is to be found only where the justified interests of competitors or consumers are aversely affected in an improper manner). It may, however, be doubted whether this may be regarded as an established legal view of Article 86. Further, it may be doubted whether the considerations which were applied in the judgment cited to special facts can without more ado be applied in the present case. Moreover, it is probably questionable whether in fact in the market in vitamins it is usual and common for large purchasers to order their annual requirements all at once and whether accordingly important interests of the purchasers require that such ties should be permissible. In any case, it appears to be established that only a small proportion of the applicant's purchasers have entered into such contracts.

Finally, however, for the following reasons it may not be necessary to decide this.

Certain contracts with express obligations in respect of supplies, namely the contracts with Guyomarc'h, Purina and Upjohn, were not subject to any temporal limitation. Here the arguments put forward, which at the most justify accepting ties for shorter periods, do not therefore apply.

It is true that other contracts are limited to a year (Isaac), are entered into for the period of a year with the possibility of extension if notice is not given before 1 October or 31 October (Afico, Cyanamid, Animedica, Organon) or provide for the possibility of notice of varying periods — 30 days or two or three months — (Isaac, Nitrovit, Dawe's, Provimi). It should not, however, be overlooked that the grant of rebate is a consideration here. The question must at least arise in respect of these contracts whether the rebate does not act as a tie which is sufficient to prevent the business relationship from being terminated. For this reason in my

view it cannot be claimed that the said contracts should be excluded from the inquiry as being unobjectionable; on the contrary, they should rather be considered when discussing the tying by rebates to which I shall subsequently turn.

(bb) So far as concerns the so-called *"English" escape clause,* on the other hand, according to which more favourable offers by competitors may be considered, it must be admitted that in this way there is still some room for competition. Apart from the fact that this clause is completely missing in the contract with Guyomarc'h, it is significant that in this way the bond with the applicant is not dissolved but at most loosened. In general the said clause is so worded that where there is a more favourable offer the purchasers are not simply free but have to inform the applicant and give it the opportunity of meeting the more favourable conditions. This is the position on a reasonable interpretation of the contract with Afico; the wording "in the event ... of Roche not being able to supply at a competitive price" must obviously be understood as meaning that Roche was given the opportunity to do so. It accordingly depended solely on the applicant's decision whether competitors were allowed in under the "English" escape clause or not. In addition, it must be remembered that in many respects the clause was very narrowly worded. Thus only offers from producers and not dealers were relevant (Animedica) or even only reputable producers (Afico, Cyanamid, Provimi) or competing producers of an equal status (Organon), which possibly meant, although this need not now be decided, that the identity of the competitor had to be disclosed. In certain cases there is also a reference to serious offers in writing (Isaac and Nitrovit) and to supplies of a comparably regular nature.

In these circumstances the "English" escape clause, of which the Commission rightly said that it probably facilitated the conclusion of the contracts giving exclusive rights, does not in fact mean that there is no wrongful bond. Perhaps a different conclusion is possible in the case of the contract with Upjohn, because in that there was only a competition clause ("provided ... that the prices of Roche are competitive"). It should be said here that Roche had no influence on supplies from other producers and therefore this type of tie might be regarded as unobjectionable, if in this case the fact were not of decisive importance that it was a question of a tie without any limitation in point of time.

(b) The other type of *tie* to which, as already stated, the Commission objected is that *by means of rebates.*

In this respect it must certainly be recognized that if advantages in relation to supply are granted in respect of customer loyalty and not on the basis of cost savings to the supplier, there is a compulsion very similar to that exerted by an express tie. If a purchaser receives rebates on the basis of his total supplies

(total turnover rebate), on the understanding that he obtains the whole or a large part of his supply from the party granting the rebate, a competitor can obtain the order only if his offer compensates for the loss of the rebate. Even where the rebate is not very high, this is frequently extremely difficult or quite impossible, so that in practice access to such customers is blocked. Accordingly, in the already cited Sugar Case (Cases 40/73 etc. *Coöperatieve Vereniging "Suiker Unie" UA and Others* v *Commission of the European Communities)* fidelity rebates were treated as an abuse where granted in respect of exclusive supplies. Such contracts are also regarded very critically in national competition law. On this I refer to Mestmaecker, "Europäisches Wettbewerbsrecht", p. 390, and to the decision of the German Bundeskartellamt (Federal Cartel Office) of 10 September 1971 (WuW/E BKartA 1361). In French law there is a pertinent judgment of the Tribunal de Grande Instance de Paris of 5 February 1966 (J.C.P. 67, II. 15029) and an opinion of the Commission Technique des Ententes et des Positions Dominantes of 28 March 1973 (Journal Officiel D.A. No 66, p. 2609). In Belgian law reference may be made to a judgment of the Cour d'Appel de Bruxelles of 16 May 1963 (J.T. 1963, p. 434 et seq.); further in this respect the report on the Supply of Flat Glass of the British Monopolies Commission of 1968 is pertinent.

From this point of view the following picture emerges of the contracts in question in the present proceedings:

In a number of them the rebate is subject to the proviso that the total supply is obtained from the applicant (Dawe's, Organon, Provimi, Radar, Purina); other contracts provide for the grant of the rebate where a particular proportion of requirements is met by the applicant (Cyanamid, Animedica, Guyomarc'h, Protector, Ramikal, Trouw); in a third group graduated rebates on turnover, which are granted on a particular minimum turnover upwards, are relevant (Afico, Beecham, Capsugel, Nitrovit, Sandoz, Upjohn, Wyeth); related to these are, finally, those contracts in which the graduated rebates are determined according to the proportion of the estimated volume of business which is conducted with Roche (Beecham, Isaac, Pauls). Even where the rebate is not expressly linked with an exclusive supply, interpretation of the contracts (they sometimes used the term "fidelity rebate"; sometimes comparison with similar contracts is revealing) suggests such a connexion (such as in the case of Afico, Cyanamid, Organon, Protector, Provimi and Purina).

In these circumstances the conclusion must be drawn that the Commission in substance rightly regarded all these contracts as constituting an abuse within the meaning of Article 86.

The applicant's attempt to treat the rebates in part as rebates in relation to quantities or to arrangements made in advance, said to be justified by the saving of manufacturing costs and the lack of any necessity for technical advice in the case of bulk buyers, in no way changes the position. The rebates in fact apply to

the whole turnover, that is to say even to the supply of small quantities of individual vitamins where there can scarcely be said to be any such savings. Moreover, it may be seen from the applicant's management memoranda that the most favourable price for the quantity in question was to be applied to all purchases made within the context of fidelity contracts, which means that the relevant quantities were already taken into consideration in fixing the prices.

Nor can the view that it was a case of genuine *del credere* rebates, where (as for example with Afico, Capsugel, Provimi and Upjohn) that term was used, lead to any other conclusion. In this respect the Commission has rightly stressed that in the case of subsidiaries of reputable large groups, and it is with such that we are concerned throughout, there can be no genuine risk with regard to payment which must be covered and charged for. Moreover, it is interesting in this respect that the description of the rebate in the contracts varied to some extent (cf. for example the contracts with Afico and Provimi).

The only question, therefore, in this connexion is whether the existence of the "English" escape clause alters the position. Let me say at once that this will have to be answered in the negative as regards the greater part of the agreements. In this respect it is not so decisive that the clause obviously does not apply where the prices are the same and that, as Roche itself admits, it does not have the effect of taking into account supplies from competitors in calculating the rebate, which means that the relevant rebate loss must be made good by competitors. Rather, it is more important here that according to the wording of the clause Roche decides on the possibility of obtaining supplies from third parties (this applies, in my opinion, also to the contract with Capsugel) and that in the event of Roche intervening the purchaser is no longer free, and would no longer fulfil the conditions for the grant of the rebate if he were to abtain supplies elsewhere. Moreover, here too it is significant that the "English" clause is in some respects rather restrictively worded, in so far as it allows only offers from producers to be considered (Ramikal, Trouw), in so far as there is reference to reputable producers, first-class manufacturers or reputable and first-class producers (Radar, Purina, Sandoz, Wyeth), in so far as it speaks of delivery of a comparably regular nature or similar conditions of supply (Beecham, Pauls and Trouw).

Only in one case (Protector) or, if the contract with Upjohn mentioned in another connexion is included, in two cases can a different conclusion be reached, because in this respect a simple competition clause applies and there is no provision for intervention by Roche. It is arguable here that the tie is so loosened and that so much genuine room for action by competitors has been provided that there can no longer be said to be an abusive obstacle to competition.

(c) Finally, as regards the existence of the bond, before there can definitely be found to be an abuse within the meaning

of Article 86, the question arises, in the applicant's submission, whether the *way in which the contracts have been treated in practice* is relevant in judging them. On this the applicant has stated that great use has been made of the "English" escape clause and that extensive supplies have been obtained from competitors, who have thus not seriously been excluded. In this context, contrary to the terms of the "English" escape clause, purchasers had frequently not informed Roche and there had been no loss of rebate in cases in which Roche had had no opportunity to intervene in relation to more favourable offers. For this the applicant relies, *inter alia* , on reports of checks on its customers which were produced during the proceedings by the Commission; further, it refers to the statements in respect of the objections made by the Commission submitted during the administrative proceedings by certain parties to contracts with the applicant.

In my opinion such considerations are irrelevant. I consider the Commission to be right in holding that the wording of the contracts and the effects which accordingly it was reasonable to assume would ensue are alone relevant in judging the question whether there is or is not an abuse within the meaning of Article 86. This view may be justified simply on the ground that it may be assumed that contractual clauses, which to some extent were obviously the subject of tough bargaining, were of some practical significance.

At most, in considering the seriousness of the infringement on the part of the applicant (adversely affecting the conditions of competition in the common market) the actual effects of the applicant's sale system should be borne in mind in assessing the fine imposed on it. I shall return to this, if necessary, in a subsequent connexion.

3. Now that it has been shown that the Commission, at least as regards the majority of the relevant contracts, rightly concluded that there was an abusive bond with the applicant, I will consider the contracts made with the undertakings Merck and Unilever to see whether any special conclusion is justified in relation thereto.

(a) The applicant entered into three contracts with Merck for the supply of vitamins A, E and B_6. They concerned the whole requirements of the purchaser or those additional requirements in excess of Merck's own production capacity and were to last for five years and then to be automatically renewed for further periods of two years unless prior notice of termination were given in time. Merck was granted rebates of 20% for vitamin B_6; minimum and maximum rebates of between 12.5 (15) and 20% applied to the other two vitamins, depending on price trends. Two contracts also contained the "English" escape clause, entitling Roche to intervene where more favourable prices and terms were offered by other manufacturers.

As far as the rebates are concerned, the applicant relies mainly on the fact that the rebates in the case of vitamins E and B_6 were for bulk purchases and in the case of vitamin A were for the task performed, because Merck resold that

product and saved the applicant marketing costs. Further, it alleges that Merck, because of the planning of its own production, is interested in a secure source of supply for large quantities and attaches importance to obtaining supplies from a single supplier because it appears to the public as a manufacturer.

Nevertheless, in my view none of this justifies the view that the contracts entered into with Merck are not caught by the provision in Article 86 on abuse. The question of the classification of the rebates can remain open, since, as we have heard, the Commission is not so concerned with that aspect but mainly with the exclusive bond. Here also, this bond, especially its long duration, is objectionable. Even if Merck's interest in a permanent and secure supply is recognized as worthy of protection, this can nevertheless not justify its being tied up to the extent and for the length of time chosen. It is perhaps right to share the Commission's doubt as to whether Merck's interest should be considered worthy of respect and protection in so far as it consists in attempting to appear to the public as a manufacturer whereas in fact it is simply a reseller. Finally, as regards the "English" escape clause the tie was not dissolved but simply loosened to the extent permitted by Roche and, moreover, only in relation to *manufacturers,* that is not dealers.

(b) As regards the contract entered into with Unilever, on the other hand, it is to be observed that it imposed an obligation to meet the estimated requirements of vitamin A for 1974 and a corresponding obligation in respect of the following year for which notice of the estimated quantity was to be given in December 1974. There were no rebates here but merely preferential prices, in respect of which it was provided that the difference between the accounting prices and the contractual prices should each time subsequently be compensated for between Unilever's parent company and Roche. An "English" escape clause also applied, with the option for Roche to align itself with the lower prices of other manufacturers.

The applicant's principal view on this point is that the special prices which were agreed are not objectionable. They are justified by long-standing business relations and having regard to the volume of the deliveries, but not least because Roche's marketing costs were lower and it could save on the technical utilization service. Furthermore, they came into being through the pressure exerted by competing offers, as may be inferred from the minutes of a meeting with Roche in London in December 1972. The mode of settlement does not have any specific importance in this connexion; it is simply explained by accounting and fiscal reasons.

If I have correctly understood the position the Commission, on this point also, is not primarily concerned with the special prices which were agreed but with the obligation imposed on Unilever to purchase its requirements from Roche. However, here too, in order to assess that obligation only those factors applicable to the contracts which have already been considered can apply. This can be repeated with reference to the

duration of the contract — even large purchasers do not necessarily order for two years; moreover, reference must also be made to what has already been said on the form of the "English" clause in connexion with the other contracts. Furthermore, one can add to this that it does not seem wrong for the Commission to deduce from the mode of settlement that it in fact served the purpose of checking that the obligation to meet requirements was fulfilled. In fact it is difficult to understand what compelling circumstances could militate against contract prices negotiated by the parent companies being directly applied by their subsidiaries.

(c) Accordingly there is no ground for viewing the contracts entered into with Merck and Unilever in any other way. They too must be regarded as an abuse, at least with reference to the obligation imposed upon the buyers to purchase from Roche, because their freedom of choice was restricted and access by third parties to these markets was made more difficult.

4. I come now to the facts constituting the second abuse, that of applying dissimilar conditions to equivalent transactions which is stated to be unlawful in subparagraph (c) of the second paragraph of Article 86 in the case of an undertaking having a dominant position within the common market. Reference can also be made on this point to the Sugar Case in which a similar criticism was made concerning fidelity rebates on the ground that the purchasers suffered thereby from a competitive disadvantage. Furthermore, it is interesting to note that similar evaluations are also found in national law; for example, under French law it is forbidden to apply differences in price levels which are not justified by differing cost prices; a similar rule applies under English law (cf. the Report of the Monopolies and Restrictive Practices Commission on "the supply of insulated electric wires and cables").

There can be no doubt that, as far as the fixing of the rebates is concerned, the purchasers in this case were treated unequally and the applicant has also not denied this. If all the graduated rebates on total turnover are examined there are found to be in part considerable differences with regard to the requisite minimum quantities and to the rebates relating to those quantities, both when contracts which are expressed in the same currency and are of the same duration are compared and when contracts which are expressed in different currencies are also compared. The same applies to the other fidelity rebates, including the so-called *del credere* rebates, where the percentage fluctuates between 1 and 7.5 %, if the discounts treated as quantitiy rebates in the contract with Merck are disregarded. These differencies, too, certainly cannot be justified with reference to the duration of contracts — which in certain cases overlaps — or to the volume of the requirements met or to actual sales in 1974, particulars of which have been produced before the Court. I am sure that I do not have to substantiate this now in detail; a careful analysis of the contracts does not admit of the slightest doubt on this point.

Consequently, the attempts made by the applicant to justify its conduct also appear in a quite different light. Thus

during the hearing by the Commission in the administrative procedure it took the view that the rebate and the differences in the rebate were not appreciable owing to currency fluctuations. It also submitted that there was no case in which the competitive capacity of its customers had been adversely affected. Almost all the buyers in fact process the vitamins. However, the vitamins only play a minor rôle in the end products; especially in the case of the production of feeding-stuffs and food, for which most of the sales are intended, they represent only a very small part of the price to the ultimate consumer, namely 1 % or less. That is said to be why even a difference in the rebate of 5 % can have no effect on conditions of competition.

It seems to me, however, that the applicant cannot with this contention expunge the complaint that it has committed an abuse. As for the first part of the applicant's argument, it is sufficient to recall that variations in the percentage of the rebate are also found in contracts which are expressed in the same currency. As for the second part of the applicant's argument, the Commission, in my view with good reason, points out that the expression "competitive disadvantage" contained in subparagraph (c) of the second paragraph of Article 86 is not synonymous with an adverse affect on competitive capacity. Likewise, academic lawyers (Siragusa in "Semaine de Bruges 1977", p. 425) stress that discrimination is also unlawful when the buyers concerned are not in competition with each other. Furthermore, it must not be forgotten that the buyers clearly attached considerable importance to the rebates, from which it is to be inferred that they were definitely of significance for their position on the market and their business arrangements; it must also be recalled that in the Sugar Case too price differences of 5 % were held by the Court to be sufficient for there to be an infringement of subparagraph (c) of the second paragraph of Article 86.

Consequently it can only be recorded — without in fact its being necessary to examine the manifestly irrelevant argument that competitors of the applicant had also applied rebates of this order of magnitude — that the Commission in the disputed decision was also right to find that the granting of different business conditions is an abuse.

5. After all these basic findings on the abuse of a dominant position the question whether the Commission's evaluation, which — as we have seen — is for the most part valid, may be upset with reference to the total volume of business covered by the contracts, must be examined. The questions which must still be considered are whether there must be an *appreciable* adverse effect on competition and intra-Community trade and whether in the present case, as the applicant holds, the application of Article 86 may be precluded because such an adverse effect is missing. On this point it puts forward the specific submission that the system of sales which is criticized — if the contracts with Merck and Unilever are disregarded and the actual fidelity contracts alone are considered, excluding the discount on aggregate turnover — comprises on average for the years 1970 to 1974 merely four per cent of vitamin sales in the common market.

I am convinced that we cannot follow the applicant on this point either. The Commission rightly points out the theory of perceptibility has been extended to Article 85, that is to a field where by definition existing effective competition has been restricted through agreements and the like. On the other hand, in circumstances to which Article 86 applies competition is practically eliminated because an undertaking in a dominant position is not exposed to effective competition. In the present case it does not in fact appear to be permissible to disregard conduct engaged in by such an undertaking, which according to the criteria of Article 86 must be held to be an abuse, because its effects on the conditions of competition are not appreciable.

However, even if it were held to be justifiable to disregard abuses or at least not to penalize them, whenever so to speak only "quantités négligeables" are in question, it must nevertheless be seriously doubted whether the present case belongs to that category. As we have seen, the contracts with Protector and Upjohn, which accounted for less than ½ % of the entire sales of vitamins in the Community in 1974, can at most be disregarded, but certainly not those with Merck and Unilever. It is also essential to note that the relevant contracts are between the applicant and important buyers who concentrate on the production of food and feedingstuffs. However, whether their volume of business is compared with the applicant's total sales or — as the applicant wishes — with the total sales of vitamins in the common market, we are certainly not confronted with volumes of such a size as to permit us, even if the "English" escape clause is taken into account, to speak of quite negligible effects on the conditions of competition. Moreover, since the contracts in question were concluded with vitamin processors, whose operations are not confined to the territory of one Member State, this at the same time justifies the assumption that trade between Member States has been affected to an extent which is in any case material for Article 86.

IV — Since the above considerations have shown that the legality of the Commission's decision, in so far as it finds that there has been an abuse of a dominant position, cannot in the main be called in question, permit me at this point to consider the further question whether the imposition of the fine can be criticized.

On this point there are three principal submissions to take into account:

— The first is based on the fact that Article 86 employs concepts (domination of the market, abuse) which have not been defined. On this point the applicant takes the view that they ought to have been put into more specific terms, principally by means of administrative decisions and if possible also by decisions of the Court, before the imposition of a fine could have been contemplated — and that this had not occurred at the time the contracts were concluded.

— Another submission concerns the requirement that there must be a wrongful act, which applies under

Article 15 of Regulation No 17. In this connexion the applicant submits that it has been involved in a mistake of law which precludes any allegation of guilt.

— Finally, the applicant relies on the principle of equality of treatment, since in comparable circumstances — it has in mind in particular the fidelity rebate in the Sugar Case, which has already been mentioned — fines have not been imposed.

1. In connexion with the first submission the applicant has called attention to Article 22 of the German Gesetz gegen Wettbewerbsbeschränkungen (Law against Restriction on Competition), under which the abusive conduct of an undertaking in a dominant position on the market is not *per se* punishable by a fine, and to other national provisions relating to competition which provide for fines only if specific orders of the cartel authorities are not complied with. It has also recalled the fact that by a Law of 1973 a supplementary procedure for prohibiting restrictions of competition was added to the German Law against such restrictions on the ground that provisions for imposing fines are not suitable for settling the questions connected therewith. If I correctly understand the applicant it does not, however, go so far as to conclude that the whole of the provision for imposing fines contained in Article 15 of Regulation No 17 is illegal in so far as it refers to Article 86 of the EEC Treaty. It merely takes the view that that Article 15 must be interpreted in accordance with fundamental rights as meaning that fines are to be imposed only if explanatory administrative decisions have already been adopted.

That view originates mainly in the argument that in the present case exception is taken to the conclusion of specific contracts which are in every way unobjectionable since they are customary and comply with the law on cartels and can be regarded as unlawful only in connexion with a dominant position. On the question of the dominant position it must, however, in the applicant's view be conceded that this entails difficult factual evaluations and that accordingly, since not only market shares and the structure of the market but also a large number of additional questions are material, there must at least have been reasonable doubts in this case. The imposition of a fine in such a situation is incompatible with the principle that before penalty clauses can be applied they must have been adequately defined. This principle of exactitude, which is connected with the principle of legal certainty, is, as may be gathered from academic writers and the case-law, in part incorporated in national constitutional law (Article 103 of the Basic Law of the Federal Republic of Germany; Article 25 (2) of the Italian Constitution); furthermore — as may also be gathered from academic writers — it has found expression in Article 7 of the Convention for the Protection of Human Rights. In the case of legal systems in which there is no such constitutional provision, which, moreover, refers not only to fines imposed under criminal law but also to breaches of administrative rules and regulations (Ordnungswidrigkeiten), reference may be made, as for example under Belgian law, to the principle *in dubio pro reo* or — and this applies in other Member States — to the principle *nullum crimen sine lege*. It may also be inferred from this — and also in fact with

reference to breaches of administrative rules and regulations — that there can be no punishment if the concepts at issue are vague and their interpretation is open to doubt. Accordingly laws which have not been defined must at least be given a restrictive interpretation.

In order to deal with these submissions the Commission raised many doubts and objections which in fact relate to the scope of the constitutional provisions invoked, to the provision contained in the Convention for the Protection of Human Rights and also to the principle found in Belgian law, and on the strength of them it must be doubted whether there is any such general legal principle having the effect claimed by the applicant. It points out that such a principle is found only in the constitutional law of two Member States which admit of a judicial review of the legislature, that this is a new kind of principle and that it relates mainly to criminal law, whereas it has not yet been finally settled whether it applies also to the law relating to breaches of administrative rules and regulations to which the fines under Article 15 of Regulation No 17 belong. It must accordingly be assumed in each case that no excessively firm conclusions are justified. It has been accepted both in German and in Italian law that general concepts which are not clearly defined are to be found in legislative provisions and consequently it is of special importance to determine whether the framework laid down allows the *courts* to give an interpretation and provides a reliable foundation for the case-law. This applies especially to competition law, where by reason of the diversity of economic life general concepts cannot be dispensed with. In this field it is said to be sufficient if the precise effect of a provision can be ascertained with reference to the purpose of the rules in their entirety and in a case such as this the fact that a large undertaking engaged in international trade can obtain sufficient pointers from its experience of the various national legal systems to enable it to determine the legality or illegality of its conduct is undoubtedly also material.

With reference to this difference of opinion there is no doubt that it would be extremely interesting — and that is why my description of it has been fairly detailed — to examine thoroughly the problems to which it has given rise. But in the present case there is no compelling need to do so for reasons which will presently become clear.

The argument that the application of the provision relating to fines in Regulation No 17 can under no circumstances be contemplated before the administrative decisions implementing Article 86 were adopted appears to me to be hardly tenable. That would clearly be going too far, because there are undoubtedly circumstances which can easily be subsumed under the provisions of Article 86 and in relation to which the existence of a dominant position and also of an abuse within the meaning of the examples set out in Article 86 cannot seriously be questioned.

However, in so far as there are also "grey" zones and borderline areas, and as long as administrative practice has not yet evolved sufficiently, it should be possible in most cases to take proper

account of this fact by means of considerations relating to the wrong alleged. This would at least seem to be the position in this case and therefore it is in my view appropriate to focus attention mainly on this matter, that is on the second of the submissions put forward by the applicant.

2. On the question whether it was at fault, that is whether it abused its dominant position intentionally or negligently, the applicant introduced into the argument the interesting legal conception of a mistake of law excluding liability.

On the strength of detailed explanations based on comparative law the applicant has also managed to show that this is a widely-held legal concept and that it is accordingly reasonable to accept it as being a progressive element in the context of the EEC and of the provisions relating to fines which apply to this case. In this connexion I would refer to the plaintiff's submissions as to the validity of the concept of a mistake of law in German law and also in the law relating to breaches of administrative rules and regulations, and also as to Danish, Dutch and French law — at all events as far as the academic writers in those countries are concerned — and I would call attention to the fact that Jeschek, in his article on "Die Strafgewalt übernationaler Gemeinschaften" (Zeitschrift für die gesamte Staatswissenschaft 1953, p. 497 *et seq.),* took the view that an analogous principle may be deduced in relation to the law of the European Coal and Steel Community from Article 36 of the EEC Treaty. As against that, it is said not to matter very much that on this point English and Italian law manifest a certain reticence.

If this view is accepted then the determinative question is whether in this case there can in fact be said to be a mistake by the applicant which exonerates it as far as its dominant position and the conduct of which the Commission complains is concerned.

With regard to the *dominant position,* and quite apart from any mistake of fact in respect of which the applicant's share of the world market may be material, the following points must be considered in this connexion.

On certain markets (vitamins A and E) the applicant's market share is quite clearly approaching material proportions. Where this is not so it may be of importance that the subject matter of decisions before the applicant entered into the contracts with its customers consisted in practice solely of monopolies or very large market shares. The submission was made to us, and was not challenged, that it was the practice in Germany before the law was amended in 1973 not to accept even very large market shares as being sufficient to establish a dominant position, if competition in respect of quality was found to exist. In this connexion what was established during the proceedings with reference to price trends on the vitamins market and to the existence of some price competition, in conjunction especially with the fact that under the Treaty establishing the European Coal and Steel Community a dominant position depends upon the power to fix prices, may be material. Finally, the

applicant's awareness of the financial power of large competitors may also have been of importance in connexion with its view that it could not eliminate effective competition, just as the possibility cannot be ruled out that its assessment of the position could have been influenced by the knowledge that it was operating in a vigorously expanding market.

With regard to the conduct criticized by the Commission — in so far as it relates to the complaint of *unequal treatment of purchasers* — account may be taken of the fact that the effects on competitiveness were kept within bounds and that the participators on the market at that time did not readily perceive that this is not determinative in the case of Article 86. As far as *tying purchasers* is concerned, the considerations which must be accepted are in my view that in some respects fidelity rebates in the law relating to the European Coal and Steel Community and with reference to Article 86 have also not been criticized by the learned writers (cf. Van Hecke, "Kartelle und Monopole im modernen Recht", Vol I p. 338), and that when the contracts which are criticized were concluded there was no decision as to which fidelity rebates were genuine and which were not. In particular, according to the unchallenged statements of the applicant, such contracts have clearly not as yet been subject in practice to sanctions by way of fines either in the United States or in Germany. Nor does it appear to be entirely irrelevant that the applicant took the view that while the market was expanding such obligations were less objectionable, because there was sufficient scope for all participants on the market, unlike the position in a stagnant market. Nor can it be regarded as entirely incorrect for the applicant to attach importance to the principle of carefully considering the interests involved, which was after all mentioned in the GEMA decision adopted by the Commission with reference to an exclusivity obligation and in the Court's judgment in the *Sabam* case with reference to a similar situation. In particular, the "English" clause incorporated in all the contracts as well as its actual implementation by the applicant should be material in this connexion and expecially with reference to the fact that such a clause was included by the Commission of its own volition in the decision which it adopted in respect of Dunlop (Journal Officiel 1969 L 323, p. 21).

Having regard to all these considerations — against which in my view it cannot convincingly be argued that the applicant could have protected itself by obtaining legal advice and that its knowledge of the various national laws, which in part differ considerably, afforded grounds for caution — one should not hesitate to speak in terms of a mistake of law excluding liability in relation to the application of Article 86 to its case. It can at least be stated that the degree of guilt is so small that there was no ground for imposing a fine, especially on an undertaking which by common consent behaved in an extremely co-operative way during the administrative proceedings and was ready to discontinue the conduct complained of forthwith.

3. After what has been said it is in principle unnecessary to give any further consideration to the view that there was unequal treatment with regard to the fine imposed. Nevertheless, if one were to do this the very brief comment on this point would be that in the present case this

point of view cannot in fact help the applicant. In so far as the applicant has referred in this connexion to the Sugar Case it must in particular be borne in mind that in that case a fine was also imposed for infringement of Article 86 by the grant of fidelity rebates and that it was simply reduced by the Court, albeit by a considerable amount.

4. If it is thought to be right to annul the decision imposing the fine it is also unnecessary to consider the question whether the fixing thereof should at least be revised. However, on this aspect of the matter I will at least point out that such a revision would be appropriate in any event, because the proceedings establish that there is no domination of the market in the case of vitamin B_3 and that the complaint of an abuse in so far as tying purchasers is concerned can hardly be upheld in the case of two of the contracts. Furthermore in this connexion account's might have to be taken of the fact that a large part of the applicant's product was supplied for technological purposes, and therefore went to a market on which it had not been established that the applicant occupied a dominant position. In addition, the actual consequences which flowed from the contracts complained of should also be taken into account. On this point I would recall the applicant's assertions, the validity of which it attempted to substantiate in part by reference to the views of its customers as to the Commission's complaints that owing in particular to the "English" clause and the extensive use thereof by the applicant they felt that they had considerable freedom to make decisions as to their purchases. I am also reminded of the Commission's admission that — and this was not apparently always checked — the obligations imposed were clearly not fulfilled consistently and that the inducement created by the granting of the rebate was not everywhere as great as was feared. At all events, this is how the Commission's view must be understood when, to sum up, it maintains that the applicant's 22 customers with which we are concerned purchased *the bulk* of their requirements either exclusively or *in the main* from the applicant. I do not intend now to go into any further detail. I refer on this aspect of the matter to the Commission's submissions on p. 52 *et seq.* of its rejoinder and to its answers to the Court's questions (12 et *seq.)* and also to the reports produced to us of the checks carried out on the applicant's customers.

V — This does not, however, complete the examination of this case. There remain for consideration two grounds which in the view of the applicant call in question the legality of the decision as a whole, namely a breach of the prohibition on the use of documents which have been obtained unlawfully and a breach of the right to be heard.

1. On the first point I can be fairly brief.

The applicant submitted on this issue that internal documents were handed over to the Commission by one of its former employees without permission, which is punishable under Swiss law — this is proved by the judgment convicting that employee. According to the statements made by the employee to the police the Commission induced him to

give the information. The Commission has thereby, in contravention of international law, made inquiries on Swiss territory without that country's consent. Such an encroachment upon the sovereignty of a non-Member State must necessarily entail a prohibition of the use of encroachment upon the sovereignty of the documents obtained in this way, especially as, having regard to the circumstance that the facts in question appear clearly from the contracts produced by the applicant, it can be said that it was quite unnecessary for the Commission to exceed its powers in this way and that it consequently infringed the principle of proportionality.

The Commission denies in particular that it induced the applicant's former employee to act in that way. Nothing of the sort emerges from the judgment which has been mentioned. Furthermore, this is supported by the fact that Switzerland has certainly not lodged any complaint with the Commission concerning inquiries wrongly made on its territory.

There is no need now to go into all the details. The material point is that the applicant in the end produced the documents concerned in the proceeding of its own accord. It also stated that it had decided not to press its claim that the use of the documents should be forbidden and expressly left this particular issue to be taken up and determined by the Court. According to my present view of this issue there is no need for the Court to do so. My reason is that we should refrain from pursuing the delicate matter which has arisen, expecially as it would in any case be necessary for this purpose to ascertain the part played by the Commission and its officials in obtaining the said documents.

2. As far as concerns the second point, namely a breach of the principle of the right to be heard, the applicant's first complaint is that certain documentary evidence considered in the disputed decision was not dealt with during any hearing. Its second complaint is that certain market data (market shares of competitors, sales of vitamins in the Community, the volume of imports) used by the Commission was not made available to it and that it did not have any opportunity, or at least any proper opportunity at the right time, to the information furnished by its customers, the reports of the checks carried out on its customers and the latter's views on the Commission's objections. Finally, it also takes the view, broadly, that it has not been allowed to undertake a thorough inspection of the documents in the case, which would have enabled it to draw attention to mitigating circumstances which were not taken into consideration.

The first point to stress with reference to this argument is that the documents which the applicant believes should have been dealt with at a hearing were its own and that it was consequently acquainted with their contents. The next material point which must also be stressed is that according to the rules applicable to such procedures in the Community there is in principle only a duty to notify objections. The Court has already held that the latter must set out the essential facts of the case and the legal considerations relating thereto, whereas there is no

mention anywhere of specifying the documents on which the Commission relies. However, if instead the view is taken that there may be circumstances in which it appears to be appropriate to discuss such documents with the person or persons concerned — for example, when they admit of several interpretations or when it is reasonable to suppose that they are incomplete and might be supplemented by the person concerned with documents in mitigation — then in the instant case it is important to note that during the procedure no such claim was made. Since, moreover, the facts established by the documents in question (the tying of buyers by means of a fidelity bonus) were clearly set out in the statement of objections and since, furthermore, they have been the subject of extensive argument during the legal proceedings there is certainly no cause to amend the Commission's decision on this point on the ground that there has been a breach of the principle of the right to be heard.

In connexion with the applicant's further claim that it was entitled thoroughly to inspect the documents in the case, the Commission points out, in my view correctly, that Community law does not specifically provide for any such right and that no general legal principle to this effect can be cited. It is of special interest in this connexion to note its observations on the highly developed German procedural law on cartels (Article 53 of the Law against Restrictions on Competition). According to that law, in administrative proceedings the only applicable principle is that the persons concerned must have the opportunity to give their views on the objections laid against them and that a decision cannot be founded on facts of which the parties concerned were unaware. The way in which the Bundeskartellamt (the Federal Cartel Office) applies this principle is evidently to communicate to the parties concerned only the essential content of the pleadings, and in particular to notify them only of the essential purport of the views of the other parties concerned. There is no such right to carry out a thorough inspection of documents even in appeal proceedings, which are judicial proceedings. Inspection of the preliminary and ancillary files, opinions and relevant information is permitted under Article 71 of the Law against Restrictions on Competition only with the consent of the parties concerned and, if that consent is refused in reliance upon the duty to maintain secrecy, only their content is disclosed so that it can be used during the proceedings.

On the strength of these principles only the following supplementary observations need be made on the individual objections raised by the applicant.

Apart from the fact that the applicant's questions were answered in a letter from the Directorate-General for Competition of 13 August 1975 and that, as may be gathered from a letter of the Commission of 16 July 1976, certain requests made by the applicant were granted in substance, it is important to note with reference to the market shares of other competitors, in respect of which the Commission in the first instance, relying on the judgment of 15 July 1970 in Case 45/69, *Boehringer Mannheim GmbH* v *Commission of the European Communities* [1970] ECR 769, invoked its duty to maintain secrecy, that these data were nevertheless notified in an

anonymous form to the applicant at least during the legal proceedings and that it is common knowledge that this made it possible to arrive to a great extent at agreed evaluations of the market shares.

With reference to the views of the applicant's buyers on the objections notified by the Commission the question whether the Commission is entitled to treat these views as secret in my opinion need not now be decided. They would in any case in fact be of only very limited value in the present case simply because, quite apart from considerations to which I shall come presently, they were given in the context of a procedure under Article 85, in which the applicant's contractual partners must also be regarded as defendants. Finally, with regard to the information obtained from the applicant's customers and the checks carried out on them it is material that only a certain number of them consented to these documents being passed on to the applicant. Subject to this reservation, the applicant had knowledge of the said documents just as documents concerning other customers were also made available to it in an anonymous form. Moreover, these documents would only be relevant if the actual effects of the applicant's system of sales were to have any bearing on the review of the disputed decision, but this in my opinion does not apply if the fine is cancelled.

Even if one has the impression that during the administrative procedure the Commission might have discussed in greater detail with the applicant the documents which it used and that, with due regard to its duty to maintain secrecy, it ought to have considered whether it should have given the applicant fuller particulars of the essentials facts during the administrative proceedings, instead of waiting for the legal proceedings, it is nevertheless impossible in the end to say that in the present case there has been a breach of the right of the party concerned to defend itself, such as would lead to the annulment of the whole of the disputed decision.

VI — Permit me now once again to recapitulate my opinion.

In my view the disputed decision is valid in so far as it finds that the applicant occupies a dominant position on the markets for six vitamins, that is, with the exception of the market for vitamin B_3, and in so far as it accuses the applicant of the abuse of tying 20 of its buyers, that is, with the exception of the Protector and Upjohn undertakings, and also of the abuse of treating unequally the undertakings mentioned in the decision. On the other hand, the imposition of a fine for infringement of Article 86 seems to me to be unjustified because the applicant is not sufficiently at fault. To that extent the application of Hoffmann-La Roche should be allowed; the rest of the application must be dismissed. Having regard to this opinion it seems to me moreover appropriate to express the view that each party should bear its own costs.