freedom of consumers to choose their suppliers.

10. The function of price competition is to keep prices down to the lowest possible level, and to encourage the movement of goods between the Member States, thereby permitting the most efficient possible distribution of activities in the matter of productivity and the capacity of undertakings to adapt themselves to change.
Independent and non-uniform conduct by undertakings in the Common Market encourages the pursuit of one of the basic objectives of the Treaty, namely the interpenetration of national markets and, as a result, direct access by consumers to the sources of production of the whole Community.

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

In Case 55/69

CASSELLA FARBWERKE MAINKUR AG, having its registered office in Frankfurt-Fechenheim, 526, Hanauer Landstrasse, assisted and represented by H. Hellmann and K. Pfeiffer, Advocates at Cologne, with an address for service in Luxembourg at the offices of E. Graf von Carmer, Counsellor (First Class) at the German Embassy, 20–22 rue de l'Arsenal,

applicant,

v

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

defendant,

Application for the annulment of the Commission Decision of 24 July 1969, published in the Journal Officiel L 195 of 7 August 1969, p. 11 *et seq.*, relating to proceedings under Article 85 of the EEC Treaty (IV/26. 256—Dyestuffs),

THE COURT

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

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

gives the following

JUDGMENT

Issues of fact and of law

I — Statement of the facts

The facts may be summarized as follows:
On the basis of information supplied by trade associations of the various industries using dyestuffs, the Commission made inquiries as to whether increases in prices for these products which had occurred since the beginning of 1964 in the countries of the Community were made by mutual agreement between the undertakings concerned.
As a result of these inquiries the Commission found that three uniform price increases had taken place. An increase of 15% affecting most aniline dyes took place between 7 and 20 January 1964 in Italy, the Netherlands, Belgium and Luxembourg and on 1 January 1965 it was extended to Germany. On that same day almost all producers introduced, in Germany and the other countries already affected by the increase of 1964, a uniform increase of 10% on dyes and pigments not covered by the first increase. Finally, on 16 October 1967 an increase of 8% on all dyes was introduced by almost all producers in Germany, the Netherlands, Belgium and Luxembourg. In France this increase amounted to 12%; in Italy no such increase was introduced at all.
On 31 May 1967 the Commission decided upon its own initiative to commence proceedings under Article 3 of Regulation No 17/62 of the Council for presumed infringement of Article 85 of the Treaty against the undertakings, including in particular Cassella Farbwerke Mainkur AG, which had participated in a concerted practice for the purpose of fixing prices for dyestuffs.
By letter of 11 December 1967 the Commission informed that undertaking of its decision. This letter was accompanied by a notice of objections made by the Commission against the undertakings which had participated in the abovementioned increases. There were sixty recipients of the said letter and notice. They were producers of dyestuffs established both inside and outside the Community, and their subsidiaries and representatives established within the common market.
In the notice of objections the Commission declared that within the Common Market the price increases had been introduced by the following producers, and by their subsidiaries or representatives:

— Azienda Colori Nazionali Affini S.p.A. (ACNA), Milan (Italy),

— Industria Piemontese dei Colori di Anilina S.p.A. (IPCA), Milan, (Italy),

— Fabbrica Lombarda Colori Anilina S.p.A. (FLCA) Milan (Italy),

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

By letter of 10 April 1968 the undertaking Cassella Farbwerke Mainkur AG submitted its written observations, the purpose of which was to refute the objections set out against it.
At its meeting on 24 July 1969, the Commission adopted a decision ordering Cassella Farbwerke AG to pay a fine of 50 000 u.a. for infringements of the provisions of Article 85(1) of the Treaty, which it had allegedly committed as a participant with other undertakings in concerted practices for the purpose of fixing the amount of price increases and the circumstances in which these increases were to be introduced in the dyestuffs industry in 1964, 1965 and 1967.
For the same reasons the decision ordered that fines of 50 000 u.a. be paid by:

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

and that a fine of 40 000 u.a. be paid by Azienda Colori Nazionali Affini S.p.A.
Cassella Farbwerke Mainkur AG lodged an appeal against this decision at the Court Registry on 4 October 1969.

II — Conclusions of the parties

The *applicant* claims that the Court should:

1. Annul, in so far as it concerns the applicant, the Decision of the Commission of 24 July 1969, relating to proceedings under Article 85 of the Treaty (IV 26.267—Dyestuffs);

2. Order the defendant to bear the cost.

The *defendant* contends that the Court should:

— Dismiss the application as unfounded;
— Order the applicant to bear the costs.

III — Submissions and arguments of the parties

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

A — Submissions as to procedure and to form

1. *Complaints concerning the commencement of the administrative procedure*

The *applicant* observes that it was the decision of the Commission of 31 May 1967 to commence proceedings on its own

initiative against various manufacturers of dyestuffs in application of Article 3 of Article 3 of Regulation No 17 which led to the contested decision. That provision only grants the Commission the power to require undertakings by decision to bring an end to the infringements which it has established or to address recommendations to them for that purpose. Therefore the decision imposing fines was not covered by the abovementioned decision of 31 May 1967, for no subsequent decision had been taken by the Commission. Furthermore, the applicant stresses that the notice of objections, containing a reference to Article 15(2) of Regulation No 17, is signed only by the Director-General for Competition.

Moreover, the question arises whether it is, in principle, permissible to combine a procedure under Article 3 with a procedure under Article 15, for in doing so it is possible, in the applicant's view, to evade the provisions of Article 21(1) of Regulation No 17, which exempts decisions imposing fines from the rule that decisions must be published.

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

Moreover, in the relationship between undertakings and the Commission, it is the notice of objections which determines the character of the procedure.

As for the validity of the signature of the Director-General for Competition, the defendant observes that the latter was empowered to sign the notice of objections by the Commissioner responsible for competition problems, who had himself been empowered by the Commission to determine the content of the objections.

The publication of the decision in the Journal Officiel, for which no provision was made in the operative part of that decision, constitutes a measure subsequent to the adoption of the measure in question, cannot as such entail its annulment. As a subsidiary point, the defendant observes that although Article 21 of Regulation No 17 does not require publication, it does not contain any provision to the contrary. It is alleged that in cases not covered by that provision, the Commission has a general power to decide, under its discretionary powers, whether it is appropriate to publish a measure.

2. *Complaints concerning the course of the administrative procedure*

(a) The applicant argues that the Commission infringed Article 19(1) of Regulation No 17 and Regulation No 99/63 in that it continued its inquiries concerning the price increases of 1964 and 1965 after sending the notice of objections, and only commenced its inquiries on the increase of 1967 after sending that notice.

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

Secondly, the defendant argues that there was no infringement of Article 19 of Regulation No 17 or of Regulation No 99, because the inquiries to which the applicant refers (those of 13.12.1967, 25.1.1968 and 6.2.1968) all took place before the meeting of 10 December 1968, organized for the very purpose of enabling the undertakings concerned to submit their observations orally on the objections as a whole.

In its reply, the *applicant* requests the Court to order the Commission to supply fully information on the inquiries carried out following notification of the objections, and in particular to produce all the instructions given for the investigations carried out under Article 13 and 14 of Regulation No 17, so as to render it possible to establish the precise purpose of

the inquiries carried out subsequent to that notice of objections.
In its rejoinder, the *defendant* states that it is willing to supply the Court of Justice with all the supplementary information requested concerning its inquiries.

(b) The *applicant* complains that the defendant infringed Article 19(1) of Regulation No 17 and Regulation No 99/63 in that in the notice of objections the Commission confined itself to stating the deductions which it had itself made from certain allegedly established facts, without giving those concerned the opportunity of acquainting themselves more closely with those facts, and thus of discussing them. This applies in particular to the dates on which the various undertakings against which proceedings were taken allegedly sent instructions to their subsidiaries, and to the supposedly comparable wording of those instructions.
Furthermore, it is argued that the contested decision has an entirely new factual basis compared with the notice of objections as regards the circumstances which accompanied the price increases, such that there was an infringement of Article 4 of Regulation No 99, which provides that the Commission shall deal only with those objections in respect of which undertakings have been afforded the opportunity of making known their views.
The new factors in the decision consisted in particular, it is said, in precise information concerning the moment when some of the producers, not including the applicant, have instructions to their Italian subsidiaries concerning the increase of 1964, and in the assertion that the concertation at issue took place between 10 named undertakings, chosen from nearly 50 undertakings which had been referred to in the notice of objections, although the contested decision did not make it possible to understand the reasons for that choice.
The *defendant* replies that according to the judgment in *Grundig-Consten* it is sufficient for the Commission to inform the interested parties of the elements knowledge of which is necessary to ascertain which objections were taken into consideration, as was done in the present case in Section II of the notice of objections. Furthermore, it would have been wrong, because of the risk of betraying business secrets, to send those concerned the full text of the circulars sent by them to their subsidiaries or representatives. In any event, the contested decision was not based on objections other than those set out in the notice of 11 December 1967.
The *applicant* replies that in accordance with the case-law of the Court in Joined Cases 42 and 49/59, the reference to commercial secrets cannot justify the failure to supply the parties with elements of fact necessary for the defence. The Commission did not even ask for the opinion of the undertakings concerned on the necessity of maintaining secrecy over the content and tenor of the letters in which it has found supposed similarities, thereby deducing the existence of a concerted practice. Moreover, the Commission has contradicted itself because it has produced some of the letters as an annex to its statement of defence.
The *defendant* takes the view that in requiring the Commission to put forward evidence at the time of notification of the objections, the applicant is confusing the obligations which Article 19(1) of Regulation No 17 imposed on the Commission for the purposes of the administrative procedure with the obligations which are incumbent upon it as a defendant before the Court of Justice.

(c) The *applicant* argues that in giving unjustifiably short notice of the hearing (12 days) and in rejecting, without sufficient reasons, a reasoned request for postponement of the date fixed, the Commission infringed the rights of the defence in that it was not given the opportunity and the possibility of developing its point of view orally, taking into account the absence of the sales director responsible and of the applicant's advocate at the time of the hearing.
Since seven months passed between the date of the hearing on 10 December 1968 and the consultation with the Advisory Committee on 8 and 9 July 1969, the Commission could have given the applicant the opportunity of submitting its observa-

tions at a later date, without thereby delaying the adoption of the decision.

The *defendant* replies that in reality the applicant had almost three weeks' notice from the date of the summons. In view of the large number of people having an interest in taking part in the hearing, it was not possible to take into consideration all the wishes expressed concerning the fixing of the date. Furthermore, the undertakings were informed that they were free to bring any relevant argument to the attention of the Commission even after the hearing.

In so far as the Commission refers to a summons by Telex sent some days earlier, the *applicant* objects that this process constitutes a clear infringement of the formal provisions of Article 10 of Regulation No 99.

As for the undertakings' opportunity of bringing their observations to the attention of the Commission even after the hearing, the applicant observes that it was informed of the minutes of the hearing for the first time by letter of 19 December 1969 sent by the Commission's authorized agents *ad litem*, following the submission of the statement of defence.

The *defendant* observes that in its application the applicant declared that it was summoned on 28 November 1968 in accordance with the formalities required.

(d) Finally, the *applicant* argues that the Commission further infringed the rights of the defence in that the contested decision mentions the decision of the Bundeskartellmat of 28 November 1967. Yet on the one hand this was not mentioned in the notice of objections, and on the other hand the Commission did not have the right to take note of the results of investigations which it had not carried out itself. Finally, the Commission should have known that an appeal had been lodged against that decision of the Bundeskartellamt and that therefore there could be no question of attributing any conclusive value to it. It is argued that the fact that the said decision was annulled by the Kameergericht Berlin confirms the soundness of the complaint thus made.

The *defendant* replies that the reference to the decision of the Bundeskartellamt were superfluous in the context of the contested decision. In any event there was no reason why it should not have been referred to in that decision, particularly since it seems undeniable that Geigy announced an increase, as the Kammergericht Berlin also held in its decision of 28 August 1969, which overruled the abovementioned decistion of the Bundeskartellamt for reasons relating to German law alone.

The *applicant* replies that the decision of the Kammergericht, annulling the decision of the Bundeskartellamt to which the Commission refers, held that no concerted action existed of any kind whatsoever.

The *defendant* objects that the Kammergericht certainly did not exclude the possibility that Geigy may have recommended the adoption of uniform conduct. The Kammergericht based itself on the first article of the German Law on competition, which merely defines the concept of an agreement, and not on Article 38(2) of the same Law, which provides for the imposition of fines in cases of arrangements in restraint of competition which are not legally binding. Accordingly, so it is argued, the decision of the Kammergericht does not in any way resolve the question whether the conduct of the undertakings concerned constitutes a concerted practice within the meaning of Article 85.

3. *Complaints concerning the reasons stated for the decision*

The *applicant* complains that the reasons stated for the contested decision are wholly inadequate, particularly in that the decision does not specify the facts which are imputed to each of the undertakings proceeded against. As regards the applicant in particular, it is unable to glean from the context of the decision the facts on which the Commission is relying so as to deduce its participation in the alleged concerted practice. The only statement which the exposition of the facts contains on this subject is the finding that the applicant increased its prices in the same way as the other undertakings. However, this is a finding which the Commission also reaches as regards other undertakings which have

not been fined. The fact that the contested decision repeatedly resorts to very general statements has the effect of making it wholly impossible for those concerned to investigate them.

Finally, there is, it is argued, a fundamental omission in the statement of reasons, because it only sets out the factors alleged against the undertaking concerned and fails to mention certain facts which tell in its favour. Yet in a procedure pursuant to which fines may be imposed, particularly where the evidence is circumstantial, the Commission has a duty to take favourable facts and elements into consideration as well.

The *defendant*, in its statement of defence, observes that the fact that the undertakings did not all announce the increases of 1965 and 1967 at the same moment does not mean that they had abandoned the concerted practice which was at the basis of the increase of 1964. They merely took care to act with circumspection.

The *applicant* replies that by referring, in its statement of defence, and for the first time, to the idea of a continuous infringement allegedly constituted by the three price increases, the defendant has given an entirely new basis to the contested decision. Since there is a glaring contradiction between the text of the decision and the justification for it which is now given by the Commission, the decision ought to be annulled for infringement of Articles 190, 173 and 174 of the Treaty.

The *defendant*, in its rejoinder, refers to the considerations set out at pages 4 to 6 of the contested decision concerning the evidence substantiating the conclusion that a concerted practice existed. It cites several passages from the preamble to the decision, from which it appears that the Commission constantly referred to a single concerted practice, and it observes that in any event this legal description is only of importance to the question as to when the limitation period commenced.

4. *The period of limitation*

The applicant observes that for want of an express provision of Community law, it is necessary to refer to the principles in force in the national laws on the subject of the limitation of actions. It is for the Court, by means of interpretation, to fill the silence of the law by setting a period of limitation falling between the two extremes represented by the three year period for which German anti-trust law provides and the 18 month period laid down by Italian criminal law in respect of fines. Whatever period is thus set, the adoption of these criteria has the result, it is said, that proceedings regarding the price increase of January 1964 are out of time. A further reason for holding that proceedings relating to facts occurring so long ago are out of time is the unavoidable uncertainty regarding a complete reconstruction of facts of this kind.

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

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

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

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

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

The *applicant* replies that the proposition that the Commission has a discretionary power concerning periods of limitation is in contradiction with the purposes for which limitation periods have been created, and in particular with the requirements of legal certainty. The proposition that the activity was continuous is not, it is said, substantiated in the contested decision, and is, moreover, incorrect in fact. Furthermore, where there is a chain of continuity the question whether time runs for each action constituting a link in the chain or whether it only starts to run when the last component action has been performed is currently the subject of controversy.

It is asserted that the Commission did not effect the slightest inquiry at the applicant's premises. The investigations carried out at the premises of SASEA, a commercial agent which is legally and financially independent of the applicant, cannot possibly constitute a measure interrupting the limitation period as against the applicant.

The *defendant* objects that since all the undertakings in question had been affected by the constant fall in prices, they had a continuous and collective interest in changing from a relatively low level of prices to a higher level. Although the operative part of the contested decision speaks of 'concerted practices' this is because the decision was addressed to ten different undertakings. The defendant also asserts that according to the predominant view amongst academic writers, a practice may be considered to be continuous if that practice simply displays certain external characteristics and if there is negligence.

The investigations carried out in Italy at the premises of SASEA were directly concerned with the infringement for which the Commission presumed the applicant to be responsible. Quite apart from the legal ties existing between that undertaking and the applicant, it is undeniable that SASEA represented the applicant in Italy, which suffices, it is alleged, to interrupt the period of limitation.

B — On the substance

1. *The concept of a concerted practice*

The *applicant* takes the view that the interpretation which the Commission puts upon this concept would appear to be the correct one, since it starts from the idea that conscious parallelism is not sufficient to establish the existence of a concerted practice. No such practice exists unless the interested parties have previously reached a common understanding as to the conduct which they will adopt on the market. Moreover, any narrower interpretation is, it is argued, legally indefensible and unacceptable in the reality of business life.

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

The *application* is of the opinion that this concept of a concerted practice, which the Commission put forward for the first time in its statement of defence, has an extremely wide scope, and that there is no precedent for it in legal doctrine or in previous practice. The traditional concept of a concerted practice, which was the one

defended by the German delegation represented by the Bundeskartellamt and by the Federal Minister of Economics at the conference of experts from the Member States cartels, requires a common will relating to the future business conduct of those concerned, acting in accordance with a common plan. The applicant cannot now be blamed for having placed reliance on this concept.

Furthermore, the Commission has not even attempted to apply to the facts of the case the factors substantiating the existence of a concerted practice, as contained in the definition which it gives of them. There is no means of telling whether, in the Commission's way of thinking, the important factor from the point of view of competition is the announcement of a price increase or the implementation of the increase.

The applicant points out that in the case of a general increase announcements are sent to all customers, including, therefore, manufacturers of dyestuffs who maintain a reciprocal supplier-customer relationship. Such announcements are even published in the daily press. Furthermore, customers insist on being informed in advance of imminent price increases. Yet according to the Commission, when this information results in identical conduct, it is not only evidence of prior concertation, but is also the decisive criterion of substance, the very essence of the concerted practice. However, such a concept is in contradiction with reality because in the case of price increases conscious parallelism necessarily presupposes publication and prior knowledge of an imminent increase. Therefore in reality, it is argued, the concept of a concerted practice put forward by the Commission coincides with conscious parallelism. Thus, in the thinking of the Commission, any increase in prices which is general and therefore necessarily public, and which is followed by the producers constituting the oligopoly, is *ipso facto* a concerted practice. This, it is asserted, is tantamount to saying that in an oligopoly in which reactions are interdependent any general increase in prices is prohibited.

Therefore the Commission's definition of a concerted practice is incompatible with Article 85, which treats concerted practices in an almost identical way to agreements and decisions as regards their constituent elements.

It is argued that even if one were to reason on the basis of the Commission's definition of a concerted practice, the requirements for its application are not met in the applicant's case. For not only did the applicant publish its own price increases without informing its competitors in advance, but it also decided to put these increases into effect only after other undertakings had already announced them publicly.

Finally, the applicant asserts that publication of intended competitive measures and the opportunity thus given to competitors to adapt themselves are perfectly compatible with competition, and are often even inevitable. Therefore, it is argued, it is a mistake to regard these matters as the factor constituting the infringement.

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

The citations from American case-law are said to prove that the question whether a given business action is taken pursuant to a common will is a question of evidence, and that a uniform action constitutes a sufficient indication of evidence, and that a

uniform action constitutes a sufficient indication of the existence of such a common will when that conduct is not the necessary consequence of the structure of the market. On the concept of a concerted practice, the defendant also refers to an article by Tolksdorf, annexed to the rejoinder.

Even in an oligopoly, in so far as the sellers have differing interests, the fact of several decisions being taken independently by the various undertakings does not necessarily lead to similar conduct on the market. This is why in an oligopoly where sellers are acting in parallel there is also a presumption of fact as to the existence of a concerted practice, unless the particular structure of the market is such as to create economic constraints causing the various undertakings to behave in a uniform way. That is the position in American case-law.

As for Community law on competition, the constituent elements of a cartel prohibited by Article 85 are not derived from the legal concept of 'conspiracy'. Nor, moreover, is the concept of an 'agreement' the right concept for describing cooperation between several undertakings by way of concerted practices. A concerted practice within the meaning of that article exists every time that the conduct of several undertakings on the market proceeds from a common will on the part of the interested parties, whether that common will is the offspring of reciprocal action or of the action of a third party. There is a common will not only when the undertakings come to an understanding as to their conduct on the market but also when they deliberately ensure that there can be no lack of knowledge about their future conduct by keeping each other informed, and, in so doing, they coordinate their conduct. The element of cooperation consists in the fact that, by reason of the common will, each of the participants can rest assured that the others will adopt either a uniform or a different course of conduct according to an allocation of roles worked out in advance. Therefore it is not necessary to show that the participants have collaborated or drawn up a common plan in order for there to exist a concerted practice for the purposes of Article 85. In the present case the Commission has proved that as regards prices the dyestuffs manufacturers in question behaved in a uniform way. This means that it has adduced sufficient proof that concerted practices existed. Furthermore, it has shown that the structure of the market for the products in question was such that there is no explanation of this uniform conduct other than that alleging concerted practices. Moreover, the Commission has even pointed out a series of facts constituting indications of concertation.

2. *The competitive situation on the dyestuffs market*

The *applicant* stresses that prices of dyestuffs have not risen during recent years as the contested decision implies, but that on the contrary prices have fallen in comparison both with the level of 1964 and with that of earlier years. The index of the applicant's prices, calculated from a base of 100, fell to 85 for the first half of 1967. It is said that this unfavourable evolution of prices is confirmed by an OECD report. On the other hand, costs are said to have increased. Expenditure on staff represents more than 25% in the applicant's case. In Germany, expenditure on salaries has increased from 100 in 1958 to 213 for the first half of 1967, and investment costs have increased from 100 to more than 140 during the same period.

In addition to this unfavourable evolution of prices and costs, the market in dyestuffs, it is said, is characterized by very intense competition relating to the quality of products, technical assistance and prices, whereby the producers attempt to appropriate to themselves areas of the market supplied by their competitors. For this purpose, discounts of a general nature would not yield any results because they would immediately call forth countermeasures from competitors already in very strong positions on this oligopolistic market. Price competition takes place mainly through individual arrangements made by the producer with certain customers for given products. Prices are

negotiated in each case with each customer, under pressure from competitors, and they are set with reference to the quantities ordered, the other services provided to the customer and the prices which competitors may have quoted. These individual arrangements do not immediately result in a general price war. Competitors react by making similar individual arrangements with other customers. In each case it is necessary to weigh up the risk that an individual arrangement will come to the notice of other customers and thus release general pressure on the level of all prices. There is no way of arriving at general rules for deciding the moment from which a producer should no longer be content with individual arrangements.

The applicant asserts that in its order of 28 August 1969 the Kammergericht Berlin acknowledged the existence of intense individual price competition on the market in question. That court also accepted the proposition that there is a certain interdependence between producers of dyestuffs when general price alterations are announced.

It is this way of proceedings, it is argued, which differs from competition existing on other markets. It is usually the case in the market at present under consideration that the result of competition is not general falls in prices, but individual exceptions which, as they become more numerous, bring about a progressive erosion of the prices.

Having thus explained its view of the evolution of prices and costs, together with the competitive situation on the dyestuffs market, the applicant states the reasons for its decisions to raise prices.

It observes that costs had risen considerably and a continuation of this strong upward trend was foreseeable, whilst receipts from sales had gone down considerably and a number of factors suggested that they would continue to do so. Therefore, the applicant says, it became apparent that it was necessary to increase selling prices substantially in order to guarantee the quality of the products, to ensure continuity of research operations and to provide an effective technical assistance service. The applicant's knowledge of the market and the statistics in its possession led it to the view that its principal European competitors were in a similar position. Therefore, when certain of its competitors announced increases the applicant had no reason not to follow them. From the point of view of commercial policy any other conduct on its part would have been irrational. If it had announced its increase only at a later date it would still not have been able to profit from the short period during which its prices would have been more competitive, because it did not have large extra stocks available and increases in production only produce their effect after several months. Furthermore, the advantages of a certain increase in sales over a short period would have been out of proportion with the disadvantages which would thereafter follow from the absence or inadequacy of any increase in profitability. There was no question of introducing a price increase greater than that already announced by a competitor, because it would then have been highly likely that the applicant would have found itself alone in its venture.

If the Commission had asked itself why the applicant should not have increased its prices or why it should have chosen a different time or a different rate or different products, it would have found that in the actual situation on the market there was no convincing reason for adopting a course other than that of parallel conduct. From its examination of the competitive situation and of the market the applicant draws the conclusion that the so-called proof by circumstantial evidence, such as the Commission seeks to adduce in the contested decision, is not of a conclusive nature. It points out that nowhere in the decision are reasons given for the Commission's fundamental proposition, which is that the price increases in question cannot be explained by the oligopolistic structure of the market.

The *defendant* maintains that the price increases in question cannot be explained by the oligopolistic structure of the market. In referring to what is expected to happen in such a market in theory, the applicant has failed to consider the postulates of price theory employed in the analysis of

parallel conduct. These factors are not applicable in the case of the dyestuffs industry.

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

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

The High Authority of the ECSC also adopted the principle that homogeneity of products is not of itself a bar to supposing that a uniform increase in prices made by several undertakings constitutes a concerted practice within the meaning of Article 65(1) of the ECSC Treaty, as appears from the fines which it imposed on certain steel works by a decision of 4 February 1959, which was not contested by the parties concerned.

If the criteria elaborated by the textbook writers concerning conscious parallelism are applied to the dyestuffs industry it will be seen that no such parallelism is possible. Competition between undertakings on the dyestuffs market cannot in any way be considered as covering similar products; this is clear from Report No 100 of the National Board for Prices and Incomes on the dyestuffs industry, dated 21 January 1969 annexed to the statement of defence, from the opinion of Professors Bombach and Hill annexed to the statement of defence, from documents produced during the preparatory inquiries by the undertakings ICI, Geigy and Sandoz and from various statistical data produced by the Commission (tables annexed to the statement of defence).

The market for the products in question covers about six thousand different products. Each of the undertakings concerned manufactures from 1500 to 3500 products and these, at least in part, display various qualities, mixtures and physical forms. The differences in strength, shade, fastness and solubility are such that when the products of various manufacturers are compared it is rare to find two dyes which are perfectly identical. The degree of similarity varies considerably: it runs from a fairly high degree of comparability in standard dyestuffs to the existence of near monopolies, often protected by patents, for products having special characteristics. Furthermore, the competitive position of the various dyes and the extent to which one can be substituted for another are

constantly undergoing rapid change because of technical progress. A notable feature of the market for the products in question is a *low level of transparency* mainly owing to the large number of products involved, the differences between them and the variety of users (textile, leather, paper, food, rubber and synthetic materials industries and manufacturers of paints, ink, cosmetics and so on). A further reason is the fact that technical services are provided for purchasers, which differ in degree according to the customer. It follows that there is no single, standard price for each dye since prices are negotiated individually with each customer, with considerable differences between one purchaser and another. The result of this practice is that the prices calculated for each product by each undertaking are not known, in most cases, to the other undertakings, nor even amongst the purchasers themselves, as ICI has agreed. Therefore changes in prices introduced by one manufacturer are only imperfectly known on the market or only become known long after the event.

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

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

This tendency seems to have increased during the course of the last few years, according to the abovementioned Report of the National Board for Prices and Incomes, at p. 5. This mobility is rendered easier by the fact that normally purchasers only maintain low stocks and only buy in small quantities.

Since purchasers carry low stocks, manufacturers must themselves maintain *large stocks* as this makes it easy for them to adapt themselves to change in demand. Because competition between manufacturers is intense and undertakings are constantly trying to increase their share of the market, they find it necessary to build up their stocks in such a way as to be able to take advantage of all chances of selling their products. It is relatively easy for them to adapt themselves in the medium term by changes in the production programme because the production plant can be used for many different purposes. In view of the particular conditions on the market, the situation of manufacturers differs from one undertaking to another. It follows that some undertakings have much more success than others in obtaining the prices at which they aim to sell their products.

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

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

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

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

Since *several of the products* in question *are not interchangeable* or only to a small extent, an undertaking putting up its prices cannot assume that its competitors will follow suit, at least for the products

in question. The price increases at issue were introduced indiscriminately for all products and this cannot possibly be explained by the *pressures of the market* or the logic of the oligopoly situation.

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

In these circumstances it is inconceivable that one undertaking would decide unilaterally on a large general increase in prices without first consulting its competitors. Supposing that there were unilateral, independent increases on the part of certain undertakings, each of the other undertakings would have been able, by setting different prices and by taking account of the position occupied on the market by the various products being manufactured by it, to attempt to obtain the best results. In order to prevent competitors from immediately withdrawing their increase, each undertaking would at the most have had to tell purchasers of *totally interchangeable products* that it was falling in line with this increase as regards these products, but this would not have been necessary for all the other products since, because of the lack of transparency of the market for those products, the various purchasers would not immediately have been able to react to the new prices.

The *applicant* objects first of all to the drafting of the statement of defence which does not comply with the requirements of the decision by which the Court rejected the first version of that statement. That decision was based on the finding that by reason of references to the contents of the files on other cases, it was difficult for the applicant to answer certain arguments put forward by the Commission with complete understanding of those arguments. Yet in the new version the Commission has simply removed the names of the other parties while leaving its exposition unchanged, and has even partly retained quotations from the pleadings of other parties, without citing their names. Furthermore, the Court cannot accept production of Report No 100 of the British National Board for Prices and Incomes, annexed to the statement of defence, because that document has been produced in English. Finally, the statistical tables appearing in Annexes VII, VIII and IX to the statement of defence are inadmissible as evidence, because they do not comply with the conditions required for a judicial review capable of guaranteeing the rights of the defence. Indeed, the data necessary for checking the statistical calculations are not furnished by the defendant.

As to the substance, the applicant replies that if, in accordance with the Commission's argument, the oligopolistic nature of the market in the products in question were to be denied, the most that that would entail would be that the applicant had taken an erroneous decision based on a faulty assessment of the situation on the market. But that would not justify the conclusion that concertation existed.

Where the defendant denies that the products in question are homogeneous it flatly contradicts itself, because it admits that 'lively and intense' competition exists as regards the prices of dyes, which necessarily presupposes that those products are comparable or interchangeable. The applicant also stresses that speciality dyes account for less than 5% of its total production, and therefore not a third, as the Commission claims.

As for the lack of transparency on the market, the applicant does not deny that transparency is guaranteed with regard to an increase where there is a general

increase in prices, since the latter is necessarily known universally. As regards the size of stocks, the Commission has misunderstood the information supplied to it on this subject. The figure of 95% of products to which it refers can only relate to the fact that the undertaking concerned stocks 95% of the different kinds of product in its production range, but in minimal quantities. However, this statement cannot have any relevance to the question whether and how far a manufacturer can satisfy the extra demand which arises when he does not follow or only partially follows a price increase introduced by other undertakings. The applicant is of the opinion that no manufacturer would be able to satisfy a considerably increased demand from stock for more than a week if most of his competitors had introduced a price increase. Furthermore, the fact that eight of the ten undertakings involved which had announced a general price increase in Italy in 1965 had to withdraw those increases because ACNA did not follow the increase shows that the reactions of producers are interdependent. The Commission does not justify in any way the proposition that that interdependence, found on the Italian market, does not exist in the other Member States.

As to the way in which it has drafted its defence, the *defendant* observes that since the infringement at issue was not committed individually by each of the interested parties, but was the result of collective action and of reciprocal collaboration, the Commission has the right to deliver a global judgment on the factual and legal aspects of the case. In particular, the Commission may not be prohibited from referring to the files concerning parallel cases and to produce evidence from them in support of its arguments.

As for the fact that the report of the British National Board for Prices and Incomes is in English, the defendant observes that the Court acceded to its request to exempt it from having this document translated into one of the procedural languages.

According to the defendant, although in a limited oligopoly the undertakings will practise parallel pricing policies if they allow themselves to be guided by rational economic criteria, nevertheless such market forces do not exist for producers of dyestuffs because the structure of the market is looser and the interests of the undertakings differ.

In these circumstances, the purely theoretical possibility of parallel conduct on the dyestuffs market does not offer sufficient explanation of the three price increases at issue, since those instances of parallelism represent irrational conduct in economic terms. The defendant argues that the objectives and interests of the undertakings in question called for the adoption of different measures, as indeed they have done in other cases, as appears from Tables VIII and IX of Annex I to the statement of defence. As proof of the accuracy of the content of those tables, the defendant states that it is willing to produce the original documents and copies of the invoices on the basis of which the tables were prepared.

In answer to the applicant's criticism that instead of furnishing proof, the Commission has put forward a theoretical conception substituting abstract economic theories for a search for the facts, the defendant asserts that it has analysed the markets in great details and that with the aid of empirical data it has proved in particular that when the undertakings act without concertation their conduct corresponds exactly with the conduct which the Commission believes to be appropriate to the situation existing on the market. Moreover, the applicant has not disputed the Commission's point of view concerning the occurrence of parallel conduct, or the accuracy of its account of the circumstances which must be fulfilled in this connexion, as set out in its statement of defence.

As for the structural factors characterizing this market, the defendant observes that the small number of sellers and the existence of fixed costs and high costs of entering or leaving the market are of little importance. What matters is the existence of divergent interests and a measure of autonomy for each undertaking as regards prices.

As for the amount of fixed costs, alleged

by the applicant to be high, the defendant argues that it is difficult to give precise indications and that in any event the role played by fixed costs in parallel conduct is variable.

The defendant declares that it does not have any information concerning the level of costs of entering or leaving the market, but says that this question is of hardly any importance in the present case, taking into account the financial strength of the big manufacturers of dyestuffs.

The cross-elasticity of prices to which the applicant refers is simply an instrument for measuring the intensity of competition. In the present case the right question to ask is what are the factors on the market which determine the degree of elasticity. According to Shubik, these are, amongst others, the degree of homogeneity of the products, the transparency of the market and the mobility of demand.

In answer to the proposition, on which the applicant relies, that there is a correlation between price competition and homogeneity of products, the defendant says that although the coefficient of comparability is relatively high for standard products, those products are nevertheless constantly subject to modifications, and it is this which constitutes the characteristic trait of their heterogeneity on the market. Contrary to the applicant's supposition, heterogeneity of dyes does not result in the disappearance of competition. Competitors react to a producer's price alterations, but only after some time has passed, and this enables the undertakings to practice an individual pricing policy, which would not be possible in a restrictive oligopolistic situation.

As for the percentage which specialities represent as a proportion of all dyes, the defendant observes that such percentages depend on the definition of specialities, since this concept would appear to be fairly loose. The proportion of one third which it has cited was taken from the English report annexed to the statement of defence.

The defendant observes that the arguments which the applicant puts forward on this point would have the effect of eliminating any examination of the situation on the market once parallel conduct has occurred, without its being necessary to consider circumstances such as the homogeneous or heterogeneous nature of the products, the existence of rapid technical progress, phases of expansion or stagnation on the market, transparency of prices and so on.

As for the ability to adapt to changes in demand, the importance of stocks follows, first, from the fact that for reasons of costs the products are manufactured only between once and four times a year, and secondly, from the fact that users of dyes maintain only very low stocks (except as regards standard dyes), and this forces the supplier to stock considerable quantities near the various centres of demand.

The defendant recalls that in its statement of defence it has drawn attention to the difference between the Italian market and the other markets. It has observed that in Italy demand for special dyestuffs is relatively low, as ACNA stated on 28 February 1968 in reply to the objections and as appears from a table produced as an annex. However, despite its special situation, no pressure is exerted on the Italian market, as is shown by the example of the price increase of January 1965 in Italy. This also shows that interdependence is not the only criterion which determines the conduct of producers on the dyestuffs market. The numerous differences existing between producers of dyes as regards the rate of growth, the extent to which plant is used, the proportion of the various products in the production programme, the relationship between producers and purchasers, costs and cost structures, prices and changes in demand on each of the markets, exclude the possibility of conscious parallelism in this case.

Despite the interdependence which is to be found on the dyestuffs market, an undertaking's price alterations come to the knowledge of competitors only after a fairly considerable delay because of the lack of transparency of the market. This fact, together with the strong position held by certain undertakings on markets in different products, gives them a certain latitude in their pricing policy. Therefore, taking into account the relatively large number of producers, the mutual interdependence is, it is argued, sufficiently loose

to permit normal competition.
In the countries of the EEC and for the years 1965 to 1967, the average prices of an undertaking for the principal products showed variations of up to 40% from country to country as a result of competition. Accordingly, if the three price increases are regarded as having taken place in a competitive situation functioning normally and if one takes into account the very different position occupied by each undertaking, the conclusion (confirmed by Professor Kantzenbach's report) must be drawn that such conduct can only be explained by the pursuit of entirely new objectives.
On the problems concerning the structure of the dyestuffs market and the relationship which exists between a heterogeneous oligopoly, the intensity of real competition and parallel conduct, the defendant states that it is willing to produce proof of the soundness of its arguments and names Professor Kantzenbach as expert for this purpose.

3. *The factual evidence*

The *applicant* argues that the circumstances in which the price increases were brought about and to which the decision refers do not constitute grounds for the conclusion that there was a concerted practice.
As regards the uniformity of the rates applied when the increases took place and of the products to which they were applied, the applicant observes in particular that the Commission contradicts itself on this subject and is inconsistent because it did not complain of this same conduct in respect of other producers of dyestuffs which aligned their prices on those of the producers against which it has brought proceedings.
As regards the allegedly simultaneous timing of the announcements of the increases, the applicant points out, first, that the Commission only supplies precise evidence on this point as regards the increase of 1964, which does not justify drawing conclusions concerning later increases. As for the increase of 1964, the decision is silent in the applicant's case. The almost simultaneous sending of Telex messages by a certain number of undertakings on the afternoon of 9 January proves one thing, namely, that those undertakings learned of the announcement of the increase at the same time as the applicant, and that since Ciba had announced its increase on 7 January with immediate effect, it was urgently necessary for the other producers to carry out their decision to adhere to that increase. They did so as soon as they learned of Ciba's decision, which had been made public on the market. As for the selling price current in Belgium, the applicant decided to increase that price on 13 January, having learned on 10 January that several undertakings had already announced an increase. It is clear from the course of events that the applicant decided to follow the increase only by reason of that which its competitors had already announced some days previously and which had become public knowledge on the market.
The increase intended for 1 January 1965 was announced by the applicant on 5 November 1964, after it had been alerted by its customers several weeks previously, and more particularly on 14 October, that its competitors had the intention of taking similar measures. The forthcoming increase had even been announced in the press. The fact that the increase was introduced on the same date was determined by the oligopolistic nature of the market. The same is true of the increase of 1967. The applicant also points out on this subject that the Commission admits that in the latter case the dates on which the increase was introduced differed from producer to producer.
As regards the alleged similarity of content of the announcements of the increases, the applicant observes that the contested decision does not specify which increase was, in the Commission's opinion, announced in a similar way. It is asserted that the interested parties were not supplied, even during the procedure before the Commission, with the texts in which the Commission sees the alleged similarities. Therefore, in the absence of any substantiating reasons, the applicant can only plead an infringement of the rights of the defence.
The applicant disputes the Commission's

assertion to the effect that the parties stated that they had aligned their conduct for the sake of convenience. The applicant also denies the accuracy of the statement contained in the decision according to which it increased its ex-works prices by a percentage lower than that by which it increased its resale prices to users. It also asserts that it did not require its Italian representative to refuse to issue antedated bills and to cancel all current offers.

Finally, as regards the meetings for the exchange of information between producers of dyestuffs, mentioned by the Commission in the statement of the facts in its decision, the applicant observes that there is a legitimate need for the exchange of information and of experience gained on problems of business policy of a general interest, as was indeed confirmed in the order, already mentioned, of the Kammergericht Berlin.

The announcement of an increase made by an undertaking during such a meeting is no ground for the conclusion that there was concertation, particularly if it is noted that the applicant did not, during that meeting, take up a position on the increase announced, and that it did not decide to increase its prices within a short time thereafter. In fact, it was only one month later, at its board meeting of 16 September 1967, that the applicant took the decision to increase its prices.

The *defendant* produces the texts of the instructions to increase prices sent to Italy and Belgium in 1964 by the undertakings covered by the contested decision. It points out that certain passages are identical almost word for word.

As for the increases of 1965 and 1967, the defendant asserts that the undertakings were careful to avoid obvious similarities. Furthermore, the defendant refers to its observations set out under (1), from which it appears that taking into account the structure and the conditions of the market, the common price increases can only be explained by the fact of prior concertation.

The *applicant* replies that the Commission's proof by circumstantial evidence is incompatible with the fact that it has not alleged infringements against several other undertakings whose conduct was found in the contested decision to have been identical and of which some even followed the increases announced sooner than the applicant. Since the contested decision is based on the idea that the uniform conduct of the producers of dyestuffs was inconceivable without prior concertation, the question arises, it is said, as to why the Commission treated differently undertakings whose conduct was the same.

The *defendant* replies, as regards the similarity of the orders to increase prices sent by the producers to their subsidiaries or representatives in 1964, that the instruction to put the increase into force immediately appears in 13 of the 14 orders, the instruction to cancel current offers appears in 12 of those 14 letters and the prohibition on making out antedated bills appears in 8 of these 14 orders, this number being explained by the fact that the prohibition in question was already implicit in the order to make an immediate and general increase.

The defendant also cites examples showing that the tenor of these letters was similar. Finally, it points out that in many cases these letters only constituted confirmation of instructions already given by telephone or that in other cases oral explanations were given as well. On this point, the defendant makes reference to the testimony of an employee of the Geigy undertaking in Basel.

4. *The fine*

The *applicant* complains that the contested decision did not take into account the fines imposed on it by the Bundeskartellamt by decision of 28 November 1967.

The *defendant* objects that the danger of concurrent penalties, which would justify taking into account fines already imposed, did not exist in this case because the decision of the Bundeskartellamt was subject to appeal when the administrative decision was adopted, and has since been annulled.

IV — Procedure

The procedure took the following course: By order of 11 December 1969 the Court

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

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

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

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

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

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

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

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

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

— A general and linear increase in prices involves opportunities and risks both for the producer who takes the initiative in putting prices up and for the producer of dyestuffs who has to fall in with a general and uniform increase an-

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

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

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

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

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

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

Grounds of judgment

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

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

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

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

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

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

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

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

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

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

3 By application lodged at the Court Registry on 4 October 1969 the undertaking Cassella Farbwerke Mainkur AG has brought an application against that decision.

Submissions relating to procedure and to form

The submissions concerning the administrative procedure

(a) *The complaint relating to the signing of the 'notice of objections' by an official of the Commission*

4 The applicant asserts that the notice of objections, for which Article 2 of Regulation No 99/63 of the Commission makes provision, is irregular because it is signed only by the Director-General for Competition.

5 It is established that the Director-General for Competition did no more than sign the notice of objections which the Member of the Commission responsible for problems of competition had previously approved in the exercise of the powers which the Commission had delegated to him.

Therefore that official did not act pursuant to a delegation of powers but simply signed as a proxy on authority received from the Commissioner responsible.

The delegation of such authority constitutes a measure relating to the internal organization of the departments of the Commission, in accordance with Article 27 of the provisional Rules of Procedure adopted under Article 16 of the Treaty of 8 April 1965 establishing a single Council and a single Commission.

6 Therefore this submission is unfounded.

(b) *The complaint relating to the disparities between the 'notice of objections' and the decision to commence administrative proceedings*

7 The applicant claims that the notice of objections refers to the possible imposition of fines, although the decision to commence proceedings only referred to proceedings to establish infringements.

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

Moreover, although the decision to commence proceedings mentions 'especially' Articles 3 and 9(2) and (3) of Regulation No 17, it refers to that regulation as a whole, and thus also to Article 15 concerning fines.

9 Therefore the submission is unfounded.

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

10 The applicant asserts that the Commission, in continuing its inquiries following communication of the notice of objections, conducted itself in a manner incompatible with the very nature of this notice which, as allegedly appears from Regulations Nos 17 and 99, must constitute the final measure of inquiry.

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

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

That is not the position in the present case.

12 This submission is therefore unfounded.

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

13 The applicant argues that the period of twelve days within which it was required to appear before the Commission was not long enough to enable it to put forward its points of view orally, taking into account the absence, at that time, of the sales director responsible and of the undertaking's advocate.

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

Although the applicant may have been prevented from ensuring that it was represented before the Commission on the date fixed by the latter, the number of persons summoned on that occasion would have made it difficult for the Commission to fix dates for the hearing so as to suit the particular requirements of each of the interested parties.

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

15 This submission is therefore unfounded.

(e) *Complaints relating to other infringements of the rights of the defence*

16 The applicant complains that the defendant infringed Article 19(1) of Regulation No 17/62 and Regulation No 99/63 in that the Commission, in the notice of objections, confined itself to stating deductions drawn from facts said to have been established, without however specifying those facts.

Furthermore, it is claimed that the contested decision is based on a new statement of the circumstances accompanying the price increases.

17 In order to protect the rights of the defence during the course of the administrative procedure, it is sufficient that undertakings should be informed of the essential elements of fact on which the objections are based.

It appears from the text of the notice of objections that the facts taken into consideration against the applicant were clearly stated therein.

That notice contains all the information necessary for deciding as to the objections put forward with regard to the applicant, in particular the circumstances in which the increases of 1964, 1965 and 1967 were announced and implemented.

Amendments included in the contested decision concerning the precise course of the facts, which were made pursuant to information furnished by the interested parties to the Commission during the course of the administrative procedure, can by no means be relied upon to support this complaint.

18 Finally, the applicant complains that in the contested decision the Commission mentioned the decision of the Bundeskartellamt of 28 November 1967, although it did not have the right to take into consideration the result of investigations which it had not itself carried out.

19 Although the interested parties are entitled to dispute the facts as alleged by the Commission in support of its objections, there is nothing to prevent the latter, in applying the Community rules on competition, from using the results of investigations carried out by national authorities.

20 Therefore these complaints are unfounded.

The submission concerning the statement of reasons contained in the contested decision

21 The applicant argues that insufficient reasons are stated in the decision for the finding of the existence of the contested infringements, particularly as regards the facts.

The applicant further alleges that the decision is couched in imprecise language and fails to state facts in favour of the interested party.

22 The decision, considered as a whole, sets out clearly and coherently the essential elements of fact and law on which it is based.

The question whether the elements of fact and the considerations put forward in evidence of the infringements in dispute are sufficient to prove the existence of those infringements is a matter relating to the substance of the case.

The Commission is under no duty, in stating the reasons for its decisions, to adopt an attitude on all the arguments which the interested parties may raise in their defence; it is sufficient that it should set out the facts and the legal considerations having decisive importance in the context of its decision.

23 Therefore this submission is unfounded.

The submission as to the limitation period

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

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

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

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

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

26 Therefore the submission is unfounded.

Substantive submissions as to the existence of concerted practices

Arguments of the parties

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

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

It is contended that these increases cannot be explained simply by the oligopolistic character of the structure of the market.
It is said to be unrealistic to suppose that without previous concertation the principal producers supplying the Common Market could have increased their prices on several occasions by identical percentages at practically the same moment for one and the same important range of products including speciality products for which there are few, if any, substitutes, and that they should have done so in a number of countries where conditions on the dyestuffs market are different.

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

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

29 The applicant argues that the contested decision is based on an inadequate analysis of the market in the products in question and on an erroneous understanding of the concept of a concerted practice, which is wrongly identified by the decision with the conscious parallelism of members of an oligopoly, whereas such conduct is due to independent decisions adopted by each undertaking, determined by objective business needs, and in particular by the need to increase the unsatisfactorily low rate of profit on the production of dyestuffs.

It is argued that in fact the prices of the products in question displayed a constant tendency to fall because of lively competition between producers which is typical of the market in those products, not only as regards the quality of the products and technical assistance to customers, but also as regards prices, particularly the large reductions granted individually to the principal purchasers.

The fact that the rates of increase were identical was the result, it is said, of the existence of the 'price-leadership' of one undertaking.

A further argument is that different price increases for interchangeable products either could not produce economically significant results because of the limited level of stocks and of the time necessary for adapting plant to appreciably increased demand, or would lead to a ruinous price war.

It is also said that dyestuffs for which there are no substitutes form only a small part of the producers' turnover.

Taking these market characteristics into account and in view of the widespread and continuous erosion of prices, each member of the oligopoly who decided to in-

crease his prices could, it is argued, reasonably expect to be followed by his competitors, who had the same problems regarding profits.

Finally, it is asserted that no reasons are stated anywhere in the contested decision for its fundamental proposition, according to which the price increases in question cannot be explained by the oligopolistic structure of the market.

The concept of a concerted practice

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

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

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

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

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

The characteristic features of the market in dyestuffs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The increases of 1964, 1965 and 1967

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The general and uniform increase on those different markets can only be explained by a common intention on the part of those undertakings, first, to adjust the level of prices and the situation resulting from competition in the form of discounts, and secondly, to avoid the risk, which is inherent in any price increase, of changing the conditions of competition.

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

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

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

By reason of the limited elasticity of the market in dyestuffs, resulting from factors such as the lack of transparency with regard to prices, the interdependence of the different dyestuffs of each producer for the purpose of building up the range of products used by each consumer, the relatively low proportion of the cost of the

final product of the user undertaking represented by the prices of these products, the fact that it is useful for users to have a local supplier and the influence of transport costs, the need to avoid any action which might artificially reduce the opportunities for interpenetration of the various national markets at the consumer level becomes particularly important on the market in the products in question.

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

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

The fine

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

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

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

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

Costs

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

The applicant has failed in its submissions.

Therefore it must be ordered to bear the costs.

On those grounds,

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

THE COURT

hereby:

1. **Dismisses the application;**

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

Lecourt Mertens de Wilmars Kutscher

Donner Trabucchi Monaco Pescatore

Delivered in open court in Luxembourg on 14 July 1972.

A. Van Houtte
Registrar

L. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS

(See Case 48/69, p. 665)