all the issues of fact and of law referred to be every interested party in the course of the administrative procedure. The statement of reasons for a decision imposing a fine is to be considered sufficient if it indicates clearly and coherently the considerations of fact and of law on the basis of which the fine has been imposed on the parties concerned, in such a way as to acquaint both the latter and the Court with the essential factors of the Commission's reasoning.

8. The Commission is entitled to publish decisions imposing penalties with regard to cartels to the extent to which such publication does not amount to divulging the undertakings' business secrets.

9. A gentlemen's agreement constitutes a measure which may fall under the prohibition contained in Article 85 (1) if it contains clauses restricting competition in the Common Market within the meaning of that article and its clauses amount to a faithful expression of the joint intention of the parties.

10. The penalties provided for in Article 15 of Regulation No 17 are not in the nature of periodic penalty payments. Their object is to suppress illegal activity and to prevent its recurrence so that their application is not restricted to current infringements alone. The Commission's power to impose penalties is in no way affected by the fact that the conduct constituting the infringement and its effects have ceased.

11. For the purpose of fixing the amount of the fine, the gravity of the infringement is to be appraised by taking into account in particular the nature of the restrictions on competition, the number and size of the undertakings concerned, the respective proportions of the market controlled by them within the Community and the situation of the market when the infringement was committed.

In Case 41/69

ACF CHEMIEFARMA NV, a limited liability company having its head office in Amsterdam, represented by its Advocate, H. van den Heuvel, 84 Rokin, Amsterdam, with an address for service in Luxembourg at the Chambers of E. Arendt, Centre Louvigny, 34 b rue Philippe-II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser E. Zimmermann, acting as Agent, assisted by G. Van Hecke, Advocate of the Belgian Cour de Cassation, with an address for service in Luxembourg at the Chambers of its Legal Adviser, E. Reuter, 4 boulevard Royal,

defendant,

Application for the annulment or amendment of the decision of the Commission of 16 July 1969, published in the Official Journal of the European Communities

L 192 of 5. 8. 1969, p. 5 et seq., and relating to proceedings under Article 85 of the EEC Treaty,

THE COURT

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

Advocate-General: J. Gand
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Statement of facts and procedure

The facts which form the basis of the dispute and the procedure may be summarized as follows:

The dispute originated in the activity carried on by certain undertakings in the Community within the framework of an international cartel relating to the production and sale of quinine and quinidine and of their salts and compounds. These products are used in particular in the manufacture of medicines for the treatment of malaria and certain cardiac illnesses. The case relates only to the sale of quinine and quinidine and of their salts and does not concern the marketing of pharmaceutical products under trademark.

From 1958 the undertaking Nederlandse Combinatie voor Chemische Industrie (hereinafter referred to as 'Nedchem'), which manufactures chemical, pharmaceutical and allied products, was a party to a series of agreements with other European manufacturers of those products.

On 30 May and 11 to 13 June 1958, in conjunction with the undertakings NV Amsterdamsche Chininefabriek, Amsterdam, NV Nederlandse Kininefabriek, Maarssen, Bandoengsche Kininefabriek Holland NV, Amsterdam, NV Pharmaceutische Groothandel van de Amsterdamsche Chininefabriek, Amsterdam, and NV Bureau voor de Kinineverkoop, Buramic, Amsterdam, it concluded an initial agreement relating to the division of national markets (Germany and the Netherlands) as well as fixing the prices and quotas for the export of quinine and quinidine to all other countries with the following undertakings:

(a) Buchler & Co., Braunschweig,

(b) C.F. Boehringer & Söhne, Mannheim, and its subsidiary, Vereinigte Chininfabriken Zimmer & Co., GmbH, Mannheim.

Pursuant to the provisions of Article 85 of the EEC Treaty, the Bundeskartellamt, to which the agreement was notified on 24 January 1959 in accordance with Article 6 (1) of the German Law against restriction of competition, requested the parties to the agreement for information on its territorial scope. Following this request Boehringer and Nedchem concluded a new agreement on 14 July 1959 excluding supplies to other States of the EEC.

Negotiations entered into in 1959 between Buchler, Boehringer, Nedchem, the group of French quinine producers (Nogentaise, Pointet-Girard, Taillandier and Pharmacie Centrale) together with Carnegies of Welwyn Ltd and Lake & Cruickshank Ltd of the United Kingdom resulted in an agreement between all those undertakings. First of all on 10, 24 and 31 March 1960 Boehringer (acting also in the name of its abovementioned subsidiary), Buchler and Nedchem (acting also in the name of all the abovementioned Netherlands undertakings) concluded an agreement providing for:

— the fixing by agreement of prices and rebates applicable to exports of quinine and quinidine;

— the allocation of export quotas and the reservation of certain markets outside the Community;

— the retention of the clause making the agreement inapplicable to exports in the States of the EEC;

— a system of compensatory quantities in the event of export quotas being exceeded or unfulfilled;

— the prohibition of collaboration outside the Common Market with undertakings which were not parties to the agreement with regard to the production or sale of quinine or quinidine;

— application to be made, in case of dispute, at the option of the parties, to arbitration or to the ordinary courts of law.

It was agreed that this export agreement would terminate on 31 March 1965 but that it might be renewed every five years. Rules drawn up to ensure the strict cooperation of the parties in order to facilitate the implementation of the agreement provided in particular that every month each of the parties to the agreement should supply the other with certain information on the basis of which Nedchem would, for the purposes of quantitative compensation, make periodic calculations of the deliveries in excess of or below the quota of each of the undertakings.

Apart from this agreement, which governed the problem of Buchler's adherence to the agreement concluded on 8 and 14 July 1959 between Boehringer and Nedchem, another agreement was concluded on 7 April 1960 between Boehringer, Buchler, Nedchem, the abovementioned French group and the two British undertakings, Carnegies and Lake & Cruickshank, in order to settle the conditions for the adherence of the French and British undertakings to the abovementioned agreement of 10, 24 and 31 March 1960, in so far as it related to quinine. Parallel with the export agreement two gentlemen's agreements containing substantially identical provisions were concluded on 9 April 1960 and recorded in writing although they were not signed; one was between the French group, Boehringer, Buchler, Nedchem and Carnegies and the other was between the French group, Boehringer, Buchler, Nedchem and Lake & Cruickshank. Those two gentlemen's agreements extended the provisions laid down in the export agreement with regard to price, quotas and compensation for quantities, for both quinine and quinidine, to all sales on domestic markets and abroad, and in particular to all sales within the Common Market. Furthermore, they laid down the principle of protection of domestic markets for each of the producers. The two British undertakings agreed not to manufacture quinidine without the approval of the German and Netherlands parties and to purchase this product ecxlusively from the German and Netherlands parties and to maintain the agreed prices on resale. The French undertakings entered into the same obligation with regard to synthetic quinidine. Derogations from the gentlemen's

agreements could take place only with the agreement of all the parties and disputes were to be settled exclusively by arbitration. It was further decided that failure to comply with or termination of the gentlemen's agreements would automatically be regarded as failure to comply with or termination of the formal export agreements relating to quinine and quinidine, and *vice versa*.

The gentlemen's agreements were kept secret.

The said agreements were supplemented during 1961 and 1962 by an association relating to the joint purchase of raw materials which, in accordance with the decision taken during a meeting on 26 January 1961, was drafted in conformity with the arrangements laid down in a draft agreement instituting a pool of stocks purchased ('bark pool') but which was never signed. The association relating to the joint purchase of raw materials terminated on 31 October 1962.

During a meeting on 2 May 1962 a general increase in prices was decided upon.

Agreements were also concluded for the purchase of reserves from the American stockpile which the General Service Administration had decided to sell. In this connexion, it was decided during the meeting on 20 and 21 April 1962 that the quantities purchased by Nedchem would be divided amongst the members in a specific ratio and that in return Nedchem would receive a commission of 2%; this commission would be increased to 7% if the other agreements (the export agreement and the gentlemen's agreements) were terminated in advance. On 4 September 1964 the American General Service Administration gave a definite refusal to make any further deliveries to Nedchem alleging that military requirements had arisen. Following each delivery Nedchem divided it amongst the other members.

The commission was always fixed on the basis of the rate of 2%. When on 13 March 1962 the first regulation in implementation of Articles 85 and 86 of the EEC Treaty came into force the abovementioned undertakings decided provisionally to continue the export agreement and to continue to implement the gentlemen's agreements.

In the course of a meeting on 29 October 1962 difficulties arose between the parties on the question of the 'bark-pool'. As a preliminary condition to concluding an agreement on bark, Nedchem requested the abolition of the prohibition on exporting bark which was in force in the Congo although Pharmakina, Boehringer's Congolese subsidiary, was in avour of this prohibition. As a result of this Lake & Cruickshank and Boehringer requested revision of the quotas. The scope of the decisions taken at this meeting with regard to the gentlemen's agreements gave rise to a dispute between the parties to the present proceedings.

On 2 November 1962 Nedchem notified the other members that the export agreement and the gentlemen's agreement should no longer be regarded as binding; it alleged that the proposals made by Boehringer and Lake & Cruickshank with regard to the 'bark-pool' and the fixing of the new sales quotas were contrary to the spirit of the said agreements.

The other members did not accept those reasons and at the meeting on 14 October 1963, at which all the parties to the agreement were present except Carnegies (which ceased producing quinine in the same month and intimated its withdrawal by letter of 28 October 1963), the parties concerned reached a compromise the purpose and scope of which are disputed by the parties to the present proceedings.

In the course of 1964 the abovementioned undertakings twice made joint decisions to raise the price of quinine, first by 15% at the meeting on 12 March and subsequently by 25% at the meeting on 28 October, whilst the prices of quinidine were raised by 20%.

An agreement modifying the length of the validity of the export agreement (which was in the meantime extended for 12 months only instead of the five years initially provided for) was concluded in December 1964 and January 1965 between Boehringer, Buchler, Nedchem, the French group and Lake & Cruckshank. At the beginning of 1967 the Commission's departments obtained more detailed information on the activities of the international quinine cartel through inquiries carried out in the United States of America in connexion with Nedchem's purchase of large quantities

from the stockpile. In particular the Commission became acquainted with the report of the American Senate Anti-Trust Sub-Committee. In addition to recording the hearings held by the sub-committee, this document has annexed to it a large number of minutes of the meetings of the members of the cartel, the correspondence exchanged by the parties concerned, the agreements drawn up between them and reports from the director of a British company which was a party to the agreements. These documents date from 1960 to 1963. Consideration of those documents led the Commission to take the view that the implementation of the abovementioned agreements (the export agreement and the gentlemen's agreements) had been continued after October 1963. Communications were exchanged in May and June 1967 with the competent authorities with regard to cartels in the Federal Republic of Germany, France and the Netherlands in connexion with the investigations to be undertaken on the undertakings concerned. In May 1967 the Bundeskartellamt had already undertaken investigations with regard to Boehringer and Buchler and the Netherlands authorities had investigated Nedchem.

On 17 July 1967 the Commission's Director-General for Competition signed the authorizations to carry out investigations the object of which was expressed thus: '... to establish whether or not the activities of the international cartel in the quinine industry have infringed the provisions of Article 85 of the Treaty establishing the European Economic Community'. On the basis of those authorizations investigations were carried out on the six undertakings and as a result the decision of the Commission of 16 July 1969 was sent to the said undertakings on the dates indicated at No 17 of that decision. Thereafter investigations were carried out on the two Belgian undertakings and on the five Italian undertakings who were purchasers of quinine, in order to establish the prices maintained in those two countries by the members of the cartel.

On 29 July 1960 the Commission decided on the basis of Article 3 of Regulation No 17 to take proceedings upon its own inititaive against the six abovementioned undertakings. This decision was notified to the undertakings concerned by letter of 30 July 1968 together with the complaints made by the Commission on the basis of the investigations.

The undertakings concerned were given a period of two months within which to define their positions with regard to the objections made against them.

At the request of four of those undertakings, including the applicant, the Commission subsequently extended that period to 15 15 December 1968.

On 11 and 12 February 1969 the undertakings concerned were given the opportunity of submitting their oral observations.

In addition to representatives of the undertakings and of the Commission, officials of the States directly concerned in the international quinine cartel, such as Belgium, the Federal Republic of Germany, France and the Netherlands, were also present at the hearing. Following discussions with the parties concerned, the Commission withdrew its objections concerning the 'bark-pool' and the stockpile agreement and also with regard to the infringements for the period from February 1965 to August 1966 during which period the termination of the export cartel had been notified to the Bundeskartellamt.

During its meeting on 16 July 1969 the Commission adopted a decision imposing on the Nedchem undertaking a fine of 210 000 units of account for infringement of the provisions of Article 85 (1) of the Treaty which this undertaking committed until the beginning of February 1965, 'by concluding and implementing the agreement on exports of 8 and 14 July 1959, the additional agreements of 10 and 31 March 1960 and of 7 April 1960 (the period of validity of which was extended by the agreement of 14 December 1964 and 19 January 1965), the gentlemen's agreements of 9 April 1960 and the agreements implementing or supplementing those agreements, in particular the agreements with regard to the fixing of prices and of export rebates for quinine and quinidine, the division of domestic markets, the system of quotas and of quantity compensation and the limitation of the production of quinidine'.

For the same reasons this decision imposed:

(1) on Boehringer Mannheim GmbH,a fine of 90 000 units of account,

(2) on Buchler und Co., KG, a fine of 65 000 units of account,

(3) on the Société Chimique Pointet-Girard SA, a fine of 12 500 units of account,

(4) on the Société Nogentaise de Produits Chimiques, a fine of 12 500 units of account,

(5) on the Pharmacie Centrale de France, a fine of 10 000 units of account.

On 13 September 1969 the undertaking ACF Chemiefirma NV lodged an application at the Court Registry for the annulment of this decision and at the same time an application within the framework of the unlimited jurisdiction of the Court under Article 172 of the Treaty and Article 17 of Regulation No 17/72 of the Council.
As its meeting on 18 March 1970 the Court, on the proposal of the Judge-Rapporteur and after hearing the Advocate-General, decided to join Cases 41/69, 44/69 and 45/69 for the purposes of the oral procedure.
At the request of the Court the defendant replied to various questions by written statements lodged at the Court Registry on 4 April and 13 May 1970.
By written statements lodged on 14 April and 23 May 1970 the applicant submitted its observations on the said replies of the Commission.
The parties presented oral argument at the hearing on 15 and 16 April 1970.
In the course of that hearing the defendant lodged documents on which the applicant submitted its observations by a written statement lodged on 23 April 1970.
The Advocate-General delivered his opinion at the hearing on 10 June 1970.

II — Conclusions of the parties

Within the framework of the *application for annulment*, the *applicant* claimed that the Court should:

(a) annul the contested decision,

(b) order the Commission to pay the costs.

Within the framework of the *appeal to the Court's unlimited jurisdiction*, the *applicant* claimed that the Court should:

(a) annul the contested decision,

(b) cancel the fine imposed on the applicant,

(c) alternatively, reduce such fine,

(d) order the Commission to pay the costs.

The *defendant* contended that the Court should:

— dismiss the application as unfounded,

— order the applicant to pay the costs.

III — Submissions and arguments of the parties

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

1 — *The submission relating to the Commission's lack of powers*

(a) Lack of powers on the basis of the enabling provisions in Article 85 (1)

The *applicant* puts forward the following preliminary arguments in order to exclude the Commission's power to apply Article 85 (1) of the EEC Treaty to the present case: The Commission has failed to indicate how the cartels in dispute affect trade between Member States and does not comment on the applicant's powerful arguments to the contrary relating to the irrelevance of domestic protection, the peculiarities of the market in pharmaceutical products, the fact that this market is not transparent and the existence of substitutes for the products in question. Furthermore the Commission has

quite failed to prove its allegation that without the cartels in dispute purchasers would in fact have benefited from the competitive policies of the undertakings concerned; it confuses the export agreement and the gentlemen's agreement although it is clear from the attitude of the undertakings concerned themselves with regard to the procedure for the exchange of information on sales that the two are quite distinct; it has ignored the fact that at the meeting on 29 October 1962 the gentlemen's agreement was terminated and that in addition the applicant ended the export agreement in November 1962. The Commission has failed to adduce documentary evidence that the alleged uniformity of export prices was regularly fixed or, if it was so fixed, that this resulted from an agreement or concerted practice.

On the contrary it is clear from the minutes of the meeting on 12 March 1964 that the increase in prices decided upon on that occasion related exclusively to sales in third countries and not in the Common Market. The Commission has consequently exceeded its powers with regard to the extra-territorial effect of the prohibition on cartels.

The exchange of letters in October 1963 on the protection of domestic markets did not constitute a legally enforceable agreement although it was a concerted practice the actual effects of which should be appraised. Since respect for domestic markets is traditionally automatic, the correspondence in October 1963 is almost without significance as the situation would not have been fundamentally different without such correspondence even if the undertakings had intended not to repect the domestic markets of their competitiors.

It is very probable that the prohibition on the production of synthetic quinidine imposed on the French undertakings in particular could not have an appreciable effect on trade between Member States since, as the Commission itself states, French exports are insignificant owing in particular to high production costs and to the technical difficulties inherent in the production process.

The *defendant* gives a general answer to those various arguments; it states that the applicant is wrong in claiming that it is a condition of the exercise of the Commission's power that trade between the Member States should be affected. That trade may be affected is one of the two basic elements in the prohibition which the Commission must implement. The Commission's power on the other hand derives from Article 3 of Regulation No 17 which in its turn is based on Article 87 of the Treaty.

(b) The Commission's lack of powers in that the cartels were notified to the competent national authorities.

The *applicant* complains that the Commission has misinterpreted or ignored its notification of the cartel to the Bundeskartellamt, its notification to the Netherlands Minister for Economic Affairs and subsequent correspondence in this connexion. The Bundeskartellamt was aware of the system of quotas and of the quantitative compensation. The applicant requests the Court in this connexion to consider to what extent Articles 88 and 89 of the Treaty and, if necessary, Regulation No 17/62 at present deny the Commission the power to consider cartels notified to the national authorities.

The *defendant* replies that there can be no doubt that the agreement was authorized by the national authorities to which it was notified. It further observes that the gentlemen's agreements were not notified to the national authorities and that consequently their attitude to the export agreement can in no wise be interpreted as a tacit approval of all the agreements in question. It was thus unnecessary for the Commission to take such notifications into consideration in the reasons for its decision.

2 — *Infringement of the rules and principles of procedure*

(a) Failure to lodge documents

The *applicant* complains that the Commission infringed the rights of the defence by refusing to communicate to the applicant not only all the documents on the file but those which should have been on it, since they are relied on in the statement of complaints. In a letter of 25 November 1968

addressed to the Commission, the applicant's lawyer further observed that when the statement of complaints does not expressly refer to a particular document it is of prime importance that the defence should know the source of such an allegation.

The *defendant* objects that the applicant was authorized to consult all the documents on the file which were mentioned in the statement of complaints and that thus the applicant had had the opportunity of acquainting itself with the documents relevant for appraising the complaints. Furthermore the Commission declares that it was neither empowered nor obliged to authorize the consultation of the entire file.

The *applicant* replies that it is only in the present proceedings that it has been able to acquaint itself, from the documents annexed to the Commission's statement of defence, with the result of the investigations made in Italy, Belgium and Luxembourg, although it had a clear interst in consulting those documents during the administrative proceedings.

The applicant, in order to confirm the Commission's obligation in this respect, refers to German administrative theory, French administrative case-law and Italian legislation.

Finally the applicant alleges that the Commission should as a matter of course lodge with the Court the entire file of the administrative procedure, including the records of the hearing of the undertakings concerned before the Commission and the documents pertaining to the consultation with the Advisory Committee.

The *defendant* replies that the rule propounded in the judgment in Joined Cases 56 and 58/64 that it is unnecessary that the entire contents of the file should be communicated to undertakings is applicable to all the procedures undertaken by the Commission on the basis of Article 85. The same rule also applies in Germany in administrative proceedings with regard to carrtels. Nor does French law recognize an absolute right to communication of the file.

Since the result of the investigations made in Belgium and Italy was described at the beginning of the statement of complaints, the applicant was in a position to know its point of view in this connexion.

(b) Complaints relating to the drawing up of the minutes of the hearing of the undertakings concerned

In the second place, the *applicant* complains that the Commission did not observe Article 9 (4) of Regulation No 99/63 by failing to draw up proper minutes, by omitting to correct mistakes, omissions and errors in recording the declaration of the persons heard, by failing to have the minutes signed by such persons and finally by allowing a lengthy period to elapse between the hearing, drawing up and delivery of the minutes. The applicant observes that it only received the draft minutes on 10 June 1969 and since it considered that they were very badly drawn up it felt unable to sign them in the form in which they were submitted to it and that it was better to invite the Commission to improve its drafting. The director of the applicant undertaking and its lawyer were still in correspondence on this point when it was announced in the press that the Commission had decided to impose a fine. The Commission's mode of procedure indicates that it attaches no significance to the minutes. The Commission thus renders it impossible for the Court to form an exact judgment of the hearing on 11 and 12 January 1969. The chronology of events gives grounds for the upposition that the decision had already been taken, at any event in draft, even before the final minutes of the hearing of the undertakings concerned had been drawn up.

Furthermore the period of three weeks which the Commission allowed for the applicant to submit its observations on the minutes was quite insufficient, the more so since July must be regarded as a holiday month.

The *defendant* replies that drawing up the minutes of that hearing, during which the persons concerned used three official languages, involved considerable work. The minutes were drawn up completely in French and German and sent on 10 June 1969 to the persons concerned, who were given three weeks to submit their observations to the Commission. The Nedchem undertaking, unlike the other undertakings concerned, did not request an extension of the period for submitting its observations

on the minutes. Furthermore it emerges from Schedule 17 to the application that on 30 June 1969 the applicant returned to its lawyer the complete list of observations drawn up on the subject of the draft minutes. Those observations were sent in the name of Boehringer on 7 July 1969 and were taken into account. Thus they could also have been sent in the name of Nedchem.
In its reply, the *applicant* states that the minutes were deficient *inter alia* with regard to its lawyer's statement on the subject of time-limits.
According to the applicant, it is clear that the Commission was at this point in such haste that it brushed aside the minutes as though they were irrelevant, which explains why it failed to ascertain whether the applicant concurred with regard to their wording.
The *defendant* observes that the only point in the note of the hearing of the applicant's counsel relating to time-limits which is not reproduced in the minutes is the argument that the Council exceeded its powers. This point is not essential for the Commission which does not possess powers similar to those which the Court possesses under Article 184 of the Treaty.

(c) Complaints relating to the legality of Regulation No 99/63 of the Commission

In the third place, the *applicant* raises the question of the validity of Regulation No 99/63. It is not certain that under the combined provisions of Article 87 (2) and Article 155 of the EEC Treaty the Council had the power to delegate to the Commission the task of drawing up the provisions relating to the hearing of persons in accordance with the provisions of Article 19 (1) and (2) of Regulation No 17. Such a delegation by the Council to the Commission under Article 24 of Regulation No 17 relates to a legislative action and seems contrary to Article 87 of the EEC Treaty; it exceeds the framework formed by the combined provisions of Article 155 and 4 of the EEC Treaty. In any case the Commission has at least violated the general principles of law which confer on persons a wider protection by the courts than that laid down by Regulation No 99/63.
The *defendant* replies that the delegation of powers provided for in Article 24 of Regulation No 17 is entirely in accordance with the Treaty under the express provisions of Article 155.
The *applicant* objects that the European Parliament was not properly consulted on the principle of the delegation of powers and since the original wording did not provide for the Commission to draw up rules of procedure. Even if it is admitted that the Commission is entitled to issue implementing provisions there are nevertheless certain limits which must be observed with regard to their content.
By the expedient of delegating its own powers to the Commission the Council would thus escape its binding obligation to consult the Parliament provided for in the second subparagraph of Article 87 (1).
The *defendant* observes that the provisions adopted in Regulation No 99/63 merely constitute implementing provisions.
With regard to consultation with the Parliament, it refers to what Mr Deringer wrote in connexion with Article 24 of Regulation No 17: 'This provision corresponds to the proposals of the Commission and of the Parliament (Article 20) and the Council has merely adapted it to the modified procedure'.

(d) Complaints with regard to the composition of the administrative body

The *applicant* complains of the violation of the general principle of continuity in the composition of the administrative body dealing with a matter which may give rise to penalties.
The applicant maintains that Article 9 (1) of Regulation No 99/63 of the Commission, which provides that hearings shall be conducted by the persons appointed by the Commission for that purpose, violates the principle of the continuity and unity in the composition of the competent body, an unwritten principle which prevails in all the Member States. The persons who drew up the statement of complaints must also hear the persons concerned and collaborate in drawing up the minutes of the meeting and of the final cecision.
The *defendant* expresses doubts as to the

existence of the principle which the applicant maintains. Furthermore, it is clear from the minutes of the meeting on 11 and 12 February 1969 that it took place in the presence of a number of officials who were dealing with the matter when the statement of complaints was drafted and who also took part in preparing the final decision.
The *applicant* doubts this.

(e) Points relating to the consultation of the Advisory Committee

The *applicant* considers that the Advisory Committee was not fully informed. In particular, it received neither the complete minutes of the hearing nor the complete preliminary draft of the decision, where specific reference is made to fines, and did not have the time to give adequate consideration to the matter. Furthermore, there is no guarantee of continuity or of unity in the composition of the Advisory Committee.
The *defendant* maintains that this complaint is unfounded as, in accordance with Article 10 (5) of Regulation No 17, the notice sent to the Committee was accompanied by a summary of the case together with an indication of the most important documents in the minutes of the hearing of the undertakings and a preliminary draft decision which the Committee was able to study in depth. Moreover such complaints are inadmissible since defence of the Advisory Committee's interests cannot be the duty of undertakings.
The *applicant* objects that it is incorrect to consider that the function of the Advisory Committee is of no importance to persons concerned and that it does not constitute a guarantee for them.
The *defendant* replies that it is clear from Article 10 of Regulation No 17 that consultation of the Advisory Committee was instituted in order to protect the interests not of undertakings but of the Member States, and moreover that it is the duty of the members of this Committee to ensure that they are in possession of all the information which they consider necessary.

(f) Complaints relating to the applicant's participation in the administrative procedure

The *applicant* states that the Commission violated the general principle of law that in the course of a procedure an administrative body is obliged to correct errors in agreement with the persons concerned, allow the completion of insufficient arguments and allow the persons concerned to be heard on all the essential points in the matter.
The applicant maintains that the contested decision contains manifest errors which arose through a misunderstanding of what the applicant maintained in its reply to the statement of complaints. Furthermore the Commission failed to give sufficient indication *inter alia* of what facts it took into consideration in the statement of complaints and what evidence was employed. Owing to its negligence, the Commission has also made it more difficult for the Court to review the contested decision.
The *defendant* recalls the various stages of the procedure which resulted in the contested decision. It is clear from this procedure that the undertakings concerned had ample opportunity to state their position in writing with regard to the outcome of the investigation, as contained in the notice of complaints, and to give more detailed explanations in the course of the lengthy hearing at which they were able to set forth orally their points of view. The defendant emphasizes that the written statements of their position and the oral procedure with the undertakings have induced it to abandon certain of its complaints.

(g) Complaints relating to the infringement of Article 4 of Regulation No 99/63

The *applicant* considers that the Commission has infringed the abovementioned provision first by inserting in its decision certain new provisions which do not appear in the notice of complaints or, if they do, in another form and, secondly, by emphasizing certain specific complaints (for example, the legal implications of the gentleman's agreement and of the suspension of the export agreement, the implications of the export agreement for the domestic markets, etc.).
The *defendant* replies that this complaint would not be well founded unless the decision were to set out new complaints which do not appear in the statement of

objections notified at the time of the administrative procedure, but this was not done since the decision merely modified the drafting of this statement following the hearing of the persons concerned.

(h) Complaints in connexion with the violation of the principle of the equality of languages

The *applicant* considers that the Commission has violated the principle of the equality of languages by its failure to translate the minutes of the meeting on 11 and 12 February 1969 into Dutch. The applicant in fact received copies of the minutes of that meeting in French and German but not in Dutch. This constitutes a violation of the principles contained in Articles 217 and 248 of the EEC Treaty together with the provisions of Regulation No 1 of the Council (OJ Special Edition 1952–1958, p. 59).
The *defendant* admits that through an oversight it only sent the applicant the French and German versions. This is because French and German were selected as working languages since it was impossible quickly to draw up all the documents in the four languages. Furthermore, this case concerns an international cartel whose working language was English and whose correspondence was frequently drafted in Grrman or French. Moreover, at the hearing in February 1969 Nedchem's representative expressed himself partly in French and partly in German. The Commission's oversight has in no way altered Nedchem's right of action. If it had indicated the oversight when it occurred the Commission would no doubt have rectified the situation.
The *applicant* replies that the principle of the equality of languages is a matter of public policy and that consequently, even if no-one has been prejudiced, its violation entails the nullity of the measure. Furthermore the agreement required of the applicant must relate not only to the substance but to the drafting in the addressee's language.

(i) Other violations of procedural principles

The *applicant* further complains that the Commission has violated the general principle of law that the attention of persons subject to the law must be drawn to the possibility of bringing an action and to the time-limits fixed for so doing.
The *defendant* replies that this principle is not common to all the Member States. It exists in Germany but failure to give such information is not penalized by the invalidity of the decision. Its only consequence is that the period of time for bringing the action does not begin to run.

3 — *The submission of the infringement of an essential procedural requirement through failure to state reasons*

The *applicant* maintains that particular strictness is required in this case with regard to the statement of reasons because the contested decision involves quasi-criminal penalties. The Commission passed over in silence whole sections of the applicant's statement in reply to the notice of complaints, such as for example what is said on the particular characteristics of pharmaceutical products, on impediments to trade in this sphere, on particular characteristics of domestic markets, on the lack of transparency of such markets, on the characteristics of special pharmaceutical products, and on the importance of this point with regard to the alleged infringement of Article 85 (1). All those are important factors in appraising whether the Commission was competent to intervene on the ground of a potential effect on trade between Member Statss. The statement of reasons is self-contradictory with regard to quantitative compensation, to the alteration of the export figures and to the period from the beginning of February 1965.
Furthermore, the Commission has in no way established that but for the cartel in question the consumer would have enjoyed a wider choice and more advantageous prices. The allegation that prices were increased because of the cartel is therefore quite unproved.
The applicant considers that it is for the Commission to supply proof in support of the allegations in the decision and that in the

absence of such proof the decision should be annulled.

The *defendant* refers in this connexion to point II in its statement of defence from which it is clear that the actions allegedly omitted by the applicant fall under the prohibitions set out in Article 85 (1) of the Treaty.

It states in particular that there is no reason to consider the pharmaceutical products under trade-mark as the 'trade' referred to by the decision is solely in raw materials (quinine, quinidine and their salts) from which it is intended to manufacture pharmaceutical products.

It observes moreover that the fact that the parties to the gentlemen's agreement continued to abide by it voluntarily, as had been provided for at the meeting in October 1962, amounts to a concerted practice with regard to their action in the Common Market.

The practical implementation of this agreement is clear from the following facts:

(1) From 1960 to 1965 the prices of quinine and quinidine were the same for all exports including those to Italy and Belgium.

(2) The undertakings concerned retained their domestic markets under the agreement, as emerges from the record of the meeting on 2 December 1959 and from the letters of October 1963. Without those provisions supplies would certainly have been sent from the Netherlands to Germany as prices were lower in the Netherlands. Although limited deliveries were sometimes made their purpose was to conceal the division of the market.

(3) During 1964 the undertakings concerned took two joint decisions to effect a similar rise in prices with regard to exports to Italy and to the Belgo-Luxembourg Economic Union. That the undertakings concerned independently fixed prices in their respective countries is explained by the protection of domestic markets which was afforded them precisely by this gentlemen's agreement.

(4) Furthermore provision was made for quantitative equalization if the quota was exceeded.

Since the object of this cartel is to restrict competition within the Common Market between the undertakings concerned, it is unnecessary in addition to prove that it has had the effect of restricting competition. It is sufficient that competition may be effected and there can be no doubt about this in the present case in view of the provision concerning the division of domestic markets and the fixing of single export prices, including trade between Member States, until February 1965.

If the Court does not share the defendant's opinion as to the type of agreement constituted by the gentlemen's agreement, and considers that it must appraise the applicant's action from the point of view of a concerted practice, the abovementioned principle, which was affirmed by the Court in its judgment in Joined Cases 56 and 58/64 with regard to an agreement must, according to the defendant, also logically apply to concerted practices. In fact, such practices differ from agreements solely in that their provisions may not be enforced through the courts, but they are always based on an understanding, like agreements. If the provisions of the understanding are reduced to writing and if it appears on perusal that its object is to restrict competition it is then unnecessary to consider the actual situation of the market.

4 — *The submission of infringement of the Treaty or of the rules of law relatingto its application*

(a) Determining the degree of competition necessary

The *applicant* claims that the Commission has infringed the Treaty by applying Article 85 (1) outside the framework within which it must be understood on the basis of the principles set out in Articles 2 and 3 et seq. of the Treaty. In fact 'the Commission's decision neither makes it possible to establish the measure of competition which it considers necessary nor states what principles form the basis of Article 85 (1)'.

The *defendant* maintains that Article 85 is based on the concept that a certain minimum of competition must be maintained, but in addition that it was not obliged to

reply to theoretical questions relating to the degree of competition which it considers necessary.

The *applicant* considers in addition that the Commission is wrong in stating that a certain minimum degree of competition must be maintained. This view is in accordance with the German system but it is foreign to the rules on competition in the EEC Treaty.

The *defendant* objects that the judgment in Case 13/60, which refers to Article 65 of the ECSC Treaty but is also valid for Article 85 of the EEC Treaty, shows the significance of the minimum of competition required to constitute observance of the basic provisions of the Treaty.

(b) Time-limits

Secondly the *applicant* complains that the Commission has violated, or at least erroneously applied, the general principle of limitation. It is not permissible to deprive those subject to the law of the protection afforded them by the national legal system with regard to time-limits. It considers that the Member States cannot be held to have alienated or restricted their sovereign rights in this area.

The applicant states that, if reference must be made to the beginning of 1965 in order to obtain the first written evidence proving that the undertakings actually carried out independent policies with regard to prices in the Common Market, this does not prove that the undertakings did not fix those prices independently prior to 1965. Since in the applicant's opinion the limitation period was only interrupted by notification of the formal decision instituting proceedings of 30 July 1968, it must in any case be excluded that proceedings could still be taken with regard to actions extending back to 1962, 1963 or 1964.

The applicant also refers to the observations in its statement in reply to the notice of complaints and to the notes which it lodged at the hearing on 11 February 1969 in connexion with the general principle of limitation relating to the case.

The *defendant* observes that the fact that no provision has been laid down in Regulation No 17 with regard to time-limits means that in practice the Commission is competent, within the framework of its power of appraisal and subject to review by the Court, to fix the limits to be set for actions with regard to proceedings for infringement. The applicant's view in connexion with the application of national law has no foundation in Community law. The judgment of the Court in Case 18/57 cannot support this argument, as the capacity to institute proceedings referred to in that decision in no way relates to Community law. The consequence of the applicant's argument would be that the uniform application of Community law would be hampered in the sphere of competition law.

On the other hand, the defendant concedes that the question is admissible whether, with regard to time-limits, there is a principle common to the legal systems of the Member States. In the four Member States with legislation on cartels, infringements of such provisions are given varying legal status: in German law (as in Community law) such infringements are of an administrative nature; on the other hand under French, Belgium and Netherlands law such infringements take on a criminal aspect.

With regard to interruption of the limitation period the rules applicable in the Member States are likewise extremely diverse.

Taking into account the extreme diversity in the various Member States of the status of infringements, of penalties, of the periods of limitation and of the acts interrupting them, the defendant concludes that no criterion can be derived common to the law of the Member States with regard to the detailed rules of application of the general principle of limitation. In those circumstances, in order to establish a period of limitation for infringements of Articles 85 and 86 of the EEC Treaty only the requirements of Community law may be taken as a basis, taking account also of the importance and the function of the rules on competition under the EEC Treaty. Nor should the fact be ignored that the Commission is obliged to rely on the co-operation of the Member States in investigating infringements.

Applying those considerations to the present case, the defendant maintains that the period of limitation which began to run

from February 1965 was interrupted by the investigations which it made on the applicant in October 1967. The official entrusted with the investigations in question produced an authorization signed by the Director-General for Competition indicating in detail the object and the aim of the check to be made in connexion with specific infringements. If the applicant had refused, as it was entitled to do, to submit to the investigation on the basis of that authorization, the Commission would immediately have ordered the investigation by a decision. Consequently, with regard to the interruption of the period of limitation different effects cannot be attributed to investigations made by the Commission depending on whether they were carried out on the basis of an authorization or a decision.

Between the point when the infringements were discontinued and the investigations by the Commission a period of less than three years elapsed which is insufficient to constitute a bar to action since, according to the legal systems of the majority of the Member States, the period of limitation for infringements intentionally committed against provisions relating to cartels is three years.

Even if it is conceded that the period of limitation was only interrupted when the Commission initiated the administrative procedure on 29 July 1968, the period of three and a half years which had thus elapsed is insufficient to establish a bar under Community law since, within the framework of the EEC, the rules on competition assume a greater importance than under national law, as is clear from the fact that 'the institution of a system ensuring that competition in the Common Market is not distorted' constitutes one of the objectives of the EEC Treaty.

The *applicant* replies that it is clear from the studies of the European Parliament relating to Regulation No 17 that that institution only proposed penalties for cases in which undertakings continued to commit an infringement which had been duly established by the Commission. Administrative powers to initiate proceedings were thus conferred on the Commission but not powers of enforcement which remained the exclusive sphere of the Member States.

If the Council had intended to confer such powers of enforcement on the Commission under Article 15 of Regulation No 17, the regulation would thus be null and void on this point, because the Council would have exceeded its powers and contravened the obligation to consult the European Parliament laid down in the second subparagraph of Article 87 (1).

The applicant maintains that long periods of limitation are applicable only with regard to infringements punishable by a prison sentence and in the Netherlands this is so only where *mens rea* is present. In this connexion what is required is not the establishment of an average but the application of a more modern and progressive system.

The length of the period of limitation is influenced by the principle of the opportunity of initiating proceedings with regard to actions judged punishable and by the principle of the legal certainty of persons concerned.

With regard to the point from which the period of limitation began to run, the applicant emphasizes that it is clear from Document No VII-64, lodged by the Commission as a schedule to its statement of defence, that as early as October 1964 Lake & Cruickshank had independently calculated higher prices, exceeding the 'export price' by 20 % to 22 %. The applicant stresses in addition that contrary to the Commission's assertion the market in England was an open market. It further draws the Court's attention to Buchler's letter of 1 January 1965 to its representative in Italy (Schedule VII-69 to the statement of defence).

With regard to the *interruption* of the period of limitation, the applicant disagrees with the conclusions which the Commission draws from its examination of comparative law. It maintains that the system of Regulation No 17 conforms only to the German and Netherlands systems so that the authorization to investigate was not capable of suspending the period of limitation, all the more so since its wording was vague.

According to the Commission's view, persons concerned have applied to them a period of limitation longer than that applicable under their national legislation. According to the applicant the Member

States cannot have intended this, all the more so since they had not renounced the principle '*nulla poena sine previa lege poenale*'.

The *defendant* observes that by Article 1 of Regulation No 17 the Council provided that the prohibition should have direct effect, in the sense that the existence of the infringement does not require a prior decision by the Commission.

With regard to the necessity of consulting the European Parliament on this question, the Commission refers to Mr Deringer's commentary which raises no criticism with regard to the decision of the Council. Furthermore, if the Council had taken a decision other than that proposed by Parliament, the problem in question would have been discussed in Parliament in full knowledge of the case.

With regard to the period of limitation the defendant considers that for infringements of Article 85 (1) the most progressive system is that which accords bset with the significance of the provisions with regard to competition for the new economic structure established by the Treaty.

With regard to the point when the period of limitation starts to run, the table produced in Schedule XII to the rejoinder establishes that the members of the cartel continued until the beginning of 1965 to apply the prices appearing in their joint export price lists in Italy and Belgium.

With regard to the interruption of the period of limitation, the defendant observes that the authorization to investigate clearly indicates the Commission's intention to initiate proceedings if the activities investigated should appear contrary to the provisions of Article 85 (1).

(c) The duration of the gentlemen's agreement

The *applicant* draws the Court's attention to its circular of 28 November 1962 in relation to its circular of 2 November 1962 and the minutes of the meeting on 29 October 1962.

The *defendant* assumes that the applicant hopes to give the impression that it terminated the gentlemen's agreement as early as October 1962. In order to discount this it emphasizes that the first part of the meeting on 29 October 1962 concluded with the following finding:

'It was clear from the discussion that the export agreement had not been terminated, that all the parties intended to abide by the gentlemen's agreements and that the undertakings concerned hoped to conclude a new agreement on the purchase of bark'.

The second part of the discussion related to a new agreement on the purchase of bark, with regard to which the parties were unable to reach an agreement. This second part ended with the following finding:

> 'A general discussion followed owing to the existence of opposing points of view; with regard in particular to revision of the quotas, it was considered now no longer useful to have the lawyers draft an agreement on the purchase of bark, so that the bark pool was terminated. For this reason it was impossible to abide by the original intention to continue to observe the gentlemen's agreement. Nevertheless there was no proposal to withdraw from this point all the parties maintained their freedom of action.'

According to the defendant, it is doubtful whether this record in fact corresponded to the members' intentions, and it raises the question whether this was the personal view of the applicant which had very probably undertaken the task of drawing up the minutes. It maintains that Nedchem thereby endeavoured to dissuade the members desirous of revising the quotas by threatening to end the gentlemen's agreement which would have involved the increase from 2% to 7% of the commission on the amounts of the stock pile which were still to be divided amongst the undertakings concerned.

Another danger of a breach arose from the fact that the level of prices was higher on the markets other than that in the Netherlands.

The defendant states that in its letter of 2 November 1962 the applicant adopted a point of view differing from that in the following record appearing at page 7 of the abovementioned minutes of 29 October:

> 'In view of the situation which has now emerged we have arrived at the conclusion that in applying conditions contrary to the letter and spirit of the various agreements, and in particular to the gentlemen's agreement, the undertakings Lake

& Cruickshank and Boehringer have failed to comply with the gentlemen's agreement which stipulates that failure to implement it *ipso facto* constitutes an infringement of the official agreements, by which latter term is intended the export agreement.'

Lake & Cruickshank and also Boehringer assumed that the gentlemen's agreement remained in force even after 29 October. This point of view also forms the basis of the letter of 10 December sent by Lake & Cruickshank to all the other members of the cartel. It is significant that the applicant did not carry out its threat of increasing the commission on the stock pile to 7%.

The attitude adopted by Boehringer in its letter of 19 July 1963 with regard to the proposed increase in prices is as follows:

'We trust that such a decision increasing prices, of which the members of the cartel should be aware, will be observed by all manufacturers'

and conforms completely to the practice of the gentlemen's agreement.

The applicant's letter of 7 August 1963 maintained the point of view that the export agreement had been terminated and by threatening the members with price competition in their domestic markets it had the effect of preventing the increase in prices.

The meeting on 14 October resulted in the compromise of 'shelving' the export agreement except for the protection of domestic markets.

The view that the gentlemen's agreement remained in force even after the abovementioned declarations by Nedchem appears to be corroborated by the members' actions after October 1962 with regard to the points governed by the gentlemen's agreement. The defendant observes that the applicant continued up to the end of 1964 to apply the prices fixed jointly on the Italian market. This uniformity also extended to increases relating to small amounts and to the calculation of the packaging and transport costs and of customs duties.

The continued protection of domestic markets in 1963 and 1964 is proved by the prices maintained by the applicant on the French market; such prices exceeded the current export prices for quinine in order to take account of the higher level of domestic French prices. An analogous finding has been made with regard to the German market.

(d) The legal nature and practical application of the gentlemen's agreement

The *applicant* considers that the Commission has infringed the combined provisions of Article 85 (1) and (2) in defining the gentlemen's agreement as an agreement within the meaning of that article and not as a concerted practice and, furthermore, by its failure to indicate the articles or provisions of the alleged agreement which are prohibited and void under the terms of the abovementioned provisions.

In fact that the gentlemen's agreements provided for arbitration if differences arose between the parties does not give those arrangements the status of an agreement since they could not be enforced in court proceedings.

In the applicant's opinion the distinction between an agreement and a concerted practice is extremely important in this case for, if it is conceded that the acts impugned result from concerted practices, the Commission may not maintain that it is unnecessary to appraise their actual consequences. The Commission has failed to prove what constituted the alleged concerted practice during the suspension of the export agreement and how long the practice had existed.

Furthermore the Commission is wrong in deciding by implication that action on the market which is intentionally parallel, particularly with regard to prices, is equivalent to or identical with the concept of a concerted practice.

The *defendant* maintains that both the written provisions termed a gentlemen's agreement and the additional provisions contained in minutes of meetings or arising from an exchange of letters are to be considered as agreements.

The provision laying down that infringement of the gentlemen's agreement should also constitute infringement of the export agreement and providing for the settlement of disputes by arbitration proceedings proves the legal nature of the obligation to observe the gentlemen's agreement.

Nevertheless, even if such provisions are only to be considered as concerted practices, this does not alter the outcome with regard to considering them incompatible with Article 85 (1), for the reasons set out at (3) above.

In the present case this distinction is also unimportant with regard to Article 85 (2) as there can be no question of applying that provision to agreements which are already terminated.

The *applicant* complains that the Commission has completely ignored economic facts, in particular that no appreciable alteration occurred in 1965, when it states that a pattern of trade had emerged to Germany from the Netherlands, and that it failed to give details of the technical obstacles to trade; it has also failed to indicate with a sufficient degree of probability whethere with regard to nature or amount inter-state trade would have evolved differently.

The applicant observes in addition that the existence of such obstacles is proved by the fact that the Commission sent a note to the Council with regard to rules of harmonization concerning pharmaceutical products.

The *defendant* objects that it is not for it to prove how the applicant would probably have acted if there had been no agreement. The fact that in 1965 there was no appreciable flow of goods may be imputed first to the shortage occurring as a result of the breach by the Americans of the stockpile agreement and secondly to an element of inactivity after years of cooperation.

The defendant admits that there were technical obstacles to trade in pharmaceutical specialities but it doubts whether such obstacles also exist with regard to raw materials such as quinine, quinidine and their salts. The fact that there were export and import movements between the countries of the EEC shows that this was not impossible on technical or administrative grounds.

The defendant further considers that both the Council Directive of 26 January 1965 and the note communicated by the Commission on 5 August 1969 to the Council relate solely to the marketing of pharmaceutical specialities to the exclusion of all pharmaceutical raw materials.

The *applicant* further maintains that the documents produced as a schedule to the statement of defence relate to investigations undertaken in Italy, Belgium and Luxembourg and do not support the Commission's view that prices were calculated uniformly for exports to those countries.

The *defendant* annexes to its rejoinder a table which analyses, as an example, the price calculated in a number of cases of sales in Italy and Belgium, from which it is clear that the prices fixed by the applicant in the years 1962 to 1964 completely correspond to the current export prices agreed on by it and the other members of the cartel.

5 — *The submission of misuse of powers*

The *applicant* states that the Commission misused or at any rate insufficiently used its powers because:

(a) it initiated proceedings on the basis of Article 85 (1), violating the principle of legal certainty for the undertakings and of the principle that the penalty must be appropriate to the wrong by imposing a high fine on it;

(b) it imposed fines for an infringement committed in the past, which has now been largely discontinued.

With regard to the first point, the applicant observes that since 1962 the Commission has contributed by its own policy to the increase in legal uncertainty for undertakings: in fact, excessive powers have been conferred upon it, it has not viewed Article 85 (1) within the framework of the objectives of the Treaty and finally it has omitted to establish criteria for the application of the abovementioned rule.

With regard to the second point, the applicant maintains that, despite the wording of Article 87 (2) (a), Article 89 (1) does not permit of proceedings' being taken with regard to infringements already ended. With regard to such infringements it must be supposed that the authors of the Treaty wished to rely on the penalty of nullity provided for by Article 85 (2). Thus in Article 15 (2) (a) of Regulation No 17 only the present indicative tense 'they infringe' is employed. In this connexion the applicant

observes that the fines are in the nature of periodic penalty payments and not penalties of a criminal law nature. It stresses furthermore that the European Parliament was not consulted in connexion with the rulse laying down the fines.

The *defendant* replies that in this case there can be no question of violation of the principle of legal certainty, as the practice impugned is expressly quoted by Article 85 (1) as an example of prohibited conduct. The Commission did not fail to ensure that wide publicity was given to the provision so that it was possible to avoid the risk of fines by making a notification within the prescribed period. The report by Mr Focsaneanu, with which the applicant is familiar, also takes this view. The applicant confuses fines and periodic penalty payments when it complains that the Commission has imposed fines for an infringement committed in the past.

6 — *Complaints relating to the publicity given to the decision*

The *applicant* complains that the Commission has infringed the principles on which Article 21 of Regulation No 17 is based by releasing the decision and its contents to the press in an unsuitable manner, even before the applicant was notified of the decision, and by publishing the decision in its entirety in the Official Journal. The Commission thus influenced public opinion to the detriment of the applicant's position, thereby causing *inter alia* a fall in its shares on the stock market and harm to its reputation.

The applicant refers in particular to statements in the contested decision relating to the possible existence of a cartel with regard to tenders, and observes that such statements may give rise to proceedings against the applicant by the American authorities and requests the Court to annul this part of the decision, so far as necessary, which moreover contains facts irrelevant to the proceedings.

The *defendant* objects that the publicity given to the contested decision was justified by the fact that it was the first decision imposing fines. The Commission cannot be held responsible for the use made by journalists of its press statement. With regard to publication in the Official Journal, the defendant observes that Article 21 of Regulation No 17 does not prohibit the publication of decisions other than those which it lists.

7 — *Application within the framework of the Court's unlimited jurisdiction with regard to fines*

The *applicant* institutes proceedings within the framework of the unlimited jurisdiction of the Court in its application for annulment. The applicant hopes that after annulling the contested decision the Court will also reconsider the proceedings *ex novo* with regard to the facts as well. This consideration should bring the Court to the conclusion that Article 85 (1) is inapplicable and that the fine should be cancelled; alternatively, if it is ruled that this provision is applicable, the Court should decide that the fine should nevertheless be cancelled, because the infringement committed was of a purely formal nature; or as a further alternative it should considerably reduce the fine.

In the applicant's view there is no proper relationship between the fine imposed and the infringement committed, all the more so since within the cartel it had always proposed that prices should be maintained at a low level and that it had indeed taken the initiative in ending the cartel. The statement in the contested decision that the existence of the commission of 2% showed that the cartel had been in existence after 1962 is inconsistent with the facts. In reality, although the applicant considered that it was entitled to a commission of 7%, it nevertheless renounced this right whilst maintaining its point of view that the cartel had come to and end. Nor is the fine proportionate to the purpose in view and finally it is out of all proportion to the fines imposed in the Dye-Stuffs case.

The *defendant* rejects the idea that the present case relates to a purely formal infringement. In fact, it displays three of the five examples of expressly prohibited practices cited in Article 85 (1). The undertakings concerned were well aware of this since they endeavoured to keep the gentlemen's agreement secret.

The large amount of the fines is justified by the grave and intentional nature of the restriction of competition continued after the entry into force of Regulation No 17. Furthermore the fine imposed on the applicant represents no more than a fifth of the maximum amount laid down.
If the British undertakings' quotas are left out of account, within the cartel the applicant had a quota of 52.5%. Nevertheless, the fine imposed on it in relation to the other members of the cartel is smaller in proportion to such quotas, as the Commission took into account the weaker position of the applicant in relation to Boehringer on the market in raw materials together with the applicant's attitude with regard to prices.

Grounds of judgment

1 NV Nederlandse Combinatie voor Chemische Industrie, Amsterdam, (hereinafter referred to as 'Nedchem') of which the applicant is the successor, together with five other Netherlands undertakings which were subsequently always represented by it, entered into an agreement in 1958 with the undertakings C. F. Boehringer & Söhne, Mannheim, and Vereinigte Chininefabriken Zimmer & Co., GmbH, Mannheim (hereinafter referred to as 'Boehringer') and Buchler & Co., Brunswick, whereby those undertakings retained their respective domestic markets and provided for the fixing of the prices and quotas for the export of quinine and quinidine to other countries.

2 Buchler withdrew from this agreement of 28 February 1959.

3 In July 1959, following the intervention of the Bundeskartellamt to which the agreement had been notified, Boehringer and Nedchem amended that agreement in such a way as to exclude deliveries to the Member States of the EEC.

4 In 1960 a new cartel was established between Nedchem and the two abovementioned undertakings and shortly afterwards it was extended to certain French and British undertakings.

5 This cartel was based in the first place on an agreement relating to trade with third countries (hereinafter referred to as the 'export agreement') and providing *inter alia* for the fixing by agreement of prices and rebates relating to exports of quinine and quinidine and the allocation of export quotas supported by a system of compensation depending on whether the export quotas were exceeded or not fulfilled.

6 Furthermore, a gentlemen's agreement between the same parties extended the abovementioned provisions to all sales within the Common Market.

7 This agreement also established the principle of the protection of domestic markets in favour of each of the producers and bound the French members of the cartel to refrain from manufacturing synthetic quinidine.

8 Since the Commission considered that the restrictions on competition therein provided for were capable of affecting trade between Member States, it imposed on the applicant a fine of 210,000 units of account by a decision of 16 July 1969 (OJ L 192, p. 5 et seq.).

9 By an application lodged at the Court Registry on 13 September 1969 the undertaking Chemiefarma NV initiated proceedings against this decision.

A — The submission of the Commission's lack of powers

10 Relying upon the fact that the export agreement had been notified to the competent national authorities without objections' being raised, the applicant requests the Court to consider to what extent Articles 88 and 89 of the Treaty and, if appropriate, Regulation No 17/62 of the Council deny the Commission power to appraise agreements so notified.

11 Under Article 9 (3) of Regulation No 17 'the authorities of the Member States shall remain competent to apply Article 85 (1)', but only 'as long as the Commission has not initiated any procedure under Articles 2, 3 or 6' of the regulation.

12 The provisional character thus conferred on steps taken by national authorities cannot call in question the Commission's exercise to the full of its powers within the framework of the Common Market.

13 In any event the gentlemen's agreements which governed the actions of the members of the cartel in question in the Common Market were not included in the above-mentioned notification.

14 Consequently the submission is unfounded.

15 The applicant maintains that the Commission has not established its powers through its failure to provide the necessary evidence to prove the existence of the conditions necessary for the application of Article 85.

16 This submission relates to the infringement of an essential procedural requirement and not to the powers of the Commission.

B — The submission relating to the limitation period

17 The applicant complains that the Commission did not take into account the fact that proceedings in respect of the alleged infringement are barred having regard to the period which elapsed between the date of the acts and the initiation of the administrative procedure by the Commission.

18 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.

19 In order to fulfil their function of ensuring legal certainty limitation periods must be fixed in advance.

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

21 Consequently the submission is unfounded.

C — Submissions relating to procedure and form

I — *Submissions relating to the notice of complaints*

22 The applicant claims that in the notice of complaints communicated to it on 30 May 1968 the Commission failed to give sufficient information on the objections made against it and the evidence on which they were based.

23 By this omission the Commission is said to have hampered review by the Court of the legality of the contested decision.

24 Article 19 (1) of Regulation No 17 obliges the Commission, before taking a decision in connexion with fines, to give the persons concerned the opportunity of putting forward their point of view with regard to the complaints made against them.

25 Article 4 of Regulation No 99/63 of the Commission provides that the Commission shall in its decisions deal only with those objections raised against undertakings and associations of undertakings in respect of which they have been afforded the opportunity of making known their views.

26 The notice of complaints fulfils this requirement since it sets forth clearly, albeit succinctly, the essential facts on which the Commission relies.

27 The requirement imposed on the Commission by Article 19 is met when in the course of the administrative procedure it supplies the details necessary to the defence.

28 In the present case the Commission has clearly set out the essential factors on which it based the complaints listed, referring expressly to statements contained in the minutes of certain meetings of the undertakings concerned and to correspondence relating to the protection of domestic markets which was exchanged between those undertakings in October and November 1963.

29 Furthermore, maintaining on the basis of its investigations that the undertakings concerned had continued to exchange information on their sales with a view to possible quantitative compensation and that up to the end of 1964 they had maintained a policy of uniform prices, the Commission thereby deduced that after 1962 they had continued to apply the gentlemen's agreement on production and sale in the Common Market.

30 Consequently the objections raised with regard to the notice of complaints are unfounded.

II — *The objection relating to consultation of the administrative file*

31 The applicant maintains that the Commission infringed the rights of the defence

by refusing in the course of the administrative procedure to allow it to consult essential documents on which the contested decision was based.

32 The defendant replies that it had enabled the applicant to consult the documents which were of importance for the appraisal of the complaints.

33 The notice of complaints alleges that the applicant together with other producers of quinine had until 1966 adopted a policy of common prices, particularly with regard to sales in Italy, Belgium and Luxembourg.

34 According to this statement this concerted conduct is clear in particular from the uniformity of prices maintained by the undertakings for their sales in the said countries.

35 In support of this statement the notice of complaints (last subparagraph of paragraph 11) refers to the outcome of investigations carried out by the Commission's staff in those countries.

36 In the course of the administrative procedure the applicant requested the Commission to acquaint it with the facts referred to.

37 The Commission rejected this request on the ground that it must protect the business secrets of the other undertakings.

38 Nevertheless the Commission itself alleged that those undertakings regularly exchanged information on the amounts sold in the States in question.

39 Furthermore in case of doubt the Commission could have requested the opinion of the other undertakings concerned with regard to the applicant's request for the communication of the documents relating to them.

40 It does not appear that the Commission consulted the said undertakings in this way.

41 Nevertheless, throughout the administrative procedure the applicant did not dispute that it had carried out a concerted policy with regard to prices until the end of October 1964.

42 Consequently the failure to communicate the documents does not appear capable of affecting the applicant's opportunities for defence within the framework of the administrative procedure, except for the period from November 1964 to January 1965.

43 Consequently this matter must be considered in conjunction with the substance of the case.

III — *Complaints relating to the drawing up of the minutes of the hearing*

44 The applicant complains that the Commission failed to observe Article 9 (4) of Regulation No 99 by omitting to submit to the undertakings concerned within a reasonable time the complete and accurate minutes of the hearing, by fixing too short a period of time for it to submit its observations and by failing to ensure, prior to adopting the contested decision, that it concurred with the draft minutes.

45 In the course of the administrative procedure the applicant, which had been given a period of three weeks within which to submit its observations on the draft minutes which the Commission had submitted to it, neither exercised its right to propose amendments nor requested an extension of the period allowed.

46 There is thus no foundation in the complaint now made against the Commission that it concurred with the minutes before adopting the contested decision.

47 The applicant further maintains that by its failure to submit the minutes to it in Dutch, the Commission infringed the principles contained in Articles 217 and 248 of the EEC Treaty together with the provisions of Regulation No 1 of the Council.

48 Under the terms of Article 3 of Regulation No 1 of the Council, documents which an institution of the Community sends to a person subject to the jurisdiction of a Member State shall be drafted in the language of such State.

49 The failure to communicate a Dutch version of the draft minutes thus constitutes an irregularity in drawing up that document which is capable of affecting its validity.

50 It is clear, however, from the arguments put forward by the applicant that it was able in due time to acquaint itself with the contents of the minutes.

51 The applicant has not alleged that this resulted in the minutes' containing substantial inaccuracies or omissions with regard to it.

52 It must therefore be concluded that the irregularity which has been found did not in this case have harmful consequences capable of vitiating the administrative procedure.

53 In these circumstances the abovementioned complaints must be rejected.

IV — *Complaints that the applicant did not take sufficient part in the administrative procedure*

54 The applicant complains that the Commission has failed to observe a general principle of law requiring it to allow persons concerned to participate closely in the administrative procedure in order that they may together correct any inaccuracies and supplement inadequate arguments.

55 It is alleged that the failure of the Commission to co-operate in this way arises in particular from the fact that the contested decision retained patent inaccuracies since account was not taken of the observations submitted by the applicant in its reply to the notice of complaints.

56 The rights of the defence are respected when each of the persons concerned has had the opportunity to submit its written and oral observations on the complaints made against it by the Commission.

57 It is not disputed that in the course of the administrative procedure the applicant had such an opportunity.

58 Consequently this complaint is unfounded.

V — *Complaints concerning the legal basis of Regulation No 99 of the Commission*

59 The applicant maintains that the delegation to the Commission of the power to

draft provisions relating to the hearing of the persons concerned and of third parties, conferred by Article 24 of Regulation No 17, concerns a legislative activity and is thus incompatible with Article 87 and with the combined provisions of Articles 155 and 4 of the Treaty.

60 Article 87 confers on the Council the task of adopting 'any appropriate regulations or directives to give effect to the principles set out in Articles 86 and 86'.

61 It is impossible to deduce from this that the Council is prohibited from conferring on the Commission the power to adopt the regulations necessary for the implementation of the rules which the Council has adopted within the framework of its tasks.

62 Article 155 of the Treaty which provides that the Council shall confer powers on the Commission for this purpose does not restrict this authority to powers other than those of drawing up regulations.

63 In Article 19 of Regulation No 17 the Council has provided that undertakings which were parties to one of the procedures provided for by that regulation shall have the opportunity of being heard by the Commission.

64 In Article 24 of the same regulation the Council has conferred on the Commission power to adopt implementing provisions concerning such hearings.

65 Since the principle that the persons concerned shall be given the opportunity of being heard by the Commission was adopted by the Council the rules laying down the procedure to be followed in this connexion, however important they may be, constitute implementing provisions within the meaning of the above-mentioned Article 155.

66 Consequently it was lawful for the Council to entrust the institution authorized to apply this procedure with the task of laying down its details.

67 Consequently the objection of illegality put forward by the applicant with regard to Article 24 of Regulation No 17 is unfounded.

68 The applicant further maintains that the draft of Regulation No 17 which was submitted to the Parliament did not provide for power to be conferred on the Commission so that it was unable to give its opinion on this point.

69 In Article 20 of the abovementioned draft in the version approved by Parliament (OJ 1961, p. 1416) there is a provision substantially identical to Article 24 of Regulation No 17.

70 Consequently this complaint is unfounded.

VI — *Complaint relating to the composition of the administrative body*

71 The applicant maintains that there has been an infringement of a general principle requiring continuity in the composition of an administrative body before which proceedings are brought which may result in a fine.

72 There is no general principle of this nature and consequently this complaint is unfounded.

VII — *Submission of the infringement of an essential procedural requirement through failure to provide a statement of reasons*

73 With regard to the infringement of an essential procedural requirement the applicant puts forward a series of complaints with regard to the reasoning of the contested decision.

74 It complains first of all that the decision omitted to refer to important parts of its reply to the notice of complaints, which dealt in particular with the characteristics of the market in pharmaceutical products and the pointlessness of territorial protection.

75 Those omissions hamper any review of the Commission's powers to intervene under Article 85 of the Treaty on the ground of a potential obstacle to trade between Member States.

76 Under Article 190 of the Treaty the Commission is required to state the reasons on which itc decisions are based, enumerating the facts forming the legal basis of the measure and the considerations which led it to adopt the decision.

77 Nevertheless the Commission is not required to discuss all the issues of fact and of law which may have been touched on by every interested prerson in the course of the administrative procedure.

78 With regard more particularly to decisions imposing a fine, the statement of reasons is to be considered sufficient if it indicates clearly and coherently the considerations of fact and of law on the basis of which the fine has been imposed on the parties concerned, in such a way as to acquaint both the latter and the Court with the essential factors of the Commission's reasoning.

79 It is clear from the decision that the Commission considered that the position of the market in pharmaceutical products was not decisive in finding an infringement of the rules of the Treaty on competition.

80 Consequently the Commission has not infringed an essential procedural requirement by omitting from the reasons for its decision factors which it rightly or wrongly considered irrelevant to the proceedings.

81 With regard to territorial protection the decision sets forth clearly and coherently the reasons of fact and of law for which the Commission alleged that the applicant together with other undertakings had shared out the markets within the Community.

82 The abovementioned complaints are thus unfounded.

83 The applicant then maintains that a number of the recitals in the preamble to the decision are contradictory.

84 Nevertheless, since the applicant has merely noted these recitals without giving details in support of its statement, this submission cannot be relied upon.

85 The applicant further complains that the contested decision contains statements without the reasons for them being stated or adequately stated.

86 With regard to the passages which have been criticized in the statement of reasons relating to the harm caused to consumers by the agreement, those considerations are not basic to the Commission's reasoning.

87 With regard to the allegation of the inadequacy of the statement of reasons relating to the statements contained in the second and third subparagraphs of paragraph 24 of the decision, this complaint relates to the factual evidence forming the basis for the decision and consequently to the substance of the proceedings.

88 In this connexion the information contained in the Commission's decision is sufficient to allow for its reasoning to be understood and for the Court to review the decision.

89 Consequently these complaints are unfounded.

90 The applicant complains in addition that the defendant has infringed Article 4 of Regulation No 99 because certain provisions in the contested decision—in particular relating to the legal scope of the gentlemen's agreement, of the export agreement and of the quantitative compensation for quantities—do not appear in the notice of complaints or do so in another form.

91 The decision is not necessarily required to be a replica of the notice of complaints.

92 In fact the Commission must take into account the factors emerging from the administrative procedure in order either to abandon such complaints as have been shown to be unfounded or to supplement and redraft its arguments both in fact and in law in support of the complaints which it maintains.

93 This latter factor does not contradict the rights of the defence protected by the abovementioned Article 4.

94 This provision is observed if the decision does not allege that the persons concerned have committed infringements other than those referred to in the notice of complaints and only takes into consideration facts on which the persons concerned have had the opportunity of making known their views.

95 No complaint of this nature arises from a comparison between the notice of complaints addressed to the applicant on 30 July 1968 and the provisions of the contested decision.

96 Consequently this complaint is unfounded.

97 The applicant finally complains that the Commission violated a general principle of law to the effect that persons concerned must be made aware of their rights of action and of the time-limits fixed for this purpose.

98 Since the applicant lodged its application within the prescribed period, this submission is irrelevant.

VIII — *The complaint relating to the publicity given to the decision*

99 The applicant complains that the Commission violated the principles on which Article 21 of Regulation No 17 is based by communicating the contested decision to the press and publishing it in its entirety in the Official Journal of the Communities although it does not appear amongst the decisions publication of which is prescribed by that article.

100 The defendant is thus alleged to have influenced public opinion to the detriment of the applicant's reputation and its stock market position.

101 Article 21 of Regulation No 17 which provides for the publication of certain decisions does not include those adopted under Article 15 of the said regulation.

102 Although the Commission was not obliged to publish the contested decision, there is nothing in the letter or the spirit of the abovementioned Article 21 to prevent it from publishing it since this did not amount to divulging the undertakings' business secrets.

103 The Commission's communication to the press altered neither the meaning nor the content of the decision.

104 The publicity thus given to the decision may even contribute to ensuring the observance of the rules of the Treaty on competition.

105 The present complaint is thus unfounded.

D — Substance

I — *The status and duration of the gentlemen's agreement*

106 The applicant complains that the Commission considered that the export agreement relating to trade with third countries and the gentlemen's agreement governing the conduct of its members in the Common Market constituted an indivisible entity as far as Article 85 was concerned.

107 The applicant states that the gentlemen's agreement, unlike the export agreement, did not constitute an agreement within the meaning of Article 85 (1) and in any event it definitively ceased to exist from the end of October 1962.

108 The conduct of the parties to the export agreement does not in the applicant's view indicate that they continued the restrictions on competition which were originally provided for in the gentlemen's agreement.

109 The opposite conclusions reached by the contested decision are therefore alleged to be vitiated because they are based on incorrect findings.

110 The gentlemen's agreement, which the applicant admits existed until the end of October 1962, had as its object the restriction of competition within the Common Market.

111 The parties to the export agreement mutually declared themselves willing to abide by the gentlemen's agreement and concede that they did so until the end of October 1962.

112 This document thus amounted to the faithful expression of the joint intention of the parties to the agrement with regard to their conduct in the Common Market.

113 Furthermore it contained a provision to the effect that infringement of the gentlemen's agreement would *ipso facto* constitute an infringement of the export agreement.

114 In those circumstances account must be taken of this connexion in assessing the effects of the gentlemen's agreement with regard to the categories of acts prohibited by Article 85 (1).

115 The defendant bases its view that the gentlemen's agreement was continued until February 1965 on documents and declarations emanating from the parties to the agreement the tenor of which is indistinct and indeed contradictory so that it is impossible to conclude whether those undertakings intended to terminate the gentlemen's agreement at their meeting on 29 October 1962.

116 The conduct of the undertakings in the Common Market after 29 October 1962 must therefore be considered in relation to the following four points: sharing out of domestic markets, fixing of common prices, determination of sales quotas and prohibition against manufacturing synthetic quinidine.

II — *Protection of the producers' domestic markets*

117 The gentlemen's agreement guaranteed protection of each domestic market for the producers in the various Member States.

118 After October 1962 when significant supplies were delivered on one of those markets by producers who were not nationals, as for example in the case of sales of quinine and quinidine in France, there was a substantial alignment of prices conforming to French domestic prices which were higher than the export prices to third countries.

119 It does not appear that there were alterations in the insignificant volume of trade between the other Member States referred to by the clause relating to domestic protection in spite of considerable differences in the prices prevailing in each of those States.

120 The divergences between the domestic legislation of those States cannot by itself explain those differences in price or the substantial absence of trade.

121 Obstacles which might arise in the trade in quinine and quinidine from differences between national legislation governing pharmaceutical products under trade-mark cannot relevantly be invoked to explain those facts.

122 The correspondence exchanged in October and November 1963 between the parties to the export agreement with regard to the protection of domestic markets

merely confirmed the intention of those undertakings to allow this state of affairs to remain unchanged.

123 This intention was subsequently confirmed by Nedchem during the meeting of the undertakings concerned in Brussels on 14 March 1964.

124 From those circumstances it is clear that with regard to the restriction on competition arising from the protection of the producers' domestic markets the producers continued after the meeting on 29 October 1962 to abide by the gentlemen's agreement of 1960 and confirmed their common intention to do so.

125 The applicant maintains that owing in particular to the shortage of raw materials the sharing out of domestic markets, as emerges from the exchange of letters of October and November 1963, had no effect on competition in the Common Market.

126 Despite the scarcity of raw materials and an increase in the demand for the products in question, as the contested decision finds, a serious threat of shortage nevertheless emerged only in 1964 as a result of the interruption of Nedchem's supplies from the American General Service Administration.

127 On the other hand such a situation cannot render lawful an agreement the object of which is to restrict competition in the Common Market and which affects trade between the Member States.

128 The sharing out of domestic markets has as its object the restriction of competition and trade within the Common Market.

129 The fact that, if there were a threatened shortage of raw materials, such an agreement might in practice have had less influence on competition and on international trade than in a normal period in no way alters the fact that the parties did not terminate their activities.

130 Furthermore the applicant has furnished no conclusive evidence capable of proving that it had ceased to act in accordance with the agreement before the date of expiry of the export agreement.

131 Consequently, the submissions concerning that part of the decision relating to the continuation of the agreement on the protection of the producers' domestic markets until the beginning of February 1965 are unfounded.

III — *The joint fixing of sales prices*

132 With regard to the joint fixing of sales prices for the markets which were not shared out, that is to say, the Belgo–Luxembourg Economic Union and Italy, the gentlemen's agreement provided for the application to such sales of the current prices for exports to third countries fixed by mutual agreement, in accordance with the export agreement.

133 The joint fixing of sales prices by the producers of virtually all the quinine and quinidine distributed within the Common Market is capable of affecting trade between Member States and seriously restricts competition within the Common Market.

134 If, as the defendant maintains, the parties to the export agreement continued until February 1965 to apply their current export prices to supplies to the above-mentioned Member States, it would follow that they continued to abide by that part of the gentlemen's agreement relating to the joint fixing of sales prices.

135 With regard to the period from November 1962 to April 1964, the figures supplied by the defendant show a substantial and constant identity between the current prices fixed for export within the framework of the agreement and the prices maintained by the undertakings concerned, including the applicant, for their sales in unprotected domestic markets in the Community.

136 Where such prices deviate from the scale of export prices they do so in terms of rebates or increases corresponding generally to those agreed on under the gentlemen's agreement.

137 The applicant had supplied no evidence capable of proving that this argument is unfounded.

138 Moreover the increase in prices of 15%, which was jointly decided upon on 12 March 1964 under the export agreement which led Nedchem to withdraw its

opposition, was uniformly applied—although that undertaking would have preferred to continue to fix lower prices—with regard to supplies to Italy, Belgium and Luxembourg also.

139 These circumstances show that with regard to sales prices the parties to the export agreement continued after October 1962 to act in the Common Market as if the gentlemen's agreement of 1960 were still in force.

140 The action taken by the parties to the agreement with regard to prices from May 1964 was only discussed in depth as a result of the questions put by the Court to the defendant during the oral procedure.

141 It is clear from the oral procedure, taking into account the information supplied by the parties, that during 1964 and in particular from May onwards, a party to the agreement applied prices which in an increasing number of cases deviated from the current export prices, and that the defendant has been unable to give a convincing explanation as to how this might be reconciled with the continuation in force of the agreement in question.

142 The failure to communicate to the undertakings concerned the results of the investigations carried out in Italy and Belgium, which excluded any possibility of clarification and discussion at the stage of the administrative procedure, may have contributed to leaving unexplained facts which ought to have been clarified.

143 In these circumstances proof has not been sufficiently established in law that the applicant by mutual agreement with the other producers maintained uniform prices for its sales in the Belgo–Luxembourg Economic Union and Italy after May 1964.

144 Consequently the period from May 1964 to February 1965 must be omitted from the infringement.

IV — *The sales quotas*

145 With regard to the fixing of sales quotas for the Common Market, which was linked to a system of compensation and which constituted a supplementary guarantee of the sharing out of domestic markets, the applicant maintains that the necessary condition for the functioning of such a system, namely the reciprocal notification of all sales including those effected within the Community, was no longer fulfilled subsequent to October 1962.

146 It is not clear that the communications of the undertakings concerned relating to sales, which the defendant has produced in support of its opposing statement, also relate to supplies within the Common Market.

147 On the contrary, such documents in general refer expressly to 'export sales', an expression habitually employed by the members of the cartel to indicate sales to third countries.

148 Furthermore, it is clear from an exchange of letters in January 1964 between two members of the cartel that even such export sales figures were no longer communicated regularly.

149 The defendant itself admits in the statement of reasons for the contested decision that during 1963 and 1964 the compensation arrangements which were intended to ensure that the quotas were observed were not applied because of the scarcity of raw materials and because of the increase in demand, so that the members of the cartel had no further interest in effecting compensatory deliveries between themselves.

150 At the hearing the defendant produced a table of the amounts of quinine disposed of by Nedchem, Boehringer and Buchler from 1962 to 1964 with the object of proving that those quantities, viewed as a percentage of the total of the quotas, did not deviate perceptibly for that period from the quota assigned to each of the undertakings within the framework of the agreement and thus that the quota arrangement continued to operate after 1962.

151 Nevertheless, this table, which moreover does not include sales of quinidine, shows that, even taking as a basis an average recorded over the previous two years, there are considerable deviations in the case of each of the three undertakings in relation to its own quota.

152 Furthermore, the Commission has supplied comprehensive figures covering all the sales of quinine by the undertakings concerned and it is thus impossible to discern from them the course of conduct of those undertakings in the Common Market.

153 Since there is insufficient proof that the system of quotas for sales within the Common Market was continued after October 1962, it must be concluded that the applicant's complaints with regard to this part of the contested decision are well founded.

V — *Restrictions on the manufacture of synthetic quinidine*

154 The gentlemen's agreement prohibited the group of French undertakings from manufacturing synthetic quinidine.

155 Owing to the stringency of the restrictions imposed on undertakings from one Member State for the benefit of undertakings in other Member States and taking into account the importance of such undertakings on the market in question, these prohibitions clearly have as their object the restriction of competition within the Common Market and are capable of affecting trade between Member States.

156 The fact relied upon that, when the gentlemen's agreement was concluded, the French undertakings were not in a position to manufacture synthetic quinidine does not render lawful such a restriction which entirely precluded them from taking up this activity.

157 That the French undertakings should accede to this restriction of their freedom of action is explicable in terms of their interest—owing to the particularly high prices which they maintained for their products in France—in preserving the territorial protection which they enjoyed on their domestic market.

158 Taking into account the connexion thus existing between those two restrictions on competition, it may reasonably be concluded that the prohibition on production lasted as long as the territorial protection.

159 Although it is true that in March 1964 Boehringer granted a licence to manufacture quinidine to the remaining British member of the cartel, on whom the gentlemen's agreement imposed prohibitions similar to those imposed on the French undertakings, this has no effect on the finding which has already been made with regard to the relationship between the French undertakings and the German and Netherlands members of the cartel.

160 Although it is possible that, owing to the scarcity of raw materials which has established by the contested decision (No 29, last paragraph), in its ultimate period protection of the domestic markets did not have important effects on competition and trade between Member States, this cartel nevertheless lasted until February 1965.

161 In the absence of any indication to the contrary and having regard to the above-mentioned connexions between the two aspects of the cartel, it must be considered that the agreement restricting the French undertakings' freedom to manufacture was of the same duration.

162 Consequently the applicant's complaints in this respect are unfounded.

VI — *General appraisal of the agreement within the Common Market*

163 It is clear from the foregoing that the applicant participated with other producers of quinine and quinidine in an agreement prohibited by Article 85 of the EEC Treaty.

164 This agreement continued in most of its forms even after the meeting on 29 October 1962.

165 Serious doubts as to the continuation of the agreement after 1962 exist only with regard to the application of sales quotas.

166 Nevertheless, the fact that the undertakings did not continue to apply the system of quotas does not seem perceptibly to have improved the conditions of competition, since they continued jointly to fix prices, to apply uniformly to their deliveries in the Common Market joint price increases arranged in March and October 1964 and decided within the framework of the export agreement and finally to maintain protection of their respective domestic markets and the prohibition on the French undertakings' production of synthetic quinidine.

167 However, the application of uniform prices for deliveries to Italy, Belgium and Luxembourg has only been proved to exist up to April 1964.

168 Finally, even if it must be conceded that the export agreement could have operated independently of the agreement relating to the Common Market, it must be found that in fact the members of the cartel attributed great importance to the joint application of both agreements.

169 Although from October 1963 the export agreement was declared to be 'in abeyance', it is clear from the declarations made by the undertakings concerned at their

subsequent meetings together with their subsequent conduct as a whole that they continued to have an interest in upholding that agreement, in particular with regard to its possible employment within the Common Market.

VII — *Complaints relating to the fine*

170 The applicant complains that the Commission imposed on it a fine for an infringement which had come to an end.

171 It claims that the fines provided for in Article 15 (2) of Regulation No 17 are in the nature of periodic penalty payments and not penalties of a criminal law nature.

172 The penalties provided for in Article 15 of Regulation No 17 are not in the nature of periodic penalty payments.

173 Their object is to suppress illegal activities and to prevent any reference.

174 This object could not be adequately attained if the imposition of a penalty were to be restricted to current infringements alone.

175 The Commission's power to impose penalties is in no way affected by the fact that the conduct constituting the infringement has ceased and that it can no longer have detrimental effects.

176 For the purpose of fixing the amount of the fine, the gravity of the infringement is to be appraised by taking into account in particular the nature of the restrictions on competition, the number and size of the undertakings concerned, the respective proportions of the market controlled by them within the Community and the situation of the market when the infringement was committed.

177 The applicant raises an objection of illegality against the abovementioned Article 15 on the ground that the system of fines provided for by this provision differs in essentials from the system provided for by the Commission's draft on which the European Parliament was consulted.

178 Considered as a whole the substance of the draft regulation on which the Parliament was consulted has not been altered.

179 Consequently the objection of illegality is unfounded.

180 The applicant requests the Court to cancel or at least considerably to reduce the fine because the infringement alleged against it is of a 'purely formal' nature.

181 Furthermore, it maintains that there is no proper relationship between the fine imposed and the infringement committed taking into account in particular the fact that within the cartel the applicant always maintained that prices should be kept at a low level.

182 It is clear from the considerations previously set out in connexion with the complaints relating to the findings of fact contained in the decision in dispute that the infringement was not of a purely formal nature.

183 In the third subparagraph of paragraph 40 of the contested decision it is expressly stated that the applicant repeatedly expressed itself in favour of relatively low prices.

184 The Commission has consequently taken this factor into account in assessing the fine.

185 The consideration given to the extenuating circumstances operating in favour of the applicant means that the fine imposed on it is proportionally smaller, in relation to those imposed on the other members of the cartel, than its quota within the cartel.

186 The relatively large amount of the fine imposed on the applicant is nevertheless justified owing in particular to the fact that this undertaking controls the major part of the market in the products in question and in consideration of the leading part which it played in drawing up and implementing the agreements together with the grave and intentional character of the infringements committed by it.

187 The findings of the contested decision relating to the infringements alleged against the applicant are thus well founded in their essentials.

188 Since excluding the fixing of sales quotas for the period from November 1962 to February 1965 and of the sales prices for the period from May 1964 to February 1965 does not appreciably diminish the gravity of the restrictions on competition arising from the agreement, it justifies only a slight reduction in the fine.

189 It is appropirate to reduce the fine of 200,00 units of account.

Costs

190 Under the first subparagraph of Article 69 (2) of the Rules of Procedure of the Court of Justice, the unsuccessful party shall be ordered to pay the costs if they have been asked for in the successful party's pleading.

191 Since the applicant has failed in the essential part of its conclusions, it must be ordered to pay 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 Article 85;
Having regard to Regulations Nos 17/62 of the Council and 99/63 of the Commission of the European Economic Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

The Court

hereby:

1. **Dismisses the application for annulment;**

2. **Annuls so much of Article 1 of the decision of the Commission of the European Communities of 16 July 1969 (OJ L 192, p. 5 et seq.) as records that the applicant applied the clauses of the gentlemen's agreement of 9 April 1960 on the system of quotas and compensation during the period from November 1962 to February 1965, and the fixing of prices and rebates for the export of quinine and quinidine during the period from May 1964 to February 1965;**

3. **Reduces the fine imposed on the applicant by the abovementioned decision to 200 000 units of account;**

4. **Orders the applicant to pay the costs of the proceedings.**

Lecourt Monaco Pescatore

Donner Trabucchi Strauß Mertens de Wilmars

Delivered in open court in Luxembourg on 15 July 1970.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 10 JUNE 1970[1]

Mr President,
Members of the Court,

The application made by the Netherlands company ACF Chemiefarma in Case 41/69 and by the German companies Buchler and Boehringer Mannheim in Cases 44/69 and 45/69 respectively will lead the Court for the first time to give judgment on a decision whereby the Commission of the European Communities, after finding that undertakings had infringed the provisions of Article 85 of the Treaty of Rome, has imposed a fine on them.

This indicates the importance of the judgment which the Court is to deliver. This is so first of all from the legal point of view, because the Court has in particular to clarify the procedural requirements for decisions of this nature, to rule whether and after what period of time actions in respect of infringements in connexion with competition are time-barred, but in addition because, having regard to the unlimited jurisdiction conferred on the Court by Article 17 of Regulation No 17 of the Council, the dispute as a whole is brought before the Court so that it has full power to consider the facts and, according to the view it takes as to the existence of the alleged infringements and their gravity, it may uphold, cancel or reduce the fine or, if necessary, increase it. I should add that this importance is in practice increased by the

1 — Translated from the French.