orders them to carry out a decision to raise prices, the uniform implementation of which together with other undertakings constitutes a practice prohibited under Article 85(1) of the EEC Treaty, the conduct of the subsidiaries must be imputed to the parent company.
For the purpose of applying the rules on competition, unity of conduct on the market as between a parent company and its subsidiaries overrides the formal separation between those companies resulting from their separate legal personality.

14. The Community administration is not bound to include in its decisions all the arguments which it might later use in response to submissions of illegality which might be raised against its measures.

In Case 52/69

J. R. GEIGY AG, now CIBA-GEIGY AG, a limited liability company governed by Swiss law, having its registered office in Basel, assisted and represented by J. J. A. Ellis, Advocate at The Hague, and H. Flad, Advocate of Frankfurt am Main, with an address for service in Luxembourg at the Chambers of J. Leosch, Advocate, 2 rue Goethe,

applicant,

v

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

defendant,

Application for the annulment of the Commission Decision of 24 July 1969 published in the JO L 195 of 7.8.1969, p. 11 *et seq.*, relating to proceedings under Article 85 of the EEC (IV/26.267—Dyestuffs),

THE COURT

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

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

gives the following

JUDGMENT

Issues of fact and of law

I — Statement of the facts

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

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

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

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

— Industria Electro-Chimica Bergamasca, Bergamo (Italy),

— Farbenfabriken Bayer AG, Leverkusen (Federal Republic of Germany),

— Farbwerke Hoechst AG, Frankfurt am Main (Federal Republic of Germany),

— Badische Anilin- und Soda-Fabrik AG (BASF), Ludwigshafen (Federal Republic of Germany),

— Cassella Farbwerke Mainkur AG, Frankfurt am Main (Federal Republic of Germany).

— Société Française des Matières Colorantes SA (Francolor), Paris (France),

— Fabriek van Chemische Produkten Vondelingenplaat NV, Rotterdam (the Netherlands),

— Ciba SA, Basel (Switzerland),

— Sandoz SA, Basel (Switzerland),

— J. R. Geigy SA, Basel (Switzerland),

— Fabrique de Matières Colorantes Durand et Huguenin SA, Basel (Switzerland),

— Imperial Chemical Industries Ltd. (ICI), Manchester (United Kingdom),

— Yorkshire Dyeware and Chemical, Leeds (United Kingdom),

— E. I. Du Pont de Nemours Company Inc., Wilmington, Del. (United States of America).

By letter of 15 January 1968 the Geigy company, referring to the opinion of the Federal Department for Political Affairs at Berne, which denied that the Commission had the right to serve the said notice of objections by post on Swiss territory, returned the letter of 11 December 1967 to the Commission.
By letter of 6 February 1968, the Commission's Director-General for Competition informed Geigy that the sole purpose of sending the notice of objections was to enable the said company to defend its rights and that accordingly the latter's silence would not influence the course of the procedure in any way.
On 24 July 1969, the Commission adopted the decision which is contested in the present application, without the applicant's having made known its point of view. That decision ordered the applicant to pay a fine amounting to 50 000 u.a. A fine of the same was also imposed on:

— Badische Anilin- und Soda-Fabrik,

— Cassella Farbwerke Mainkur AG,

— Farbenfabriken Bayer AG,

— Farbwerke Hoechst AG,

— Société Française des Matières Colorantes SA,

— Ciba SA,

— Sandoz SA,

— Imperial Chemical Industries Ltd.

A fine of 40 000 u.a. was imposed on Azienda Colori Nazionali Affini (ACNA) S.p.A.
A copy of this decision was sent by registered letter to Geigy at the offices of its subsidiary in Frankfurt am Main. The applicant, informed of this communication, instructed its subsidiary to return it to the Commission. By letter of 1 August 1969 it formed the Commission that it could not consider transmission to one of its subsidiaries as legally valid service upon itself.
By application lodged at the Court Registry on 3 October 1969, the Geigy company brought the present application against the decision of the Commission.

II — Conclusions of the parties

The *applicant* claims that the Court should:

1. Annul, in so far as it applies to the applicant, the Decision of the Commission of the European Communities of 24 July 1969 concerning proceedings under Article 85 of the EEC Treaty (IV/26.267—Dyestuffs) (JO L 195 of 7.8. 1969, p. 11 *et seq.*);

2. Order the Commission of the European Communities to bear the costs.

The *defendant* contends that the Court should:

— Dismiss the application as unfounded;

— Order the applicant to bear the costs.

III — Submissions and arguments of the parties

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

1. *The submission concerning the jurisdiction of the Commission to adopt the contested measure in respect of the applicant*

A — The applicant's view

Complaint concerning the statement of reasons

The *applicant* states that with a view to justifying its jurisdiction the Commission does no more than refer to the principle according to which the effects of actions

are subject to the law of the country on whose territory those effects occur. The Commission does not in any way examine whether this principle, which is hotly debated in the textbooks, is compatible with EEC law and with the general rules and principles of public international law, and in particular whether it can be applied to offences of an economic nature. Therefore Article 190 of the EEC Treaty has been infringed on the ground of insufficient statement of reasons.

Criticism of the 'effects doctrine' ('Auswirkungsprinzip')

(a) *According to the law of the Member States*

It is argued that this 'effects doctrine' is inadmissible in EEC law. Referring to the preparatory drafts of the Netherlands Law on competition, the applicant asserts that the law of the Netherlands clearly rejects this principle. Furthermore, the competent authorities of several Member States have clearly opposed the proposition that undertakings having registered offices on their territory are subject to the provisions of the legislation of third countries in matters of competition. It is asserted that the Member States of the EEC adopted the same attitude in 1967 in respect of the OECD. The Netherlands, in Article 39 of the Law on competition, and France, in Law No 68-678, have even taken express legislative measures against the extraterritorial application of foreign laws.
Taking into account this general tendency of the Member States, it is hard to believe that they intended to make the doctrine in question part of Community law. This is confirmed, in the applicant's view, by the absence of provisions concerning notifications to be made to undertakings having their registered offices abroad.

(b) *According to international law*

Furthermore, reliance on the 'effects doctrine' does not accord with the principles of public international law, as appears both from the general practice of States and from the opinion of eminent jurists. Admittedly a sovereign State can declare this principle to be applicable by legislative measures. However, one cannot go so far as to read the principle into an international treaty on the basis of a wide interpretation, mainly because that principle goes further than the rules in force in the Member States and there is no basis for it in customary international law.
Alternatively, according to the applicant, even if the applicability of the said principle were to be accepted as regards the EEC, there must at least be a substantial effect, in other words there must be material interference with competition at the level of international trade within the EEC. Yet in its decision the Commission did not examine this point.
This aspect of the problem has been expanded in an opinion by Professor Huber, a member of the Swiss Constitutional Commission. The applicant produces this opinion as an annex to its application.
In his opinion Professor Huber argues first that, according to public international law the fines imposed on the applicants are penalties because they deprive the individual of the enjoyment of assets subject to legal protection. The assertion in Article 15(4) of Regulation No 17 that the provisions in question are not of a criminal law nature is, he asserts, of no value or force from the point of view of public international law. But the Commission is purporting to justify a criminal sanction on the basis of the 'effects doctrine'. The problem raised by the principle at the level of public international law is all the more important in that according to Article 15(2) of Regulation No 17, EEC competition law seems to be based on the idea that the Commission is prompted by the principle that it is free to act without being under an obligation to do so ('Opportunitätsprinzip'). It is argued that this latter principle is of itself contrary to law, and in particular to the requirement of equality of treatment and to the principle of legal certainty. Moreover, its effect is a serious handicap to international trade, particularly when one considers the very substantial fines which may be imposed under Regulation No 17.

According to international criminal law, a State can only punish an act having effects on its territory when there exists some reasonable connecting element, the main reason for this being to avoid encroaching on the legislation of other States. It is not possible for the union of the Member States of the EEC in the Community to have the effect of freeing them from this condition in relation to third States.

Admittedly, in its judgment in the Lotus case the permanent International Court of Justice approved the proposition that a State has power to exercise its criminal jurisdiction wherever this does not encounter a rule prohibiting it. However, that decision concerned an offence considered as punishable in all countries, and its main purpose was to deny the exclusive legal jurisdiction of a State over an offence committed by the captain of a ship flying the flag of that State. Therefore it is not possible to transpose this decision into international economic law on competition.

Professor Huber then examines the American case-law prior to and subsequent to the judgment delivered in 1945 by an Appeal Court of the United States in the Aluminium Company of America (Alcoa) case, which declared that an agreement concluded between six foreign companies with a view to regulating their production by means of quotas covering their exports to the United States was contrary to the Sherman Act. He observes that whilst several decisions of the American courts require that the effects must be direct and substantial, in other countries, on the contrary, the case-law is vaguer and wider. The author makes a number of references to academic writers in the international context who are opposed to the tendency which has arisen both in the case-law of the American courts and at the instance of the State Department. He also refers to legislation and to official statements contrary to this tendency in several States. He concludes that a national case-law which has been adopted only by a certain number of States and has not been followed generally is not sufficient to establish a custom at international law, and he further states that the failure in recent case-law concerning the suppression of cartels to adhere to the objective territorial principle and the application of the 'effects doctrine' is not in conformity with public international law.

In international criminal law, the principle of the protection of essential interests and the principle of universal usage which are the basis for extra-territorial jurisdiction are linked to special conditions which are relatively strict. The limits to be placed on the extra-territorial extension of jurisdiction follow not only from the principle of territorial sovereignty, but also from the necessity of guaranteeing legal certainty and from the possibility of striking a balance between the interests at issue. According to the principle of universal usage, the idea of a set of rules proper to public international law appears as a kind of interdependence between States as regards the suppression of crimes considered throughout the world to call for very heavy penalties, such as the forcible abduction of women, slavery, and so on. The 'effects doctrine', on the contrary, is extraneous to this set of international rules; rather, it reflects the tendency of each State towards legal self-sufficiency, accompanied by an attempt to secure world recognition of the national law of a particular State. If many States adopted this principle, the result would be a situation of anarchy as regards laws in force and courts claiming jurisdiction, together with legal confusion on the part of those concerned. In order to avoid a penalty, undertakings would have to make their conduct conform to the practice of each of the States with which they traded, although such diversification of conduct is in contradiction with the structure and requirements of foreign trade. Furthermore, the vagueness of legal concepts would bestow on the courts of the various countries a wide degree of discretion in determining what constitutes a 'substantial effect'.

It is argued that Article 85(1) does not deal with the questions which arise if the prohibition is applied extra-territorially. Professor Huber distinguishes between effects which are the mere consequence of a measure and effects which form an essential constituent element of the offence. The objective territorial principle relates to

the latter situation, and it is therefore to be distinguished clearly from the 'effects doctrine' as asserted by the American Alcoa judgment and as adopted by the Commission in the contested decision. It is argued that by reason of the special character of the Community legal order, the European Economic Community must, to a much greater degree than a State, respect public international law, under which the 'effects doctrine' is not admitted.
Furthermore, Article 85(2) which provides that prohibited agreements are void cannot take effect with regard to undertakings which have their registered offices abroad; a declaration of nullity cannot be executed and is contrary to the rules commonly accepted in conflict of laws.

B — The defendant's view

The *defendant* believes that the applicant's conduct against which objection is made in this case took place inside the Common Market. Furthermore, and in any event, the circumstances and the effects of the applicant's conduct abroad were such as to give the Community authorities jurisdiction under international law to apply EEC competition law.

The complaint concerning the statement of reasons

The defendant refers to the case-law of the Court on the subject of the statement of reasons, such as it appears in particular from the *Grundig-Consten* judgment and according to which in proceedings leading to a finding that infringements have occured, the administration is not required to give reasons for its rejection of the parties' submissions. Furthermore, the defendant observes that the grounds relating to the Community's claim to jurisdiction are to be found in part in statements contained in the preamble to the decision as to the effect of the activities of the applicant company on competition within the Common Market and on trade between Member States.

The jurisdiction of the Commission based on the 'conduct' of the applicant inside the Common Market

The *defendant* notes first that the expression 'conduct' (or behaviour) means something more than the commission of acts, in that in certain circumstances inaction or failure to act can also be 'conduct'. It is argued that human conduct is an indissoluble whole which cannot be subdivided into static categories such as action on the one hand and its effects on the other. The objectionable practices of the applicant consisted in the fact that it gave orders to its subsidiaries established within the Community to increase prices, as appears from a Telex message sent by the applicant to its Italian subsidiary (Annex II.16 to the statement of defence). The fact of influencing the behaviour of the subsidiaries constitutes conduct on the part of the applicant within the Common Market, and this conduct, it is asserted, formed part of concerted practices over which the Commission has jurisdiction.
The applicant's influence on the conduct of the subsidiaries only took effect upon receipt of the instructions by the subsidiaries, in other words, it only took effect within the Common Market.
As to the relationship between the subsidiaries and the parent company, the defendant believes that the application of a purely legalistic concept of agency would in the present circumstances lead to a distortion of reality. What really matters here is the fact that when the practices at issue occurred the subsidiaries of the applicant simply carried out orders, so that when one considers their competitive situation in respect of third parties they appear as mere extensions of the applicant within the Common Market.

The jurisdiction of the Commission based on the effects produced inside the Common Market by certain conduct of the applicant outside the Common Market

Alternatively, the *defendant* argues that it has jurisdiction as regards the conduct of the applicant outside the Common Market, because of the relationship between that

conduct and the Common Market, and that this view accords both with the present state of international law and with the law of the Member States.

The defendant states that the case only raises the question of the power of authorities amenable to international law to make laws and regulations, and not that of their enforcement jurisdiction abroad.

(a) *The question whether the Commission's claim to jurisdiction accords with international law*

The *defendant* observes that the few authoritative judgments of an international character deal mainly with the jurisdiction of States prosecuting offences against common law. Cartel law is in the main of an administrative nature. Furthermore, the effects of infringements of the rules which it lays down are almost never the direct and physical consequences of the act. Accordingly, precedents should always be adapted to the special needs of the subject at issue.

It appears from the judgment delivered by the International Court of Justice in the Lotus case that the jurisdiction of a State cannot be limited as a matter of principle to acts committed on its own territory, but that on the contrary, in principle, except where a rule of international law provides otherwise, the State may, in certain circumstances, exercise its jurisdiction over acts committed by foreigners outside its territory. In applying this principle to the case which it was hearing, the Court at The Hague attached decisive importance to the fact that it was on the territory of the State the jurisdiction of which had been called in question that one of the elements constituting the offence had taken place, and more especially to the fact that the effects of that offence occurred there. This constitutes the basis of what is called the objective theory of territoriality. This theory came into existence in relation to the enforcement of criminal laws of the traditional kind and in the case of offences where the act and the result form an indissoluble whole. On the other hand, the principle whereby the jurisdiction of one State can extend to acts committed by foreigners on the territory of another State has been propounded in an entirely general way.

The Alcoa judgment asserted the applicability of American competition law without setting any definite limits as regards it extra-territorial application. Thus it was possible to conclude that any agreement made between foreigners abroad restricting competition on the American market could be prohibited by American anti-trust law, however indirect, distant or negligible the connexion between the agreement and the said market or its effects on that market. Furthermore, that judgment constituted the basis of a broad interpretation of the extra-territorial jurisdiction of American authorities and courts, which have gone so far as to issue injunctions to undertakings established abroad and to order that amendments be made to contracts or articles of association the terms of which have been agreed between foreigners abroad.

The diplomatic protests which have been made in response to this practice have been exclusively concerned with the *application* of American anti-trust legislation abroad.

However, this problem does not arise in the present case because the contested decision does not go further than to state that the practices complained of constitute an infringement of Article 85 of the Treaty and to impose a fine because of this. The simple fact of imposing a fine should be considered as exercising an enforcement jurisdiction.

Article 39 of the Netherlands Law on competition should also be read in the context of a reaction against the abovementioned broad interpretation of enforcement jurisdiction.

As regards the danger of applying the Alcoa principle of legislative jurisdiction too widely, the defendant stresses, first, that the jurisdiction of a State cannot be based on some vague and indirect relationship with its economy, and secondly that a strict application of the objective territorial principle would scarcely be satisfactory in determining the jurisdiction of a State on the basis of effects which are not indissolubly linked to the conduct complained of.

The solution consists in finding a reasonable compromise between these two extreme positions, taking the special needs of competition law into account. The necessity for such a compromise was accepted by the Swiss Federal Court in a judgment of 21 March 1967 concerning the application of the Federal Law on cartels to an agreement dividing up the market together with an exclusive dealing agreement made between French and Swiss undertakings (Official Reports of the Federal Court 93, II, p. 192 *et seq.*). The Court opted for a widening of the strict objective criterion of territoriality, holding that the jurisdiction of a State is based on economic repercussions arising within the territory of that State by reason of acts or practices taking place abroad, provided that these repercussions have 'a direct effect on the forces of competition within the territory of Switzerland'.

A compromise should be attempted on the basis, first, of a criterion limiting jurisdiction to *direct effects*, as was decided by the Swiss court, and, secondly, of the *principle of the protection of essential interests*, taking into account the fact that every State is highly interested, and quite rightly so, in maintaining the economic structure of the country and in allowing to the forces which go to make up that economy the freedom to act. The defendant asserts that the Community legislation on cartels is a matter of public policy within the Community and that therefore the applicant cannot claim that when it sells its products in the Community it need not take that legislation into account. The recent theory known as that of the *connecting link* is a means of arriving at similar results.

On the basis of these considerations the defendant argues that, should it be the case (which it has already denied under the first head of its argument) that the conduct of the applicant undertaking took place wholly outside the Community, the jurisdiction of the Community is justified by reason of the economic effects that this conduct has produced within the common market and of the resultant disruption of the public policy of the Community as regards competition law. To reach this result it is sufficient to make a prudent application of the doctrine of economic effects, taking into account the extent of the direct economic effects resulting from the conduct of the applicant, and in particular the successive price increases in the common market. In the present case this result is in accordance with the principles laid down by the International Court of Justice in the Lotus case. This conclusion also accords with the previous practice of the Commission, as appears from its decisions in the cases of Grosfillex (JO 1964, p. 915), Bendix (JO 1964, p. 1246), Vitapro (JO 1964, p. 2287), Transocean (JO, 163, p. 10) and European Machine Tool Exhibition (JO 1969, L 69, p. 13).

(b) *The question whether the jurisdiction claimed by the Commission accords with the internal law of the Member States*

In answer to the applicant's argument according to which in the absence of express provisions in the Treaty establishing it, the Community cannot exercise an extra-territorial jurisdiction to which the Member States are allegedly hostile, the defendant points out first of all that even if the Community was claiming to exercise wider rights than those claimed up till now by the Member States, there is no reason why this claim should not be justified, bearing in mind the fact that the Community is an independent entity in international law. Although it may be that in the past the Member States have not claimed the full extent of the jurisdiction which international law confers on them, the defendant nevertheless denies that the Community is claiming more extensive jurisdiction in this case than is claimed by the Member States.

The diplomatic protests and legislative measures mentioned by the applicant constitute a reaction against the excessive extra-territorial exercise of enforcement jurisdiction alone. Therefore it is scarcely possible to glean any information from them as to the attitudes of the States concerning the extra-territorial effect of their competition. law.

The defendant gives a summary of the legislation of the Member States on competition and of the comments of legal writers, and comes to the conclusion that the theory of economic effects and the principle of the protection of essential interests constitute the basis for the competition law of the four Member States having legislation on this subject.
Such, therefore, is the attitude which the Community can and should adopt.

C — The applicant's reply

The legal personality of the Community under international law

The *applicant* replies that the arguments of the Commission are based on the proposition that in the nature of the case the rules of public international law on the jurisdiction of States apply to the European Economic Community by reason of its status as an entity under international law. The applicant disputes the soundness of this proposition on the ground that since the EEC is an executory Community devoid of sovereignty, it is far from comparable to a sovereign State as regards public international law. The applicant refers to the supplementary legal opinion of Professor Huber on this point (annexed to the reply).

The activity of the applicant within the common market

Where, in its statement of defence, the Commission asserts that the applicant pursued an activity contrary to Article 85 of the Treaty within the Common Market, this assertion is *inadmissible*, it is argued, because it does not appear in the contested decision.
The defendant's theory, according to which actions decided upon by its subsidiaries must be considered as actions of the applicant, fails to take into account the legal independence of the subsidiaries in relation to the parent company, and the theory is thus completely alien to Community law and to the law of the Member States. The American doctrine of the '*alter ego*' is based on a specific legal provision, Section 12 of the Clayton Act. It is argued that the Commission's proposition is also contrary to the case-law of the International Court of Justice.
Further, as regards the instructions which it sent to its subsidiaries established in the Community, the applicant asserts that the defendant admits that it was only upon receipt of these instructions that the supposed influence on the conduct of the subsidiaries arose. This was not an 'action' within the Common Market, but an 'effect' (it is asserted that this distinction is legitimate and further that it is the basis of legal doctrine on questions of jurisdiction in competition law). Even if one were to consider this influence as an action within the EEC, the jurisdiction of the Commission would be established only for the price increase which the applicant applied in Italy in January 1964. The only evidence for the supposed actions of the applicant inside the EEC adduced by the Commission is the Telex message sent by the applicant to Italy in 1964.
Finally, the applicant observes that the illegality is to be found in the concerted action, and not in the increase as such. Yet the Commission has never asserted that this prior concerted action took place within the EEC.

The claim to jurisdiction based on effects

(a) *According to public international law*

The defendant fails to draw the necessary consequence from the distinction between competition law and criminal law, namely that no exceptions can be made to the strict territorial principle as regards competition law which, unlike traditional criminal law, is not recognized by the great majority of States. The infringement dealt with in the Lotus case fell within the generally recognized traditional criminal law. As opposed to this, a concerted practice which, according to the concept adopted by the Commission, does not depend on the existence of an agreement, cannot give rise to a fine in any of the States of the EEC.

As to American case-law, the applicant observes that the Alcoa judgment was reached in application of a law expressly intended to restrict foreign trade, whereas Article 85 of the EEC Treaty does not contain any provision of this nature. Furthermore, the American case-law in question is contrary to public international law and is not accepted outside the United States.

As to the protests of States against American policy on foreign cartels, the applicant observes that these protests are also directed against the adoption of laws and that, furthermore, any execution of a law by force, and in particular the recovery of a fine, represents the exercise of 'enforcement jurisdiction'.

On 12 October 1969 the British Government addressed a protest to the Commission against its attempts to apply a principle analogous to that contained in the Alcoa judgment.

As regards the argument which the Commission draws from the judgment of the Swiss Federal Court of 21 March 1967, the applicant refers to the legal opinion of Professor Huber which it has produced as an annex and according to which that judgment does not contain any pointers as to the question of the exercise of jurisdiction in the procedure to be followed in imposing fines. Professor Huber observes, *inter alia*, that Swiss competition law is not based on the same conception as EEC competition law since the subject-matter of the protection is not the same. Therefore the importance which Swiss competition law attaches to the 'effect' in the sense of an infringement of a personal right of the interested party is not comparable to the application of the 'Auswirkungsprinzip' in a procedure leading to the imposition of a fine for infringement of Community competition law.

It is asserted that the compromise suggested by the Commission for the application of the 'effects doctrine' is based on a rather vague distinction between direct and indirect effects.

The *principle of the protection of essential interests*, according to which it is not even necessary for an effect to have occurred on the territory of the State claiming jurisdiction, can only apply when the fundamental interests of a State are infringed or when it is necessary to prevent ruinous effects within the country, for if this principle were to be interpreted otherwise it would necessarily lead to unlimited territorial jurisdiction in proceedings for the infringement of competition laws. The theory of the *connecting link* is formulated by the Commission in such a general way that in practice, so it is argued, it would appear to be wholly inapplicable.

(b) *According to the internal law of the Member States*

The applicant argues that the Commission's assertion that the theory of effects and the principle of the protection of essential interests are the basis of the competition law of the Member States in which there exists legislation on this subject is inaccurate. As regards Belgium, it seems that the Commission is unable to cite a single practical case of the application of the 'Auswirkungsprinzip'. Furthermore Belgium has even, so it is argued, adopted special legislative measures against the application of this principle (Law concerning the rules for carriage by sea of 27 March 1969, Moniteur, 17 June 1969). Although the German legislation is widely drafted, this does not mean that the German legislature intended to justify the application of national law to foreign undertakings on the basis of the 'effects doctrine'. Furthermore, the German Government is amongst those which have protested against the extra-territorial application of American anti-trust legislation. The same is true of French practice. As for Netherlands law, the applicant refers to the passage in the preparatory stages which states that 'the application of Netherlands competition law presupposes a concrete measure on Netherlands territory'. It is asserted that the 'effects doctrine' has never been applied in any of the Member States.

Therefore the applicant doubts whether the government representatives on the Advisory Committee approved the Commission's point of view.

D — The defendant's rejoinder

The legal personality of the Community under international law

In its rejoinder the *defendant* stresses first that the Community has legal personality under international law, and states that this follows both from the provisions of Articles 113, 114, 228 and 238 of the Treaty, on the conclusion of commercial agreements and international agreements in general, and from the case-law of the Court of Justice (Judgment in Case 6/64 — *Costa* v *ENEL*), and also from the fact that the Community has been recognized as an independent entity under international law by at least 81 States. Although the Community does not have the same legal personality as a State, it is nevertheless true that in certain areas it alone now possesses certain sovereign powers which the States have assigned to it, including notably powers in the field of competition law. In such areas the Community may therefore exercise the said powers to the full, subject to the rules of international law, even if the Member States have not previously exercised those powers completely.

The activity of the applicant within the Common Market

The fact that a subsidiary is controlled by the parent company means that it automatically obeys instructions from the parent company. Although in normal circumstances a subsidiary may decide upon its sales prices in a relatively independent way, it remains a fact nevertheless that the parent company may at any time restrict this independent power of decision, and this was what happened in the present case. The legal personality of the subsidiaries does not change the situation in any way. Furthermore, according to recent legal commentators, the concept of legal personality should only be applied in so far as it does not result in unjust and unacceptable consequences within the legal order. It is on the basis of this idea that the new German companies legislation makes the parent company jointly and severally liable with the subsidiary for obligations entered into by the latter, and on the other hand recognizes the right of the parent company to give instructions to its subsidiary. In certain respects French and Italian companies legislation and the draft Belgian law on companies also take into account the particular relationships existing within an industrial concern. Therefore, it may be asserted that the principle of vicarious liability is based on the legal systems of the Member States.

The defendant then stresses that the provisions of competition law concern the business conduct of undertakings to the extent to which it has repercussions on the market, and that furthermore, in matters of competition, business reality is more important than legal form. The Commission has already taken favourable note of the particular situation of members of a concern in giving negative clearance. Therefore it must be admitted that unfavourable consequences can also follow from such a relationship.

Jurisdiction justified by the effects which the conduct of the applicant has produced within the Common Market

(a) *Jurisdiction of the Commission under the rules of international law*

The *defendant* observes that in providing for an exception to the rule that a State may not exercise its sovereignty on the territory of another State, the decision of the International Court of Justice in the Lotus case does not forbid a State to exercise its jurisdiction on its own territory in all cases where the relevant facts have occurred abroad. According to this principle, States, like the Community, may make laws applicable on their territory to activities taking place abroad, without a 'permissive rule' of international law being necessary for them to do so. The Court at The Hague has delcared that this principle applies equally to criminal matters, notwithstanding the strict ties which exist between jurisdiction in criminal matters and the concept of the State. Therefore the applicant's assertion that a State give up a part of its powers in relation

to the traditional view of criminal law, but not as regards competition law, is in contradiction with the reasons which led the International Court to approve extra-territorial jurisdiction in respect of traditional criminal law.

If the Commission's reasoning according to which competition law cannot be treated on the same footing as traditional criminal law is accepted, the general rules expressed in the Lotus judgment are applicable without restriction, and this means that in the absence of any rule of international law to the contrary the Commission has jurisdiction within the territory of the Community over activities taking place outside it, the basis of such jurisdiction being the theory of the connecting link.

Even if one were to approve the line of reasoning according to which infringements of competition law should be treated in the same way as infringements of ordinary criminal laws and were thus to apply the theory of effects as a constituent element the jurisdiction of the Commission would still have to be recognized. The instruction to raise prices which the subsidiaries of the applicant established in the common market were required to carry out constituted an act which directly produced effects within the Common Market, and that act and its effects were constituent elements of one and the same infringement, as in the Lotus case.

The diplomatic protests to which the applicant refers were mainly concerned with American draft laws concerning the requirement that documents located abroad be returned to the United States, and this, so it is argued, is a typical case of enforcement jurisdiction. On the other hand, none of the protests in question concerned fines, since the imposition of a fine is governed by legislative jurisdiction.

As for the judgment delivered on 21 March 1967 by the Swiss Federal Court, the defendant stresses that according to that decision the Swiss Law, and in particular Article 7(2)(b), is intended to 'curb obstacles to competition from whatever source, to the extent to which they have a direct effect on competition within Swiss territory'.

As for the distinction between direct effects and indirect effects which according to the applicant is not sufficiently clear, the defendant observes that this criterion is used in many legal systems and in several branches of the law. The application of this criterion together with the principle of the protection of essential interests and the theory of the connecting link ensure a solid legal basis for the contested decision as regards the jurisdiction of the Commission.

As for the applicant's argument that the Commission should, in order to justify its jurisdiction, prove at least that the effects within the Common Market are substantial, the defendant observes that it does not see why the criterion used for evaluating direct effects should be different from that used in relation to actions performed within the Common Market.

(b) *The question whether the Commission's claim for jurisdiction accords with the internal law of the Member States*

Replying to the applicant's argument denying that connecting elements exist in the Treaty whereby the rules on competition may be interpreted as being applicable extra-territorially, the defendant asserts that Article 85(1) is applicable to all restrictions on competition affecting inter-State trade which become discernible within the Common Market. It is asserted that the origin of these restrictions is to be found in actions performed outside the common market by undertakings foreign to the Community. The only effect of the absence of a 'foreign commerce clause' is, so it is asserted, to prevent Article 85 from being generally applicable to exports by undertakings within the Community to countries outside it. The fact that there are no rules of procedure concerning the imposition of fines on undertakings foreign to the EEC cannot alter this interpretation of the fundamental provision, just as the fact that there are no explicit provisions covering undertakings in third countries has not prevented a large number of foreign undertakings from making use of the possibility of obtaining negative clearance or a declara-

tion of inapplicability on the basis of Article 85(3).
By reason of its legal personality under international law and of the exclusive or at least higher-ranking powers which it possesses to apply rules concerning competition in relation to trade between Member States, the Community can decide certain questions on a discretionary basis within the limits of international law.
The principle that the rules on competition in the Treaty are applicable extra-territorially cannot be rendered subject to the condition that all the anti-trust laws of the Member States must point the same way.
It is asserted that Article 39 of the Netherlands Law on competition has only been applied as regards requests for the transmission of information or documents made by the American authorities.
As for the opinion on the question of the Community's jurisdiction put forward by the Advisory Committee on Restrictive Practices and Monopolies, the defendant points out that this was an internal opinion not forming part of its decision.

2. *The submission concerning notification of the decision*

The *applicant* argues that the contested decision is irregular in so far as Article 4 provides that it may be notified to one of the subsidiaries of the undertaking to which it is addressed.
The applicant opposes the assertion contained in the contested decision stating that the subsidiaries form part of the 'internal structure' of the parent company and observes that in its judgment in Case 8/56 (*ALMA*), the Court took the view that a letter had by due process reached the internal structure of the addressee upon duly reaching the registered office of the undertaking in question. But this condition was not fulfilled in the present case because the applicant's registered office is at Basel and not at Frankfurt, where the Commission attempted to notify its decision.
The independence of the subsidiaries at distinct legal persons is also relevant as the procedural level. German law concerning limited liability companies does not allow notifications addressed to the applicant to be made to its subsidiary established in Germany.
In the legal opinion mentioned above, Professor Huber observes that the fiction consisting in treating different companies as one entity for legal purposes is in absolute contradiction with the world economic structure. In Swiss Federal revenue law, economic considerations are not authority for disregarding the legal autonomy of companies, except in cases where that autonomy has been established for the sole purpose of evading tax.
It is asserted that the truth of the matter is that in arguing that subsidiaries and parent companies constitute one entity the Commission is trying to overcome the obstacle of territorial limits.
The *defendant* objects that the applicant did receive notice of the contested decision and that its subsidiary forwarded the decision to Switzerland. The defendant adds that the second paragraph of Article 191 of the EEC Treaty does not lay down any particular form which notification is take. Therefore, if the notification to the subsidiary of the applicant were to be considered insufficient, this would mean no more than that the contested decision would not have yet taken effect as regards the subsidiary.
On the basis of the judgment of the Court in Case 8/56 the defendant argues that notification to a subsidiary established in the Common Market and entirely controlled by the applicant means that the decision thus notified reached the internal structure of the applicant, even if the subsidiary has separate legal personality. It is argued that this principle must also apply to the notification of measures during the course of a purely administrative procedure.
In view of the fact that the said judgment of the Court does not require that once the decision has reached the internal structure of the addressee, the latter must have actual notice of it, the obligation to notify was fulfilled *a fortiori* in the present case, because the contested decision did indeed come to the notice of the addressee.
In its reply, the *applicant* denies that it is established that its subsidiary forwarded the decision to it in Switzerland, and

observes that the copy of the decision in question was sent back to the Commission and was not forwarded to Switzerland. The applicant only learnt of the decision through the press and through the Official Journal of the Communities, which, it should be pointed out, does not contain the complete text of the decision. Notification must not only take place in fact but also in law. According to the second paragraph of Article 191 of the Treaty, notification of a decision is an indispensable requirement without which the decision cannot take effect. Therefore the fact that the applicant learnt of the decision in a wholly fortuitous way must not be taken into account as regards this point. Contrary to what the Commission apparently wishes to maintain, the fact that the applicant has brought an application within due time cannot remove the flaw vitiating both the notification procedure and Article 4(2) of the decision, which makes provision for that form of notification.

The judgment of the Court in Case 8/56 cannot be relied on in support of the Commission's proposition, because the Court based its decision on notification made to the registered office of the undertaking concerned itself. According to Swiss law, which is the only law applicable to the applicant as regards determining where its registered office is, the applicant, being a limited liability company, cannot have several registered offices. Therefore it is impossible to consider the registered office of its subsidiary as being the registered office of the parent company. Besides, the legal independence of subsidiaries has constantly been confirmed by the Court (see the Judgments delivered in Cases 17 and 20/61, *Mannesmann and Others*).

The *defendant* observes that it appears from the letter received by the Commission from the applicant dated 1 August 1969 (Annex V to the application) that Geigy was not unaware of the text of the letter which the Commission had sent to it. The very fact that the applicant was able to give its subsidiary instructions to return the letter containing the text of the decision proves that that letter reached the internal structure of the applicant undertaking.

The reference which the applicant makes to the judgment of the International Court of Justice of 5 February 1970 in the *Barcelona Traction* case is not relevant, because the concept of legal personality has an entirely different meaning when applied to diplomatic immunity as opposed to the relationships existing in a 'Konzern'. The same is true of the reference to the case-law of the Court of Justice in the judgments concerning ferrous scrap.

It was for reasons of courtesy in international relations, and taking into account in particular the position of the Swiss Government, that the contested decision was not sent by post. Furthermore, since the Swiss Ambassador refused to forward notification of the decision by diplomatic channels, the Commission notified the decision to a subsidiary of the applicant established within the Common Market. This form of publication takes the interests of the undertakings affected more fully into account than mere publication of the decision in the Official Journal of the Communities, and it must be treated as notification of the decision to the addressee. The two paragraphs which, for reasons concerning the protection of business secrets, were omitted from the publication did not directly concern the applicant. Furthermore, the authorities of foreign States or of international organizations cannot be compelled to follow rules for notification made by a State for its own nationals.

Finally, an irregularity concerning notification cannot in any case render a decision void.

3. *The submission concerning the commencement of the administrative procedure*

The *applicant* states that the Commission's decision of 31 May 1967 provided for the commencement of a procedure against it under Article 3 of Regulation No 17. The fact that, without a further decision on the part of the Commission, the procedure was later extended under Article 15 of that regulation constitutes an irregularity, and more particularly an infringement of Article 19 of Regulation No

17 and of Articles 2 and 4 of Regulation No 99, combined with the second paragraph of Article 162 of the EEC Treaty and Article 27 of the Commission's Rules of Procedure.

The applicant also observes that the Director-General for Competition does not have any jurisdiction to commence proceedings under Article 15 of Regulation No 17 and the Commission could not legitimately delegate such a power to him in the absence of an express provision to that effect.

In its statement of defence, the *defendant* refers to the text of the decision of 31 May 1967 where the following is to be found *inter alia*: 'Having regard to Regulation No 17 of the Council, especially Article 3 and Article 9(2) and (3) ... decides ...'. It clearly appears from this text that the decision was taken in application of Regulation No 17 as a whole, and not only on the basis of Articles 3 and 9. Furthermore, the wording of paragraph (3) of the abovementioned Article 3 is such that the special power given by that article to the Commission does not exclude the power to impose fines.

The procedure was commenced with special reference to Article 3 in order to forestall the future application of the concurrent jurisdiction of the national authorities to apply Article 85(1) of the Treaty, pursuant to Article 9(3) of the said regulation.

In its reply, the *applicant* observes that the text of the decision of 31 May 1967, of which it has now taken notice, does not state with sufficient clarity that proceedings are being commenced under Article 15.

The *defendant* replies that nowhere is it laid down that a decision to commence a procedure based on Regulation No 17 must specifically mention Article 15. It is argued that in the relationship between undertakings and the Commission, it is the notice of objections which determines the scope of the proceedings. In Part V of that notice, it was stated that the infringement resulted at the least from serious negligence such that the requirements for the application of Article 15(2) appeared to be met. Finally, it was not the Director-General for Competition but the Commission which adopted the decision of 31 May 1967 commencing the procedure.

4. *The submission concerning the communication of the notice of objections to the applicant in Switzerland*

The *applicant*, after referring to the provisions of Article 2(3) of Regulation No 99/63, which states that a fine may be imposed on an undertaking only if the objections were notified in writing to the undertaking concerned, observes that the Commission communicated the notice of objections in a manner contrary to the general rules of public international law and of Swiss law, which was the law of the place where notification of the same was to be effected. According to a generally recognized principle of public international law, each sovereign State has the right to decide whether it will permit foreign authorities to serve notice of official documents by post on a person resident in its territory. The notice of objections was an administrative measure of a coercive nature, officially commencing a procedure of a quasi-criminal nature. Therefore the abovementioned principle, which applies to notification of all official documents, should apply *a fortiori* to that notice. The applicant observes that Switzerland, by opposing the International Convention of The Hague of Civil Procedure, signed in 1905, had already made it clear that as regards civil and commercial matters it did not permit notifications to be served by post on its territory. The invariable practice of the Swiss Federal authorities points the same way. Therefore, since the objections were notified in an irregular way, that notice is null and void, according to the general principles of public international law.

Professor Huber, in his opinion already mentioned, states in this connexion that although this constitutes an exception to the rules of judicial cooperation, public international law permits a sovereign State to refuse acceptance of notification by post constituting an expression of the sovereignty of a foreign State, and this is the case even in fields other than civil

matters, and *a fortiori* when a criminal matter is involved. In criminal matters, the legal obstacles cannot be removed; it is not even possible to do so by electing domicile in Switzerland or by way of other measures open to private individuals.

These considerations lead the applicant to conclude that the decision infringes Article 19 of Regulation No 17 and Article 2 and 4 of Regulation No 99, because it was taken without the notice of objections having validly reached the interested party. The applicant reproves the Commission for not having adopted the course recommended by the Federal Department of the Swiss Police, which consisted in inviting the applicant to elect domicile on EEC territory with a view to a possible notification and, should the applicant refrain from doing so, drawing its attention to the consequences which would follow from this. The Commission's argument that the procedural requirements of Community law are fulfilled, notwithstanding the fact that notification may be irregular, as soon as the applicant has taken notice of the statement of objections amounts to approval of an infringement of the principles of public international law. The fact that the Commission later tried to give notice of the final decision to a subsidiary of the applicant in Germany, and not directly to the applicant in Switzerland, shows that it had itself the feeling of having committed an irregularity in respect of the notice of objections.

The *defendant* objects that service of the notice of objections on the applicant by post did not constitute the exercise of a coercive administrative power. In fact the notice of objections has nothing to do with the commencement of the procedure, and undertakings are not required to submit observations concerning it. The contrary opinion of the Swiss police authorities represents a particularly restrictive practice, which is nowhere laid down in Swiss law and which does not correspond to any generally accepted principle of international law. This only involves the interpretation of Swiss law, an infringement of which cannot possibly constitute grounds for an application under Article 173 of the EEC Treaty.

The applicant could have elected domicile in one of the Member States of the Community if it had wished the defendant to respect the provisions in force in Switzerland. It could have done so because, contrary to what Professor Huber asserts, the procedure in question is not of a criminal nature.

In its reply the *applicant* points out that according to Article 2(2) of Regulation No 99, communication of the objections in writing is an essential element in the procedure which may result in the imposition of a fine. By its nature and purpose this communication forms part of the exercise of administrative powers. It is therefore an administrative measure within the meaning of Swiss case-law, which describes the notification of any procedural document as an administrative measure. According to the applicant, the Swiss practice, which the Commission criticizes for being allegedly too restrictive, is based on public international law.

The applicant also stresses that, contrary to the Commission's statement, it has not submitted written and oral observations on the notice of objections; only its subsidiaries have done so.

As for the possibility of electing domicile within the EEC, the applicant observes that it has never been invited to do so. It is argued that it is unacceptable to reverse the situation by imputing the nullity of the notice to the practice of the Swiss authorities and to the conduct of the applicant.

5. *The submission concerning the right to be heard*

The *applicant* claims that the facts set out in connexion with Submissions 3 and 4 also constitute infringements of the right to be heard, which is acknowledged in Article 19 of Regulation No 17 and Articles 2 and 4 of Regulation No 99. Furthermore, since it appears that measures of inquiry were carried out even after the notice of objections was sent, there was a further infringement of Article 2 of Regulation No 99, according to which the notice of the objections adopted by the

Commission must be communicated to the undertakings involved upon termination of the measures of inquiry.

Taking into account the vague and imprecise nature of its terms, the notice of objections does not, it is argued, adequately explain how the applicant was guilty of a concerted practice with all the other undertakings to which the notice of objections was sent. The notice therefore lacked the basis required under Article 19 of Regulation No 17 and Articles 2 and 4 of Regulation No 99.

The applicant also complains of the fact that the contested decision is based on matters, such as Telex messages being sent simultaneously, which do not appear in the notice of objections.

The *defendant* objects that it is sufficient for the Commission to inform the interested parties of the facts knowledge of which is necessary for determining the objections which the Commission has adopted. In the present case the principal facts are set out in the second section of the notice of objections.

As to the complaint concerning the pursuance of inquiries after the notice of objections had been sent, the defendant observes that the sole purpose of these inquiries was to check statements made by certain undertakings during the procedure, and in particular the statement that following each general increase prices slid quickly downwards as a result of discounts given to certain customers. In adopting the contested decision, the defendant took into consideration only the facts set out in the notice of objections.

More generally, the defendant observes that the procedural rules set out in Regulations Nos 17 and 99 are not to be considered as rules relating to the application of the Treaty within the meaning of Article 173 since, if this were the case, infringement of formal requirements laid down in those regulations would always constitute grounds for an application, which is not the case for rules to form found in the Treaty itself.

In its reply, the *applicant* observes that the judgment delivered by the Court in Joined Cases 56 and 58/64 (*Grundig-Consten*) requires that the interested party be sufficiently informed of the facts on which the objections are based. It is argued that in the present case this means that the Commission should, *inter alia*, have made available the file containing the documents which it had used in so far as this was necessary to enable the interested parties to be adequately enlightened. Without seeing the full text of the Telex messages, which the Commission only made available by means of Annexes to the statement of defence, the applicant could not form its own opinion as to the alleged similarity of the wording of those messages.

The applicant stresses that its reliance on the present submission does not imply that it acknowledges having received service of the notice of objections, this point being the specific subject of the submission set out under No 4, above.

Finally, the applicant argues that infringement of the right to be heard is always an infringement of essential procedural requirements within the meaning of Article 173 of the Treaty, since such a right forms part of the fundamental guarantees of any system based on the rule of law.

In its reply, the *defendant* argues that the applicant is confusing the duties of the Commission during the administrative procedure with its duties as a defendant before the Court.

As for the similarities in the content of the instructions given to the subsidiaries of the various undertakings for the 1964 increase, the defendant observes that they are noted under No 10 of the notice of objections.

6. *The submission concerning the period of limitation*

Relying on the principle '*in dubio in reo*', the *applicant* asserts that in the absence of any provision as to limitation in Community legislation, the national rule which is the most favourable to the undertaking against which proceedings have been taken must be applied. This is to be found in Italian legislation which provides for a limitation period of 18 months.

The applicant states that there is no evidence of continuity to connect the

alleged concerted practice of 1965 with those which supposedly took place in 1967 and that no measure was taken suspending the time-limit as regards the alleged concerted practice said to have resulted in the increase of January 1965.

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

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

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

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

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

In its reply, the *applicant* observes that the Commission cannot raise the argument that the three price increases were interconnected, because the contested decision does not contain this assertion.

Furthermore, the Commission misunderstands this concept of a continuing connexion. Before the existence of such a connexion can be accepted, there must be shown to be an intention from the beginning to achieve a final result by progressive stages. But economic pressures are such that agreements for successive future increases are not possible. The fact that the price increase decided upon in January 1965 in Italy had to be postponed because two of the undertakings against which proceedings have been taken did not follow the undertakings which took the initiative shows clearly that the producers in question had not decided upon further price increases for future years.

Therefore, since the parties concerned did not have a common plan, one cannot possibly say that there was a continuing connexion.

In its rejoinder, the *defendant* argues that in order to justify the proposition that there was a continuous concerted practice, it is sufficient to show that, starting with the price increase of 1964, each of the undertakings concerned could rest assured that the other interested parties would adopt the same conduct upon the occurrence of further general increases in prices. Since real prices were constantly falling, the producers of dyestuffs had a continuous and common interest in raising the level of competitive prices from a relatively low level to a more lucrative level for all, by abstaining from undercutting each other.

7. *The submission concerning the concept of, the reasons for and the evidence of the concerted practice*

The applicant argues that the Commission

has failed to appreciate the meaning of the concept of a concerted practice contained in Article 85(1) of the EEC Treaty, because it starts from a mistaken conception of the market in dyestuffs in the EEC. The applicant refers to the opinion of Professors Bombach and Hill (Annex 8 to the application), according to which the European market in dyestuffs constitutes a typical example of an imperfect market, this quality being due to objective factors and not being caused artificially.

The *extremely wide range* of products existing on the market means that the buyer cannot have a clear idea of that market, be it in relation to the technical and chemical properties of the various dyestuffs, or to the prices demanded by the various sellers, or to special terms governing delivery and technical assistance.

The producers have to carry *large stocks* near centres of consumption, because users always obtain supplies in small quantities and only keep very low stocks. Therefore stock turnover is very low and as a result the costs of keeping stocks are high. Yet even as regards speciality products it is essential to maintain stocks for it can be more important to be in a position to meet customers' special requirements than to grant discounts on prices.

Furthermore, by reason of the mounting level of research costs, the *return* from dyestuffs divisions has diminished considerably during the course of the last ten years. Therefore, once it appears that a leader undertaking has increased its prices on the market, other undertakings follow its example immediately. If a sizeable undertaking did not fall in with the increase, this policy would not be to its advantage because the other manufacturers would be subject to such pressure from their customers that they would be forced to withdraw their price increases, with the consequence that the manufacturer which had not increased its prices could not, in the end, increase its profits.

Still following the opinion of Professors Bombach and Hill, the community of interests existing on the European dyestuffs market is said to be analogous to the market situation considered in the judgment of the Court in Case 13/60. It is said to create a sort of tacit coalition such as that postulated by the theory of oligopolistic strategy. The basic idea of this theory is that the parties do not communicate with each other and that it is the community of interests alone which determines a common attitude on their part.

The Kammergericht Berlin and the National Board for Prices and Incomes are said to have reached a similar conclusion, taking into consideration the oligopolistic nature of the market in dyestuffs in Europe.

The contested decision merely notes the simultaneous nature of the increases, the identity of the rates of increase, the identity of the products covered by the increases and the similarities in the way in which the increases were introduced, yet it does not in any way inquire into the cause of this so-called parallel action. In the preamble to its decision, the Commission should have shown that the action of the manufacturers concerned was not to be explained by the economic phenomenon of price leadership and it should have proved that on the contrary this action was the result of a concurrence of wills contrived beforehand by the undertakings with a view to arranging their conduct on the market. The decision does not attribute to any individual undertaking any specific factors of a nature such as to prove the existence of a concerted practice. It is therefore difficult for the applicant to formulate an attitude to the conclusions of a wholly general nature put forward by the Commission.

The applicant observes that the rates of increase were identical because of the existence of price leadership. As for the allegedly simultaneous nature of the increases, the Commission puts forward detailed evidence only as regards the price increase which took place in Italy in 1964. Yet this increase may equally be explained by the oligopolistic structure of the market. Since the questions which arose when the price increase took place were the same for all the undertakings concerned, the contents of the notices sent to the subsidiaries were necessarily similar. As to the fact that the selling prices to

customers and the selling prices to subsidiaries were partly increased in different proportions, the applicant observes that the consequences of an oligopolistic market become apparent on the user market, whereas selling prices to subsidiaries are not determined by the oligopoly system.

As for the fact that prices were not increased in Italy in 1967, the applicant argues that, contrary to the Commission's assertion, it was not the conduct of the ACNA company which prevented that increase, but rather the applicant's realization that the conditions necessary for an increase were not met, in that the applicant was not in a position to act the part of leader undertaking in Italy and that there was no other manufacturer which could do so.

It is argued that Geigy's conduct during the meeting of 18 August 1967 was typical of an undertaking acting as price-leader on an oligopolistic market, and that that conduct had nothing to do with a concerted practice.

For all these reasons it is argued that the Commission has infringed Article 85(1) of the EEC Treaty, in that the grounds on which it based its decision were erroneous and in that it did not furnish sufficient evidence in support of its allegations.

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

The defendant maintains that the price increases in question cannot be explained by the oligopolistic structure of the market. In referring to what is expected to happen in such a market in theory, the applicant has failed to consider the postulates of price theory employed in the analysis of parallel conduct. These factors are not applicable in the case of the dyestuffs industry.

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

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

automatically be absolutely parallel.

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

If the criteria elaborated by the text-book writers concerning conscious parallelism are applied to the dyestuffs industry it will be seen that no such parallelism is possible.

Competition between undertakings on the dyestuffs market cannot in any way be considered as covering similar products; this is clear from Report No 100 of the National Board for Prices and Incomes on the dyestuffs industry, dated 21 January 1969 (Annex V-1 to the statement of defence), from the opinion of Professors Bombach and Hill (Annex 8 to the application), from documents produced during the preparatory inquiries by the undertakings ICI, Geigy and Sandoz, and from various statistical data produced by the Commission (Tables I to VI of Annex I to the statement of defence).

The market for the products in question covers about six thousand different products. Each of the undertakings concerned manufactures from 1 500 to 3 500 products and these, at least in part, display various qualities, mixtures and physical forms. The differences in strength, shade, fastness and solubility are such that when the products of various manufacturers are compared it is rare to find two dyes that are perfectly identical. The degree of similarity varies considerably: it runs from a fairly high degree of comparability in standard dyestuffs to the existence of near monopolies, often protected by patents, for products having special characteristics. Furthermore, the competitive position of the various dyes and the extent to which one can be substituted for another are constantly undergoing rapid change because of technical progress. A notable feature of the market for the products in question is a *low level of transparency* mainly owing to the large number of products involved, the differences between them and the variety of users (textile, leather, paper, food, rubber and synthetic materials industries, and manufacturers of paints, ink, cosmetics and so on). A further reason is the fact that technical services are provided for purchasers, which differ in degree according to the customer. It follows that there is no single, standard price for each dye since prices are negotiated individually with each customer, with considerable differences between one purchaser and another. The result of this practice is that the prices calculated for each product by each undertaking are not known, in most cases, to the other undertakings, nor even amongst the purchasers themselves, as ICI has itself agreed. Therefore changes in prices introduced by one manufacturer are only imperfectly known on the market or only become known long after the event.

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

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

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

Since purchasers carry low stocks, manufacturers must themselves maintain *large stocks* as this makes it easy for them to adapt themselves to changes in demand. Because competition between manufacturers is intense and undertakings are constantly trying to increase their share of the market, they find it necessary to build up their stocks in such a way as to be

able to take advantage of all chances of selling their products. It is relatively easy for them to adapt themselves in the medium term by changes in the production programme because the production plant can be used for many different purposes.

In view of the particular conditions on the market, the situation of manufacturers differs from one undertaking to another. It follows that some undertakings have much more success than others in obtaining the prices at which they aim to sell their products.

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

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

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

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

Since *several of the products* in question are not interchangeable, or only to a small extent, an undertaking putting up its prices cannot assume that its competitors will follow suit, at least for the products in question. The price increases at issue were introduced indiscriminately for all products and this cannot possibly be explained by the *pressures of the market* and by the logic of the oligopoly situation. Moreover, the defendant argues that an analysis of conditions on the dyestuffs market shows that on that market, which is characterized by a high rate of expansion and rapid technical progress, a general alignment of price increases, announced without prior concertation, would not be possible for *interchangeable products*. The defendant refers to the example of the ACNA company, which for the most part manufactures standard types and which, after eight of the ten undertakings in question had announced a general increase in prices of pigments and had begun to apply this increase as from 1 January 1965, did not fall in line with this increase in prices, so that thereafter the other undertakings withdrew their increases. This shows, in the Commission's view, that even in the case of products towards which sellers react in a sensitive way, interests are so varied on the dyestuffs market that parallel action does not take place automatically.

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

In its reply, the *applicant* argues that on the one hand the defendant, in taking the view that a concerted practice is possible in the absence of express concertation, is

going against the view generally adopted by academic writers, according to which a concerted practice requires a concordance of wills amongst the parties concerned. On the other hand, the Commission contradicts itself in requiring coordinated conduct on the part of the undertakings, because such conduct, which is more than uniform conduct, presupposes prior concertation. Yet the Commission nowhere indicates when and how the undertakings in question informed each other of the attitude they intended to adopt upon the occurrence of the increases at issue. The only purpose of the statement made by the applicant's representative at the meeting in Basel in August 1967 was to inform the other undertakings of the decision already taken to increase prices. Shortly afterwards Geigy introduced this increase on the market, without waiting for the reactions of the other undertakings.

The Commission cannot prove the existence of a concerted practice merely by refuting the arguments put forward by the applicant to the effect that its conduct was necessarily dictated by the structure of the European dyestuffs market. For, even if it succeeded in demonstrating this, it could be the case, even in the absence of pressure imposed by the market, that the applicant acted independently.

The correct way to assess the applicant's conduct is to start, not with concepts taken from any given theory about oligopolies, which is what the Commission does, but rather with precise findings as to the situation on the European dyestuffs market.

The applicant observes that the Commission does not explain why homogeneity of products is so important, and that furthermore it does not give a definition of what it means by homogeneity. The American case-law mentioned by the Commission on this subject is entirely irrelevant in the present dispute, because it applies a legal system different from the European system.

According to Professors Bombach and Hill, differences between products can result, *inter alia*, from particular delivery and maintenance terms related to the product, and from the rapidity of technical progress. The concept of homogeneity of products can only be defined on the basis of a given economic situation. According to these observers experience shows that despite the identical nature of the products in the technical sense, preferences for certain suppliers always exists.

According to the applicant, the decisive element in this case is not the question of homogeneity or heterogeneity, but the fact that there is a high degree of *interdependence* between manufacturers, and that in the sector in question they are subject to high costs, so that they are obliged to seize every opportunity of increasing their prices.

It is alleged that the Commission forgets that growth on the market in question depends on the rate of expansion of the user industries, particularly the textile industry. Therefore the theoretical concept used by the Commission of the *rate of expansion* of the market, and the tables showing the consumption and production of organic dyestuffs are not very useful for assessing the situation on the European market in dyestuffs. Furthermore, the Commission does not sufficiently appreciate the *limits to mobility of demand* on the European markets in the products in question. It is asserted that from the point of view of production, no manufacturer of dyestuffs would be in a position to satisfy the demand which could theoretically exist on the market if he did not rally to a general increase introduced by the other manufacturers. This would require an increase in his productive capacity, which would take much too much time.

Contrary to what the Commission asserts, it is not easy, the applicant argues, to convert the existing means of production. Furthermore, since the market cannot grow of its own accord, any increase in the growth rate of one manufacturer must take place at the expense of other manufacturers. In these circumstances, manufacturers have a choice only between ruinous price competition or improving their returns by following a leader undertaking when it increases its prices.

The importance which the defendant attributes to stocks does not reflect business reality, because stocks always

remain geared to current transactions, and therefore they can never be sufficient to meet sharp increases in demand due to possible increases in prices not followed by the applicant. To maintain enormous stocks for this purpose would not be economically viable.

As regards the alleged differences between the situations of the manufacturers on the market, the applicant observes that the Commission overestimates the amount represented by speciality dyes in the total sales figure. The truth is that in the applicant's case it only represents about 5%. It would seem that the same is true for the other manufacturers. In any event, the important factor for consumers is not the chemical composition of dyestuffs, but the colour obtained. Accordingly, the uniform colour obtained by mixing dyestuffs makes it possible to eliminate the importance of specialities. The English report on speciality dyes to which the Commission refers only deals with the proportion represented by these dyes in the complete range of a manufacturer. It does not deal with the fraction which they represent of the total sales figure. The large number of specialities produced by each manufacturer does not have any effect on the total sales figure.

The special relationships between manufacturers and users noted by the Commission are, it is argued, inherent in the European dyestuffs market as a whole, and they offer identical commercial possibilities to all manufacturers, since the market situation is the same for all.

It is asserted that the differences between the rates of expansion do not prove that once manufacturers have decided to increase their prices they can reasonably expect that their competitors' returns will be different. It is argued that Tables II, III, and V produced in Annex I to the statement of defence are therefore of no relevance.

It is asserted that the differences between the production costs of the various manufacturers are of no consequence in considering the price increases introduced by the applicant. Prices are always increased up to the amount which, in the mind of the person introducing the increase, will be accepted by the market. Speculative considerations take precedence over considerations relating to costs. Furthermore, the person introducing a price increase does not know the extent of his competitors' costs. It may be that the profits situation varies from one manufacturer to another, but a calculation of the profit per product would be extremely unreliable.

The applicant argues that when the Commission decided that there were no market pressures in relation to speciality products (from which it concluded that the uniform increases extended to these products could not be explained purely by the market situation), it failed to take into account the very small proportion which these non-interchangeable dyestuffs represent in the turnover of European manufacturers. It also lost sight of the fact that the large number of dyestuffs renders it impossible in practice to introduce a general price increase with different rates depending on the product. These were factors justifying the expectation that the various producers would fall in line with the undertaking announcing an increase, even as regards non-interchangeable speciality products. Furthermore, the events in connexion with the increase of 1 January 1965 in Italy show that there is a risk in such decisions to make increases.

Graduated price increases, which in the Commission's opinion offer the undertakings excellent prospects, would in reality lead to a ruinous price war, which would have repercussions for the customers because in such a situation the manufacturer would no longer have the financial means necessary to attempt innovations and ensure that customers are given reliable service. The applicant believes that before giving such advice the Commission would do well to make a close analysis of the market in question.

It is asserted that the similarity in the Telex messages was a necessary consequence of the similarity of conditions in modern business life. The points mentioned by the Commission (the necessity of imposing as high a price as possible, and of refusing further transactions at such low prices) are essential factors in any price increase and therefore they necessarily

feature in the letters from all the manufacturers. Furthermore, no similarity is to be found in the sale of the goods in question in a number of important particulars, as appears from the table produced in Annex III to the reply.

The applicant formally denies the Commission's assertion to the effect that it adopted a more prudent course at the time of the later increases.

Furthermore, it is alleged that the Commission admits that conscious parallelism can occur on the European dyestuffs market, because it has not imposed fines on other manufacturers of dyestuffs, although the latter increased their prices exactly as the applicant did, and because it declares that it did not impose fines in these cases since it was not convinced that those manufacturers participated in a concerted practice.

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

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

As for Community law on competition, a concerted practice within the meaning of Article 85 exists every time that the conduct of several undertakings on the market proceeds from a common will on the part of the interested parties, whether that common will is the offspring of reciprocal action or of the action of a third party. There is a common will not only when the undertakings come to an understanding as to their conduct on the market but also when they deliberately ensure that there can be no lack of knowledge about their future conduct by keeping each other informed, and, in so doing, they coordinate their conduct. The element of cooperation consists in the fact that, by reason of the common will each of the participants can rest assured that the others will adopt either a uniform conduct or a different course of conduct on the market according to an allocation of roles worked out in advance. Therefore it is not necessary to show that the participants have collaborated or drawn up a common plan in order to argue that there exists a concerted practice for the purposes of Article 85.

In the present case the Commission has proved that as regards prices of dyestuffs the manufacturers in question behaved in a uniform way. This means that it has adduced sufficient proof that concerted practices existed. Furthermore, it has shown that the structure of the market for the products in question was such that there is no explanation of this uniform conduct other than that alleging concerted practices. Moreover, the Commission has even pointed out a series of facts constituting indications of concertation.

According to the defendant, although it is the case that in a limited oligopoly the undertakings will practice parallel pricing policies if they allow themselves to be guided by rational economic criteria, nevertheless such market forces do not exist for producers of dyestuffs because the

structure of the market is looser and the interests of the undertakings differ.

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

In answer to the applicant's criticism that it has relied premarily on theoretical arguments rather than on the facts, the defendant asserts that it has analysed the markets in great detail and that with the help of empirical data it has proved in particular that when the undertakings act without concertation their conduct corresponds exactly with the conduct which the Commission believes to be appropriate to the situation existing on the market. Moreover, the applicant has not disputed the Commission's point of view concerning the occurrence of parallel conduct, or the accuracy of its account of the circumstances which must be fulfilled in this connexion, as set out in its statement of defence.

As for the structural factors characterizing this market, the defendant states that it certainly is not saying that conscious parallelism presupposes homogeneous products, and it recognizes that the criteria elaborated by academic writers should not be applied automatically to concrete cases. What really matters is the existence of *divergent interests* and a *measure of autonomy* for each undertaking as regards prices.

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

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

As to *the homogeneity of products*, the opinion of the Commission coincides with that of Machlup, to which the applicant mistakenly referred with a view to contradicting the defendant's arguments.

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

Certain writers do notexclude the possibility of parallel conduct in the case of heterogeneous products. But in such a case the maintenance of the relationship between the prices of the various products is considered necessary. This condition is not met in the markets for dyestuffs, which are heterogeneous to a large extent, both because of rapid and constant change in the degree to which products can be substituted for one another and because of the competitive position of the various dyes.

The applicant's argument, which attempts to discount the technical heterogeneity of the dyes and considers only the homogeneity of the product, that is to say the colour obtained, is in contradiction with the application and with the first report of Professors Bombach and Hill. According to the latter, customers also attach importance to the technical characteristics of dyes.

Furthermore, it is incorrect to assert that in practice 'the total colour effect obtained' from the products of the various sellers is completely interchangeable.

The concept of a speciality is not a precise one and therefore there is no point in discussing the question whether speciality dyes represent 5% or a third of the total

output. What matters is the existence of a measure of autonomy in fixing prices. The factors mentioned by the applicant (rapid technical progress, the importance of technical assistance to the customers) makes it possible, so it is argued, for the undertakings to have an individual strategy. The defendant states that the applicant underestimates the importance of facts such as the homogeneity or otherwise of the products, the existence of rapid technical progress and of a period of expansion on the market.

It takes the view that the applicant's assertions as to the community of interests and the foreseeable conduct of competitors is in contradiction with the real situation on the market.

The applicant's statement that dyestuffs divisions are not profitable is shown to be untrue by the fact that demand for and production of these products has doubled since 1958. Professor Kantzenbach thinks that the return is 'fairly good' for the main manufacturers. The risk of a ruinous price war mentioned by the applicant does not exist, because each producer knows that its competitors have the financial means necessary for defending themselves against any attack.

As for the *rate of expansion of the market*, the defendant takes the view that as regards the question of interdependence it is necessary to know to what extent an increase in the sales of one undertaking has repercussions on the sales of competitors. If consumption is increasing, an increase in the sales of a active competitor does not necessarily mean fewer sales for the others.

As for the *ability to adapt to changes in demand*, the importance of the part played by stocks follows, first, from the fact that for reasons relating to costs the products are manufactured only between once and four times a year, and secondly, from the fact that users of dyes maintain only very low stocks (except as regards standard dyes). This forces the supplier to stock considerable quantities near the different centres of demand. Since the market in question is expanding, the defendant assumes that stocks are calculated in such a way that sudden demand can be met.

As to the fact that certain undertakings to which the notice of objections was addressed have gone unpunished, the defendant notes that it was not entirely convinced of their guilt.

As regards the problems concerning the structure of the market in dyestuffs, and the relationship which exists between an oligopoly covering heterogeneous products, the intensity of real competition and parallel conduct, the defendant says that it is willing to produce proof of the soundness of its arguments, and names Professor Kantzenbach as expert for this purpose.

As to the *factual evidence* for the existence of prior concertation, the defendant observes that the instruction to increase prices immediately appears in thirteen of the fourteen orders, the instruction to cancel current offers is found in twelve of the fourteen letters and the prohibition against making out antedated bills is found in eight of the fourteen letters, this difference being explained by the fact that this prohibition was already implicit in the order to make an immediate and general increase.

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

8. *The submission concerning the adverse effect on trade between Member States*

The *applicant* observes that the opinion of Professors Bombach and Hill has proved that the market in dyestuffs is a local market, and that it is impossible for inter-State trade to develop at the level of the consumer. The reasons for this include the urgency of the deliveries requested, the importance of technical assistance and therefore of personal contacts and the fact that purchases are always made in small quantities and that there exist variations in colouring between similar

dyestuffs produced by the various manufacturers.

The applicant argues that, without denying that the market in question has these characteristics, the Commission is content to assert, without any substantiation, that these considerations and factors do not justify discounting the possibility of intra-Community imports by certain users where there exist sufficient disparities between the levels of prices of dyes in the various countries. The applicant observes that disparities between price-levels have always existed within the EEC and that this has never led to intra-Community trade. Thus, for example, the Commission has not been able to point to the existence of commercial exchanges with Italy, despite the fact that the price increase which took place in 1967 in the other countries of the EEC did not take place in Italy.

In its defence, the *defendant* observes that any material restriction on competition which goes beyond the frontiers of a Member State results in an artificial alternation in the conditions on the market inside the Community. There was such a restriction in this case because the concerted practice in question extended to the territory of several Member States. Trade between Member States was particularly seriously affected because the undertakings concerned, taken as a whole, effect more than 80% of deliveries of dyestuffs in the Community, and because they increased their prices in such a way that it would have been quite impossible for consumers to import directly from other Member States.

Contrary to what the applicant asserts, there has for many years been significant trade in dyestuffs between States inside the Community, and the amount of this trade and the profits therefrom have been constantly increasing. The defendant here refers to statistics of the OECD and states that it is willing to produce these.

In its reply, the *applicant* observes that as regards the trade pattern between itself and its subsidiaries, which constitute marketing outlets for its products, the contested decision does not contain any argument in evidence of an alleged restriction on trade between Member States at this trade level. As regards the trade pattern between subsidiaries and consumers, no trade between Member States can exist, the reasons for this being practical ones. The statistics of the OECD are of no use because they only concern trade between manufacturers and marketing outlets and therefore do not show whether trade exists at the consumer level. Trade between Member States would have been affected if the Swiss producers had not followed the increase decided upon by the leader undertaking, because in such a case the Swiss undertakings could theoretically have increased their share of the market at the expense of the manufacturers inside the Community which had increased their prices.

In its rejoinder, the *defendant* stresses the fact that the purpose of Article 85 is not to procure advantages for undertakings established within the Community, but to ensure that goods in free circulation within the Common Market can be freely traded on that market, whatever their origin.

9. *The submission concerning the restriction on competition*

The *applicant* observes that the struggle involved in obtaining orders and thus in conquering a share of the market does not take place in the same way in all sectors of the market. It is argued that the opinion of Professors Bombach and Hill shows that in the dyestuffs sector, competition takes place through individual price offers made by each manufacturer to each customer, through the offer of a wide range of products, through intensive research and development, through the maintenance of large, permanent stocks, and through the quality of technical assistance to customers. The consequence, it is argued, has been that despite the price increases announced, the level and structure of prices have always been aligned on supply and demand in sectors of the market, and this has led Professors Bombach and Hill to describe the price increases of which the applicant is accused as 'neutral' from the point of view of competition. Despite these increases, the tendency of prices to fall in

the long run has continued, precisely because of competition. The above-mentioned observers have plotted this tendency on a saw-tooth curve. Therefore it cannot correctly be claimed that the price increases meant that thenceforth competition only took place in relation to quality and technical assistance.

The *defendant* replies that concertation in connexion with price increases limits competition between manufacturers in the sense that they are prevented from leaving their prices as they are or from confining themselves to smaller increases. It is argued that buyers suffer accordingly.

10. *The submission concerning the applicant's 'error'*

According to the applicant, in asserting that the impugned undertaking could not be unaware that the practice complained of constituted an infringement of Article 85, the Commission has not taken account of the situation on the market in dyestuffs, or of the particular situation of the applicant as an undertaking having its registered office outside the EEC. Given the divergences of view as to the applicability of the doctrine of jurisdiction based on effects, it was not unreasonable for the applicant to suppose that the Commission had no jurisdiction to commence proceedings against it. Therefore, even if it was wrong on this point, it must be admitted that it has committed a pardonable error, and that therefore the alleged infringements of Article 85(1) of the Treaty are not imputable to an offence on its part.

In its statement of defence the *defendant* considers it unlikely that the applicant, which sells its products throughout the world, could believe that the rules of the Treaty on competition do not apply to its activities within the Community. It is argued that the applicant has at the very least been negligent in relying upon the interpretation favourable to itself without further inquiry, and in doing so notwithstanding the existence of opinions which differ on this matter, as the applicant itself recognizes.

In its reply, the *applicant* refers to a judgment of 9 April 1954 in which the Bundesgerichtshof accepted the proposition, in relation to an error concerning a concept found in competition law, that it was necessary to take into account ignorance of the fact that a given act constituted a criminal offence. Similarly, the Commission should have taken into account the fact that by reason of the special situation existing on the European market in dyestuffs the applicant did not take the view that its conduct was illegal and that therefore it was in error concerning the concept of a concerted practice referred to in Article 85 of the EEC Treaty, this error being all the more understandable since it was only in its statement of defence that the Commission produced a definition—which, it should be said, differs from the opinion of the majority of commentators.

Finally, the applicant denies that it relied upon the interpretation favourable to itself without further inquiry, since it asked for the opinion of an eminent expert, Professor Huber. When it took its decisions to raise prices in 1964 and 1965, it was not possible for the applicant to take account of the judgment of the Swiss Federal Court of 21 March 1967 to which the Commission refers.

In its rejoinder the *defendant* observes that at the time covered by the judgment of the Bundesgerichtshof mentioned by the applicant, it was more difficult for the accused in that case to interpret a legal concept appearing in a regulation made in 1947 by the military government than for the applicant to interpret Article 85 of the EEC Treaty.

The clarity of the wording of Article 85 and the abundant literature existing on this question are such that the applicant's alleged conviction that the Community's rules on competition do not apply to it because of its 'non resident' status cannot be regarded as a serious and exhaustive examination of the problem at issue.

11. *The regularity of the statement of defence*

In its reply, the *applicant* states that the Commission's statement of defence does

not take sufficient account of the fact that the applications lodged by the various dyestuffs manufacturers have not been joined. It is argued that the said statement, which contains numerous references to cases brought by the other manufacturers, infringes the rules of procedure and the order made by the Court on 11 December 1969. In examining the dispute, the arguments put forward in the statement of defence should be disregarded.
In its rejoinder, the *defendant* replies that it cannot be prohibited from referring to the files concerning parallel cases for the purpose of adducing evidence in support of its arguments since the infringement of Article 85(1) arises from a collective action on the part of the various applicants.

IV — Procedure

The procedure took the following course:

By order of 11 December 1969 the Court decided that the defendant should lodge separate statements of defence without reference to the other cases pending on the subject of dyestuffs.
By order of 8 July 1970, the Court, having regard to the report of the Judge-Rapporteur and the views of the Advocate-General, ordered as follows:

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

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

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

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

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

By order of the same date the Court joined Cases 48/69, 49/69, 51/69, 52/69, 53/69, 54/69, 55/69, 56/69 and 57/69 for the purposes of the expert's report.
In a document lodged at the Registry on 10 July 1970, the applicant asked for a further period in order to deal with arguments which, in its opinion, the defendant put forward for the first time in its rejoinder, and with the expert's report by Professor Kantzenbach, produced by the defendant as an annex to the said rejoinder.
By letter dated 21 July 1970 the Registrar of the Court informed the applicant that it would have the opportunity of submitting observations on this subject after the expert's report had been submitted.
By order dated 13 November 1970 the Court, having regard to the proposal made by common agreement between the parties on the names of two experts, instructed Horst Albach, Professor of Business Management at the University of Bonn, and Wilhelm Norbert Kloten, Professor of Political Economy at the University of Tübingen, to prepare the report jointly.

The experts' joint report was lodged at the Court Registry on 23 April 1971. The experts summarized the results of their report in the following terms:

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

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

— A general and linear increase in prices involves opportunities and risks both for the producer who takes the initiative in putting prices up and for the producer of dyestuffs who has to fall in with a general and uniform increase announced by a competitor. Both as regards the producer who determines the price and as regards those who follow him, the conclusion to be drawn is that during the period in question the advantages to be obtained from a general and uniform increase in prices were greater than the disadvantages.

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

Observations on the experts' report were lodged at the Court Registry on 18 June 1971 by the applicant and on 21 June 1971 by the defendant.

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

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

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

Grounds of judgment

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

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

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

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

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

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

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

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

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

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

3 By application lodged at the Court Registry on 3 October 1969 Geigy AG, now Ciba-Geigy AG, has brought an application against that decision.

Submissions relation to procedure and to form

The submissions concerning the administrative procedure

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

4 The applicant asserts that the notice of objections, for which Article 2 of Regulation No 99/63 of the Commission makes provision, is irregular because it is signed by the Director-General for Competition *per procurationem* although, according to the applicant, no such delegation of powers on the part of the Commission is permitted.

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

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

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

6 Therefore this submission is unfounded.

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

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

It is argued that in this way the Commission has infringed Article 19 of Regulation No 17/62 and Articles 2 and 4 of Regulation No 99/63, combined with the second paragraph of Article 162 of the EEC Treaty and Article 27 of the Commission's Rules of Procedure.

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

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

9 Therefore this submission is unfounded.

(c) *The submission concerning the service of the notice of objections*

10 The applicant complains that the Commission served the notice of objections in a manner which did not accord with Swiss law, the law of the place where the notice was to be served.

It is said that the Swiss Confederation does not recognize the validity of service by post of a foreign measure of this kind on its territory.

Therefore since the notice of objections was not duly served, it is null and void according to general principles of international law.

It is argued that this irregularity gives rise to an infringement of the applicant's right to be heard granted to it by Article 19 of Regulation No 17 and Articles 2 and 4 of Regulation No 99.

11 The purpose of the notice of objections for which Article 2(1) of Regulation No 99 makes provision is to enable those concerned to put forward their arguments in the context of proceedings initiated against them by a decision adopted by the Commission in the exercise of the powers which Articles 3 and 15 of Regulation No 17 confer on it.

Since there is no convention on the matter between the Community and the Swiss Confederation, the question how this notice is to be served on interested parties established outside the territory of the Community depends on international practice and must be resolved with mutual regard to the spheres of jurisdiction both of the Community and of the third State concerned.

It appears from the file that the authorities of the third State in question do not for the present envisage any practical possibility of service, considered by them to be valid under internal law, on the territory of that State.

Therefore international law cannot be invoked in order to deny the Community the power to take the necessary steps to ensure the effectiveness of measures taken with a view to curtailing conduct adversely affecting competition which has arisen in the Common Market, even if the registered office of the undertaking responsible for such conduct is situated in a third country.

Furthermore, the main purpose of the notice in question is to ensure that those concerned may exercise the rights which they enjoy under the Treaty and Community legislation.

There a notice served in accordance with Community rules cannot be considered to invalidate the subsequent administrative procedure if it must be served in a third country, once it is established that by enabling the addressee to take cognizance of the objections held against him it has achieved its purpose.

12 The submission must be rejected.

(d) *The complaint concerning the continuation of inquiries after the notice of objections had been served*

13 The applicant argues that the Commission, in undertaking inquiries after the notice of objections had been served, failed to appreciate the nature of that notice which, as appeared from Regulations Nos 17 and 99, must constitute the final measure of inquiry.

Furthermore, the contested decision is based on factors, such as the simultaneity of the Telex messages, which are not mentioned in the notice of objections.

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

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

Such is not the case in the present proceedings.

It appears from the text of the notice of objections that the facts taken into account against the applicant were clearly set out therein.

That notice contains all the information necessary for determining the objections made against the applicant, and in particular the circumstances in which the increases of 1964, 1965 and 1967 were announced and implemented.

Amendments concerning the precise course of the facts included in the contested decision in the light of information furnished by the undertakings concerned to the Commission during the course of the administrative procedure do not infringe the rights of the defence.

15 Therefore these complaints are unfounded.

The submission relating to notification of the decision

16 The applicant argues that the contested decision is irregular in that it provides, in Article 4, that it may be notified to one of its subsidiaries.

17 The second paragraph of Article 191 of the Treaty provides that 'decisions shall be notified to those to whom they are addressed and shall take effect upon such notification'.

Article 4 of the contested decision cannot in any circumstances alter that provision.

Therefore it cannot prejudice the applicant.

18 Irregularities in the procedure for notification of a decision are extraneous to that measure and cannot therefore invalidate it.

In certain circumstances such irregularities may prevent the period within which an application must be lodged from starting to run.

The last paragraph of Article 173 of the Treaty provides that the period of instituting proceedings for the annulment of individual measures of the Commission starts to run from the date of notification of the decision to the applicant or, in the absence thereof, from the day on which it came to the knowledge of the latter.

In the present case it is established that the applicant has had full knowledge of the text of the decision and that it has exercised its right to institute proceedings within the prescribed period.

In these circumstances the question of possible irregularities concerning notification ceases to be relevant.

19 Therefore this submission is inadmissible for want of relevance.

The submission as to the limitation period

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

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

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

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

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

22 Therefore the submission is unfounded.

Substantive submissions as to the existence of concerted practices

Arguments of the parties

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

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

It is contended that these increases cannot be explained simply by the oligopolistic character of the structure of the market.

It is said to be unrealistic to suppose that without previous concertation the principal producers supplying the Common Market could have increased their prices on several occasions by identical percentages at practically the same moment for one and the same important range of products including speciality products for which there are few, if any, substitutes, and that they should have done so in a number of countries where conditions on the dyestuffs market are different.

The Commission has argued before the Court that the interested parties need not

necessarily have drawn up a common plan with a view to adopting a certain course of behaviour for it to be said that there has been concertation.

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

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

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

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

It is argued that Geigy's conduct at the meeting of 18 August 1967 in Basel was characteristic of an undertaking controlling prices on an oligopolistic market and had no connexion with a concerted practice.

Different price increases for interchangeable products either could not produce economically significant results because of the limited level of stock and of the time necessary for adapting plant to appreciably increased demand, or would lead to a ruinous price war.

Dyestuffs for which there are no substitutes only form, it is said, a small part of the producers' turnover.

Taking these market characteristics into account and in view of the widespread and continuous erosion of prices, each member of the oligopoly which decided to increase its prices could, it is argued, reasonably expect to be followed by its competitors, which had the same problems regarding profits.

Finally, it is argued that the contested decision is based primarily on theoretical considerations and does not specify individually the concrete facts which might prove the existence of a concerted practice.

The concept of a concerted practice

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

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

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

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

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

The characteristic features of the market in dyestuffs

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

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

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

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

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

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

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

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

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

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

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

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

Although the foremost reason why producers have acted in this way is in order to adapt themselves to the special features of the market in dyestuffs and to the needs of their customers, the fact remains that the dividing-up of the market which results

tends, by fragmenting the effects of competition, to isolate users in their national market, and to prevent a general confrontation between producers throughout the common market.

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

The increases of 1964, 1965 and 1967

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

By reason of the limited elasticity of the market in dyestuffs, resulting from factors such as the lack of transparency with regard to prices, the interdependence of the different dyestuffs of each producer for the purpose of building up the range of products used by each consumer, the relatively low proportion of the cost of the final product of the user undertaking represented by the prices of these products, the fact that it is useful for users to have a local supplier and the influence of transport costs, the need to avoid any action which might artificially reduce the opportunities for interpenetration of the various national markets at the consumer level becomes particularly important on the market in the products in question.

Although every producer is free to change his prices, taking into account in so doing the present or foreseeable conduct of his competitors, nevertheless it is contrary to the rules on competition contained in the Treaty for a producer to cooperate with his competitors, in any way whatsoever, in order to determine a

coordinated course of action relating to a price increase and to ensure its success by prior elimination of all uncertainty as to each other's conduct regarding the essential elements of that action, such as the amount, subject-matter, date and place of the increases.

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

The effect of the concerted practice on trade between Member States

38 The applicant argues that the uniform price increases were not capable of affecting trade between Member States because notwithstanding the noticeable differences existing between prices charged in the different States consumers have always preferred to make their purchases of dyestuffs in their own country.

39 However, it appears from what has already been said that the concerted practices, by seeking to keep the market in a fragmented state, were liable to affect the circumstances in which trade in the products in question takes place between the Member States.

The parties who put these practices into effect sought, on the occasion of each price increase, to reduce to a minimum the risks of changing the conditions of competition.

The fact that the increases were uniform and simultaneous has in particular served to maintain the *status quo*, ensuring that the undertakings would not lose custom, and has thus helped to keep the traditional national markets in those goods 'cemented' to the detriment of any real freedom of movement of the products in question in the Common Market.

40 Therefore this submission is unfounded.

The jurisdiction of the Commission

41 The applicant, whose registered office is outside the Community, argues that the Commission is not empowered to impose fines on it by reason merely of the effects produced in the common market by actions which it is alleged to have taken outside the Community.

42 Since a concerted practice is involved, it is first necessary to ascertain whether the conduct of the applicant has had effects within the Common Market.

It appears from what has already been said that the increases at issue were put into effect within the common market and concerned competition between producers operating within it.

Therefore the actions for which the fine at issue has been imposed constitute practices carried on directly within the Common Market.

It follows from what has been said in considering the submission relating to the existence of concerted practices, that the applicant company decided on increases in the selling prices of its products to users in the common market, and that these increases were of a uniform nature in line with increases decided upon by the other producers involved.

By making use of its power to control its subsidiaries established in the Community, the applicant was able to ensure that its decision was implemented on that market.

43 The applicant objects that this conduct is to be imputed to its subsidiaries and not to itself.

44 The fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company.

Such may be the case in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.

Where the subsidiary does not enjoy any real autonomy in determining its course of action on the market, the prohibitions laid down by Article 85(1) may be considered to be inapplicable in the relationship between it and the parent company with which it forms one economic entity.

In view of the unity of the group thus formed, the actions of the subsidiaries may in certain circumstances be attributed to the parent company.

45 It is not denied that at the time the subsidiaries of the applicant established within the common market were place entirely under the latter's control.

The applicant was able in particular to exercise decisive influence over the policy of those subsidiaries as regards selling prices in the Common Market and in fact used this power upon the occasion of the three price increases in question.

In effect the Telex messages relating to the 1964 increase, which the applicant sent to its subsidiaries in the Common Market, gave the addressee orders as to the prices which they were to charge and the other conditions of sale which they were to apply in dealing with their customers.

In the absence of evidence to the contrary, it must be assumed that on the occasion of the increases of 1965 and 1967 the applicant acted in a similar fashion in its relations with its subsidiaries established in the common market.

In these circumstances the formal separation between these companies, resulting from their separate legal personality, cannot outweight the unity of their conduct on the market for the purposes of applying the rules on competition.

It was in fact the applicant undertaking which brought the concerted practice into being within the Common Market.

46 The submission as to lack of jurisdiction raised by the applicant must therefore be declared to be unfounded.

47 The applicant complains that insufficient reasons were given in the decision, in that it does not mention the relationship existing between the parent company and its subsidiaries by way of justification of the Commission's jurisdiction.

48 The fact that no statement is included showing why the Commission has jurisdiction does not stand in the way of a review of the legality of the decision.

Furthermore, the Commission is not bound to include in its decisions all the arguments which it might later use in response to submissions of illegality which might be raised against its measures.

49 Therefore this objection is unfounded.

50 Furthermore the applicant claims that the Commission did not take into account its special situation as an undertaking having its registered office outside the Community.

It is argued that by reason of differences of opinion as to the applicability of the principle of jurisdiction based on effects, the applicant was entitled to take the view that the Commission had no jurisdiction to commence proceedings against it.

There, it is said, it must be admitted that in any event the applicant committed a pardonable error, and that any infringements of Article 85(1) of the Treaty are not imputable to an offence on its part.

51 It appears from the examination of the submission concerning the jurisdiction of the Commission that that jurisdiction is based not only on the effects arising from a course of conduct pursued outside the Community, but also on an activity pursued within the Common Market and imputable to the applicant.

52 Therefore this submission is unfounded.

The fine

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

Costs

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

The applicant has failed in its submissions.

Therefore it must be ordered to bear the costs.

On those grounds,

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

THE COURT

hereby:

1. **Dismisses the application;**

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

Lecourt Mertens de Wilmars Kutscher

Donner Trabucchi Monaco Pescatore

Delivered in open court in Luxembourg on 14 July 1972.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS

(See Case 48/69, p. 665)