This is especially the case if the parallel conduct is such as to enable those 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.

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

10. 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 change of prices and to ensure its success by prior elimination of all uncertainty as to each other's conduct regarding the essential elements of that action, such as the amount, subject-matter, date, and place of such changes.

11. Where an undertaking established in a third country, in the exercise of its power to control its subsidiaries established within the Community, 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.

12. The fact that no statement is included showing why the Community administration has jurisdiction does not stand in the way of a review of the legality of its measures.
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 48/69

IMPERIAL CHEMICAL INDUSTRIES LTD. (hereinafter referred to as 'ICI'), having registered offices in London and Manchester, assisted and represented by C. R. C. Wijckerheld Bisdom and B. H. ter Kuile, Advocates at the Hoge Raad of the Netherlands, with an address for service in Luxembourg at the Chambers of J. Loesch, 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 Journal Officiel No L 195 of 7 August 1969, p. 11 *et seq.*, relating to proceedings under Article 85 of the EEC Treaty (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 Imperial Chemical Industries Ltd., London, which had participated in a concerted practice for the purpose of fixing prices for dyestuffs.
By registered letter of 11 December 1967

addressed to the undertaking in London 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 above-mentioned increases. There were sixty recipients of the said letter and notice. They were producers of dyestuffs established both inside and outside the Community, and their subsidiaries and representatives established within the Common Market.

In the notice of objections the Commission declared that within the Common Market the price increases had been introduced by the following producers, and by their subsidiaries or representatives:

— Azienda Colori Nazionali Affini S.p.A. (ACNA), Milan (Italy),
— Industria Piemontese dei Colori di Anilina S.p.A. (IPCA), Milan, (Italy),
— Fabbrica Lombarda Colori Anilina S.p.A. (FLCA) Milan (Italy),
— Industria Electro-Chimica Bergamasca, Bergamo (Italy),
— Farbenfabriken Bayer AG, Leverkusen (Federal Republic of Germany),
— Farbwerke Hoechst AG, Frankfurt am Main (Federal Republic of Germany),
— Badische Anilin- und Soda-Fabrik AG (BASF), Ludwigshafen (Federal Republic of Germany),
— Cassella Farbwerke Mainkur AG, Frankfurt am Main (Federal Republic of Germany),
— Société Française des Matières Colorantes SA (Francolor), Paris (France),
— Fabriek van Chemische Produkten Vondelingenplaat NV, Rotterdam (Netherlands),
— Ciba SA, Basel (Switzerland),
— Sandoz SA, Basel (Switzerland),
— J. R. Geigy SA, Basel (Switzerland),
— Fabrique de Matières Colorantes Durant 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).

On 10 December 1968 the Board of ICI gave its answer to the Commission's notice of objections before representatives of the Commission and of the Member States.

At its meeting on 24 July 1969, the Commission adopted a decision ordering Imperial Chemical Industries Ltd. to pay a fine of 50 000 u.a. for infringements of the provisions of Article 85(1) of the Treaty, which it had allegedly committed as a participant with other undertakings in concerted practices for the purpose of fixing the amount of price increases and the circumstances in which these increases were to be introduced in the dyestuffs industry in 1964, 1965 and 1967.

For the same reasons the decision ordered that fines of 50 000 u.a. be paid by:

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

and that a fine of 40 000 u.a. be paid by Azienda Colori Nazionali Affini S.p.A.

ICI lodged an appeal against this decision at the Court Registry on 1 October 1969.

II. Conclusions of the parties

The *applicant* claims that the Court should:

1. Annul the decision at issue;
2. Order the Commission of the EEC to bear the costs of the action.

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 extra-territorial jurisdiction of the Commission*

A — The applicant's view

Complaints as to the jurisdiction claimed by the Commission on the basis of the effects arising within the Common Market of the applicant's activity outside it

(a) *International law*

The *applicant* argues that the decision concerning it taken by the Commission is based on an erroneous conception of the extra-territorial jurisdiction of the Community. According to a letter dated 22 January 1968 addressed to the applicant by the Director-General for Competition (Annex 3 to the application), the proceedings brought against ICI under Article 3 of Regulation No 17 were justified on the premise that Article 85 of the Treaty is applicable to a course of conduct adopted within the Common Market by undertakings outside it. However, in the contested decision a more general claim is put forward regarding the Community's jurisdiction in relation to those undertakings, its basis being that the rules of the Treaty on competition apply to all restrictions on competition which produce, within the Common Market, effects covered by Article 85(1), without its being necessary to examine whether the undertakings responsible for those restrictions have their registered offices inside or outside the Community.

Therefore, compared with the position taken up in the abovementioned letter of 22 January 1968, the decision is based, according to the applicant, on a much wider conception of the jurisdiction of the Commission, and this leads to the application of repressive measures in competition law in response to effects produced inside the Community by activities pursued in third countries.

The applicant argues that this point of view is contrary to international law. As regards this matter the applicant refers to the opinion of several authors from various countries and also produces as an annex to the application the text of an opinion by Professor Jennings, Professor of International Law at the University of Cambridge, on the following question: 'Whether, according to recognized principles of international law and practice, the Commission would have jurisdiction, under Article 85 and Regulation 17, to make a "cease and desist" order, or to impose a fine, binding upon ICI, a company registered in the United Kingdom, with its head office in London.'

This opinion was brought to the attention of the Commission before the hearing for which Article 19 of Regulation No 17 makes provision. The applicant asks the Court to consider this document as forming part of its application.

In his opinion, Professor Jennings observes that in respect of penal offences which amount to 'common crimes' generally recognized as such, States have somewhat relaxed the principle of the territoriality of the penal law. On the other hand, restraint of trade laws belong not to that category where State practice permits a wide discretion but rather to the category of public law peculiar to a State or group of States, which should therefore be territorially confined unless there is a specific permissive rule. As to the territorial test Professor Jennings notes that in the Lotus case the International Court of Justice relied on an objective test and held that offences are to be regarded as having been committed in the national territory if one of the constituent elements of the offence, and more especially its effects, have taken place there. As the survey in 'Harvard Research' has pointed out, an essential element of the offence must be involved. It is only since 1945, starting with the judgment of the Court of Appeal of the United States in the Aluminium Company of America (Alcoa) case, that American case-law has presented the objective territorial test as a mere 'effects' doctrine, and applied it not to a common crime but to anti-trust law. This judgment

no longer requires that a part of the illegal conduct should take place within the territory of the state claiming jurisdiction and considers it enough that all that happens within the territory is an economic repercussion in terms of trade. Hence the judgment creates not a difference of degree but a difference of kind. The result is that essentially extra-territorial jurisdiction is being claimed on the strength of the territorial principle. This constitutes an inherent contradiction.

According to the opinion of a committee of leading European lawyers which assisted the American Law Institute, the exercise of jurisdiction based on territory is not justified as regards conduct occurring abroad and producing effects within the territory unless the contested conduct and its effects are generally recognized as constituent elements of a crime or tort under the laws of States that have reasonably developed legal systems. Professor Jennings observes that commentators agree that neither the principles nor the methods of laws directed against trusts, cartels and other restrictive practices belong to this latter category. During the last twenty years protests have been made by a number of States, including France, Germany, Italy, the United Kingdom, the Netherlands, Canada and other European and non-European countries against attempts to claim jurisdiction made by certain United States authorities on the basis of the theory criticized above. It is asserted that these protests specifically referred to the limits placed on State jurisdiction by international law and opposed the extra-territorial jurisdiction claimed by the authorities of the United States.

In January 1966 the Legal Committee of the Consultative Assembly of the Council of Europe submitted a report in which it put forward the proposition that each State has jurisdiction to pass judgment in accordance with its laws against an agreement made outside its territory, even between parties who are not nationals of that State, but it observes that that state cannot give effect to such a judgment unless in addition it enjoys extra-territorial powers of enforcement. This relatively innocuous version of the 'effects' doctrine evoked strenuous opposition from many quarters.

A number of States, including the Netherlands, have made it illegal for companies residing in the territory to furnish documents or information about their activities to foreign authorities.

From the facts outlined above, the author of the study here considered draws the conclusion that the contemporary practice of States is vigorously opposed to attempts to apply anti-trust laws extra-territorially.

Professor Jennings also observes that the extra-territorial enforcement of anti-trust laws is not something which can be applied in one direction only. Thus the European Community and the States which compose it would have to be ready to accept the proposition that a third State could act in the same way as regards undertakings having their headquarters within the Community.

Furthermore, he notes that unlike a sovereign State, the Community does not enjoy inherent competence but only that attributed to it. Yet there is nothing, he asserts, in the Treaties to suggest any intention of conferring on the EEC competence to exercise extra-territorial jurisdiction as regards the rules on competition. On the contrary, Articles 85 and 86 show an intention to limit the competence not only to the Common Market territories but, within that area, to trade between Member States. Moreover, it would be absurd to suppose that the Member States intended to confer such jurisdiction on the Community when they have denied the principle itself by showing their intention to reject the claims of the American authorities to exercise that jurisdiction.

Professor Jennings comes to the conclusion that the EEC has jurisdiction over ICI only as regards its conduct inside the frontiers of the Community, if that conduct were to constitute some infringement of the Community rules on competition. As regards the conduct of ICI outside the community he is of the opinion that the EEC does not have jurisdiction.

(b) *The law of the Member States*

In its application the *applicant* refers to the

preliminary stages of French and German anti-trust legislation and to Netherlands legislation on this subject, and comes to the conclusion that those States consider it to be an unacceptable interference with sovereignty for some third state to impose penalties under its competition laws on undertakings established within one of those States by reason of conduct occurring on the territory of the State in which they are established, notwithstanding the fact that the conduct of those undertakings has produced effects within that third State. It is therefore quite wrong to suggest that the Commission has such a power as regards undertakings whose registered offices are in third countries.

Complaints concerning the jurisdiction claimed by the Commission on the basis of the conduct of the applicant within the Common Market

Professor Jennings examines the question whether the supply of dyestuffs on CIF contracts is conduct within the territory of the Community. The CIF contracts whereby ICI sells dyestuffs to its subsidiaries in the EEC are governed by English law and the making of these contracts by ICI clearly constitutes, he says, conduct in England by ICI. The only way in which these contracts could be brought within the territorial jurisdiction of the EEC would be by calling in aid the effects doctrine. But as regards this Professor Jennings points out that FOB contracts may also have similar repercussions. Thus one arrives at the absurd conclusion that on the basis of the effects doctrine territorial jurisdiction covers the extra-territorial conduct of foreigners in their own countries.

In conclusion the author examines the question whether the applicant can be considered to have acted within the territory of the EEC through its subsidiaries established in the Community. He asserts that the subsidiaries did not act on behalf of ICI as its agents, and that therefore it would be wrong for their actions to be attributed to ICI. The distinct legal personality of the subsidiary ought to be respected for the law ought not to discount what it has itself created. This latter consideration runs counter to the proposition that when a subsidiary is entirely controlled by the parent company the conduct of the subsidiary may, in law, be attributed to the parent company even if no real agency relationship exists.

According to the American Law Institute's Restatement of the Conflict of Laws: 'Where ... the parent so controls and dominates the subsidiary as in effect to disregard the latter's independent corporate existence ... judicial jurisdiction over the subsidiary may carry in its wake jurisdiction over the parent'.

Professor Jennings concludes that, unless it can be shown that the subsidiary is an automaton operated by the parent, the distinct legal personality of the subsidiary should be respected and that the existence of a given jurisdiction over a subsidiary does not necessarily entail jurisdiction over the parent. He ends his opinion with the remark that if the European countries were henceforth to entertain a weakening of the doctrine of the separate legal personality of their own national companies, they would be opening the floodgates to the incursion of foreign economic policies.

Complaint regarding the grounds on which jurisdiction is claimed

The decision at issue does not state whether the effects of ICI's conduct can be considered as elements of an offence generally recognized as such in States having developed legal systems, nor whether the effects within the EEC are of particular importance in so far as they result directly from the specific conduct of ICI.

On the considerations set out above the applicant draws the conclusion that the decision is vitiated by an infringement of an essential procedural requirement, in that the Commission did not set up adequate grounds against the objections raised by ICI against its territorial jurisdiction. It is further asserted that the decision violates both the Treaty and international law, because the Commission was wrong in holding that it had jurisdiction over

acts committed by the applicant outside the Common Market simply because those acts allegedly had effects inside the Community.

B — The defendant's view

The *defendant* believes that the conduct of ICI 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 conduct of ICI abroad were such as to give the Community authorities jurisdiction under international law to apply Community competition law.

(a) *The jurisdiction of the Commission based on the conduct of ICI within the Common Market*

The *defendant* notes first of all that the expression 'behaviour' or 'conduct' means something more than the commission of acts, in that in certain circumstances inaction or failure to act can also be 'conduct'. The contested practices of the applicant consisted, it is asserted, in the fact that the applicant gave orders to its subsidiaries established within the Community to increase prices, as appears from the two Telex messages (Annexes IV-22 and III-31 to the statement of defence). The fact of influencing the free conduct of the subsidiaries constitutes conduct by the applicant within the Common Market, constituting a concerted practice over which the Commission has jurisdiction. The arguments which the applicant draws from the delivery terms set out in the sales contracts which it made with its subsidiaries, and from the independence of the latter in relation to itself in the eyes of the law do not make any less real the business reality of the influence which it exercised over its subsidiaries inside the Common Market. At the level of purely legalistic argument the defendant sets up against the applicant the fact, which Professor Jennings himself admits, that a CIF contract has more effect on the working of the Common Market than an FOB contract, and it further states that there is some doubt about the assertion that since the contracts were made in England they constitute 'conduct' exclusively in that country. According to the legal theory of dispatch the contract is made at the place where he who accepts the offer—in this case the subsidiary—sends his letter of acceptance.

As to the relationship between the subsidiaries and the parent company, the defendant believes that to retire behind 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 as regards the practices at issue the subsidiaries of the applicant simply carried out the latter's orders, so that when one considers their competitive situation in respect of third parties they appear as mere extensions of ICI in the Common Market.

(b) *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, should the Court have doubts as to the soundness of the line of reasoning set out above, *the defendant* argues that it had jurisdiction as regards the 'conduct' of ICI outside the Common Market, on account of the relationship which this 'conduct' had with the Common Market, and that this point of view accords both with the present state of international law and with the law of the Member States.

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

(aa) Jurisdiction of the Commission in 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, international 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 penal 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 declared that an agreement between six foreign undertakings to control their production by quotas covering in particular their exports to the United States was contrary to the Sherman Act. That judgment asserted the applicability of American competition law without setting any definite limits as regards its 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 not 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 so broad an interpretation of enforcement jurisdiction.

As regards the danger of applying too widely the Alcoa principle of legislative jurisdiction, 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 a contract 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 the economic repercussions arising within the territory of that State by reason of acts or practices taking place abroad, provided that those repercussions have 'a direct effect on the forces of competition within the territory of Switzerland'.

The search for a compromise should take place 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 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 arguments) that the conduct of the applicant company took place wholly outside the Community, the jurisdiction of the Community is justified by reason of the economic effects that this conduct has produced in 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 enough 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. 1426), Vitapro (JO 1964, p. 2287), Transocean (JO 1967, No 163, p. 10) and European Machine Tool Exhibition (JO 1969, No L 69, p. 13).

(bb) 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 in the nature of 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 it is claiming more 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 the enforcement jurisdiction alone. Therefore it is scarcely possible to glean from this any information as to the attitudes of the states as regards 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 protection of essential interests are the basis of 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.

(cc) The complaint regarding the grounds on which jurisdiction is claimed.

The *defendants* 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 occurred, 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 Commission's jurisdiction are partially contained in the preamble to the decision, which deals with the effects of the activities of the applicant undertaking on competition within the Common Market and on trade between Member States.

C — The applicant's Reply

(a) *The legal personality of the Community under international law*

The *applicant* first of all denies the defendant's assertion to the effect that the principles governing the jurisdiction of the States also apply to the Community. It is argued that although the Community has independent existence under international law, it cannot have rights other than those which have been assigned to it by the Member States, whereas States are possessed of all the rights and duties recognized by international law.

(b) *Jurisdiction on the basis of the conduct of ICI within the Community*

As regards the alleged activities of the applicant within the Common Market, ICI observes that the fact of having influenced the conduct of its subsidiaries established in the Community in sending them Telex messages cannot be considered to be conduct inside that territory of such a nature as to justify the exercise of legal jurisdiction, for to accept this proposition would amount to stretching the concept of territorial jurisdiction to the point where it would lose all meaning. In any event, the Commission cannot use the two Telex messages of 1964 to prove that the applicant acted inside the Common Market in 1965 and 1967.

Not only are the applicant's sales contracts governed by English law, but also the acts which it has undertaken in respect of those contracts took place exclusively in England.

It is not accurate to say that the applicant's subsidiaries established in the countries of the Common Market simply carry out orders. They are not authorized to act either in the applicant's name or on its behalf; they have their own sales policy, which they themselves define, and they have complete freedom in fixing sales prices to consumers.

(c) *Jurisdiction based on the effects produced within the Common Market*

(aa) According to international law

The *applicant* then notes that according to the judgment delivered by the Court at The Hague in the Lotus case, the territoriality principle remains the rule, while the extension of the jurisdiction of a State to acts undertaken by foreigners on the territory of another State constitutes an exception which is allowable only in limited cases.

As regards the Alcoa judgment, the applicant states that the text of the second tentative draft of the American Restatement of Foreign Relations Law of 1958, prepared by the American Law Institute, which in paragraph 8 laid down criteria very close to those of the Alcoa judgment, was afterwards substantially altered, as appears from the new paragraph 18 thereof, the scope of which is much narrower than that of the Alcoa judgment.

As to the diplomatic protests against the claims of the United States to exercise extra-territorial jurisdiction in anti-trust matters, the applicant opposes the distinction made by the Commission between prescriptive jurisdiction and enforcement jurisdiction. The imposition of a fine is a means of putting competition law into effect and the purpose of it is to influence the conduct of the applicant.

The statement of reasons found in the Netherlands Law on competition, Article 39 of which is relied on by the Commission, makes it clear that the Netherlands government takes the view that other

States do not have any prescriptive jurisdiction to govern the conduct of traders on Netherlands territory. Nor is the reference made by the Commission to the judgment of the Swiss Federal Court any more convincing, particularly since it is impossible to claim that the constituent elements to which that judgment by implication refers are present in the Community, and also since the judgment does not deal with criminal or quasi-criminal jurisdiction but only with the jurisdiction *ratione loci* of the civil courts.

As regards the criterion which limits jurisdiction solely to the *direct* effects of a contested practice within the Common Market, the applicant observes that the only direct effect of the alleged concerted practices which could be relevant in this case is the increase in the sales price as between producers and their subsidiaries, and this occurred outside the Common Market. A further point is that it is debatable whether these criteria may be taken as a basis for justifying legal jurisdiction, particularly in the case of legislation which applies only to a very limited extent to foreign trade.

As to the defendant's argument based on the importance of the interest of the State in maintaining the economic structure, the applicant observes that this interest is no justification for the assumption by States of a jurisdiction over acts committed outside their territory. Such a proposition would mean that they are also possessed of practically limitless jurisdiction in criminal matters. In international law, it would be wrong to accept the proposition that there exists a rule extending jurisdiction on the basis of the effects doctrine, unless such a rule were universally acknowledged, which is not the case. On this subject the applicant refers to the memorandum prepared by the government of the United Kingdom, which is opposed to a territorial jurisdiction based on effects. In particular, that document criticizes the contested decision.

(bb) According to internal law

The observations of the defendant concerning the protests of the Member States against the jurisdiction which the United States claim to exercise seem to imply that those States are reproaching the American authorities for practices to which they themselves have had recourse or themselves wish to apply. The applicant believes that it would be wrong to accept such an ambiguous position without evidence. In this connexion it invites the Commission to produce the opinion of the Advisory Committee on the draft of the decision at issue, since that opinion reflects the ideas of the Member States.

It is at least certain that the Netherlands do not claim the extra-territorial jurisdiction which the Commission is claiming in this case.

(d) *The statement of reasons concerning jurisdiction contained in the decision*

As regards the statement of reasons concerning jurisdiction contained in the contested decision the *applicant* observes that in its defence the Commission argues that the applicant acted inside the Community and that even if the conduct of the applicant occurred abroad certain individual events constituting the direct effects of that conduct took place inside the Common Market. Yet the Commission's decision is wholly silent on these two points. In the applicant's view this is an omission which it is impossible to fill.

D — The defendant's rejoinder

(a) *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 eighty-one 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 defendant further observes that the memorandum delivered to the Commission in October 1969 in the name of the government of the United Kingdom and mentioned in the applicant's reply is marked 'Confidential'. It invites the Court to take this fact into account in considering that document.

The Commission also points out that the memorandum states that even if the illegal agreement has been concluded outside the territory of the State claiming jurisdiction, such jurisdiction may be admitted if the persons against whom proceedings have been initiated have performed acts in application of that agreement on the territory of the said State. According to the Commission, this is just what ICI did, since in application of concerted practices it gave mandatory directives to its subsidiaries established in the Common Market.

(b) *Jurisdiction based on the activity of the application 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. The *defendant* quotes the text of the Telex message of 13 January 1964 sent by the applicant to its Belgian subsidiary. It is asserted that this text shows the purely automatic way in which the order given by the applicant to its subsidiary was to be carried out.

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 case-law and legal doctrine, the concept of legal personality is far from being an absolute concept in the case of an industrial concern. It 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 combine in giving negative clearance on 18 June 1969 to an agreement between a Danish parent company and its Netherlands subsidiary on the ground that the two undertakings were not in competition with each other, the subsidiary being considered by the Commission as an integral part of the business entity constituted by the group under the control of the parent company. Thus while the existence of a group-relationship can have favourable consequences for undertakings as regards the application of Community competition law, it must be admitted on the other hand that unfavourable consequences can also follow.

(c) *Jurisdiction based on the effects which the conduct of the applicant has produced within the Common Market*

(aa) According to 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 bring into force provisions applicable on their territory to activities taking place abroad, without a rule of international law being necessary for them to have authority to do so.

The existence of special treaties governing particular points, to which ICI refers, does not in any way undermine the general principle set out in the Lotus judgment.

The defendant refutes ICI's assertion that the only exception to the strict territorial principle approved in that judgment concerns the theory of effects as a constituent element, and asserts that in the said judgment that Court at The Hague decided that international law does not forbid a State to base its jurisdiction on the effects which an act committed abroad produces on the national territory. It is argued that such is the case when an essential element of the offence took place on the national territory, and is especially the case when its effects have occurred on that territory. The Court at The Hague has declared 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 may 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 conduct relating to 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 thus to apply the theory of effects as a constituent element, the jurisdiction of the Commission would still have to be recognized. In effect, 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 defendant states that it would not appear to it that the present wording of paragraph 18 of the Restatement is narrower than the concept which it is itself advancing. It points out that the terms 'direct and foreseeable result' appearing in that document convey the same meaning as the Dutch expression which it has used in its defence.

As to the applicant's arguments concerning diplomatic protests, the defendant observes that there is undoubtedly a difference between, on the one hand, imposing a fine on the applicant on account of conduct having an adverse effect on the Common Market and, on the other hand, adopting a measure requiring natural or legal persons to return to the country documents situated abroad or to amend contracts or articles of association made or drawn up abroad. The fact of declaring that the conduct of the applicant is illegal under the Treaty and of inflicting a fine on it should not be confused with the stage of effective coercion, that is to say, with putting that declaration into effect and enforcing those fines by issuing injunctions or effecting confiscations. That is the distinction between jurisdiction to prescribe and jurisdiction to enforce. By virtue of the former a public authority draws up provisions in relation to its own territory and these apply even if the act has been committed abroad. On the other hand, in exercising its jurisdiction to enforce, the authority in ques-

tion will sometimes attempt to control the acts which are to be carried out abroad.
Article 39 of the Netherlands Law on competition is mainly concerned with the exercise of the jurisdiction to enforce. The fact that that article also constitutes an attitude as regards prescriptive jurisdiction is evidence of the intention of the Netherlands legislature to maintain exclusive authority over trading relations within the territory of the Netherlands.
As for the applicant's observations on the decision of the Swiss Federal Court of 21 March 1967, the defendant stresses that according to that judgment the Swiss law against cartels, and especially Article 7(2)(b), 'must curb obstacles to competition from whatever source, to the extent to which they have a direct effect on competition within Swiss territory'.
The applicant's argument that only a positive rule of international law could provide a basis for the jurisdiction of the Community as regards facts occurring abroad is in contradiction with the rule formulated by the Court at The Hague in the Lotus case.
The defendant also states that the concept of direct consequences covers the visible and normal effects which the conduct adopted has within the Common Market. Since the principle of protection of essential interests may be considered a direct extension of what has been called counter-legislation, it is difficult to assert that the Commission may not claim the slightest jurisdiction concerning conduct relating to exports destined for the Community.

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

The *defendant* is of the opinion that the applicant's observations on this subject are incomprehensible or, at the very least, devoid of meaning. In the first place, it is inaccurate to say that the Commission has not disputed the applicant's assertion that the Community may not claim a wider kind of extra-territorial jurisdiction than that of the Member States. On this point the defendant refers to page 88 of its statement of defence.
Furthermore, asserts the defendant, the applicant has not properly understood the Commission's arguments relating to the fact that the diplomatic protests made by the Member States referred exclusively to the extra-territorial exercise of the jurisdiction to enforce and not at all to the jurisdiction to prescribe.
As to the opinion delivered on the question of the Community's jurisdiction by the Advisory Committee on Restrictive Practices and Monopolies the defendant points out that this was an internal opinion which did not affect its decision.
Since the Treaty has transferred sovereign powers from the Member States to the Community, the competent Community institutions may, in so far as they see fit and to the extent to which international law allows, rule on the extra-territorial effects of the provisions adopted in connexion with competition law without being required to comply with the requirements elaborated by the Member States under their national legislation on cartels.

(d) *The statement of reasons in the decision relating to jurisdiction*

The *defendant* believes that by reason of the clarity and of the considerable scope of Article 85(1), the reference to that provision is sufficiently precise for it to be said that the defendant has stated grounds for its jurisdiction as regards the practices at issue. Furthermore the Commission is not required, as part of the administrative procedure, to state its reasons for rejecting the arguments of the applicant.

2. *The submission concerning notification of the contested decision*

The *applicant* asserts that Article 4 of the decision and the recital concerning notification are not in conformity with the Treaty, or at least infringe essential procedural requirements, in that they provide that notification may be effected at the registered offices of the subsidiaries of the applicant established in the Common Market, and because notification was effected to the German subsidiary. According to the laws and to the practice current in the Member

States, notification should be made to a person who has authority to receive it.
It is argued that such was not the case with the applicant's subsidiary, which had no authority in this respect and which, according to German law, was not required to bring the documents in question to the attention of the parent company.
The reference made by the recital in the contested decision to the judgment of the Court in Case 8/56 is not relevant, since the said subsidiary does not form part of the 'internal structure' of ICI.
The *defendant* observes first that it is common ground that the applicant did receive notice of the contested decision, which necessarily implies that the German subsidiary forwarded the decision which had been served on it to the applicant in the United Kingdom. The defendant also observes that the second paragraph of Article 191 does not lay down any particular form which notification is to take.
The defendant states that it appears from the judgment of the Court in Case 8/56 (*ALMA*) that where notification is required during the course of administrative proceedings, it is sufficient that the document of which notification is made should by due process reach the inner structure of the addressee, and the question whether the company concerned did in fact have notice of the contents of the document is of little importance. In view of the fact that the applicant's German subsidiary is entirely controlled by the applicant, the contested decision reached the internal structure of ICI, and this is so even if the subsidiary is a separate legal person in its own rights. Furthermore, in this case the decision did indeed come to the notice of the addressee.
The *applicant* is of the opinion that the contested decision has not yet come into force because it has not been notified in due form. It is true that it did receive a copy of the decision, but it has not received notification within the meaning of Article 191 of the Treaty, according to which notice must be given through official channels. The judgment of the Court in the *ALMA* case (8/56) is not relevant here because in the present case the decision was not notified to the addressee but to another company, ICI GmbH in Germany, and this is not the same thing as applying the concept of the registered office of the addressee in accordance with the criterion adopted in the abovementioned judgment. Nowhere is it accepted that an undertaking and its subsidiaries are one and the same thing in law.
The *defendant* notes that in its reply the applicant admits to having received a copy of the decision.
As to the means of notification of which the applicant complains, the defendant observes that the second paragraph of Article 191 of the Treaty does not lay down any particular form in which notification is to be effected. Since, as regards the notification of a decision relating to competition law, it is appropriate to consider the parent company and the subsidiary as one entity, service at the registered place of business of the subsidiary takes effect simultaneously as regards the parent company.
Since the Ambassador of the government of the United Kingdom refused to convey the decision through the normal diplomatic channels to the British parent company, the Commission, taking the view that for reasons of courtesy in matters of international relations it ought not have recourse to service by post, concluded that notification through a subsidiary established within the Community was the means of notification best suited to the interests of the undertakings concerned.
Even supposing that there were some irregularity in respect of the second paragraph of Article 191 of the Treaty, the interests of the applicant were not prejudiced by this in any way, for it has availed itself of its right to bring an application against the decision.

3. *The submissions concerning the administrative procedure*

The *applicant* accuses the Commission of having committed irregularities in respect of the procedural provisions of Relation No 17 of the Council and of Regulation No 99/63 of the Commission on the following points:

(a) The notice of objections referred to in Article 2 of the latter regulation is signed by the Director-General for Competition 'by delegation' although no such delegation of powers on the part of the Commission is permitted;

(b) The notice goes further than the decision of 31 May 1967 to which it refers because it takes into account price increases occurring after that decision and furthermore it considers the possibility of fines under Article 15 of Regulation No 17, whereas the decision refers exclusively to the procedure mentioned in Article 3;

(c) The contested decision refers to a certain number of facts which do not appear in the notice of objections and accordingly the applicant has not been in a position to comment on them;

(d) The Commission adopted its decision before ICI had had a chance to make known its observations on the draft minutes of the hearing.

In its defence the *defendant* replies to the first three points as follows:

(a) In the exercise of the powers delegated to him by the Commission the member of the Commission with competence for problems concerning competition authorized the Director-General for Competition to sign, in his name, notices of objections which he had approved;

(b) The decision of 31 May 1967 to commence proceedings is worded as follows: 'Having regard to Regulation No 17 of the Council, especially Article 3 and Article 9(2) and (3)'. It is therefore clear that that decision was taken in application of Regulation No 17 as a whole, the purpose of the reference to Article 3 being to forestall the future application of the concurrent jurisdiction of the national authorities to apply Article 85(1) of the Treaty;

(c) In accordance with the case-law of the Court in the *Grundig-Consten* case, it is not necessary for all the documents to be communicated verbatim to the parties to administrative proceedings or for the file to be placed at their disposal. It is sufficient for the Commission to communicate the facts, knowledge of which is necessary for an understanding of the objections which it has made. For this purpose it was not necessary to communicate the communicate the complete text of every memorandum, and, besides, this would have involved a risk of giving away business secrets. In its decision the Commission only took into account the facts with which the proceedings were concerned.

The *applicant* replies that:

— Since the delegation of powers mentioned by the defendant does not appear from any of the document furnished by the Commission, a notice from the Commission must be signed by the Commission;

— The fact that it is Article 3 and not Article 15 which is mentioned in the decision to commence proceedings shows that proceedings under Article 3 alone are thereby commenced;

— If Article 4 of Regulation No 99 is to mean anything, the Commission must set out all the facts on which the notice of objections is based.

The *defendant* repeats the arguments already set out in its statement of defence and in addition replies as follows:

— The Commission's rules of procedure, on the basis of which the Director-General for Competition was empowered to sign 'by delegation', is based on Article 162 of the EEC Treaty;

— In the relationship between undertakings and the Commission, it is the notice of objections which determines the scope of the proceedings;

— On 27 June 1969 the minutes were sent to the applicant's authorized agents in accordance with what had been agreed

at the hearing. The fact that the agent did not reply cannot constitute a procedural defect, particularly since the applicant does not claim that its observations were not reproduced with accuracy.

4. *The submission regarding the period of limitation*

The *applicant* argues that the contested decision is contrary to the Treaty and to the provisions adopted in application of it and that in any case the reasons on which it is based are insufficiently stated because the Commission, in commencing proceedings as regards the price increase of January 1964 after a lapse of time in excess of any reasonable limit, has not taken account of the effect of limitation. If account is taken of the rules on periods of limitation applicable in the Member States as regards infringement of administrative law (three years according to paragraph 27 of the 'Gesetz über Ordnungswidrigkeiten' of 24 May 1967 in Germany and two years according to the Netherlands penal code) and of the fact that the notice of objections was notified to the applicant only on 11 December 1967, all events which may have taken place before December 1964 should remain off the record, even if a three-year limitation period is applied. However, the applicant takes the view that it would be equitable to apply the shortest limitation period to be found amongst the Member States.

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

Secondly, the defendant observes that in the absence of provisions governing time-limits in the law in force, the Commission retains complete authority as part of its duties and in exercise of its discretionary power to determine more precisely, subject to review by the Court of Justice, the limitation periods 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 have in common only the principle that there should be a limitation period. However, as regards putting that principle into practice there are important differences. In view of this disparity the Commission reaches the conclusion that it is impossible to discern any precise criteria and that therefore as regards limitation periods for infringements of the provisions of Article 85 of the Treaty it is the needs of Community law alone 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 Commission under Article 14 of Regulation No 17 at the registered place of business of several undertakings, including that of the applicant.

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

The applicant notes that the infringements in question were not committed intentionally and points out that, in such circumstances, the law of the Netherlands lays down a limitation period of two years. Prior to the notice of objections, the Commission had never brought any proceedings against ICI, and its activities in respect of its subsidiaries cannot be considered as an investigation into ICI.

The *defendant* replies that the investigations carried out in respect of the applicant's subsidiaries, to whom it had given instructions to raise prices, were directed at the infringement of which the applicant was the presumed originator.

5. *The submissions concerning (a) the concept and the existence of concerted practices and (b) the existence of restrictions on competition*

(a) The *applicant* argues that in so far as the decision asserts that ICI participated in concerted practices resulting in price increases in the years 1964, 1965 and 1967 it is vitiated by infringement of essential procedural requirements for want of a sufficient statement of reasons. It observes that in order for a concerted practice to exist it is not enough that undertakings operating on an oligopolistic market consciously adopt a parallel attitude. Their conduct must be the result of a common plan of action and of a mutual will to act in accordance with that plan. According to the applicant the contested decision does not clearly say that it is based on the idea that there was just one concerted practice resulting, contrary to the Treaty, in the various price increases already mentioned, or whether its thinking is that there was a separate concerted practice in respect of each of the three price increases. The wording of the decision seems to indicate the former interpretation. If that is so, the reasoning given would appear to be inadequate from the very first, since the decision does not produce the slightest evidence of concerted action on so large a scale.

The reasons given are just as inadequate if it is supposed that the Commission is saying that there were separate concerted practices in relation to each of the price increases. It is not enough to show that a concerted practice existed; it must be proved that ICI took part in it. Furthermore, proof that a concerted practice existed in relation to a price increase in country A on date X does not of itself prove the existence of a concerted practice in country B or on date Y.

As for the existence of the concerted practice, the applicant makes the observation that the Commission does not mention the facts of which it was made up, but attempts to prove it by the *reductio ad absurdum* method. This technique is not compatible with the quasi-criminal nature of the proceedings in question. Furthermore, the reasoning is erroneous since every time there was an increase it was introduced on the initiative of one of the producers, and all the other producers adopted it separately. This can easily be explained by the situation on the market and the commercial strategy of the undertakings, without its being necessary to fall back on the idea of prior detailed concertation. The Commission's reasoning to the effect that every case of similar conduct on an oligopolistic market entails a strong presumption that there is a concerted practice represents a misunderstanding of how an oligopolistic market really works.

The applicant also observes that certain undertakings whose affairs were initially investigated by the Commission and whose conduct on the market was precisely the same as that of the undertakings to whom the contested decision was directed were not ultimately fined.

Therefore, the arguments drawn by the Commission from the fact that the increases took place at about the same dates and that they were announced in similar wording constitute evidence against the applicant. It should indeed be noted that in 1967 the effective date did not coincide everywhere or for all producers. The same objection is equally valid as regards uniformity in the amount of the increases.

As for the statement made by the Geigy undertaking at the meeting at Basel on 18 August 1967, the applicant observes that the mere fact that a manufacturer informs his competitors that he has in principle decided to make an increase cannot constitute an adequate reason for accusing him of having taken part in a concerted practice. At all events this was certainly not the case as regards the applicant.

For the reasons stated above, the decision is vitiated by infringement of essential procedural requirements. If the decision necessarily means that there is a concerted practice whenever an undertaking copies the conduct adopted by one of its rivals on the market this would mean that the Commission has misunderstood the concept of a concerted practice and that it has thus infringed the Treaty.

(b) Admitting, as a pure hypothesis, that

the uniform price increases were in fact due to a concerted practice, the *applicant* argues that it did not have the result of determining the prices charged in each particular case, since it is undeniable that so far as dyestuffs are concerned prices vary from case to case according to the circumstances. As to the assertion that there were no price lists, the applicant refers in particular to the report on the European dyestuffs industry prepared by Professors Bombach and Hill of the University of Basel, which is joined to the application.

It is argued that there is nothing in the fact that the prices were increased by the same percentage to prevent the circumstances in which they were set from having been competitive both before and after the increase. That being so, the applicant argues that even if the existence of the alleged concerted practices is admitted, the conduct of the producers on the market would have been identical in the absence of any concertation, and this means that the said practices did not restrict competition.

Finally, the applicant expresses disagreement with the Commission's assertion that the parties had argued that in an oligopolistic market competition between producers is not mainly concerned with prices but with quality and technical services to customers. The applicant states that on the contrary it had already argued before the Commission that competition was and remained intense precisely in the field of prices.

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, 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 resistance 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 1969, which has not been 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 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 the best 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. Finally, the defendant produces the text of the instructions to raise prices sent to Italy and Belgium in 1964 by the undertakings referred to in the contested decision (Annexes II and III to the statement of defence). It stresses the fact certain passages are the same almost word for word.

As for the rises of 1965 and 1967, the defendant states that the undertakings were careful not to make the instructions read too obviously alike.

In its reply the *applicant* observes as a preliminary point that since the defendant has produced a single statement of defence in which it gives one reply to the various applicants, the result is that as regards ICI the Commission has not replied to certain of its arguments but has, on the other hand, devoted a great deal of energy to arguments which the applicant has never put forward.

The applicant also requests the Court to look upon a supplementary report made by Professors Bombach and Hill, which the applicant lodges as an annex to its reply, as forming part of its reply.

(a) *The concept of the so-called concerted practices and evidence thereof*

The *applicant* declares itself strongly against the idea that the oligopoly situation found on the dyestuffs market is not compatible with conscious parallelism. As to the importance that *homogeneity of products* can have in assessing whether such conduct has occurred, the applicant observes that Professor Shubik, who is quoted by the Commission, does not consider this feature to be one of the essential factors of conscious parallelism. Again, another author quoted by the defendant, Mr Machlup, has written that the distinction between perfectly homogeneous products and dissimilar products is not particularly important if it is assumed that the market is imperfect in other respects.

According to the applicant, the existence of a concerted practice under Article 85 of the Treaty necessarily means the existence of a common will. The requirement of a plan worked out in common is tailored to meet the example which the defendant gives when it considers the case of undertakings informing each other in advance of the attitude they are to adopt as regards competition: in such a case there does indeed exist a plan worked out in common.

The applicant asserts that, as appears from the description of the market in question and from the first report of Professors Bombach and Hill, it can be seen that on the dyestuffs market competitors cannot do otherwise than behave in the same way, and different price rises cannot be introduced without agreement on this point.

The applicant completes the definition of an oligopoly given by the defendant by adding that no undertaking will take a measure affecting competition on a transparent market without having previously studied the probable reactions of its competitors, and that furthermore a market becomes transparent when one producer introduces a general prices increase. If the Court were to confirm the decision of the Commission and the proof *ex reductione ad absurdum* on which it relies, producers of dyestuffs would no longer be able to copy a general price increase introduced by one of their competitors and, more seriously, none of them would be able to take such an initiative because in doing so it would be infringing Article 85 of the Treaty. In such a case proof of the existence of a concerted practice would reside simply in the fact of a price increase and of parallel conduct by competitors, and this would be so even if in fact there had not been any agreement between the undertakings. This would lead to absurdities: every producer would have to work out his prices policy bearing in mind such evidence as the Commission might be able to use against him, whether the evidence thus put forward had any basis in reality or not. Producers would not even be able to lower their prices in order to come to terms with a price cut by a competitor.

Finally, the applicant opposes the defendant's assertion according to which the undertakings in question acted with much greater circumspection and lack of uniformity in putting up the prices in 1965 and 1967. This allegation is nothing more

than a suspicion that is quite unfounded. The *defendant* argues that the *concept of a concerted practice* is not equivalent to the American concept of 'concerted actions'. A concerted practice under Article 85(1) of the EEC Treaty is one of the constituent elements of the infringement listed in the provision, whereas 'concerted action' constitutes a particular case, elaborated by American case-law, of 'conspiracy' as forbidden by the Sherman Act, which presupposes that the undertakings concerned are acting with a common will. This notion of 'concerted action' has decided advantages as regards proof, and it is not based on a substantive definition of an 'agreement', that is to say, the common will 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 consulation.

The citations from American case-law included in the defence allegedly prove that the question whether a given business action is taken pursuant to a common will is a question of evidence, and that a uniform action constitutes a sufficient indication of the existence of such a common will when that conduct is not the necessary consequence of the structure of the market. On the concept of a concerted practice, the defendant also refers to an article by Tolksdorf (Annex VI-I to the rejoinder).

Even in a oligopoly, in so far as the sellers have differing interests, the fact of several decisions being taken independently by various undertakings does not necessarily lead to similar conduct on the market. This is why in an oligopoly also 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 or a different course of conduct according to an allocation of roles worked out in advance.

Therefore it is not necessary to show that the participants have collaborated or drawn up a common plan in order 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 the dyestuffs manufacturers in question behaved in a uniform way. This means that it has adduced sufficient proof that concerted practices existed. Furthermore, it has shown that the structure of the market for the products in question was such that there is no explanation of this uniform conduct other than that alleging concerted practices. Moreover, the Commission has even pointed out a series of facts constituting indications of concertation.

(b) *The existence of a restriction on competition*

The *applicant* emphasizes that the Commission agrees that because of the wide range of product involved and because of the different degrees of 'interchangeability' of those products, prices are very flexible and that in fact price lists cannot be published. Furthermore, the following phenomenon occurs: on the one hand, there are constant discussions about prices between suppliers and users considered individually, but, on the other hand, producers attempt, as soon as the occasion arises, to adapt the general level of prices in force for dyestuffs as a whole to new conditions on the market, doing so by measures

of a completely different kind. Without wishing to reject the Commission's assertion that certain prices have risen independently of any general increase, the applicant argues that since the level of prices is constantly being eroded, all producers are inclined to seize instantly upon the slightest occasion for a general increase. It is asserted that the Commission has not disputed the opinion of Professors Bombach and Hill, according to which the upward trend of prices in dyestuffs remained far behind that of the general level of prices, particularly between 1965 and 1967.

As regards the prices of the different dyestuffs, the applicant observes that the average price of a given dye differs according to the country. However, the importance of factors which formerly determined the differences between average national prices (economic and commercial factors proper to each country, strength of the position of a group of buyers and so on) has considerably diminished since the establishment of the European Economic Community.

The applicant then argues that the factors involved in a general modification of prices are very different from the market situation. When a producer alters all his prices by the same percentage he informs his competitors and this alteration is comparable to the fixing of an entirely new price for a whole range of products. In this case the market has become transparent. There is an essential difference between this situation and the fixing of prices for each given product, which explains why suppliers cannot act selectively when they proceed to a general alteration of their prices. Producers who wish to take advantage of the initiative of a competitor who alters his prices have to act at once: this is recognized by the text book writers, and in particular by Shubik. Thus producers are at pains to avoid complicated price alterations and they proceed to a general change in prices, both because of the necessity of acting immediately and in order to avoid disturbing the peace on the market as regards the prices individually agreed with users. This does not prevent discussions being immediately resumed with each user and for each product. In this way, each supplier can introduce new differences in prices between various products. When a producer wishes to alter his prices policy on a given national market, he waits until a percentage alteration in prices occurs. In this way a price increase does not as such given rise to a restriction on competition. If a supplier whose profit margin is wider than that of all his competitors wished to increase his share of the total market he would prefer to achieve his aims by means of individual prices agreed with users.

The applicant argues that it appears from all these considerations that the price increases at issue were legitimately introduced in the context of consciously parallel conduct on the part of the producers, without there being any concerted practice. Furthermore, these increases did not have any effect on the competitive relationships between the undertakings in question, for the strict competition existing on the markets remained the same after the increases were introduced. In reality the percentage increases only increased the differences between the prices charged by the different producers.

Therefore, even if the price increases had been the result of a concerted practice, the fact that competition between suppliers went on without interruption shows that there was no restriction of competition for the purposes of Article 85.

The *defendant* replies that the increases in question 'had the effect for a brief space of time of putting a complete stop to the intense competition which does indeed exist on the dyestuffs market'. Competition between manufacturers was limited to such a point that they found themselves unable either to continue with the prices in force or to content themselves with smaller price increases. Moreover, purchasers were adversely affected because they were prevented from buying dyestuffs at more favourable prices from manufacturers not taking part in the concerted practice.

The defendant makes it clear that it is not maintaining that there can only be conscious parallelism where there are homogeneous products. The criteria set out by academic writers should not be

applied mechanically, and it should be ascertained whether the interests of the undertakings diverge and whether the structure of the market is wide enough to allow the undertakings to transpose those divergences into different competitive measures. In the present case, such evidence may be drawn, *inter alia*, from the observation that the products are dissimilar, from the rapidity of technical progress, from the particular relationship between producers and purchasers, from the lack of transparency of the market, from the expansion of the market, from the capacity of the producers to adapt themselves, from the difference between rates of growth, from the level and the structure of costs and from the trend of prices and of demand at national level.

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 not exclude 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 market 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.

As to the argument of the applicant according to which the factors governing the three price rises do not fit in with the market situation described above, the Commission refers to the argument which it has already developed in its statement of defence. The applicant is mistaken in under-estimating the importance of inquiries into the situation on the market when the object is to form a view on parallel increases in prices.

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

As to the *factual evidence for the existence of prior concertation*, the defendant goes back over the various similarities that it has found (as to rates, date, dyestuffs involved in the increase, and, finally, as to the contents of the orders to increase sent to the subsidiaries).

6. *The submission relating to the effect of the price increases on trade between Member States*

The *applicant* asserts that the producers of dyestuffs could not have had the intention of restricting trade between Member States, since, apart from trade existing between producers and subsidiaries or representatives, no other form of inter-State trade can exist in the field of dyestuffs, for reasons (also pointed out in the report by Bombach and Hill) such as:

— The requirements of immediate delivery;

— The importance of technical assistance and the consequent necessity of having a precise knowledge of the special difficulties of each customer;

— The considerable differences existing between similar dyestuffs according to

how concentrated they are, and, therefore, between the colours obtained;

— The fact that orders are placed in small quantities, which would make transport costs excessively high in the case of inter-State trade;

— The fact that dyestuffs form only a relatively unimportant part of the costs of users.

In the contested decision the Commission is of the opinion that these reasons taken together would not allow the possibility of imports between Member States by users to be excluded if sufficient differences in the price levels in the various countries were to arise.

The applicant observes that in respect of Article 85 of the Treaty the decisive point is not whether it is *a priori* impossible for there to be an unfavourable effect on inter-State trade, but whether it is possible to say with a sufficient degree of probability that the concerted practices are of a nature such as to affect, directly or indirectly, actually or potentially, freedom of trade between Member States to such an extent as to affect the achievement of the objectives of the Common Market. The applicant emphasizes that there have always been noticeable differences both as regards the general level of prices for dyestuffs and as regards the price of each one of them, but that nevertheless these differences have never given rise to a movement of goods between States. It is possible for a consumer to think of changing his supplier for these products if he thinks that he is being charged too high a price, but it would not be possible for consumers to replace a local supplier by a competing supplier established in another country.

The applicant argues that the Commission has based its case on a purely theoretical proposition which does not take the reality into account and which therefore is not enough to support the decision which it took on the question whether the alleged concerted practices are of such a nature as to affect trade between Member States. Insufficient reasons were therefore given for the decision and, at the very least, it infringes Article 85 of the Treaty.

The applicant offers to prove its assertions by means of witnesses, experts or documents.

In its statement of defence, the *defendant* observes that any material restriction on competition which goes beyond the frontiers of a Member State results in an artificial alteration 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 direct importations by consumers from other Member States were thereby prevented to the maximum possible extent. 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* insists on the fact that the deliveries which it makes from England to its subsidiaries and to other producers established in the Member States of the Common Market are not of such a nature as of themselves to influence trade between Member States within the meaning of Article 85.

To the defendant's argument that the increases have prevented users from importing directly from other Member States, the applicant answers that this allegation is not supported by any evidence either in the decision or in the statement of defence. The fact that although there were no price increases in Italy in 1967 users in other countries did not make purchases in Italy refutes the Commission's allegation.

In its rejoinder, the *defendant* observes that the decision also concerns trade between the applicant and its subsidiaries, the objective of the Treaty being to ensure that goods in free circulation in the Common Market may be freely traded with the Community.

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.
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 17 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.

2 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.

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

4 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.

5 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.

6 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.

7 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.

8 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.

9 It therefore imposed a fine of 50000 u.a. on each of these undertakings, with the exception of ACNA, for which the fine was fixed at 40000 u.a.

10 By application lodged at the Court Registry on 1 October 1969 Imperial Chemical Industries Ltd. has brought an application against that decision.

Submissions relating to procedure and to form

The submissions concerning the administrative procedure

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

11 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.

12 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.

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

14 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.

15 Therefore this submission is unfounded.

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

16 The applicant claims that the notice of objections mentions price increases occurring after the decision to commence proceedings was taken, and that the said notice also refers to the possible imposition of fines, although the decision to commence proceedings only referred to proceedings to establish infringements.

17 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.

18 If, during the period between the decision and the said notice, the undertakings continue or repeat actions such as those against which the Commission has decided to commence proceedings, the rights of the defence are not prejudiced by the taking into consideration in the notice of objections of facts which consist simply of a continuation of earlier actions; this, moreover, accords with the principle of economy of administrative activity.

19 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.

20 Therefore these submissions are unfounded.

(c) *The complaints relating to infringements of the rights of the defence*

21 The applicant complains that in the contested decision the Commission refers to facts which are not mentioned in the notice of objections and that therefore, it was unable to deal with them during the course of the administrative procedure.

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

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

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

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

26 This submission is therefore unfounded.

(d) *The complaint relating to the minutes of the hearing*

27 The applicant complains that the defendant took its decision before the applicant was able to make known its observations on the minutes of the hearing of the interested parties.

28 Article 9(4) of Regulation No 99/63 of the Commission provides that the essential content of the statements made by each person heard shall be recorded in minutes which shall be read and approved by him.

29 The purpose of this provision is to assure the persons heard that the minutes contain a true record of the substance of what they have said.

30 The minutes of the hearing of 10 December 1968 were sent to the applicant only on 27 June 1969, about four weeks before the decision was adopted.

31 Although the Commission was dilatory in sending the minutes, the delay of which the applicant complains could only affect the legality of the decision if the record of the applicant's statements contained in the minutes was of doubtful accuracy.

32 Since this is not the case, the abovementioned omission is not of such a nature as to vitiate the contested decision.

33 Accordingly this complaint is unfounded.

The submission relating to notification of the decision

34 The applicant argues that in providing in Article 4 of the contested decision that notification of the decision might be effected at the registered offices of the sub-

sidiaries of the applicant established in the Common Market, and in acting in accordance with this, the Commission has infringed the Treaty, or, at least, essential procedural requirements.

35 It is argued that the applicant's German subsidiary, to which the decision was notified by the Commission, had not been given any authority by the parent company to accept notification and that, under German law, it was under no duty to bring the documents in question to the attention of the parent company.

36 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'.

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

38 Therefore it cannot prejudice the applicant.

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

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

41 The last paragraph of Article 173 of the Treaty provides that the period for 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.

42 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.

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

44 Therefore the abovementioned submissions are inadmissible for want of relevance.

The submission as to the limitation period

45 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.

46 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.

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

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

49 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.

50 Therefore the submission is unfounded.

Substantive submission as to the existence of concerted practices

Arguments of the parties

51 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.

52 That decision states that *prima facie* evidence that the increase 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.

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

54 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.

55 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.

56 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.

57 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.

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

59 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.

60 It is also argued that the large number of dyestuffs produced by each undertaking makes it impossible in practice to raise prices product by product.

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

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

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

The concept of a concerted practice

64 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.

65 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.

66 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.

67 This is especially the case if the parallel conduct is such as to enable those 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.

68 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

69 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.

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

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

72 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.

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

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

75 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.

76 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.

77 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.

78 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 'priceleader', who in some cases is the largest producer in the country concerned, and in other cases is a producer in another Member States or a third State, acting through a subsidiary.

79 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.

80 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.

81 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.

82 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

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

84 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.

85 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.

86 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.

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

88 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.

89 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.

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

91 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.

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

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

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

95 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.

96 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.

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

98 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.

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

100 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.

101 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.

102 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 regard the precentage rates of increase.

103 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.

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

105 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.

106 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.

107 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.

108 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.

109 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.

110 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.

111 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.

112 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.

113 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.

114 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.

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

116 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.

117 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.

118 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.

119 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

120 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 cifferent States consumers have always preferred to make their purchases of dyestuffs in their own country.

121 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.

122 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.

123 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.

124 Therefore this submission is unfounded.

The jurisdiction of the Commission

125 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.

126 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.

127 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.

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

129 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.

130 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.

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

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

133 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.

134 Where a subsidiary does not enjoy real autonomy in determining its course of action in the market, the prohibitions set out in Article 85(1) may be considered inapplicable in the relationship between it and the parent company with which it forms one economic unit.

135 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.

136 It is well-known that at the time the applicant held all or at any rate the majority of the shares in those subsidiaries.

137 The applicant was able to exercise decisive influence over the policy of the 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.

138 In effect the Telex messages relating to the 1964 increase, which the applicant sent to its subsidiaries in the Common Market, gave the addressees 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.

139 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.

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

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

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

143 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.

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

145 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.

146 Therefore this objection is unfounded.

The fine

147 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

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

149 The applicant has failed in its submissions.

150 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 of the First Chamber